[***Bajwa v. Deol, [2018] I.L.R. para. G-2792***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RF8-TBH1-JWR6-S3G0-00000-00&context=)

Canadian Insurance Law Reporter Cases

Supreme Court of British Columbia

Before: B.J. Brown J

Decision: September 21, 2017.

Docket No. S146980

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2010s* > *2017***

**[2018] I.L.R. para. G-2792** | [*[2017] B.C.J. No. 1883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PK6-1SD1-F81W-227X-00000-00&context=) | [*2017 BCSC 1673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PK6-1SD1-F81W-227X-00000-00&context=)

Himmat Singh Bajwa v. Gurpaul Purgash Singh Deol and John Doe

**Case Summary**

**Tort — Assault — Damages — Plaintiff alleged he was punched in face by defendant and received blow to head from unknown person while at wedding reception — Plaintiff suffered split lip, broken teeth, and abrasions on cheek and chin — Plaintiff took week off work as dentist — Plaintiff had facial swelling, headaches, and anxiety — Plaintiff obtained default judgment against defendant — Defendant took position that he was not served with original notice of civil claim — Defendant brought application to set aside default judgment — Plaintiff brought application for Court to assess damages — Court did not find service was not effected on defendant — Process server swore that he served defendant at his residence — Defendant did not show he had meritorious defence — Defendant did not show plaintiff's alleged threat to punch him first constituted contributory *negligence* or provocation forming defence to assault — Attack was unprovoked — Plaintiff would require further dental treatment — Plaintiff experienced pain, suffering, embarrassment, and shock — Injury was indivisible — Court awarded $55,000 in aggravated damages, $3,000 in income loss, and $7,000 in dental repair costs — Defendant's application dismissed and plaintiff's application allowed.**

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| **Facts:** The plaintiff alleged that, at a wedding reception in August 2012, he was punched in the face by the defendant and then received a blow to the head from an unknown person. He suffered a split lip, broken teeth, and abrasions on his cheek and chin. The plaintiff had taken a week off work as a dentist due to pain and the state of his appearance. He could not chew properly for approximately two to three weeks and had facial swelling, headaches, anxiety, and difficulty sleeping. In December 2014, the plaintiff obtained default judgment against the defendant in his civil claim for assault and battery, with damages to be assessed. The defendant also pleaded guilty to criminal charges against him. The defendant took the position that he was not served with the original notice of civil claim. The defendant brought an application to set aside the default judgment. He claimed a defence of contributory ***negligence*** and provocation, claiming that the plaintiff threatened to punch him first. The plaintiff brought an application for the Court to assess his damages.  HELD: The defendant's application was dismissed.  The plaintiff's application was allowed. The Court did not find that service was not effected on the defendant. The process server swore that he served the defendant at what was the defendant's residence. The defendant did not show that he had a meritorious defence or defence worthy of investigation. The defendant did not provide the Court with any authority for the contention that the plaintiff's alleged threat to punch him first constituted contributory ***negligence*** or provocation forming a defence to assault.  Turning to the plaintiff's damages, the Court considered that he would require further dental treatment and was quoted $7,000 for further treatment. The plaintiff had a fear of social situations. He experienced pain, suffering, embarrassment, and shock. The plaintiff was a credible witness. The Court found that the attack was unprovoked. It was likely that some of his injuries and pain arose from the blow to the back of the head. This was an indivisible injury. It was not possible for the Court to determine which complaints could be due to the blow to the back of the head as opposed to the punch to his face. Considering case law, the Court found an award of $55,000 in aggravated damages to be appropriate, as well as an income loss of $3,000 and a dental repair cost of $7,000. |

**Counsel**

K.S. Garcha for the plaintiff; J. Jachimowicz for the defendant

**Reasons for Judgment**

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| **B. BROWN J.** |

**1**   There are two applications before me, the first is an application made by Mr. Deol for an order setting aside the default judgment granted against him by the registrar on December 9, 2014. The second is an application by the plaintiff for the court to assess damages against Mr. Deol.

**2**  The background is set out in Mr. Bajwa's statement of claim. He pleads that on or about August 11, 2012, he was assaulted by Mr. Deol and another. He received serious injuries. He sued Mr. Deol, John Doe, Sandeep Parhar, Nicole Parhar, Bombay Banquet Hall Ltd., Gurminder Singh Brar, and the owners of Strata Plan BCS 1684.

**3**  Mr. and Mrs. Parhar were married on or about August 10, 2012. It was their wedding celebration at which Mr. Bajwa says that he was assaulted. That celebration took place at Bombay Banquet Hall. Mr. Brar is a principal of Bombay. The strata corporation was the owner and occupier of the common property.

**4**  Before this matter came before me, the action against the defendants other than Mr. Deol had been resolved.

**5**  Although not much turns on it, Mr. Deol's application was heard by me on June 9, 2017, after Mr. Bajwa's application.

**Application to set aside the default judgment**

**6**  The plaintiff obtained a default judgment against Mr. Deol with damages to be assessed. Mr. Deol says that he was not served with the original notice of civil claim. He argues that the affidavit of service fails to identify him as the party that was served. In addition, he argues that the style of cause on the face of the affidavit of service is incorrect.

**7**  In the affidavit of service filed November 27, 2014, and sworn November 21, 2012, Mr. Buck deposes that on Monday, November 19, 2012, he served Gurpaul Purgash Singh Deol with the notice of civil claim (attached as Exhibit A) by handing it to and leaving it with that person at his place of employment, Deol and Basi Trucking, 5517 Spruce Street, Burnaby, BC. The style of cause of the affidavit of personal service does not list all of the defendants in the attached notice of civil claim. It lists only Gurpaul Purgash Singh Deol, John Doe, and Sandeep Singh Parhar.

**8**  In his affidavit in support of his application, Mr. Deol denies that he was served with the notice of civil claim. He says he never received the documents attached as Exhibit A to the affidavit of Mr. Buck. He has searched for his records to determine what he was doing on November 19, 2012, but has not been able to locate any information. He says "the first time I became aware I was the defendant in a civil action brought by the plaintiff was in August 2016, when the notice of application and supporting documents were delivered to my home."

**9**  In response, the plaintiff filed the affidavit of Lisa Dixon, a legal assistant. She appends to her affidavit a printout dated October 24, 2012, of the contact details on the website for Deol and Basi Trucking and Film Transportation which provided an address of 5517 Spruce Street Burnaby, BC. She also attached an interoffice memo from Lisa to "Kinda". I understand Kinda to be Mr. Garcha, counsel on this application. In the memo Lisa says "the defendant Deol has been served but has not filed a reply to civil claim. Do you want me to take default against it?" In handwritten notes, written on the memorandum are the following instructions: December 11, 2012. Paul (1) phone defendant Deol ask who his lawyer is (2) address for defendants Parhars.

**10**  In response, in an affidavit of December 2, 2016, Mr. Deol deposed "I have never spoken to counsel for the plaintiff. I certainly never spoke to him on December 21, 2012."

**11**  In response to this affidavit, the plaintiff filed the affidavit of Paul Sangha, a lawyer with the law firm of Garcha and Company. In that affidavit Mr. Sangha attached a copy of his hand written notes of a telephone conversation between counsel for the plaintiff, K.S. Garcha and the defendant Deol on December 21, 2012. Mr. Sangha deposes that he was present for that conversation and heard it over the speakerphone. It was a conversation regarding an extension for the filing of a response to civil claim by Mr. Deol. The memorandum is as follows: "TCW defendant Deol (W/KG) gave extension for response to civil claim to mid-January." The memorandum is dated December 21, 2012.

**12**  Mr. Deol argues that the plaintiff sat on its rights to take default judgment for 3 1/2 years from December 2012, until the fall of 2016. Mr. Deol argues that if the plaintiff had moved quicker he could have been in a better position to defend himself. He says that the delay in proceeding has worked to his prejudice. He is out of time. He could have issued third-party proceedings. He would have had counsel and could have participated in settlement discussions.

**13**  He argues as well that the error with respect to the style of cause in the affidavit of service brings into question the accuracy of the documents. He says that Mr. Buck does not indicate that he obtained identification for Mr. Deol and that this should cause the court concern.

**14**  He argues that I should permit cross-examination of Mr. Sangha if the affidavits are accepted. He argues that there are "glaring errors in the affidavit" and that these demonstrate that the process server's affidavit should not be preferred over that of Mr. Deol.

**15**  He says that he applied to set aside the default judgment as soon as reasonably possible. He learned of the plaintiff's claim in August 2016 and then applied to set aside the default judgment in November 2016. His defence is contributory ***negligence*** and provocation. He refers me to paras. 35 and 36 of his affidavit of November 21, 2016. There he says:

The plaintiff looked at me in a drunken manner said he was going to punch me out or knock me out. He was right in my face so that as he spoke his saliva hit my face. I think he stumbled at that moment and I was certain he was going to strike me so I moved quickly and struck him first. I struck him with an open hand.

He then stumbled and fell to the ground. I did not hit him hard enough to cause him to fall. I believe that he fell because he was unsteady on his feet due to the alcohol he had consumed. He fell backwards on his rear end."

**16**  Mr. Bajwa argues that there are sufficient circumstances to establish that Mr. Deol was indeed served. He says that nothing turns on the irregularity in the style of cause.

**17**  Mr. Bajwa argues that there is nothing to support Mr. Deol's assertion that he was not served. Mr. Bajwa argues that if Mr. Deol had a defence to the claim, he would have put it before the provincial court judge on the criminal charges arising from the incident. Instead, he pled guilty.

**18**  He says as well that there is no explanation for a delay of 3 1/2 months before bringing an application to set aside the default judgment.

**Discussion**

**19**  Mr. Deol refers me to the leading decision in this area, *Miracle Feeds v. D. & H. Enterprises Ltd.*, [*10 B.C.L.R. P 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F2F4-G1FN-00000-00&context=), [1979] A.C.W.S. 264, [*"Miracle Feeds"*] and to *Fraser Valley Disposal Ltd. v. Cho*, [*2016 BCSC 1923*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M1Y-F741-JWJ0-G2VD-00000-00&context=) ["*Fraser Valley"*]. In *Fraser Valley*, Mr. Justice Kent said:

[9] The case law is clear that if the court is satisfied service has not been effected upon a defendant, then any subsequent default judgment against that defendant is a nullity and the defendant is entitled to have the order set aside as of right. The discretionary considerations usually invoked in cases of this sort, and which have been articulated in *Miracle Feeds v. D. & H Enterprises Ltd.*, [*[1979] B.C.J. No. 1965*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F2F4-G1FN-00000-00&context=), simply do not apply to applications to set aside default judgments where proper service was not first effected.

**20**  In this case, I am not satisfied that service was not affected on Mr. Deol.

**21**  Mr. Buck, the process server, swears that he served Mr. Deol and provides the address where he says Mr. Deol was served. That is Mr. Deol's residence, according to Mr. Deol's own affidavit. It is also the address used on the order for substitutional service with respect to the assessment of damages application which Mr. Deol says he received. Mr. Sangha deposes to the conversation with Mr. Deol regarding the extension of time. He attaches his notes of that conversation. I also have the internal memorandum with respect to Mr. Deol's failure to respond to the action. I am not persuaded in the face of this evidence that Mr. Deol was not served, or that the affidavit of service of Mr. Buck incorrect.

**22**  The irregularity, if it is one, in the abbreviated style of cause (on the affidavit) is nothing more than an irregularity and does not persuade me that Mr. Buck was sloppy or inaccurate in the substance of his affidavit. He appends the materials that were served on Mr. Deol. The affidavit follows the form set out in the rules of court that applied at the time.

**23**  A defendant seeking an order pursuant to Rule 3-8(1) of the *Supreme Court Civil Rules* [the "*Rules*"] to set aside or vary a judgment obtained by default should show:

1. They did not fail to enter an appearance or file a defence to the plaintiff's claim wilfully or deliberately;
2. They applied to set aside the default judgment as soon as reasonably possible after learning of the default judgment, or have given and explanation for any delay in bringing their application;
3. They have a meritorious defence, or at least a defence worthy of investigation; and
4. The foregoing requirements have been established to the satisfaction of the court through affidavit material.

**24**  The elements in *Miracle Feed*s are not conditions that the applicant has to satisfy, but are relevant factors that the chambers judge should take into account when exercising discretion to set aside the default judgment (*British Columbia v. Ismail*, [*2007 BCCA 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61Y7-00000-00&context=), 235, B.C.A.C. 299, at para. 11).

**25**  Here, I am not persuaded that it is appropriate for me to exercise my discretion to set aside the default judgment based on the first and third factors. Mr. Deol's affidavit materials do not persuade me that he was not served and did not wilfully or deliberately fail to respond to the plaintiff's claim. In addition, I am not persuaded that he has a meritorious defence or defence worthy of investigation. His defence, as set out in his affidavit is that the plaintiff threatened to assault him; that he believed that the plaintiff was going to assault him and so he intentionally struck the plaintiff first. Although Mr. Deol argues that this constitutes contributory ***negligence*** or provocation and that this could form a defence to the civil claim for assault, I am not persuaded that it is so. Mr. Deol has not provided me with any authority to support his contention. The claim is not in ***negligence***, it is for assault and battery, an intentional act. Therefore, I am not persuaded that contributory ***negligence*** applies. Secondly, I have been provided with no authority that provocation constitutes a defence in a civil action.

**26**  Mr. Deol argues that Mr. Bajwa's injuries are not as extensive as he suggests or were not caused by his actions. It is for that reason that I ordered that Mr. Bajwa be produced for cross-examination on the assessment of damages, so that the extent of his injuries and the effect of Mr. Deol's actions could be tested and determined. The extent of Mr. Bajwa's damages is a matter for the assessment of damages. It is not a defence to the action.

**27**  Finally, Mr. Deol argues that had he had an opportunity to participate in settlement negotiations the results could have been different. Or, he could have brought third-party proceedings. Or, the amount paid in settlement by the other defendants could have affected how much he will be required to pay. It is speculative to suggest that the results of settlement might have been different had Mr. Deol participated. In any event, the amount paid in settlement by the other defendants will be deducted from the damages that I assess. Mr. Deol will have the benefit of that deduction.

**28**  With respect to the second factor listed in *Miracle Feeds*, that is that Mr. Deol applied to set aside the default judgment as soon as reasonably possible after learning of the default judgment, he deposes that he learned of the default judgment in August 2016. If that were so, he applied to set aside the default judgment on November 23, 2016. While I do not consider that to be particularly prompt action, and I am not persuaded that he learned of the action in August 2016, this is not a significant factor in my decision not to set aside the default judgment.

**Application to Assess Damages**

**29**  Mr. Bajwa seeks damages against Mr. Deol pursuant to Rules 9-7 and 3-8. On December 9, 2014, Mr. Bajwa obtained a default judgment against Mr. Deol. He seeks damages arising from an assault and battery committed by Mr. Deol and/or John Doe on August 11, 2012.

**30**  This action was commenced on November 13, 2012. Police investigated the assault and Mr. Deol was charged with assault, assault causing bodily harm and assault with a weapon pursuant to ss. 266 and 267 of the *Criminal Code*. On November 19, 2012 Mr. Deol was personally served with the notice of civil claim. On July 14, 2014 Mr. Bajwa filed a notice of trial with a trial date set of January 11, 2016 for 10 days.

**31**  On September 25, 2014 Mr. Bajwa reached a settlement against the other defendants and third parties, excluding Mr. Deol and Mr. Doe. On December 9, 2014 Mr. Bajwa obtained a default judgment against Mr. Deol for his failure to file and serve a response to civil claim. It was ordered that Mr. Deol pay to Mr. Bajwa damages to be assessed.

**32**  On May 12, 2015 Mr. Deol was found guilty of the offence of assault contrary to s. 266 of the *Criminal Code* and was sentenced to one day jail, one year probation and a two-year firearms prohibition.

**33**  On June 3, 2015 the trial of the action herein was adjourned by requisition.

**34**  Mr. Bajwa argues that it is appropriate to proceed summarily with a damage assessment on the basis of affidavit evidence because the amount of damages involved is relatively small. The court should be able to assess the range of general damages based on medical and legal reports and clinical records. The plaintiff's loss of income claim is relatively small and he did not miss a substantial amount of work due to his injuries. It is largely an arithmetic calculation. The claim for special damages is also supported by documentation and capable of assessment.

**35**  In his response the defendant admits that he was present during the altercation with the plaintiff. He says, however, that he was not involved to the extent claimed by the plaintiff. He says that there is a statement from the plaintiff's spouse who was present during the altercation in which she says that Mr. Deol was less involved than the plaintiff says he was. He says that the plaintiff has acknowledged that his wife has more recall of the altercation than he does.

**36**  As I have indicated above, I permitted examination and cross-examination of Mr. Bajwa so that Mr. Deol could challenge Mr. Bajwa's evidence, particularly on the grounds advanced by Mr. Deol.

**37**  Mr. Bajwa gave his evidence on February 10, 2017. He stated that he is 38 years old and lives in Surrey. He has been married since June 2010. He immigrated to Canada from the United States in 2012. He is a dentist. On August 11, 2012, he and his wife attended a wedding reception at the Bombay Banquet Hall. They arrived at approximately 8:00 pm. He said that he was socializing with his in-laws. He had three to four beers over the course of the evening between 8:00 pm and 12 o'clock midnight. He was introduced to Mr. Deol's father by his wife when they were outside on the patio. He also met Mr. Deol briefly on the patio. He and his wife were leaving at approximately 12:30 am. They were waiting for a cab. Mr. Deol and another individual arrived. Mr. Deol charged Mr. Bajwa and punched him in the side of the face with what appeared to be brass knuckles. He was struck just below the nose on the right side of his mouth with a closed fist. Mr. Bajwa saw something sharp and shiny, a metal object in Mr. Deol's hand as he was punched. Mr. Bajwa said that he was stunned and at that point another individual struck him on the back of the head. He could not see what he was struck with but it felt like some kind of hard object. He fell to the ground and lost consciousness. He was taken to Surrey Memorial Hospital where he received a CT scan. His lip was split open and his front teeth were broken. He had numerous abrasions to his cheek and chin. He also had scrapes and cuts to the back of his head.

**38**  After discharge from Surrey Memorial Hospital he received treatment from a dentist, Dr. Machine. He also had follow-up with Dr. Adrian Lee, a plastic surgeon. He took Tylenol 3's for approximately one week. He also took Xanax for anxiety over the course of the week. He had been working two different dental offices, one in Maple Ridge and one in Langley. After the assault he had to take a week off work because of the pain and because of his appearance. He could not chew properly for approximately two to three weeks. He suffered from facial swelling, headaches, and had difficulty sleeping. He had anxiety and a fear of going out in public. The bruising and swelling took approximately three weeks to resolve. He said that five days of lost income equates to $3,000, averaging his income over the period.

**39**  He will require further dental treatment in the future. He will require porcelain crowns or veneers. He will also require endodontic treatments. He may need a root canal. He has been quoted $7,000 for further treatments which does not include specialist or endodontic treatment and a root canal.

**40**  As to other effects from the assault, he has a fear of social situations. He has experienced pain and suffering. He has suffered from embarrassment and shock. His relationship with his wife has suffered.

**41**  He had persistent headaches for the first month. Thereafter he suffered from headaches from time to time. It does not affect his ability to work.

**42**  In cross-examination he said that he was not intoxicated. He acknowledged that he had had a few drinks. He denied that there had been any scuffle inside the banquet hall with the Deol family. He and his wife left after an argument with Mr. Deol's father. They walked down the stairs outside from the banquet hall. They saw the cab and then Mr. Bajwa saw Mr. Deol. He said that he received a direct blow to the right side of his face when Mr. Deol punched him. There appeared to be a weapon of some sort in Mr. Deol's hand. There was definitely one and possibly two punches. Mr. Bajwa said that he was unsteady after he was struck by Mr. Deol and then another individual hit him on the back of the head with a hard object. He remembered being struck on the head and falling to the ground.

**43**  He said that his teeth were not knocked out - they were fractured. He said that his teeth were not fractured by a fall to his face after he was he was struck by the other individual. There was a direct hit by Mr. Deol which shattered his teeth. He said that he felt the fracture from Mr. Deol's punch. He was struck by Mr. Deol at the exact location where his teeth were broken.

**44**  He saw a plastic surgeon, Adrian Lee to deal with his split lip.

**45**  In his affidavits filed in this matter the defendant Mr. Deol in Affidavit No. 1 sworn November 10, 2016 said:

1. With respect to the allegations set out in the Notice of Civil Claim, I admit that I was present at the time and place where the alleged assault of the Plaintiff occurred. There was a scuffle between myself and the Plaintiff where there was pushing and shoving. However, I deny causing the injuries that the Plaintiff is claiming compensation for.

**46**  In Affidavit No. 2 sworn November 21, 2016 Mr. Deol said

1. I arrived at the reception at approximately 9:00 PM. My father and wife were with me.
2. We sat at a table and ate appetizers while listening to the various traditional wedding speeches. I recall having a scotch and water during that time.
3. Then dinner was served. The hosts had set up a BBQ outside on the patio. I went outside with my Mother, Father, wife, and uncles and grandparents. While we were chatting Rose Gill approached us. She was unsteady on her feet and appeared intoxicated. She started poking my wife in an obnoxious manner and was harassing about some dispute they had between them. I believe it related to a mutual friend of theirs who had been told something by my wife which led her to cease associating with Rose. She was loudly and drunkenly saying "why don't you like me", "why did you get in between me and Preeti"?
4. My wife told Rose to leave her alone. My family is of course observing this. My father told Rose that she was assaulting his daughter in law, and to just leave.
5. At this time I looked into the reception hall and noticed there was a scuffle occurring between the Plaintiff, Himmat Singh Bajwa, and another guest. They were shoving and pushing each other and yelling.
6. Rose took her husband, the Plaintiff, by his arm and pulled him outside to the patio area. The plaintiff was clearly intoxicated. I heard Rose him what my father had told her earlier.
7. The Plaintiff then stared speaking loudly and aggressively to my father. He said things like "you don't know who I am!", "you can't talk to me and my wife like that!", and "I am a dentist!" He was extremely cocky and belligerent. My mother left to seek out someone from Security because all of us could see that this was not a good situation.
8. I then left with my cousin to take a look at a car that he had borrowed from a friend. It was a 66 Chevelle. I was having a cigarette and talking to my cousin when another one of my cousin's came out to see the car.
9. Then I saw the Plaintiff and his wife exiting the hall. They were both unsteady on their feet and were obviously intoxicated.
10. The Plaintiff looked at me and in a drunken manner said he was going to punch me out or knock me out. He was right in my face so that as he spoke his saliva hit my face. I think he stumbled at that moment and I was certain he was going to strike me so I moved quickly and struck him first. I struck him with an open hand.
11. He then stumbled and fell to the ground. I didn't hit him hard enough to cause him to fall. I believe that he fell because he was unsteady on his feet due to the alcohol he had consumed. He fell backwards on his rear end.
12. At that point my cousin said let's leave and we got into the car and left the parking lot.
13. I do not know what occurred after I left.

**47**  The application for assessment of damages was heard on November 15, 2016, before Mr. Deol's second affidavit was filed. At that time Mr. Deol argued that the application should not be dealt with summarily, based on his Affidavit No. 1, that there was a scuffle between himself and Mr. Bajwa, but he did not cause the injuries that Mr. Bajwa was claiming compensation for. His counsel argued:

If my client caused damage, and it is likely that he did cause some damage, my lady, what was the extent of it?

My friend shows you photographs of the plaintiff. And his face looks quite cutup and puffy. And it is my submission that could have happened as a result of other parties who were involved in this -- in the scuffle.

**48**  He referred me to Mr. Bajwa's statement to police in which Mr. Bajwa described Mr. Deol punching him and someone else hitting him on the back of the head. He argued:

So someone smacked him from the back of the head, on the back of the head, my lady, which caused him to fall over onto the concrete, which I submit is very plausible that that caused a lot of the damage. And he is not saying that Mr. Deol did that. [p.32]

**49**  He also referred me to Mrs. Bajwa's statement to police which described Mr. Deol punching Mr. Bajwa twice and then a second person striking Mr. Bajwa on the back of the head with a crowbar.

**50**  He submitted:

It is unclear as to the amount of involvement Mr. Deol had. And that is one of the reasons why I would like to cross-examine... the plaintiff on his affidavit so I can get more information on this.

He continued:

... my client admits he was involved in the altercation. He admits there was a scuffle. There is no doubt about it... he struck him and then someone came from behind with some crowbar and knocked him over and then started banging on him with it... my client believes that that is what caused the majority of the damage to the plaintiff. And that requires the ability or the opportunity to -- to cross-examination - to cross-examine, and perhaps also examine the plaintiff's wife to determine what exactly - to get their evidence out properly and fully for the court.

**51**  Mr. Deol argued that the court needed to be able to see Mr. Bajwa to assess the extent of his damages and that he needed to cross-examine Mr. Bajwa with respect to the extent of his loss.

**52**  He argued that the claim was not a minor claim and was not appropriate on that basis for summary trial.

**53**  He submitted that the appropriate range of damages was between $25,000 and $50,000.

**54**  After having heard submissions from counsel, and considered the evidence as it was before me on November 15, 2016, I concluded "it seems to me that the case really depends on the *Athey v. Leonati* [*(1996), 140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) analysis:

Which is divisible and indivisible injuries ... to that extent there is some purpose in a cross-examination or an examination and cross-examination of Mr. Bajwa to permit me to determine whether the teeth are actually the result of the punch or if they are divisible injuries and are the result of the second... I will call it the "second assault.

That is one of the things that I can do on an application such as this. And I think that it serves a purpose to have Mr. Bajwa attend to get evidence and be cross-examined... so I am thinking that what we really want to do is have Mr. Bajwa in for cross... for examination and cross-examination as to the cause of his injuries as best he recalls it and extent of his injuries.

**55**  Based on the state of the evidence before me, that is Mr. Deol's affidavit of November 10, 2016; I concluded that it was not necessary for Mr. Deol to attend to give evidence. Mr. Deol did not deny that he was involved in an altercation with the plaintiff. His counsel in submissions acknowledged that Mr. Deol may have caused some injury. The issue was whether the "second assault" caused Mr. Bajwa's injuries, or whether those injuries were indivisible.

**56**  After hearing of November 15, 2016, Mr. Deol filed the further affidavit sworn November 21, 2016 with the contents as noted above.

**57**  Mr. Bajwa was examined on February 10, 2017. At that time Mr. Deol's evidence that he had struck Mr. Bajwa with an open hand and Mr. Bajwa had fallen on his rear-end was not put to Mr. Bajwa in cross-examination. Rather, the thesis advanced in cross-examination was that Mr. Bajwa fell on his face after he was struck from behind with a crowbar. This thesis is not consistent with Mr. Deol's second affidavit.

**58**  The new evidence was filed after the hearing of the original application. The question then becomes whether this matter continues to be appropriate for summary trial disposition.

**59**  At the conclusion of Mr. Bajwa's evidence, Mr. Deol argued that Mr. Bajwa was somehow struck by him. He was then struck on the back of his head and landed on his face. He argued that it was more likely the fall that caused the chipped teeth and that this would be a divisible injury. He argued that he could be liable for the bruise and the split lip but not the teeth or the blow to the back of the head. He argued that only the punch to the face was attributable to Mr. Deol.

**60**  Mr. Deol's own evidence in his second affidavit is inconsistent with his position on this application. His evidence is inconsistent with any injury to Mr. Bajwa's face. His evidence says nothing about a blow to the back of Mr. Bajwa's head or Mr. Bajwa falling on his face. He says that Mr. Bajwa fell on his rear-end. This would lead to no injury to his face. Mr. Deol's evidence does not account for any significant injury to Mr. Bajwa. It is inconsistent with his position on November 15, 2016. It is inconsistent with his position on February 10, 2017.

**61**  It is also inconsistent with the statement of Rose Gill (Mr. Bajwa's wife) on which Mr. Deol relied. That statement provides:

That Ms. Gill observed Mr. Deol waiting by the front entrance of the banquet facility when she and Mr. Bajwa left to catch their taxi. She saw that Mr. Deol had an object in his right hand which she described as possibly being brass knuckles. It covered his knuckles and was dark colour. Mr. Deol was yelling and swearing at Mr. Bajwa. Mr. Deol charged Mr. Bajwa and assaulted him on the right side of his face using the object that was in his right hand. Mr. Bajwa was unsteady and she attempted to get between him and Mr. Deol. She was pushed aside by Mr. Deol and he assaulted Mr. Bajwa again using the object in his hand. An unknown second male assaulted Mr. Bajwa by hitting him in the back of the head with the object. Mr. Bajwa was knocked unconscious and fell to the ground. Ms. Gill attempted to block his fall. Other bystanders attempted to assist.

**62**  Mr. Bajwa gave his evidence under oath before me. He was cross-examined by counsel for Mr. Deol. He was entirely credible in his evidence. I accept his evidence. In my view, I am able to find the facts necessary to determine this matter. As I have indicated above, Mr. Deol's affidavit of November 21, 2016, is inconsistent with the position he has advanced before me on more than one occasion. It is inconsistent with the statement that Ms. Gill gave to police, on which Mr. Deol relied. It is also inconsistent with Mr. Bajwa's evidence.

**63**  As the Court of Appeal has indicated in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd*. [*(1989), 36 B.C.L.R. (2d) 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X23K-00000-00&context=), 36, C.P.C. (2d) 199 (B.C.C.A) said:

[56] Lastly, I do not agree, as suggested in *Royal Bank v. Stonehocker*, that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer*, quoted at p. 15 [pp. 212-13] of these reasons. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. For example, in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.

**64**  In my view, in the circumstances of this case, despite the inconsistency raised by Mr. Deol's affidavit of November 21, 2016, I am able to find the facts necessary to determine this case.

**Assessment of Damages**

**65**  Mr. Bajwa seeks general damages, special damages, punitive aggravated and or exemplary damages and special costs

**66**  He has provided me with three authorities with respect to assessment of damages:

*Thornber v. Campbell*, [*2012 BCSC 1449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S263-00000-00&context=) [*"Thornber"*];

*Besic v. Karenyi*, [*2011 BCSC 1277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6287-00000-00&context=) [*"Besic"*]; and

*Pete v. British Columbia (A.G.)*, [*2004 BCSC 1563*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MK-00000-00&context=), [*136 A.C.W.S (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MK-00000-00&context=) [*"Pete"*]

**67**  In *Thornber*, the plaintiff was awarded non-pecuniary damages of $125,000. In *Besic* the plaintiff receive non-pecuniary damages $70,000 with the reduction of $10,000 for failure to mitigate. In *Pete* the plaintiff was awarded $75,000 in non-pecuniary damages.

**68**  While the injuries suffered in each of these cases are more extensive than those suffered by Mr. Bajwa, they are nonetheless helpful in determining the appropriate range of damages.

**69**  In *Thornber*, Mr. Justice Greyell discusses exemplary, punitive and aggravated damages. He said:

[45] I make no award for either exemplary or punitive damages. The defendant in this case was charged, convicted, and sentenced for assault causing bodily harm. In other words, there is no need to send a message of deterrence to others who may be inclined to act like Mr. Campbell. In support of this finding, I refer to the Supreme Court of Canada decision *Whiten v. Pilot Insurance Co.*, [*[2002] 1 S.C.R. 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=). Justice Binnie, writing for the majority, laid out ten principles to guide the award of punitive damages. In particular, I note the third principle that recognizes criminal law is the primary vehicle for punishment. Punitive damages should only be resorted to in exceptional circumstances (at 635 - 636).

[46] For further guidance, I rely upon the decision of Justice Burnyeat in *Reddemann v. McEachnie*, [*2005 BCSC 915*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0Y7-00000-00&context=), a case involving an unprovoked attack by a hockey assistant trainer on a spectator. Burnyeat J. awarded punitive damages to the plaintiff, taking into account the fact that the attack was unprovoked, the value of deterring and denunciating such egregious behaviour, and the absence of any criminal proceedings or actions taken by the hockey league to punish the defendant's behaviour.

[47] Additionally, the award against Mr. Thornber is a substantial one that encompasses the compensatory intangible elements intended to be covered by an award of aggravated damages: see the BC Court of Appeal decision *Huff v. Price* [*(1990), 51 B.C.L.R. (2d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNM1-JCRC-B52T-00000-00&context=), [*76 D.L.R. (4th) 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2W8-00000-00&context=) at 153 and *Vukelic* at paras. 17 - 22.

**70**  In this case, although Mr. Bajwa's injuries are not as extensive as those suffered by the plaintiffs in the cases above, the injuries were nonetheless very serious. It was an unprovoked attack. Three of Mr. Bajwa's teeth were broken. He will require further dental repair. He suffered a loss of income. He experienced headaches and anxiety.

**71**  Considering the cases to which I have been referred, in my view the appropriate award of damages, including the compensatory intangible elements to be covered by an award of aggravated damages is $55,000. In addition, I am satisfied that Mr. Bajwa lost income of $3,000 as result of this assault and will incur dental repair of $7,000.

**72**  The defendant referred to the decision of *McMahon v. ICBC*, [*1998 CanLii 5338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M220-00000-00&context=) (B.C.S.C.) a 1998 decision of Madam Justice Quijano arising from a motor vehicle accident in 1995. The plaintiff suffered a lacerated chin, a broken molar and a chipped tooth. She had an abrasion on her right thigh and the head of her radius was fractured. She required gum surgery to prepare the site of the broken molar for a crown. The chipped tooth was smoothed out by grinding. It was likely that she would have to have the crown replaced every 10 years or so and possible that she would have to have a root canal. The plaintiff sought $30,000 to $35,000 damages for pain and suffering.

**73**  I did not find this case to be helpful. It is very dated and does not arise from an intentional assault. It does not include any element of aggravated damages.

**74**  Finally, it is likely that some of the injuries and pain experienced by Mr. Bajwa arose from the blow to the back of his head. He does not claim for the laceration to the back of his head. However, it may well be that the headaches and some of the psychological results of the assault are due at least in part to the blow to the back of his head. This is an invisible injury as contemplated by *Athey*. It is not possible for me to determine which aspects of these complaints may be due to the blow to the back of the head as opposed to the punch to his face. As the Court said in *Athey*:

24 The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her ***negligence***.

25 In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

**75**  Mr. Bajwa is also entitled to his costs. If the parties are not able to agree, they may file written submissions before me.

**76**  The amount paid in damages by the other defendants will be deducted from the amount to be paid by Mr. Deol.

B. BROWN J.

**End of Document**

[***Blok v. Mathew, 2012 CHFL para. 15,640***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-H241-JNS1-M0TR-00000-00&context=)

Canadian Health Facilities Law Guide

British Columbia Supreme Court

Before: Abrioux J

Decision: May 24, 2012.

Docket No. S109685

***Canadian Health Facilities Law Guide*  > *Cases* > *2010s* > *2012***

**2012 CHFL para. 15,640** | [*[2012] B.C.J. No. 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3V0-00000-00&context=) | [*2012 BCSC 754*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3V0-00000-00&context=)

Gail Blok, Plaintiff v. Dr. Biju Mathew, Defendant

See commentary at [*CHFL para. 3925*](https://advance.lexis.com/api/document?collection=analytical-materials-ca&id=urn:contentItem:5K75-22C1-F65M-611M-00000-00&context=).

**Case Summary**

***Negligence* — Application by psychiatrist to dismiss *negligence* action against him — Psychiatrist treated plaintiff from 1999 to 2004 — Plaintiff commenced action against psychiatrist in 2007 — Psychiatrist argued action barred by expiry of limitation period — Application allowed - - Plaintiff had necessary facts to link treatment to pain, injuries, and symptoms when cause of action arose in 2004 — Plaintiff could have obtained advice from notional adviser — Plaintiff's interests and circumstances did not warrant postponement of limitation period — Limitation Act, RSBC 1996, c. 266, s. 3(2), 6.**

|  |
| --- |
| **Facts:** This was an application by the defendant psychiatrist, Dr. Mathew, for a dismissal of a ***negligence*** action against him on the basis that the action was statute-barred due to the expiry of the two-year limitation period or, alternatively, on the basis that he met the standard of care. Dr. Mathew treated the plaintiff, Blok, from 1999 to 2004. Blok was initially diagnosed with eosinophilic gastritis in November 2006 and the diagnosis was confirmed June 2007. She obtained her hospital records in August 2007 and commenced an action against Dr. Mathew in November 2007 on the basis that he breached the standard of care. Blok conceded that the initial limitation period expired in 2006, but she argued that it was postponed until she obtained her records. Blok also argued that the diagnosis of eosinophilic gastritis postponed the limitation period. She asserted that she did not discover the true state of her health until after the limitation period had expired. Blok gave discovery evidence that 2004 was when she first considered that Dr. Mathew's care was not up to standard. In addition, Blok provided affidavit evidence that she had concluded early on during the period she was under Dr. Mathew's care that she had suffered injuries resulting from it. During submissions on the application, Blok admitted that she had not been relying on Dr. Mathew to make the diagnosis of eosinophilic gastritis. That diagnosis had been made by a gastroenterologist. In addition, on the application, she sought to introduce the report of another psychiatrist suggesting that Dr. Mathew may have breached the standard of care owed to her. Furthermore, during the initial limitation period, Blok was accepted into the RCMP, completed training, secured two permanent part-time jobs, and conducted another action.  HELD: The application was allowed.  Blok had knowledge of the necessary facts to link her treatment under Dr. Matthew to her pain, injuries, and symptoms when her cause of action arose in 2004. She had made a connection between the treatment and her injuries and symptoms well before that date. Blok knew, or it was within her means of knowledge, that she could have obtained advice from a notional adviser. Blok's interests and circumstances were not "serious, significant and compelling" so as to warrant postponement of the limitation period. It would not have been "overwhelming" for her or unfeasible due to her circumstances to have brought the action against Dr. Mathew within the limitation period. |

**Counsel**

K. Morrison for the petitioner; B. Stock for the defendant.

**Reasons for Judgment**

|  |
| --- |
| **P. ABRIOUX J.** |

**I INTRODUCTION**

**1**  The defendant applies under Rule 9-7 for a dismissal of this medical malpractice action. He does so on the basis the claims were statute barred under the *Limitation Act*, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=), before the plaintiff commenced this action on November 22, 2007. In the alternative he seeks to have the action dismissed on the basis he met the standard of care expected of him.

**2**  Rule 9-7(15) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*, provides, in part:

1. On the hearing of a summary trial application, the court may
2. grant judgment in favour of any party, either on an issue or generally, unless
3. the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
4. the court is of the opinion that it would be unjust to decide the issues on the application,

**3**  The parties are in agreement the Court can find the facts necessary to grant judgment under Rule 9-7 with respect to the limitation defence. Should I conclude the action is not statute barred then it is the plaintiff's position the substantive medical malpractice issues cannot be decided pursuant to the summary trial provisions since there are conflicts in the evidence. Accordingly the Court would be unable to find the facts necessary to decide the issues of fact or law. Furthermore it would be unjust to decide the substantive alleged medical malpractice issues on an application pursuant to this Rule. In response, the defendant submits that to the extent there are any material conflicts in the evidence, they can be resolved by reference to the medical records created contemporaneously with the events in issue. Even if there is a conflict in the evidence it is still proper for the summary trial judge to weigh the evidence and to ascribe different values to it.

**II BACKGROUND**

**4**  The plaintiff received psychiatric treatment for depression and severe anxiety from 1996 onwards. She was treated by several psychiatrists who had diagnosed a major depressive disorder, and had been prescribed anti-depressant medication. She also had a history of suicidal ideation and of gastrointestinal complaints which included symptoms of vomiting and diarrhea. She had been diagnosed with Celiac disease, Gilbert's disease, possible porphyria and autoimmune disease.

**5**  Dr. Mathew is a psychiatrist. He first became involved in the plaintiff's care in September 1999 while she was an inpatient at the Ridge Meadows Hospital. He treated her on various occasions both when she was hospitalized and on an outpatient basis until January 13, 2004. There was then more than a two year absence until Ms. Blok consulted Dr. Mathew in 2006. These consultations were for matters entirely unrelated to the psychiatric symptoms which had been the object of Dr. Mathew's care between 1999 and early 2004. They related to emotional difficulties which she was having with her adopted daughter. Ms. Blok took no medications prescribed by Dr. Mathew after December 2003 and her allegations against him are directed to the care which he provided between 1999 and early 2004.

**6**  In November 2006 the plaintiff was tentatively diagnosed with eosinophilic gastritis. Three biopsies were performed, two of which were positive. In 2008 she was diagnosed by her current gastroenterologist, Dr. Atkinson with eosinophilic gastroenteritis.

**7**  At the time Dr. Mathew commenced his treatment of the plaintiff in 1999 he was aware of her history of a constellation of physical and psychiatric problems which the plaintiff had for many years.

**8**  Dr. Mathew prescribed various medications to the plaintiff during the timeframe she was under his care. The plaintiff was also receiving prescription medication from her general practitioner, Dr. Shearer. She also consulted other psychiatrists during this timeframe including Dr. Nanda and Dr. Hewko in 2001.

**9**  Dr. Hewko's practice focused on patients presenting with physical symptoms with an element of psychiatric factors giving rise to their illness. In a consultation report arising from his assessment of the plaintiff in June 2001, Dr. Hewko concluded the plaintiff's gastrointestinal symptoms were at least in part caused by psychological issues. He did not disagree with Dr. Mathew's assessment of the plaintiff or his course of treatment.

**10**  Dr. Mathew received Dr. Hewko's consultation report and noted his opinion that treatment had to be focussed on trying to treat all of the possible interrelated factors simultaneously if possible.

**11**  In the writ of summons filed November 22, 2007, both Dr. Mathew and Dr. Hanna Binder were named as defendants. The allegations against Dr. Binder, a gastroenterologist who treated the plaintiff between 1993 and 2007, included:

1. failing to take an adequate history;
2. failing to consider physical conditions matching the plaintiff's complaints and symptomatology;
3. having diagnosed the plaintiff with gastritis failing to identify the specific type of gastritis;
4. failing to perform an adequate differential diagnosis;
5. "having acquiesced" in a diagnosis of psychiatric illness, failing to diligently pursue investigations of type and cause or cause of gastritis;
6. failing to consider information gathered over time which contradicted the diagnosis of psychiatric illness.

**12**  The statement of claim contained the following allegations against Dr. Mathew:

1. failing to take an adequate history;
2. failing to consider physical conditions matching the plaintiff's complaints and symptomatology;
3. failing to perform an adequate differential diagnosis;
4. assuming that the plaintiff was abusing alcohol and drugs without any evidence and support and repeatedly accusing the plaintiff of the same;
5. failing to acknowledge the plaintiff had a physical cause for her illness;
6. belittling and discounting the plaintiff's attempts to state and explain her symptoms to him;
7. suggesting to the plaintiff she would meet an early death if she did not take the psychotropic drugs he prescribed, thereby visiting upon the plaintiff numerous and diverse side effects, including hallucinations, severe vomiting, vertigo and suicidal thoughts.

**13**  On March 19, 2009, an amended statement of claim was filed. The claims against Dr. Binder remained as set out in the statement of claim. The claims against Dr. Mathew were broadened to include:

1. assuming that the plaintiff was abusing alcohol and drugs without any evidence in support and repeatedly accusing the plaintiff of the same by making such entries in his office chart without verifying those claims with the plaintiff, her family or her other caregivers;
2. "dehydration, malnutrition and suicidal attempt" as further effects of the psychotropic drugs prescribed;
3. forcing the plaintiff to ingest numerous psychotropic drugs by threatening to have her physicians withdraw the drugs being administered to lessen the effects of her gastrointestinal illness if she did not ingest the set of psychotropic drugs as prescribed by him;
4. administering a trial drug Reboxetine which was not, and is not approved for use in Canada without informing the plaintiff of its non-approved status in Canada;
5. failing to supply a constant dose of the drug Reboxetine, thus forcing the plaintiff to undergo and endure withdrawal from that drug with multiple effects;
6. causing emotional distress over many years stemming from the failure to diagnose, and the bullying of the plaintiff into ingesting numerous psychotropic drugs which caused numerous side effects including nausea, vomiting, vertigo, suicidal thoughts, suicidal attempts, persistent anxiety, irrational fear of impending death and pain superimposed on her gastrointestinal symptoms resulting in the inability of the plaintiff to perform various duties attendant on her status as a wife to her husband and business partner and mother to their five growing children;
7. causing illness by forcing the plaintiff to ingest numerous psychotropic drugs by threatening her, stopping medications without proper tapering, causing numerous withdrawals from numerous psychotropic drugs, prescribing psychotropic drugs with prior knowledge they were causing significant side effects.

**14**  The plaintiff consented to a dismissal of the action against Dr. Binder on May 30, 2011.

**15**  In August of 2007 the plaintiff obtained her Ridge Meadows Hospital records. She deposed that upon reviewing the records she learned Dr. Mathew had noted she had abused alcohol. She was extremely upset. She deposed she could not drink alcohol without becoming very ill. One of the submissions advanced on her behalf on this application was that Dr. Mathew inserted into the written record references to alleged abuse of alcohol "to give himself a defence if any untoward incident or condition occurred". There was evidence before me in the form of an affidavit from the plaintiff's former general practitioner, Dr. Shearer that in December 2000 she reported to him she consumed Kaluha and milk at night in order to make herself feel better.

**16**  In May 2008 counsel for Dr. Mathew obtained a copy of the Ridge Meadows Hospital's chart. A copy was provided to plaintiff's counsel on May 26, 2008. In comparing this set of records obtained from defendant's counsel with the one obtained by the plaintiff herself the prior year, she noted there were handwritten alterations on the records obtained by her in 2007 which did not appear in the copy of the chart obtained by counsel for Dr. Mathew in May 2008. Furthermore, there were some spaces in the copy obtained by defence counsel which were filled in by handwritten words which were different to the handwritten words filling the same spaces made on the pages obtained by the plaintiff in August of 2007.

**17**  The plaintiff advanced the position that Dr. Mathew made alterations to his copy of the medical chart after the plaintiff had ceased to be his patient. It was alleged: "This is conclusive evidence that Dr. Mathew was willing to and did falsify a former patient's records. This evidence calls Dr. Mathew's veracity into question."

**18**  In an alternative submission the plaintiff did raise the possibility that the alterations Dr. Mathew made were in the interest of ensuring that the records were as accurate as he could make them.

**19**  Dr. Mathew addressed this issue in his affidavit #4 sworn February 13, 2012. He set out in some detail the procedure he follows when dictating consultation notes. This included the following:

1. the dictation is transcribed by medical transcriptionists. A hard copy is sent to him for review;
2. if the dictation is correct he will usually sign the hard copy to be filed in the medical records department;
3. if it is incorrect, incomplete or needs editing, he will make the changes in handwriting directly on the hard copy and return it to transcription for correction. In the usual course he would then approve and sign the corrected copy;
4. if the changes are minimal he will often leave his writing on the hard copy, sign it and return the hard copy for filing.

**20**  Dr. Mathew deposed he had reviewed both sets of the records. He acknowledged that the handwritten words were, in some cases, different.

**21**  Dr. Mathew then deposed he had no way of knowing for certain the circumstances under which he made the notations. He acknowledged it was possible that in 2007 he was afforded the opportunity by a clerk in the medical records department to review the hospital chart before it was sent to the plaintiff:

In doing so, I may have filled in blanks or corrected what I perceived to be errors in the copy generated by the medical records department in 2007 without having had the benefit of going back to review the hard copy of the Ridge Meadows Hospital records.

**22**  In any event, Dr. Mathew cross-referenced both hard copies of the Ridge Meadows Hospital records. The differences are set out at paragraph 5 of his affidavit #4.

**III THE LIMITATION DEFENCE**

1. **The plaintiff's position**

**23**  The plaintiff acknowledges she last saw Dr. Mathew in respect of the cluster of symptoms for which he was treating her in early to mid-January 2004. She also acknowledges that when she consulted him in relation to her adopted child from March 15, 2006, to June 19, 2006: "this 'treatment' was not in respect of her eosinophilic gastroenteritis".

**24**  The plaintiff further concedes at paragraph 46 of her written summary of argument that "the initial two-year limitation period expired, therefore, in mid-January 2006."

**25**  It is the plaintiff's position the applicable limitation period, being two years, was postponed from January of 2004 to August of 2007 when she obtained a copy of her chart, or May 2008 when she received the second copy of her chart.

**26**  The plaintiff's affidavit provided the evidentiary basis for the following submission, made on her behalf:

Mrs. Blok had always felt that Dr. Mathew was wrong in the way he treated her, in the way he tended to dismiss her symptoms and her idea of what was wrong with her. However, she herself did not know what was wrong with her, and she could not state conclusively that Dr. Mathew was wrong in his diagnosis and his treatment. If her illness had proved to be psychiatric, his treatment, while hard to take, could have been correct [At para. 88 of the plaintiff's written submissions.]

**27**  The plaintiff also submits the diagnosis of eosinophilic gastritis which was confirmed in June of 2007 provided a basis for the postponement of the limitation period *vis a vis* her claims against Dr. Mathew.

1. Not until her diagnosis of eosinophilic gastritis was confirmed in June of 2007 could Mrs. Blok anticipate even some chance of pursuing a successful action against Dr. Mathew.
2. Dr. Mathew provided psychiatric care for what he felt was a psychiatric illness. Mrs. Blok did not like what he had done, the threats, the bullying, the fear she felt for him, but she felt she did not have a complaint which she could take forward at law and recover damages. Looking at the evidence and the arguments presented by the Defence, it is difficult to argue with her view of her prospects of success.
3. She had neither the evidence nor the knowledge to state that Dr. Mathew was guilty of ***negligence*** when she was able to move on from, or more accurately, escape Dr. Mathew's treatment with psychotropic drugs. Although she had less intense gatrointestinal symptoms less frequent [sic], she still had them.
4. That all changed when Dr. Binder informed her that she had eosinophilic gastritis, to be treated with prednisone. Once she knew she had been misdiagnosed, she decided to obtain some hospital records, including consultation reports and test results.
5. When she saw that Dr. Mathew had written in her records that she had admitted to him that she had abused alcohol, she became very angry.

**28**  In the plaintiff's submission she did not discover the true state of her health until after the two-year limitation period had expired. She submits her case

[i]s on all fours with *Karsangii Estate v. Roque*. Mrs. Blok had been given no indication by anyone that she had a cause of action against Dr. Mathew. She herself felt she had no chance of success, so long as she did not know what was wrong with her.

1. **The defendant**

**29**  The defendant's position is that the limitation period commenced to run in late 2003 or early 2004. Reference is made to the plaintiff's evidence on examination for discovery. The following extracts pertain to when the plaintiff concluded Dr. Mathew had breached his duty of care to her, causing her damage:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 227 Q |  | When did you first consider that the care you received from Dr. Mathew wasn't up to standard? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | In 2004. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 228 Q | And was that when you left him? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | My husband told me that if I don't stop seeing Dr. Mathew, I would inevitably die. So he told me, he gave me an ultimatum, either I stop seeing him or he's going to leave. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 229 |  | Q |  | So your husband thought that the treatment you were getting from Dr. Mathew was going to cause you to die? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 230 Q | And that was in 2004? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I believe it was 2004 or in the end of '03. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 231 Q | Okay. And did you agree with your husband? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was on so many drugs, I don't remember. In the end, I obviously agreed with him, but during those years, I didn't really know what was going on. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 232 |  | Q |  | Okay. So you would have come to the conclusion, I guess, after you went off the drugs in what, late 2003, early 2004 that the treatment Dr. Mathew gave you was not up to standard? |  |

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|  | A | Yes. |  |

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| 233 |  | Q |  | When did you conclude that Dr. Mathew was prescribing medications to you that you believed you did not require? |  |

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| --- | --- | --- | --- |
|  | A | From the beginning. |  |

. . . .

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| 241 |  | Q |  | Well, you already said that it was in late 2003 or early 2004 that you realized this, so let's talk about that -- |  |

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| --- | --- | --- | --- |
|  | A | My husband realized it. |  |

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| --- | --- | --- | --- |
|  | 242 Q | -- when you came off the drugs. Right. |  |

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|  | A | Yes. |  |

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| 243 |  | Q |  | And you said that when you came off the drugs, you agreed with your husband. When did you come off the drugs? |  |

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|  | A |  | I would have to look at the records, but I believe it's the end of '03 or beginning of '04. |  |

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| 244 |  | Q |  | Right. And so from the time you came off the drugs, you said something really bad -- you realized something really bad had happened when you were being treated by Dr. Mathew, correct? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Well, I knew off and on during the time when I was in his care, obviously, but didn't -- didn't realize how bad it was until I was well enough to look back and see what happened. |  |

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| 245 |  | Q |  | All right. When did you conclude that the medications that Dr. Mathew was prescribing you were not helping you? Was it during the time he was treating you? |  |

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|  | A | Probably in 2004. |  |

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|  | 246 Q | So when you came off? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Uh -- huh, but I did know during that time that I couldn't keep them down and they were causing me immense grief. |  |

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| 294 |  | Q |  | Paragraph 46 says that "October 10. 2001, you were commenced on Prozac by Dr. Mathew, and then in paragraph 47, it says "I continue to feel dreadful", and I just want to put it contextually. I imagine that what you man [sic] by this paragraph 47, "I continue to feel dreadful" is that in October of 2001, you were continuing to feel dreadful: is that right? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | From the time he started giving me medication in '99 until the end, I felt dreadful all the way through, so if you're trying to ask me on a specific medication, I couldn't tell you which one was worse. |  |

**30**  In addition, the plaintiff on her own evidence concluded early on during the period she was under Dr. Mathew's care she had suffered injuries as a result of the alleged breaches of duty of care. Paragraph 34 of her third affidavit, referring to the timeframe of August 2001, states:

. . . That I was actually living my worst nightmare, because it was real life not a dream you can forget about after you wake up ... I didn't live in my bed because I was afraid; I lived in my bed because I was paralyzed with terror ... I cried and cried and cried but that was all I could do to relieve my suffering as Dr. Mathew was my only escape and I was not allowed to escape. My life was in his hands. When I begged Dr. Mathew for some help he acted as if this was the normal course of anxiety, it was no big deal, and it was mild stuff.

**31**  The defendant also relies on the fact there was no evidence the plaintiff was not legally competent during the time she was under Dr. Mathew's care. In fact, the independent evidence from many of her treating physicians was to the effect she was always competent to manage her affairs.

**32**  Furthermore, the plaintiff was accepted into the R.C.M.P. in January 2005. She became an auxiliary constable after completing a six-month course through the Justice Institute, and was available to work as an on-call cell guard as of late 2005.

**33**  Reduced to its essentials, the defendant's position is that all elements of the cause of action were in existence by early 2004 at the latest. The writ of summons was filed on November 22, 2007, well after the expiration of the limitation period.

**IV ANALYSIS AND DISCUSSION**

**Introduction**

**34**  The parties agree s. 3(2) of the *Limitation Act* applies. It provides:

Limitation Periods.

3(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

1. subject to subsection (4)(k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

**35**  Section 6(3)(c) of the *Act* postpones the commencement of the running of time for professional ***negligence*** actions.

**36**  Section 6(4) qualifies Section 6(3) by providing:

Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

1. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
2. the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

**37**  Sections 6(5)(a) and (b) of the *Act* define "appropriate advice" and "facts" as follows:

1. For the purpose of subsection (4),
2. "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
3. "facts" include
4. the existence of a duty owed to the plaintiff by the defendant, and
5. that a breach of a duty caused injury, damage or loss to the plaintiff ...

**38**  Finally, section 6(6) of the *Act* provides that the burden of proving the running of time has been postponed is on the person claiming the benefit of the postponement, in this case, the plaintiff.

**39**  In *Lorette v. Thorson Health Centre*, [*2008 BCSC 552*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2G1-00000-00&context=), MacKenzie J. (as she then was) summarized the applicable legal principles:

**71** In ***Ounjian v. St. Paul's Hospital***, [*2002 BCSC 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61GK-00000-00&context=), the court considered the components of s. 6(4) of the ***Limitation Act***. It reiterated the three components Lambert J.A. articulated in ***Vance v. Peglar*** [*(1996), 138 D.L.R. (4th) 711*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61JD-00000-00&context=) (B.C.C.A.) and found, at para. 21, that there is also a fourth component of s. 6(4):

1. The identity of the defendant is known to the plaintiff.
2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge.
3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.

**72** All four components must be satisfied before time begins to run. The Plaintiff commenced her action on December 31, 2004. Therefore, all four components must have been satisfied by December 31, 2002 in order for the limitation period to have expired before the commencement of the action.

**40**  McEachern C.J.B.C. made the following observation in *Vance v. Peglar* [*(1996), 22 B.C.L.R. (3d) 251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61JD-00000-00&context=):

Perhaps it will be useful at the outset to state what I understand to be the reason why the law includes limitation statutes. The reason was well stated in the Report of the Ontario Law Reform Commission, Report on Limitation of Actions 9, 10 (1969), adopted by the British Columbia Law Reform Commission's Report on Limitations, (Project No. 6), 1974, Part II, General, at page 8:

. . . These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute.

**41**  In *Bera v. Marr* [*(1986), 1 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S057-00000-00&context=) (C.A.), Esson J.A. stated the following with respect to what was s. 6(3) of the *Act*, at 26-27:

. . . It is important to observe that s. 6(3) does not postpone the running of the limitation period until the plaintiff 'has taken appropriate advice' but rather until he has within his means of knowledge facts that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard as demonstrating the two matters. The test is an objective one. What s. 6(3) does is to state, in the precise but rather complex language typical of modern statutes, essentially the same test stated by the court in Sparham-Souter, [1976] 2 W.L.R. 493, i.e., the date on which the plaintiff should with reasonable diligence have discovered the damage. It is a matter of two forms of words intended to define the same concept. I find support for that view of the matter in the language of Wilson J. who said at p. 50 (W.W.R.):

It seems to me that the purpose of ss. 3(1)(a) and 6(3) was to give legislative effect to the reasoning in Sparham-Souter by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action.

**42**  In the absence of postponement, the limitation period commences when the cause of action arose: *Lorette* at para. 66. Accordingly, the burden is on the plaintiff to prove one of the components had not been satisfied as at the relevant date, being November 22, 2005, that is, two years before the action was commenced.

1. **First component: identity**

**43**  There is no issue with respect to identity. The plaintiff knew the doctor was Dr. Mathew during the relevant period. She received treatment from him from September 1999 to January 2004.

1. **Second component: necessary facts**

**44**  This second component involves an analysis as to when the plaintiff had "certain facts within her means of knowledge", those facts including:

1. the existence of a duty owed to her by the defendant, and
2. that a breach of a duty caused injury, damage or loss to her.

**45**  In considering the "means of knowledge" test, Taylor J.A. in concurring reasons in *Karsanjii Estate v. Roque* [*1990, 43 B.C.L.R. (2d) 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61J5-00000-00&context=) (C.A.), stated at 263-64:

I have concluded that where, as here, the fact that injury has been suffered -- surgery which "backfired totally" -- is known to the prospective plaintiff, and where a reasonable person in his position would have appreciated that this may reasonably have resulted from a breach of duty on the part of a person whose identity is known to the prospective plaintiff, and where the fact that it was so caused could reasonably be discovered by obtaining advice available to the prospective plaintiff (even though the assistance of a lawyer or other intermediary might be required in order to obtain such advice) then the relevant "facts" should be regarded as falling within his "means of knowledge" for the purpose of Section 6(3)(i).

I say this because to hold that time does not start to run in such circumstances until the prospective plaintiff happens to receive expert advice confirming that the relevant breach of duty is a possible explanation for the problem -- let alone a probable or likely explanation -- would in my view unreasonably expose prospective defendants to 'stale' claims.

**46**  It has also been stated that the facts falling within the plaintiff's means of knowledge are:

. . . firstly, those actually known, and secondly, those which would become known if he [the plaintiff] took such steps as would have been reasonable for him [or her] to take in his [or her] circumstances.

*Levitt v. Carr* [*(1992), 66 B.C.L.R. (2d) 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B10P-00000-00&context=) at p. 69 (C.A.).

**47**  In *Thomas v. Vancouver Coastal Health Authority*, [*2006 BCSC 422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23VR-00000-00&context=), Pitfield J. noted at para. 23:

As I appreciate the applicable jurisprudence, it is not necessary that all available information necessary to prove the cause of action actually be in the plaintiff's possession before the limitation period begins to run. What is important is that the claimant be in a position to gain access to the material information . . .

**48**  In *Lorette* at para. 89, MacKenzie J. referred to the timeframe when the plaintiff "had the necessary facts within her means of knowledge to link her treatment at THC to her subsequent pain when her cause of action arose" (emphasis added).

**49**  MacKenzie J. went on at para. 91 to state:

Further, I note that it is not necessary for the Plaintiff to have a diagnosis of her injury in order have the requisite facts within her means of knowledge. As the court in ***Karsanjii*** noted at p. 264, to wait for time to run until the plaintiff has expert evidence confirming that the breach of duty may have caused the injury would "unreasonably expose prospective defendants to 'stale' claims". In these circumstances, it was not necessary for the Plaintiff to have a diagnosis in order to have the facts within her means of knowledge. To satisfy the second condition, it is sufficient to find, as I have found, that she had connected the treatment she received at THC with her injuries and had all other necessary facts within her means of knowledge.

[Emphasis added]

**50**  In *Taylor v. Paulson*, [*2005 BCSC 1249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1D9-00000-00&context=), Truscott J. stated the following at para. 40 with respect to the second component:

The "facts" within her means of knowledge were only those facts necessary to submit to a notional advisor for appropriate advice as to whether an action on the cause of action would, apart from the fact of the expiration of the limitation period, have a reasonable prospect of success. It was not necessary that the plaintiff's full extent of injuries be known before the limitation period began to run. All that was necessary is that there existed a duty of care and a breach of that duty and that she suffered compensable injury.

**51**  On the basis of her evidence before me on this application, including the examination for discovery evidence referred to above, I find the plaintiff did have the necessary facts within her means of knowledge to link or connect her treatment under Dr. Matthew to her pain, injuries and symptoms as at the point in time when her cause of action arose in early January 2004. She made a connection between the treatment and her injuries and symptoms well before then.

**52**  In fact her counsel stated during submissions that the plaintiff "was not interested in suing her doctor" as at mid-January 2006 being two years after her last consultation with Dr. Mathew. It was only later when she received the copies of her hospital chart and saw what she believed to be the lies regarding her alcohol consumption and noticed the differences between the charts that she decided to seek advice.

**53**  I cannot accept the plaintiff's submission that it was not until her diagnosis of eosinophilic gastritis was confirmed in June of 2007 that she could anticipate even some chance of pursuing a successful action against Dr. Mathew. First of all, this diagnosis was made by a gastroenterologist. The plaintiff did not require a diagnosis from a specialist in gastroenterology in order to have the necessary facts within her means of knowledge to link or make the connection with her treatment by Dr. Mathew and the alleged consequences which she alleges form the basis of a cause of action against him. Dr. Mathew is, after all, a psychiatrist, not a gastroenterologist. It is not surprising that during submissions on this application the plaintiff admitted she was not relying on Dr. Mathew to make the diagnosis which was ultimately made by her current gastroenterologist, Dr. Atkinson. In addition, the plaintiff pursued a cause of action against Dr. Binder, her then treating gastroenterologist, but then consented to its dismissal.

**54**  There was also considerable evidence before me that the interaction between the plaintiff's physical and psychiatric difficulties had been diagnosed many years before she was first treated by Dr. Mathew. There is an abundance of evidence that Dr. Mathew was aware of and did consider the interaction between the plaintiff's physical and psychiatric problems which had existed for some time.

**55**  In any event, as was stated in *Karsanjii*, to wait for time to run until the plaintiff has expert evidence confirming that the breach of duty may have caused the injury would "unreasonably expose prospective defendants to 'stale' claims".

**56**  Accordingly, the second component of the test was satisfied as of January 2004.

1. **Third component - "notional" advice**

**57**  The third component of s. 6(4) requires one to assume that the claimant obtained notional advice from a notional advisor at the time that the facts were known to the claimant or within her means of knowledge: *Thomas v. Vancouver Coastal Health Authority* at para. 24.

**58**  Furthermore, as Tysoe J. (as he then was) held in *Ounjian v. St. Paul's Hospital*, [*2002 BCSC 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61GK-00000-00&context=) at para. 28:

The abstraction of notional advice by notional advisors means that the actual advice or the absence of advice is not relevant. As pointed out by McEachern C.J.B.C. in *Vance v. Peglar* at p. 261, appropriate advice is deemed to be competent advice, which may be different from actual advice or no advice. He also pointed out that the limitation period is not postponed until the plaintiff obtains a favourable opinion.

**59**  On this application the plaintiff sought to introduce into evidence the report of a psychiatrist, Dr. Paul Janke, dated August 18, 2011.

**60**  It is not necessary for me in considering the limitation defence issue to decide whether Dr. Janke's report satisfies the legal criteria pertaining to the admissibility of expert evidence in accordance with the principles set out in *R. v. Abbey* [*2009 ONCA 624*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22S0-00000-00&context=) ("*Abbey No. 2"*); *R. v. Abbey*, [*[1982] 2 S.C.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=) ("*Abbey No. 1"*); and *R. v. Mohan*, [*[1994] 2 S.C.R. 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3D0-00000-00&context=). The admissibility of Dr. Janke's report would be an issue to be determined in the event there were a trial (summary or otherwise) on the substantive allegations of medical malpractice which the plaintiff makes against Dr. Mathew.

**61**  For the purposes of the limitation defence issue, however, the report is of assistance to me in that it sets out what the notional advice by a notional advisor may have been had it been obtained by the plaintiff prior to the expiry of the applicable limitation period.

**62**  In his report, Dr. Janke states:

To summarize, if I accept Dr. Mathew's affidavit of material as being a full and accurate description of his interactions with Ms. Blok, it would be my opinion that he attempted to provide psychiatric care to a very difficult patient in which an unusual medical diagnosis was not made until many years had passed. If I accept Dr. Mathew's affidavit material as being a true and accurate representation of his treatment of Ms. Blok, I still have significant concerns with respect to what appear to be clear inaccuracies in his documentation regarding Ms. Blok's circumstance, his diagnosis of a Personality Disorder in the presence of significant physical symptomatology, and his use of reboxetine in an unapproved fashion without obtaining informed consent from his patient.

If I accept Ms. Blok's affidavit material as being a true and accurate representation of her treatment by Dr. Mathew, it is my opinion that in a number of areas he clearly failed to meet the expected standard of care, specifically, his failure to recognize and acknowledge the side effects and symptoms Ms. Blok was experiencing, his use of a coercive approach in order to compel Ms. Blok to take medications, his use of medications in an "off label" fashion without obtaining informed consent from his patient, and allowing medications to run out without tapering them appropriately resulting in significant withdrawal symptoms on multiple occasions. (at p. 2)

**63**  Accordingly, I find the facts were known to the plaintiff or within her means of knowledge at the relevant time such that she could have obtained notional advice from a notional advisor. Accordingly, the third component of the test was satisfied as of January 2004.

1. **Fourth component**

**64**  The final component of the test involves a consideration of s. 6(4)(b) of the *Act.* Time does not begin to run until the plaintiff in her own interests and taking her circumstances into account ought to be able to bring an action.

**65**  In *Lorette*, MacKenzie J. stated:

[96] The Supreme Court of Canada in ***Novak v. Bond,*** [*[1999] 1 S.C.R. 808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M428-00000-00&context=) considered how the court should construe s. 6(4)(b) of the ***Limitation Act***. Writing for the majority, McLachlin J. (as she then was) held at para. 90 that the limitation period will be postponed if:

[T]he individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized. The task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances.

[97] She held at para. 85 that "the reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling".

[98] McLachlin J. gave the following examples of when a plaintiff might not be able to reasonably bring an action at para. 85:

1. [A] plaintiff may not reasonably be able to bring an action when, viewed objectively but with regard to the plaintiff's own situation, the costs and strain of litigation would be overwhelming to him or her, the possible damages recoverable would be minimal or speculative at best, or other personal circumstances combine to make it unfeasible to initiate an action.

**66**  The question then becomes whether the plaintiff has established, on an objective standard, that her interests and circumstances were "serious, significant and compelling" so as to warrant postponement of the running of time to some point in time after Dr. Mathew ceased treating her in January 2004.

**67**  In my opinion she has not. Her evidence, and that of her treating physicians does not warrant such a conclusion being reached. During the timeframe in question, as noted above, the plaintiff was accepted into the R.C.M.P. She also successfully completed training at the Justice Institute and secured two permanent part-time jobs. She was also capable of conducting a bankruptcy and small claims action. If anything, the plaintiff's physical and mental condition improved during the two-year timeframe after January 2004. The material before me does not establish it would have been "overwhelming" for the plaintiff to have brought an action against Dr. Mathew in the two years after January 2004. Nor has she established it was unfeasible for her to do so because of the circumstances in which she found herself. The objective test, being that of a reasonable person, would not find the plaintiff's interests and circumstances serious, significant and compelling so as to warrant postponement of the running of time.

**68**  Accordingly, the fourth component of the test was satisfied as of mid-January 2004.

**69**  I wish to comment on the plaintiff's submission that Dr. Mathew's alleged altering of the records after the fact amounts to his having "taken a step in his relationship with Mrs. Blok". The plaintiff alleged in paragraph 56 of her written submissions that this amounts to performing

an action as her psychiatrist. It is submitted that he had brought himself within her reach as surely as if he had called her in and consulted with her, or given her a new prescription.

**70**  I do not accept this submission. That is because:

1. Dr. Mathew provided in his affidavit #4 sworn February 13, 2012, an explanation with respect to the differences in the two copies of the plaintiff's medical chart;
2. I accept Dr. Mathew's explanation;
3. in any event, the differences between the two charts are innocuous and inconsequential. They would not have assisted the plaintiff, at any time in making the necessary link between Dr. Mathew's treatment and her pain and symptoms when her cause of action arose.

**71**  In the event I am in error in concluding all four components of the test were satisfied as of mid-January 2004, I conclude, based on a consideration of all the evidence, they were satisfied before November 22, 2005, that is two years prior to the commencement of the action.

**V CONCLUSION**

**72**  I agree with the parties that the limitation defence issue is suitable for determination pursuant to Rule 9-7 of the Rules of Court.

**73**  For the reasons outlined I conclude the plaintiff's claims were statute barred before she commenced her action against Dr. Mathew on November 22, 2007. The action is dismissed. In light of this conclusion, as was the case in *Lorette*, it is not necessary for me to consider the substantive allegations pertaining to the standard of care and whether they caused the plaintiff damages.

**74**  In the usual course I would have awarded costs to the defendant at Scale B. In light of the claims made by the plaintiff against Dr. Mathew which in part include allegations as to the falsification of the hospital chart, I give liberty to the defendant to apply for costs on a different scale should he wish to do so.

P. ABRIOUX J.

**End of Document**

[***Christensen v. Jand, [2018] B.C.J. No. 2908***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T04-FS01-JT99-2458-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.L. Forth J.

Heard: June 18-22, 2018.

Judgment: August 1, 2018.

Docket: M151602

Registry: Vancouver

**[2018] B.C.J. No. 2908** | [*2018 BCSC 1294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5V6G-6N51-JNCK-203V-00000-00&context=)

Between Bert Christensen, Plaintiff, and Yashpaul Jand, Defendant

(151 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Head injuries — Ears — Action by Christensen for damages for personal injuries sustained in a motor vehicle accident allowed in part — Christensen was proceeding through an intersection when the defendant Jand made a left-hand turn and the two vehicles collided — Jand was wholly at fault for the collision — As a result of the accident, Christensen suffered soft tissue injuries, which had largely resolved, and tinnitus, which he would suffer from on a permanent basis — There was no basis for an award for the cost of future care — However, Christensen was awarded $189,916 in damages, including $85,000 in non-pecuniary damages.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Retroactive loss of income — Special damages — Non-pecuniary loss — Action by Christensen for damages for personal injuries sustained in a motor vehicle accident allowed in part — Christensen was proceeding through an intersection when the defendant Jand made a left-hand turn and the two vehicles collided — Jand was wholly at fault for the collision — As a result of the accident, Christensen suffered soft tissue injuries, which had largely resolved, and tinnitus, which he would suffer from on a permanent basis — There was no basis for an award for the cost of future care — However, Christensen was awarded $189,916 in damages, including $85,000 in non-pecuniary damages.**

**Tort law — *Negligence* — Motor vehicles — Action by Christensen for damages for personal injuries sustained in a motor vehicle accident allowed in part — Christensen was proceeding through an intersection when the defendant Jand made a left-hand turn and the two vehicles collided — Jand was wholly at fault for the collision — As a result of the accident, Christensen suffered soft tissue injuries, which had largely resolved, and tinnitus, which he would suffer from on a permanent basis — There was no basis for an award for the cost of future care — However, Christensen was awarded $189,916 in damages, including $85,000 in non-pecuniary damages.**

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| Action by Christensen for damages for personal injuries sustained in a motor vehicle accident. The accident occurred in March 2013. Christensen was proceeding through an intersection when the defendant Jand made a left-hand turn and the two vehicles collided. Christensen was born in 1966. He was separated from his wife but was caring for his two sons on a 50 per cent basis. At the time of the accident, he was working as a letter carrier for Canada Post. Jand denied liability for the accident. Jand conceded that Christensen suffered some injuries in the accident but disagreed with Christensen about the nature, extent, and seriousness of the injuries. Jand also alleged that Christensen had failed to mitigate his damages.  HELD: Action allowed in part.  The Court preferred Christensen's testimony to that of Jand as Christensen's version of events was much more plausible. Christensen's vehicle was close enough to the intersection to constitute an immediate hazard. Jand therefore should not have commenced his left turn. Jand was wholly at fault for the collision. As a result of the accident, Christensen suffered soft tissue injuries, which had largely resolved aside from some mild morning stiffness. He also suffered tinnitus, and would continue to suffer from it on a permanent basis. The tinnitus caused Christensen to develop anxiety, disrupted his sleep, and had caused some vertigo and concentration issues. His ability to perform certain tasks and accept certain work assignments had been impaired. Christensen did not fail to mitigate his damages. There was no basis for an award for the cost of future care. However, Christensen was awarded $189,916 in damages, including $85,000 in non-pecuniary damages, $8500 for past income loss, $95,500 for loss of future earning capacity, and $916 in special damages. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*R.S.B.C. 1996, c. 231, s. 95*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B06G-00000-00&context=), s. 98

Motor Vehicle Act, [*R.S.B.C. 1996, c.318, s. 144*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0FY-00000-00&context=), s. 158, s. 174

**Counsel**

Counsel for the Plaintiff: T.L. Spraggs, I.A. Mis.

Counsel for the Defendant: C.J. Hope.

**Reasons for Judgment**

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| **C.L. FORTH J.** |

**Introduction**

**1**  The plaintiff, Bert Christensen, was injured in a motor vehicle accident that occurred on March 22, 2013, in Burnaby. It was an intersection collision. He was driving northbound on Nelson Avenue in Burnaby. A vehicle driven by the defendant, Yashpaul Jand, made a left-hand turn, and the two vehicles collided. Mr. Christensen commenced this action against the defendant, as the driver of the vehicle, seeking damages for the injuries he sustained in the accident. The defendant has denied liability for the accident.

**2**  The defendant concedes that Mr. Christensen suffered some injuries in the accident. However, the defendant disagrees with Mr. Christensen about the nature, extent, and seriousness of the injuries he claims were caused by the accident.

**3**  The defendant alleges that Mr. Christensen has failed to mitigate his damages.

**Issues**

**4**  The issues raised by the pleadings, evidence, and submissions are:

1. Liability for the accident.
2. What are the nature, extent, and duration of the injuries suffered by Mr. Christensen as a result of the accident?
3. What is the appropriate award for general damages for pain and suffering?
4. What is the appropriate award for past wage loss and loss of earning capacity?
5. What is the appropriate award for future loss of earning capacity?
6. What is the appropriate award for cost of future care?
7. What is the appropriate award for special damages?
8. Has Mr. Christensen failed to mitigate his damages, and if so, what would the appropriate reduction be?

**Background**

**5**  Mr. Christensen was born on June 28, 1966 and raised in Burnaby, BC. He completed his Grade 12 and has some college-level courses. He has been predominantly employed in blue-collar jobs such as warehousing and driving. He has also worked for his brother for a few years building crates.

**6**  At the time of the accident, he was working as a temporary letter carrier for Canada Post. He had held that position from July 11, 2011. He held an on-call position and was working a long-term assignment. This assignment provided him with the same route and eight hours of work a day. He was also working some overtime.

**7**  After the accident, he immediately returned to work in the same position carrying out the same job duties for approximately two weeks. He then worked reduced hours for approximately six months. In November 2015 he took on a long-term assignment that provide only four hours of work but on a fixed route. It is anticipated that this route will continue for at least another two years.

**8**  While growing up, Mr. Christensen was a very recreation-minded individual who enjoyed sports, particularly hockey, and being outdoors.

**9**  He was separated from his wife but was caring for his two sons on a 50% basis.

**10**  On March 22, 2013, Mr. Christensen was driving his 1999 Chevrolet Cavalier northbound on Nelson Avenue. As he approached Sanders/Hazel Streets intersection, he moved from the left northbound lane to the right northbound lane. He estimates he was travelling between 40 and 50 kph. The posted speed limit was 50 kph. As he approached the intersection, there were a number of vehicles in the left northbound lane with their left signal lights on. He did not see the defendant's vehicle, a 2006 Dodge Grand Caravan, until it was in front of him in the intersection. The defendant was driving southbound on Nelson Avenue intending to turn left and proceed east on Sanders Street. Mr. Christensen slammed on his brakes but he struck the defendant's vehicle. The pedestrian control light was flashing green for northbound and southbound traffic on Nelson Avenue.

**11**  Mr. Christensen's vehicle suffered damage to the front and a crack in the windshield. The driver and passenger airbags were deployed. The defendant's vehicle suffered damage to the right front side. Both vehicles had to be towed from the accident site. Mr. Christensen's vehicle was determined to be a total loss. The damage estimated to the defendant's vehicle was in the amount of $5,585.50.

**12**  Mr. Christensen testified that he felt a big jolt. He heard a loud noise. His right ear "blew up and then heard a ringing". He thought his vehicle was on fire because there was smoke. He was able to squeeze out of the driver's door. He immediately felt a high-pitched sound in his right ear. The police attended and he provided a statement to them. He took pictures of the damage to his vehicle. He called his sister to come and get him.

**13**  His sister attended and assisted in making an appointment with a walk-in clinic and an appointment with his family doctor for the following day.

**Liability for the Accident**

**The Law**

**14**  The relevant statutory provisions of the *Motor Vehicle Act*, *R.S.B.C. 1996, c.318* [*MVA*], governing left-hand turns are as follows:

**Careless driving prohibited**

**144** (1) A person must not drive a motor vehicle on a highway

1. without due care and attention,
2. without reasonable consideration for other persons using the highway, or
3. at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
4. A person who contravenes subsection (1) (a) or (b) is liable on conviction to a fine of not less than $100 and, subject to this minimum fine, section 4 of the *Offence Act* applies.

...

**Yielding right of way on left turn**

**174** When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

**15**  The meaning of immediate hazard has been described as when the approaching driver must take some sudden or violent action to avoid the threat of the collision with the vehicle that is attempting a left turn: *Aerabi-Boosheri v. Retallick*, [*[1996] B.C.J. No. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2K1-00000-00&context=) at para. 8 (S.C.).

**16**  The law governing passing on the right is s. 158 of the *MVA*:

**Passing on right**

**158** (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except

1. when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
2. when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
3. on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
4. Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
5. when the movement cannot be made safely, or
6. by driving the vehicle off the roadway.

**17**  In *Nerval v. Khehra*, [*2012 BCCA 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2JD-00000-00&context=) at paras. 29-30, the Court of Appeal applied the following reasoning respecting the interaction between the obligations imposed by ss. 174 and 158 of the *MVA*:

[29] I do not agree. In my opinion, the trial judge correctly concluded that the obligation created by s. 174 has priority over the obligation created by s. 158. This result follows from the reasoning of this Court in *Pacheco (Guardian ad litem of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (B.C.C.A.) at para. 15, in which Legg J.A. stated:

In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. ...

[30] I acknowledge that *Pacheco* did not involve a direct conflict between the obligations imposed by the equivalents of ss. 174 and 158, but in the course of explaining the obligation imposed on a driver about to turn left across oncoming traffic, and immediately after the passage just quoted, Legg J.A. endorsed the following principle:

16 I find support for that conclusion in the unreported decision of Mr. Justice McKenzie in *Bond v. Chernoff* (14 October 1985), Vancouver 27420/73 (B.C.S.C.). The accident in that case occurred at the intersection of Broadway and Victoria Drive. The plaintiff was proceeding east on Broadway. When the plaintiff's vehicle had entered the intersection he was confronted by the defendant's vehicle which was heading westbound making a left hand turn in front of his vehicle.

17 Mr. Justice McKenzie said:

I think the accident is readily explainable in that neither of the parties could see the other party because the view to [sic] one another was denied to each of them by the presence of the line of eastbound vehicles that were waiting in the eastbound lane for the foremost of those vehicles to make a left hand turn. It was not until the Plaintiff's vehicle and the Defendant's vehicle got to a point of inevitable collision that they became visible to one another and at that point each driver was helpless to prevent an accident.

I think the law is clear under the circumstances that the obligation of the Defendant doing the left turn was an absolute obligation and I am unable to discern, on the facts of this case, that the Plaintiff was negligent. [Emphasis added.]

**18**  The Court of Appeal then outlined a two-stage analysis to assess liability under s. 174 of the *MVA*, being:

1. To determine whether an immediate hazard was present when the left-turning driver commenced the turn. If no immediate hazard was present, the left-turning driver becomes the dominant driver with the right of way: see para. 33; and
2. If the through driver is found to have been the dominant driver with the right of way, the court must determine whether the through driver was nevertheless negligent and at fault for causing or contributing to the accident: see para. 37.

**19**  Once a determination has been made on who is the dominant driver, the onus of proving ***negligence*** shifts to the servient driver: *Dawes v. Valadas*, [*2005 BCSC 1319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1HB-00000-00&context=) at para. 31. A dominant through driver may still be negligent, but the correct analysis is to recognize that the through driver is breaching his common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of his obligations: *Nerval* at para. 38.

**Application of the Law to the Facts**

**20**  The accident happened at the intersection of Nelson Ave and Sanders/Hazel Streets in Burnaby (the "Intersection").

**21**  The evidence supports that on March 22, 2013, Mr. Christensen had left work at approximately 2:00 p.m. and was heading northbound on Nelson Street. He was driving in the left northbound lane and had crossed Kingsway Avenue. At this point, Nelson Street has four lanes - two lanes in each direction. The defendant was proceeding southbound on Nelson Street and was planning to turn left onto Sanders Street.

**22**  The evidence of what happened as the parties approached the Intersection diverges. Although the evidence diverged, I find that both drivers gave their evidence trying to be as accurate as possible. I do find that Mr. Christensen was a forthright and credible witness. His evidence on how the accident happened was internally consistent and made the most sense.

**23**  Mr. Christensen's evidence is that there were vehicles in the left northbound lane, turning left at the Intersection, so he moved to the right northbound lane. He testified that he made this lane change about 12-15 car lengths prior to the Intersection. He made the change because there were three to four vehicles waiting to turn left onto Hazel Street in the left northbound lane. He does not recall if, at the time of his lane change, the white line was dashed or solid. His plan was to proceed straight through the Intersection and then turn right on Dover Street which was one block north of the Intersection.

**24**  As he was approaching the Intersection, he was travelling between 40-50 kph. As he was about to enter the Intersection, a van travelling in the southbound direction turned left in front of him. It happened very quickly. He immediately applied his brake but was not able to avoid the collision.

**25**  I also find the defendant was credible; however, as I will discuss, his evidence, and the story it told, was less plausible. The defendant's evidence is that he was planning on turning left onto Sanders Street at the Intersection. He stopped briefly at the stop line and then proceeded into the Intersection. He paused in the middle of the Intersection for approximately 15 seconds. He was aware of four vehicles who he believed were all turning left onto Hazel Street.

**26**  He waited for the first vehicle to commence its left turn and he slowly edged further into the Intersection. He believed the right northbound lane on Nelson Avenue was clear, so he commenced his left turn. He would have accelerated. His vehicle was already aligned east-west on Sanders Street when he was struck by Mr. Christensen's vehicle.

**27**  He testified that Mr. Christensen's vehicle was the third vehicle waiting in the left northbound lane on Nelson Avenue. He testified that Mr. Christensen's vehicle suddenly swerved out of the left northbound lane, accelerated to full speed into the right northbound lane, and struck him without applying brakes.

**28**  Considering all of the evidence, I prefer the testimony of Mr. Christensen to that of the defendant. Mr. Christensen's version is much more plausible. There was common sense to what he described in the steps he took as he approached the Intersection and how the accident unfolded. The evidence of the defendant, particularly in respect to how Mr. Christensen pulled out from behind the stopped left-hand vehicle, suddenly accelerated, and hit his vehicle after it was already into the Intersection, was not believable.

**29**  The defendant's evidence of how Mr. Christensen's vehicle went from a complete stop to full speed lacks believability. This would have required Mr. Christensen to fully engage the gas pedal when the defendant's vehicle was already in the Intersection. The defendant sought to explain this maneuver on the basis that the other driver intentionally drove into him. There is no rational reason for why a driver would endanger his own safety and proceed in this manner. The defendant's explanation of the events is at odds with logic and my impression of Mr. Christensen as a sensible and careful driver. Therefore, I favour Mr. Christensen's version.

**30**  Taking all of the evidence into consideration, I find the following facts regarding the accident:

1. the accident happened during daylight on Friday, March 22, 2013, at the Intersection of Nelson Avenue and Sanders/Hazel Streets in Burnaby;
2. the light was flashing green for north-south traffic on Nelson Avenue;
3. the posted speed limit on Nelson Avenue was 50 kph;
4. Mr. Christensen was driving north on Nelson planning to turn right on Dover Street, which is one block north of the Intersection;
5. Mr. Christensen was travelling in the left northbound lane on Nelson and changed lanes into the right northbound lane approximately 12-15 car lengths prior to the Intersection;
6. As Mr. Christensen passed the stopped left turning vehicles, the defendant's vehicle had not commenced the left-hand turn and was not a threat;
7. Mr. Christensen's vehicle was close enough to the Intersection to constitute an immediate hazard, and the defendant should not have commenced his left turn;
8. When Mr. Christensen saw the defendant's vehicle, he applied his brakes but was not able to avoid the collision;
9. Mr. Christensen struck the defendant's vehicle on the front right passenger side with the front of his vehicle; and
10. Mr. Christensen was driving within the posted speed limit.

**Conclusion - Liability**

**31**  I find that Mr. Christensen was the dominant driver at all times and he did not cause or contribute to the accident in any way. I am not prepared to find any contributory ***negligence*** on Mr. Christensen. He made a safe lane change, he was travelling within the posted speed limit, he was aware of what traffic was doing around him, and he was confronted with a vehicle that suddenly turned left in his path. He applied the brakes but was unable to stop or take any evasive action to avoid the collision. He acted as a careful and prudent driver throughout. The defendant is wholly at fault for the collision.

**What are the Nature and Extent of the Injuries Suffered in the Accident?**

**Plaintiff's Position**

**32**  Mr. Christensen claims that as a result of the accident, he suffered tinnitus, or ringing in his ears, more on his right than left, dizziness, difficulties with balance, jaw pain, and soft tissues injuries to his neck, shoulders, back, and right shin. The most significant complaint is the tinnitus.

**33**  Mr. Christensen testified that prior to the accident, he was very active and his general health was excellent. He had no hearing issues.

**34**  He testified that the pain and stiffness primarily resolved within a few weeks of the accident. He continues to get some morning stiffness, but it resolves with stretching and as the day progresses.

**35**  His most significant complaint relates to the tinnitus in his right ear. It has been constant since the accident. It affects his occupation, his home life, and his activities.

**Defendant's Position**

**36**  The defendant concedes that Mr. Christensen sustained soft tissue injuries as a result of the accident. The defendant says that these injuries have resolved. The defendant concedes that Mr. Christiansen has developed tinnitus as a result of the accident. The defendant disagrees that this condition impacts the ability of Mr. Christensen to carry out his occupation, activities of daily living, or recreational pursuits.

**Applicable Law**

**37**  In order to establish that the accident caused his injuries, Mr. Christensen must prove on a balance of probabilities that but for the accident he would not have suffered the injuries of which he complains.

**38**  The Supreme Court of Canada considered causation in *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=), and confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), and *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant, the injury would not have occurred. The "but for" test recognizes that compensation for negligent conduct should only be awarded where a substantial connection between the injury and the defendant's negligent conduct is present: *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at paras. 21-23.

**39**  A plaintiff is not required to establish that the defendant's ***negligence*** was the sole cause of his or her injuries. The tortfeasor must take his or her victim as the tortfeasor finds them, and the tortfeasor is liable even if other causal factors, for which the defendant is not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in but for the accident: see *Snell; Athey* at paras. 32-35.

**Application of the Law to the Facts**

**40**  As a result of the accident, Mr. Christensen suffered tinnitus predominantly in his right ear that continues to bother him. He also suffered from some dizziness and balance issues, jaw pain, and soft tissue injuries to his chest, neck, shoulders, back, and right shin. The soft tissues injuries essentially resolved within a few months, and he is left with some morning neck stiffness, which is not a concern for him.

**41**  The tinnitus caused Mr. Christensen to develop anxiety, it disrupted his sleep, and it has taken an emotional toll. It has also caused some vertigo and concentration issues. These have arisen when having to focus at work in sorting mail to various addresses. He deals with this by getting up and walking outside for a few minutes. He finds that working inside exacerbates his condition.

**42**  His sister and eldest son testified to the changes in Mr. Christensen since the accident, from being outgoing, humorous, and good-natured to a grumpier, irritable individual. He has become more sensitive to loud noises and does not enjoy music in the same manner.

**43**  He has had some limited physiotherapy and massage treatments. He was prescribed a mouth guard but he was not able to sleep with it. He has tried using a white noise machine, but it was not helpful. He has not required any other ongoing treatments.

**44**  Dr. Stephen Sharpe, Mr. Christensen's treating family doctor, prepared a report dated May 12, 2014 and testified at trial. This doctor opined that Mr. Christensen had suffered soft tissue injuries to the cervical and trapezius regions. The doctor confirmed that Mr. Christensen has complained of ringing in his ears since the accident. The diagnosis was chronic bilateral, nonpulsatile tinnitus which was anticipated as being long-standing or permanent.

**45**  Dr. Sharpe testified that Mr. Christensen described his mood as fluctuating and that he has difficulty with tasks requiring mental focus. His understanding was that there are therapies that can improve or neutralize the sound but that the condition is a chronic one.

**46**  Dr. Longridge, otolaryngologist, prepared a medical-legal report dated May 18, 2016. The report sets out his opinion that the likely cause was the explosive sound of the airbag into Mr. Christensen's right ear. If the tinnitus has not resolved after one year, it is likely to be present on a long-term, permanent basis. The report confirmed that dizzy symptoms had fluctuated, and he had been symptom free from dizziness in the past two months. The doctor recommended that Mr. Christensen be assessed to see whether tinnitus retraining therapy ("TRT") could be effective in improving his sleep. In direct examination, he gave evidence on the costs of such treatment.

**47**  Dr. Longridge testified on cross-examination that his impression was that the sound was not intrusive enough that it impacted Mr. Christensen's normal daily functioning. As the doctor described, the noise is less intrusive because "it becomes part of you" and "you can get used to its presence".

**48**  Dr. Waseem, physiatrist, prepared a medical-legal report dated June 20, 2017. He was not required to attend for cross-examination. In the report, Dr. Waseem opines that Mr. Christensen has learnt to live with his neck pain, and it is not interfering with the performance of his usual employment duties, household tasks, or recreational activities. He provides no recommendation for treatment other than to continue using Advil as needed and to perform self-directed exercises.

**49**  Dr. Thompson, orthopedic surgeon, prepared a medical-legal report dated February 1, 2018, on behalf of the defendant. He was not required to attend for cross-examination. Dr. Thompson opined that Mr. Christensen likely suffered soft tissue injuries, strains, and contusions to his neck, shoulder, upper extremities (wrists), chest wall, and right lower limb. The majority of the soft tissue injuries improved over three to six months. He is left with some residual stiffness and discomfort in his neck, mid back, and lower back. This will not be a physical barrier for Mr. Christensen resuming his usual vocational, recreational, and household activity.

**50**  The experts agree that the soft tissue injuries and tinnitus were caused by the accident. They further agree that the tinnitus is likely permanent and there are no treatment options that will resolve this condition.

**51**  Accordingly, I find, on a balance of probabilities, that as a result of the accident Mr. Christensen suffered soft tissue issues, which have largely resolved, except for some mild early morning stiffness, and tinnitus, for which he will continue to suffer on a permanent basis.

**What is the Appropriate Award for General Damages for Pain and Suffering?**

**52**  Mr. Christensen seeks an award of $100,000 to $140,000 for general damages for pain and suffering. The defendant submits that the appropriate award for general damages is $50,000 to $60,000.

**Applicable Law**

**53**  A plaintiff is entitled to reasonable damages for his pain and suffering. The plaintiff should be placed in the same position he would have been if the accident had not occurred, but not in a better position: *Parypa v. Wickware*, [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=) at para. 29.

**54**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at paras. 188-189.

**55**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, [*2004 BCCA 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**56**  The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate those experiences: *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**57**  Mr. Christensen relies on *Young v. Anderson*, [*2008 BCSC 1306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3JG-00000-00&context=), *Chaudhry v. John Doe*, [*2017 BCSC 1895*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PWM-06C1-JX8W-M4YR-00000-00&context=), *Kijowski v. Scott*, [*2015 BCSC 2335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNM-S131-JSJC-X4WR-00000-00&context=), and *Murphy v. Jagerhofer*, [*2009 BCSC 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XM-00000-00&context=) in support of the general damages sought. A review of these cases support that the range of $100,000-$140,000 has been awarded for more substantial individual losses than what Mr. Christensen has suffered in this case.

**58**  For example, in *Kijowski*, the plaintiff, a 59-year-old credit union manager was awarded $140,000 non-pecuniary damages for injuries by a motor vehicle accident, which significantly altered his recreational, professional, and domestic pursuits. Dr. Longridge was an expert witness in that case, and opined to permanent dizziness and imbalance impairments requiring indefinite vestibular therapy. The plaintiff also suffered from tinnitus and a hearing deficit (at para. 128).

**59**  In *Murphy*, the plaintiff, a 36-year-old financial advisor was awarded $100,000 non-pecuniary damages caused by a motor vehicle accident, which left him with back and neck pain, hearing loss, tinnitus, episodes of dizziness, jaw pain, and myofascial pain. There was a "rather cautious outlook for improvement" (at para. 116).

**60**  The defendant relies on *Chumber v. Ford Credit Canada*, [*2006 BCSC 1935*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61KS-00000-00&context=); *Maddex v. Sigouin*, [*2013 BCSC 1338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B23P-00000-00&context=); *Pichugin v. Stoian*, [*2014 BCSC 928*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2R5-00000-00&context=); *Yang v*. Chan, [*2012 BCSC 1753*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2PT-00000-00&context=); *Moukhine v. Collins*, [*2012 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1NK-00000-00&context=); *Charlebois v. Vandas*, [*2004 BCCA 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44S-00000-00&context=); and *Kiljowski*. The *Chumber, Maddex* and *Pichugin* cases clearly involve individual losses less than what Mr. Christensen has suffered. These cases provided non-pecuniary awards of $35,000, $42,000, and $48,000 respectively.

**61**  In contrast, the *Kijowski* and *Charlebois* cases, which awarded $140,000 and $110,000 (albeit, in 2004), involved more substantial individual losses in my view.

**62**  The case most equivalent is *Yang*, in which $60,000 was awarded for similar injuries. The medical evidence in this case was provided by Dr. Longridge and Madame Justice Wedge noted the following:

[42] Mr. Yang testified that the tinnitus in both ears has persisted since the accident and has improved only marginally over time. He continues to suffer from ringing in both ears. While the tinnitus does not affect his ability to work while he is on the job, it is constantly a distraction. Further, he finds the tinnitus very disruptive of his ability to sleep. He is wakened several times each night by the ringing sounds, and the lack of sleep affects his mental acuity during the day. Mr. Yang takes sleeping pills to assist his sleep, but they also have the effect of making him drowsy during the day.

...

[46] Dr. Longridge examined Mr. Yang and evaluated his condition in December 2011. The evaluation included extensive testing at Vancouver General Hospital to assess the severity of Mr. Yang's tinnitus and related dizziness. Several objective tests detected abnormalities in both inner ears and dizziness.

[47] Dr. Longridge diagnosed Mr. Yang's tinnitus as being of moderate severity, which, he explained in his evidence, means that the condition is a significant problem for Mr. Yang.

**63**  Mr. Christensen has also suffered from anxiety, mood changes, and impact on his work which supports that a higher award should be made than in *Yang*.

**64**  While all of these cases are helpful to provide a general framework, as noted in *Stapley* at para. 45, the impact on Mr. Christensen as an individual is the key.

**Application of the Law to the Facts**

**65**  Mr. Christensen has suffered a permanent injury in the form of a ringing in his ears. There is a high unrelenting squeal in his right ear. This sound was reproduced by a computer and played during the trial. The sound was highly irritating and objectionable. Mr. Christensen testified that since the accident, he has been hearing the same sound. It is with him at all times and has impacted his personality, his outlook on life, his ability to sleep, his relationship with his children, and his occupation.

**66**  There is no treatment that can stop this noise. He has had to learn to accept it but thinks about it every day. This causes him anxiety.

**67**  He finds that loud noises bother him. He has become grumpier with his children.

**68**  In order to help him sleep, he drinks. He testified that he drinks two beers and a full glass of wine every night to help him sleep. He has concerns with this consumption since alcoholism has been an issue in his immediate family.

**69**  He is not a complainer and has returned to all of his past activities, except coaching soccer. There was approximately a four to six month period when he was not running. He has returned to running approximately the same distance as before.

**70**  He immediately returned to his scheduled work and has continued working.

**71**  His sister, oldest son, and his friend Darren Babey, testified to the change in his personality in that he was grumpier and less patient after the accident. His sister was most concerned in the initial two years, when she saw signs of depression, anger, and frustration. She testified to conversations during the initial two years when she had to "talk him off the ledge a little bit when he didn't think he could beat this" and he once told her, "he'll commit suicide with this". Gradually her brother started to accept the "new norm".

**72**  It is to Mr. Christensen's credit that he has returned to work and his activities. He has continued to care for his sons as a single father. He has been able to learn to live with the constant noise and has adjusted to life with it.

**73**  I have reviewed the various cases provided, and in assessing the particular circumstances of Mr. Christensen, I am of the view that the appropriate award for non-pecuniary damage is $85,000.

**What is the Appropriate Award for Past Wage Loss and Loss of Earning Capacity?**

**Applicable Law**

**74**  In *Karim v. Li*, [*2015 BCSC 498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0N3-00000-00&context=) at paras. 130-133, Mr. Justice Abrioux discussed the purpose and framework for determining the appropriate award for past loss of earning capacity, and the task of awarding compensation for pecuniary loss that has resulted from an inability to work.

**75**  Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=) at para. 49.

**Application of Law to the Facts**

**76**  It is important when assessing both the past and future loss of earnings to understand the nature of the employment that Mr. Christensen had. While working as a temporary Canada Post employee, there are essentially two categories of shifts:

1. On-call shifts, which typically involve longer daily hours (up to eight hours) but with no guarantee of shifts every week for any extended period of time. These shifts generally are for one to three weeks and are not for a fixed route ("On-call shifts"); and
2. Long-term shifts, which typically involved shorter daily hours but guaranteed shifts every day for a longer period of time. These shifts would be for a fixed route ("Long Term-Part Time shifts").

**77**  Part of the job of a letter carrier, regardless of the category, includes sorting mail at the start of each shift. The mail sorting takes place in the depot and requires significant focus and concentration. After the mail is sorted, the job requires the delivery of the mail and parcels.

**78**  Prior to the accident, Mr. Christensen was working both categories of shifts. Mr. Christensen would take whatever work was offered to him but he preferred the Long Term-Part Time shifts since they offered guaranteed work. His evidence was that "anybody would take a long-term assignment if they could".

**79**  A review of the Canada Post attendance records show the following pattern of work prior to the accident:

1. March 2012 to June 2012 - mainly working eight-hour shifts;
2. June 2012 to approximately mid October 2012 - mainly working shorter hours in Long Term-Part Time shifts;
3. Mid-October to November 2012 - mainly eight hour shifts with some overtime;
4. End of November 2012 to end of January 2013 - mainly working shorter hours in Long Term-Part Time shifts; and
5. February 2013 to date of accident - working mainly eight hour shifts.

**80**  Mr. Christensen testified that he immediately returned to his same job and duties and continued for approximately two weeks. However, he was not able to cope with the physical demands of full-time work. On April 8, 2013, he reduced to part-time work and worked at that capacity for approximately six months. On October 17, 2013, he began working longer hours.

**81**  It is difficult to know when Mr. Christensen would have stopped working the full-time job and chosen to accept a Long Term-Part Time position.

**82**  He testified that before the accident, he would accept overtime opportunities even after an eight hour shift. He does not think he could now perform overtime duties after an eight hour shift. This is inconsistent with the Canada Post attendance records that shows him working overtime after an eight hour shift since December 2014 on a number of occasions.

**83**  Mr. Christensen's ultimate goal is to work an eight hour day, owning his own route. The evidence supports that he is currently number one on the on call list, meaning that if a permanent position becomes available, he could apply for it. The problem is that if he were accepted on the permanent list, he would have to return to taking a variety of routes until a permanent route became available to him.

**Loss of Past Earning Capacity**

**84**  Mr. Christensen submits that because of the accident his ability to earn income has been reduced. Reliance is placed on Mr. Justice Steeves' comments in *Mojahedi v. Friesen*, [*2016 BCSC 1225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-9V81-JJ1H-X44G-00000-00&context=) at paras. 73 and 75:

[73] A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=), at para. 30). The loss of earning capacity rather than the loss of actual income is considered, although loss of income can be a way to measure loss of capacity. This is described in *Personal Injury Damages in Canada* at p. 205-06 as follows:

... The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the *actual earnings* the plaintiff would have received; sometimes by a *replacement cost evaluation of tasks* which the plaintiff will now be unable to perform; sometimes by an assessment of reduced *company profits*; and sometimes by the amount of secondary income lost, such as *shared family income*.

[Emphasis in original.]

...

[75] In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges*, [*2014 BCSC 1329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B17M-00000-00&context=), at para. 165).

**85**  The defendant submits that once Mr. Christensen has been compensated for his past wage loss, there is no other compensation payable because Mr. Christensen admitted that he had not sustained any income loss since the initial six-month period after the accident in 2013.

**86**  The evidence does support that immediately after the accident, Mr. Christensen was not able to do the work he had been doing prior to the accident, and that this was caused by his injuries.

**87**  Mr. Christensen submits his past income loss for six months in 2013 is $8,977.28 (gross). The defendant submits that his past wage loss "could be" in the range of $8,256 (gross). These estimates are based on the higher end of the range of hours worked. The defendant submits that I should consider the contingency that Mr. Christensen would have switched to lower hours regardless of the accident.

**88**  I note that between March 2012 and March 2013, Mr. Christensen's hours fluctuated roughly between full-time and part-time. With this in mind, and considering that Mr. Christensen was working full-time hours at the time of the accident, a fair and reasonable award is $8,500 (gross).

**89**  Mr. Christensen agreed that in the last four years, his working hours were based on availability of work, and not his ability to work. In cross-examination, he could not recall whether he had turned down overtime work. I accept the evidence given by Mr. Christensen that supports he did not sustain any past loss of earning capacity beyond the initial six-month period during which his physical injuries limited him. However, this does not preclude a future loss of earning capacity.

**What is the Appropriate Award for Loss of Future Earning Capacity?**

**Applicable Law**

**90**  A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?

**91**  The recent decision in *Pololos v. Cinnamon-Lopez*, [*2016 BCSC 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J0C-MF51-JSXV-G2N2-00000-00&context=), provides an excellent summary of the applicable leading principles on the assessment of loss of future earning capacity:

[133] The relevant legal principles are well-established:

1. To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's ***negligence***; *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185, leave to appeal ref'd [*[2009] S.C.C.A. No. 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F8KH-X1YH-00000-00&context=);
2. The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32;
3. The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 18;
4. The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) at para. 7 (S.C.); and *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at paras. 11-12;
5. Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
6. The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=) at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, [*2013 BCCA 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S46D-00000-00&context=) at paras. 36-37.
7. When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

**92**  Also recently, in *Grewal v. Naumann*, [*2017 BCCA 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NDB-4M41-F956-S0BN-00000-00&context=) at paras. 48-49, the Court of Appeal provided a summary on the assessment of loss of future earning capacity and the application of a "real and substantial possibility" principle:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, [*2016 BCCA 211*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JW3-TKC1-JGPY-X4PG-00000-00&context=) at para. 21.

**93**  It is this head of damages that represents the most significant and complex aspect of Mr. Christensen's case and generates the most disagreement between the parties.

**Plaintiff's Position**

**94**  Mr. Christensen is advancing a claim for loss of future earning capacity on the basis that his plan was to continue working at Canada Post and would one day become a permanent employee.

**95**  When he becomes a permanent employee, he will not be able to take advantage of on-call work, as he finds that type of work very challenging. After the accident, he tried on-call work but felt dizzy while sorting mail. He was not able to sort large amounts of mail. He was less efficient at sorting than his co-workers.

**96**  The tinnitus he suffers from the accident has impacted and will continue to impact his ability to engage in on-call work. If he is not able to work the on-call position he may not be able to perform the work of a permanent employee, if such a position is eventually offered to him.

**97**  A permanent position would guarantee him work, benefits, and a higher wage.

**98**  Mr. Christensen submits that his loss of earning capacity justifies damages in a range of $75,882-$243,500.

**99**  The high end of the range is a calculation based on what he is currently earning in 2017, $36,111, and what he would have earned if working full-time, $51,000. The present values of these two salaries to age 70 is $843,500 and $600,000, hence the difference of $243,500.

**100**  An alternative approach, is that Mr. Christensen has lost a capital asset and a fair approach would be to award him three years salary. This was the approach taken in *Flores v. Burrows*, [*2018 BCSC 334*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RTY-1871-JCBX-S0TG-00000-00&context=) at para. 139.

**101**  If Mr. Christensen's 2015 income of $57,637 is used, then the diminishment of earning capacity is $172,911. If his 2012 earnings is used, $37,941, then his diminishment of earning capacity is $113,823. If a lower number of years is used, then his loss is further reduced.

**Defendant's Position**

**102**  The defendant disputes that Mr. Christensen has sustained any future income loss. Mr. Christensen admitted that he is physically able to work eight hour shifts and has done so since the accident. He agreed that his current symptoms are not disabling. He testified that his tinnitus does not stop him from being able to do his work. He continues to enjoy the job and plans to continue working.

**103**  Dr. Waseem stated in his report that Mr. Christensen "is not disabled to any degree from performing his usual employment duties".

**104**  Dr. Thompson stated in his report that Mr. Christensen's physical injuries "will not be a physical barrier to Mr. Christensen resuming his usual vocational, recreational, and household activity".

**105**  The defendant submits that Mr. Christensen has not proven there is a real and substantial possibility of any future income loss, and, as such, none should be awarded.

**Application of Law to the Facts**

**106**  The evidence supports that Mr. Christensen struggled when working eight hour shifts that required being at different depots and delivering on different routes. He described it like "starting a new job everyday". He testified that following the accident, he began experiencing vertigo when he was sorting mail for different addresses at the start of shifts. He stated that the vertigo arises in moments of concentration and focus, such as looking at mail, street names, and addresses. When he looks up and down, he gets an "off tilt" sensation that lasts a couple of minutes.

**107**  The risk is that if in the future he is offered and accepts a permanent position, he will go to the bottom of the list, which would require him to accept the On-call shifts.

**108**  He is concerned that he will not be able to work those types of shifts on an ongoing basis. He is also concerned that he cannot work the same amount of overtime as he did prior to the accident. He has worked some overtime but testified that there is "just no way" he could physically perform the same overtime work now. He explained that Canada Posts allows 1.75 hours of overtime for every eight-hour route.

**109**  I find that there is a real and substantial possibility of a loss. The issue is how to quantify it. In the circumstances, the appropriate approach is the capital asset approach, as the loss is not easily measurable in a pecuniary way. I accept that Mr. Christensen has suffered an impairment to a capital asset, in that his ability to perform certain tasks and accept certain assignments has been impaired. In assessing the quantum of loss, the years' approach is the correct approach to follow in the circumstances: *Flores* at para. 138.

**110**  In the circumstances, a fair award is two years' income. Mr. Christensen submits a range of annual income from $37,941 (based on pre-accident earnings) to $57,637 (based on 2015 earnings). As Mr. Christensen only worked one full year (2012) at Canada Post prior to the accident, I do not think his 2012 income is an appropriate figure to use in calculating his loss. Moreover, Mr. Christensen's 2015 income was his highest income with Canada Post. In my view, it would be fair and appropriate here to split the difference and use $47,789 as the income figure.

**111**  Therefore, I award Mr. Christensen $95,500 for loss of future earning capacity.

**What is the Appropriate Award for Future Care Costs?**

**112**  Mr. Christensen seeks an award for the future management of his tinnitus, for future counselling, and for massage therapy in the amount of $26,000.

**113**  The award for the TRT was suggested by Dr. Longridge, and he testified to the costs of a clinic assessment, $1,200, costs for hearing instruments, $4,000 each with a replacement every five years, and the need to have batteries replaced every quarter, $30-40.

**114**  The suggestion made in submissions was that Mr. Christensen would benefit from psychological counselling and some massage.

**115**  The defendant submits that there is no medical justification for any future care award.

**Applicable Law**

**116**  Mr. Christensen is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote Mr. Christensen's mental and physical health: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 83 (S.C.); *Gignac v. Insurance Corporation of British Columbia*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras. 29-30.

**117**  Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=) at para. 42; *Milina* at 84; *Tsalamandris v. McLeod*, [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=) at paras. 62-63.

**118**  Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be (able to be) rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=) at para. 74; *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at paras. 55, 60, and 68-70.

**Application of the Law to the Facts**

**119**  It was recommended by Dr. Sharpe, his family doctor, that Mr. Christensen attend a tinnitus clinic, a multidisciplinary clinic that emphasizes coping strategies and support. An appointment at this clinic was made for September 24, 2014, but Mr. Christensen chose not to attend.

**120**  Dr. Longridge, in his report, suggested that Mr. Christensen be assessed for TRT. There have been no steps taken by Mr. Christensen to schedule such an assessment. There is no evidence that if Mr. Christensen was assessed, he would be a candidate for any type of hearing instruments.

**121**  The evidence falls short of establishing support for an award of future care costs for the TRT and hearing instruments.

**122**  In respect to the submissions that Mr. Christensen would benefit from psychological counselling services in the future, there is no support in the medical reports that such treatment will be required.

**123**  Mr. Christensen's evidence, supported by his sister, was that the first couple of years were the most difficult in adjusting to the chronic tinnitus. Since then he has adapted to his new normal. The evidence does not support that any type of psychological counselling will be needed in the future.

**124**  In respect to the submissions that Mr. Christensen would benefit from massage in the future, the evidence does not sufficiently support this. Mr. Christensen did attend for two massage treatments right after the accident in June and December 2013. Dr. Waseem, physiatrist, made no recommendation for any further massage therapy treatments.

**125**  There is no basis for any future care costs award on the evidence presented.

**What is the Appropriate Award for Special Damages?**

**126**  It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at para. 281; *Milina* at 78.

**127**  The parties agree that the therapy costs to treat the soft tissue injuries in the amount of $916.23 is appropriate. The parties disagree on whether the pillow and mattress should be reimbursed.

**128**  In October 2016, Mr. Christensen purchased a new mattress and pillow for the sum of $1,027. He claims that he did so to see if it would assist him with his sleep.

**129**  The defendant submits that by that date, Mr. Christensen's physical injuries were essentially resolved. The pillow and mattress were not specifically made or marketed for treatment of injuries. He had been using a second-hand mattress for a number of years. It is likely that he would have purchased a new mattress and pillow at some point in the future.

**130**  I am not convinced that the defendant should reimburse for the new mattress and pillow.

**131**  The award for special damages is $916.23.

**Failure to Mitigate**

**132**  A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, [*2010 BCSC 1111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2115-00000-00&context=) at para. 234.

**133**  Once the plaintiff has proved the defendants' liability, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 202.

**134**  The test for failure to mitigate is set out in *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=) at para. 57:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

**135**  The defendant submitted that either Mr. Christensen has failed to mitigate or his symptoms were not as bothersome as he claims, in the following two aspects:

1. addressing his sleeping issues; and
2. failing to attend the tinnitus clinic.

**Sleeping Issues**

**136**  Mr. Christensen testified that he has experienced problems getting to sleep due to his tinnitus. He did not report these sleep problems to his family doctor. He did not seek any type of sleeping medication to assist his sleep problems. He has treated his sleep difficulties by drinking alcohol in the evenings.

**137**  The evidence does not support that Mr. Christensen suffers from fatigue as a result of his sleeping difficulties to the extent that he cannot carry out his household, recreational, or work activities. The evidence supports that he never stopped looking after his children and carrying out household chores such as cooking, cleaning, shopping, and laundry. He is able to run up to three times a week for about 10 kilometres.

**138**  Dr. Sharpe testified that he would only rarely prescribe sleep medication and would only prescribe it for a short period of time.

**139**  The evidence does not support that Mr. Christensen would have been prescribed sleep medication, and, that if he had, this type of medication would have assisted him on a long-term basis. There is no basis to find a failure to mitigate on Mr. Christensen's part for failure to seek and take prescription medications to assist his sleep.

**Attendance at the Tinnitus Clinic**

**140**  It was recommended by Dr. Sharpe that Mr. Christensen attend at the tinnitus clinic to obtain strategies on coping with the tinnitus.

**141**  When Mr. Christensen attended on Dr. Sharpe on March 21, 2014, he was emotional and tearful, complaining that he was fearful of the future if the symptoms remained chronic. It was in this setting that Dr. Sharpe recommended a prompt assessment with the tinnitus clinic.

**142**  Dr. Sharpe's report notes that the tinnitus clinic was a multi-disciplinary clinic that emphasized coping strategies and support.

**143**  When Mr. Christensen returned for a reassessment on May 9, 2014, the doctor noted that he was "more emotionally grounded today". After that visit, Mr. Christensen's subsequent visits to Dr. Sharpe in 2014 focused on respiratory symptoms he was having.

**144**  As of May 2014, Mr. Christensen was back to his work, child care duties, and recreational activities. He had begun the process of adapting to the tinnitus. He ultimately was successful in adapting. This is supported by his own evidence, along with the impression that Dr. Longridge formed that the tinnitus was not intruding on his normal daily functioning during the day.

**145**  The evidence does not support that if Mr. Christensen had attended the tinnitus clinic his damages would have been reduced.

**146**  The defendant has not shown, on a balance of probabilities, that attending the tinnitus clinic would have reduced Mr. Christensen's symptoms. There is no basis to reduce the damages for this allegation.

**Conclusion**

**147**  The defendant is solely responsible for the accident.

**148**  Mr. Christensen is entitled to the following damages:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary damages | $85,000 |  |
| Past income loss | $8,500 (gross) |  |
| Future loss of income earning capacity | $95,500 |  |
| Special damages | $916.23 |  |
| **TOTAL** | $189,916.23 |  |

**149**  Mr. Christensen is entitled to interest on the past wage loss and special damages claims.

**150**  The amount of past wage loss should be net: *Insurance (Vehicle) Act*, [*R.S.B.C. 1996, c. 231, ss. 95*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B06G-00000-00&context=) and 98. The parties should be able to agree on what that amount is but may make written submissions if they are not able to do so.

**151**  Mr. Christensen is entitled to his costs at Scale B unless there is a submission to be made on any offers to settle. If so, the parties are at liberty to file written submissions. The party seeking to rely on an offer to settle must file and serve submissions within 60 days from the date of these reasons. Counsel for the responding party is entitled to file and serve written submissions in response within 15 days of receipt of the submissions. Any reply submissions must be filed and served within 10 days of the receipt of the responding submissions.

C.L. FORTH J.

**End of Document**

[***Dudley (Personal representative of) v. British Columbia, [2018] B.C.J. No. 273***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RRK-9081-JCBX-S0GY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: January 30, 2018.

Judgment: February 19, 2018.

Docket: S117170

Registry: Vancouver

**[2018] B.C.J. No. 273** | 2018 BCSC 236 | [2018] 6 W.W.R. 416 | 289 A.C.W.S. (3d) 195 | 8 B.C.L.R. (6th) 435 | 2018 CarswellBC 323

Between Rosemarie Surakka, as the personal representative of Lisa Cheryl Dudley, Plaintiff, and Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of Canada, Defendants

(33 paras.)

**Case Summary**

**Constitutional law — Division of powers — Federal jurisdiction — Federal powers (Constitution Act, 1867, s. 91) — Provincial jurisdiction — Provincial powers (Constitution Act, 1867, s.92) — Application by Province of British Columbia and Attorney General of Canada (Canada) to dismiss Surakka's claim for damages on grounds it was not within Limitation Act time limits allowed — Application by Province to dismiss declaratory relief action dismissed — Surakka, personal representative of daughter Dudley, filed claim under s. 24(1) of Charter against Royal Canadian Mounted Police (RCMP) for s. 7 Charter violation leading to Dudley's death — Surakka's claim was "in respect of injury to person" and governed by two-year time limit — Issue regarding Provincial responsibility for RCMP actions was not bound to fail.**

**Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Life, liberty and security of person — Right not to be deprived thereof — Remedies for denial of rights — Procedural remedies — Damages — Declaration of rights — Application — Entities subject to Charter — Parliament and federal government — Provincial legislatures and governments — Application by Province of British Columbia and Attorney General of Canada (Canada) to dismiss Surakka's claim for damages on grounds it was not within Limitation Act time limits allowed — Application by Province to dismiss declaratory relief action dismissed — Surakka, personal representative of daughter Dudley, filed claim under s. 24(1) of Charter against Royal Canadian Mounted Police (RCMP) for s. 7 Charter violation leading to Dudley's death — Surakka's claim was "in respect of injury to person" and governed by two-year time limit — Issue regarding Provincial responsibility for RCMP actions was not bound to fail.**

**Constitutional law — Constitutional proceedings — Practice and procedure — Limitation periods — Application by Province of British Columbia and Attorney General of Canada (Canada) to dismiss Surakka's claim for damages on grounds it was not within Limitation Act time limits allowed — Application by Province to dismiss declaratory relief action dismissed — Surakka, personal representative of daughter Dudley, filed claim under s. 24(1) of Charter against Royal Canadian Mounted Police (RCMP) for s. 7 Charter violation leading to Dudley's death — Surakka's claim was "in respect of injury to person" and governed by two-year time limit — Issue regarding Provincial responsibility for RCMP actions was not bound to fail.**

**Damages — Proceedings — Practice and procedure — Limitation periods — Application by Province of British Columbia and Attorney General of Canada (Canada) to dismiss Surakka's claim for damages on grounds it was not within Limitation Act time limits allowed — Application by Province to dismiss declaratory relief action dismissed — Surakka, personal representative of daughter Dudley, filed claim under s. 24(1) of Charter against Royal Canadian Mounted Police (RCMP) for s. 7 Charter violation leading to Dudley's death — Surakka's claim was "in respect of injury to person" and governed by two-year time limit — Issue regarding Provincial responsibility for RCMP actions was not bound to fail.**

|  |
| --- |
| Application by the defendant Her Majesty the Queen in Right of the Province of British Columbia (Province) and the defendant Attorney General of Canada (Canada) for summary judgment dismissing Surakka's claim for damages on the grounds it was not filed within the time required by the Limitation Act. The Province also sought the dismissal of the declaratory relief action against it. Surakka, as the personal representative of Dudley, filed a claim for declaratory relief and damages under s. 24(1) of the Charter against the Royal Canadian Mounted Police (RCMP) for improper investigation. Surakka asserted the improper investigation of a call of shots fired led to a delay that caused or contributed to the death of her daughter, Dudley. Dudley had been shot in her home, but remained alive for four days until discovered, on which day she passed away. The notice of claim was filed three years and one month after Dudley's death. The defendants argued the claim was barred by s. 3(2)(a) of the Limitation Act, which prescribed a two-year limitation period for personal injury damages claims. Surakka argued the claim was not for personal injury and thus was covered by s. 3(5), which allowed for a six-year period. Surakka relied on authorities that limited s. 3(2)(a) to "direct damage" to person or property caused by an "extrinsic act". Surakka argued here the RCMP did not cause the "identifiable injury": the "extrinsic act" that caused the injury was the shooting. Rather, she argued the RCMP omissions imperiled Dudley's security of the person under s. 7 of the Charter. On the declaratory relief action, the Province asserted no facts established conduct by the Province, as opposed to the RCMP, constituted a breach of Dudley's s. 7 rights; RCMP members were employees of Canada and the Province was not liable for their conduct. Surakka argued the RCMP functioned as British Columbia's provincial police force under provincial legislation, and thus the Province had a legal responsibility for actions of the RCMP that resulted in a breach of Charter rights.  HELD: Application for dismissal of damages action allowed; application by the Province for dismissal of declaratory relief claim dismissed.  The "identifiable injury" was the deterioration of Dudley's physical condition, resulting in a death that would likely not have occurred had police found her on the night of the shooting. Injury to Dudley's person was therefore an essential element of the claim for breach of her s. 7 rights. Surakka's claim was analogous to a medical ***negligence*** action in which a plaintiff alleged a doctor failed to diagnose or properly treat an injury or illness. There was never any question that such cases were claims for injury to the person and subject to the two-year limitation period. Surakka's claim was "in respect of injury to person" and governed by the two-year time limit in s. 3(2)(a) of the Limitation Act. The claim for damages was dismissed. On the issue of declaratory relief, the Provincial authority over the RCMP may nor may not make the Province responsible for RCMP actions in an individual case. On the current application, Surakka had raised an issue of legal responsibility on the part of the Province that could not be said was bound to fail. The Province's application for dismissal of the claim for declaratory relief was dismissed. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 24(1)

Limitation Act, R.S.B.C. 1996, c. 266, s. 3(2)(a), s. 3(5), s. 6

Police Act, [*R.S.B.C. 1996, c. 367, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S0R6-00000-00&context=), s. 7, s. 14, s. 14(1), s. 14(2)

Royal Canadian Mounted Police Act, [*R.S.C. 1985, c. R-10, s. 20*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBP1-JNY7-X0J4-00000-00&context=)(1)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 9-6*(4), Rule 9-6(5), Rule 9-6(5)(a)

**Counsel**

Counsel for the Plaintiff: M. Pongracic-Speier, Q.C.

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia: J.D. Hughes, A. Harlingten.

Counsel for the Defendant, Attorney General of Canada: D. Kwan, L. Bantourakis.

**Reasons for Judgment**

|  |
| --- |
| **N.H. SMITH J.** |

**1**   On September 18, 2008, Lisa Dudley and her partner, Guthrie McKay, were shot in their home in Mission, B.C. Mr. McKay died, but Ms. Dudley remained alive in the home for four days before being discovered on September 22, 2008. She died later that day.

**2**  The plaintiff in this action is Ms. Dudley's mother and personal representative. She alleges that the Royal Canadian Mounted Police ("RCMP") failed to properly investigate a call of shots fired on the night of the shooting and that the resulting delay in finding Ms. Dudley in her wounded condition caused or contributed to her death. The plaintiff seeks both declaratory relief and damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c. 11 (the "*Charter*").

**3**  On this application the defendant Her Majesty the Queen in Right of the Province of British Columbia (the "Province") and the defendant Attorney General of Canada ("Canada") both seek summary judgment dismissing the claim for damages on the grounds that it was not filed within the time required by the *Limitation Act*, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=), which was in force at the relevant time.

**4**  The Province also says that the pleadings do not show it to be a proper party and seeks dismissal of the entire action as against it. Canada does not seek dismissal of the claim for declaratory relief, so the action could at least proceed against Canada on that basis even if these applications succeed.

**5**  The central allegation in the plaintiff's Further Amended Notice of Civil Claim is found at para. 26:

Ms. Dudley was deprived of her right to life and security of the person due to the failures of the RCMP and its officers, employees and agents to adequately and reasonably respond to the complaint lodged at or about 10:42 pm on September 18, 2008. In particular, Ms. Dudley's security of the person was imperiled and her ultimate demise was caused or contributed to by her being trapped, paralyzed and bleeding, in her chair for nearly four days. But for the failures of the RCMP and its members, employees and agents to reasonably respond to and investigate the complaint, Ms. Dudley's circumstances would not have remained undetected for four days.

[Emphasis added]

**6**  The relief sought in the Further Amended Notice of Civil Claim is:

1. a declaration that Ms. Dudley was deprived of her right to life and security of the person in a manner that is not in accordance with the principles of fundamental justice, contrary to s. 7 of the *Charter* ; and
2. damages pursuant to s. 24(1) of the *Charter*.

**7**  The original Notice of Civil Claim was filed on October 27, 2011, three years and one month after Ms. Dudley's death. The defendants argue that the claim for damages is barred by s. 3(2)(a) of the former *Limitation Act*, in force at the time of Ms. Dudley's death, which prescribed a two-year limitation period for claims for damages arising out of personal injury. The section read:

3(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

1. subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

[emphasis added]

**8**  The plaintiff argues that the claim is not one for personal injury and is governed by s. 3(5), which said:

Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

**9**  The *Act* also provided, in s. 6, for postponement of the running of time in certain circumstances, but the plaintiff does not suggest any of those circumstances apply.

**10**  This application is brought pursuant to subrules 9-6 (4) and (5) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*, which read:

Application by answering party

1. In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

1. On hearing an application under subrule (2) or (4), the court,
2. if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
3. if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
4. if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
5. may make any other order it considers will further the object of these Supreme Court Civil Rules.

**11**  Under Rule 9-6(5)(a), the court must dismiss an action if satisfied that there is no genuine issue for trial. It must be plain and obvious that the action will not succeed. Those requirements are met and the order is appropriate where a claim is statute-barred due to the passage of time: *Sandhu v. Sun Life Assurance Company of Canada*, [*2016 BCSC 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K2F-CNC1-JKPJ-G2WW-00000-00&context=), at paras. 11-13.

**12**  The court may award damages for breach of an individual's *Charter* rights, *Vancouver (City) v. Ward*, [*2010 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1HX-00000-00&context=). However, personal claims for constitutional relief are subject to limitation statutes: *Ravndahl v. Saskatchewan*, [*2009 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1F0-00000-00&context=), at paras. 16-17.

**13**  Even before those decisions by the Supreme Court of Canada, this Court held that a claim for damages based on the *Charter* was subject to the two-year limitation period if it arose from injury to the person. In *Bush v. City of Vancouver et al.*, [*2006 BCSC 1207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3FY-00000-00&context=), the plaintiff was arrested at a demonstration, strip-searched and held in custody for 26 hours. He was charged with a number of offences, but the Provincial Court judge at a subsequent criminal trial held that his *Charter* rights had been violated. The plaintiff then sought damages for breach of his *Charter* rights in an action commenced more than two years after his arrest and detention.

**14**  Justice Allan concluded that the plaintiff had not shown any breach of *Charter* rights "independent of any damage he suffered to his person or property" (at para. 26). She held that the two year limitation period in s. 3(2)(a) of the *Limitation Act* applied.

**15**  In *R. v. Newman*, [*2016 FCA 213*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KN8-XG81-DYFH-X3G4-00000-00&context=), the plaintiff was assaulted and seriously injured by two other prison inmates. He sought *Charter* damages against the federal crown, alleging that prison authorities and employees failed to assure his personal safety. The Federal Court of Appeal found the action to be governed by the same limitation period as actions seeking private law remedies for bodily injury.

**16**  "Injury to person" means "the claim must be in respect of some identifiable injury to the body or mind of the plaintiff": *Moses v. Lower Nicola Indian Band*, [*2015 BCCA 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G77-HXG1-FCK4-G3X9-00000-00&context=), at para. 33.

**17**  The plaintiff relies on authorities that limit s. 3(2)(a) to "direct damage" to person or property caused by an "extrinsic act." In *Zurbrugg v. Bowie* [*(1992), 68 B.C.L.R. (2d) 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M105-00000-00&context=) (C.A.), the Court of Appeal held that it did not apply to a claim arising out of faulty dental bridge and crown work:

1. It is therefore apparent that "injury to property" in s. 3(1)(a) should be construed to refer to a circumstance where property has received direct damage from or by "an extrinsic act" or, putting it another way, from or by "an identifiable external event." In my view, the phrase "injury to person" in s. 3(1)(a) should be construed in the same manner.
2. In the case at bar the damage sustained by the plaintiff arose during the numerous dental attendances which occurred between September 1981 and the spring of 1983, in the course of which Dr. Bowie designed, fabricated and installed bridges and crowns on at least 16 of the respondent's teeth. There were latent defects in the crown and bridge work done by the appellant which did not become apparent to the respondent until the spring of 1986. The injury to the person or property of the respondent was not attributable to direct damage; it was not caused by "an extrinsic act" or "an identifiable external event."

**18**  In *Arndt v. Smith*, [*[1995] B.C.J. No. 1416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62N5-00000-00&context=) (C.A.) (reversed on other grounds, [*[1997] 2 S.C.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3W7-00000-00&context=)), the plaintiff claimed she would have terminated a pregnancy if her doctor had warned her that her illness during pregnancy created a risk of injury to her fetus. The court held that the two-year limitation period did not apply.

**19**  The plaintiff therefore argues that the RCMP did not cause the "identifiable injury" to Ms. Dudley. The extrinsic event that caused that injury was the shooting by a person who is not a party to this action. On that analysis, the plaintiff says there is no claim that the police caused an identifiable injury. The claim is that their omissions imperiled Ms. Dudley's security of the person.

**20**  I find that the "identifiable injury" alleged in this case is the deterioration of Ms. Dudley's physical condition, resulting in a death that would likely not have occurred had police found her on the night of the shooting. Injury to her person is therefore an essential element of the claim for breach of her s. 7 rights and I find it to be indistinguishable from the type of claim that was advanced in both *Bush* and *Newman*. I also note that *Zurbrugg* was referred to, and clearly found to be inapplicable, in *Bush*.

**21**  The plaintiff's claim is analogous to a medical ***negligence*** action in which a plaintiff alleges that a doctor failed to diagnose or properly treat an injury or illness. Although the doctor did not cause the injury or illness, the absence of proper or timely treatment worsened the plaintiff's physical condition and the plaintiff's claim is for damages for that further injury. There has never been any question that such cases are claims for injury to the person and subject to the two-year limitation period. The plaintiff in this case claims *Charter* damages as a remedy, as opposed to damages for ***negligence***, but the authorities make clear that that does not change the underlying nature of the claim.

**22**  The claim here is not comparable to *Arndt*. In that case, the Court held that the six-year limitation period applied because the claim was solely for the economic loss incurred by parents in caring for a disabled child. There was no claim on behalf of the child for physical injury.

**23**  In this case, the plaintiff claims not on her own behalf but as the personal representative of Ms. Dudley. The claim relies on a physical injury to Ms. Dudley flowing directly from the alleged breach of her *Charter* rights.

**24**  In the result, I find that the claim is one "in respect of injury to person" and governed by the two-year time limit in s. 3(2)(a) of the former *Limitation Act*. Because the plaintiff began this action more than two years after Ms. Dudley's death and does not rely on the postponement provisions of the *Act*, the plaintiff's claim for damages must be dismissed as against both defendants.

**25**  The Province also seeks dismissal of the claim against it for declaratory relief. It says that the plaintiff has failed to plead any material facts to establish conduct by the Province, as opposed to the RCMP, that constitutes a breach of Ms. Dudley's s. 7 rights. RCMP members and civilian staff are all employees of Canada and the Province says the plaintiff does not plead any legal basis to make the Province liable for their conduct.

**26**  The relevant factual portions of the Further Amended Notice of Civil Claim are:

1. At all material times, the Royal Canadian Mounted Police ("RCMP") was British Columbia's provincial police, pursuant to a contract between the Government of the Province of British Columbia and the Government of Canada dated April 1, 1992 (the "Provincial Police Service Agreement"), and the *Police Act*, *R.S.B.C. 1996, c. 367* (the "*Police Act*"), s. 14(1) and the *Royal Canadian Mounted Police Act*, [*R.S.C. 1985, c. R-10*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9W1-FBFS-S4XY-00000-00&context=) (the "*RCMP Act*"), s. 20(1).
2. Further, the officers and civilian employees of the RCMP who were material participants to the events herein described were, at all relevant times, members of the RCMP, and formed part of the provincial police pursuant to the Provincial Police Service Agreement, and the *Police Act, supra*, s.14.

**27**  In the "Legal Basis" section of the Further Amended Notice of Civil Claim, the plaintiff says:

1. Pursuant to the Provincial Police Service Agreement, members of the provincial police must render such services as are necessary to, *inter alia*, preserve the peace and protect life.

**28**  The *Police Act*, referred to in the plaintiff's pleadings, includes ss. 2, 7 and 14(1) and (2), which read:

Adequate level of policing and law enforcement

|  |  |  |  |
| --- | --- | --- | --- |
| 2 |  | The minister must ensure that an adequate and effective level of policing and law enforcement is maintained throughout British Columbia. |  |

Duties and functions of commissioner and police force

7(1) The commissioner, under the minister's direction,

1. has general supervision over the provincial police force, and
2. must
3. exercise powers and perform duties assigned to the commissioner under and in accordance with this Act and any other enactment, and
4. ensure compliance with the director's standards as they relate to the provincial police force.
5. The provincial police force, under the commissioner's direction, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the commissioner, under the director's standards or under this Act or any other enactment.

Royal Canadian Mounted Police as provincial police force

14(1) Subject to the approval of the Lieutenant Governor in Council, the minister, on behalf of the government, may enter into, execute and carry out agreements with Canada, or with a department, agency or person on its behalf, authorizing the Royal Canadian Mounted Police to carry out powers and duties of the provincial police force specified in the agreement.

1. If an agreement is entered into under subsection (1),
2. the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial police force,
3. every member of the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial constable,
4. the provisions of this Act respecting the powers and duties of the provincial police force and provincial constables apply, subject to the agreement, and with the necessary changes and insofar as applicable, to the Royal Canadian Mounted Police and its members, and
5. the officer commanding the division of the Royal Canadian Mounted Police referred to in the agreement and the second in command of the division are deemed to be the commissioner and deputy commissioner, respectively, appointed under this Act.

**29**  The plaintiff's claim is essentially that, although Canada is the direct employer of RCMP members, the force functions as British Columbia's provincial police force under provincial legislation. Therefore, the plaintiff says the Province has a legal responsibility for actions of the RCMP that result in a breach of *Charter* rights.

**30**  The legal authority over the RCMP that the plaintiff says arises from the legislation may nor may not make the Province responsible for RCMP actions in an individual case. The question of how Canada and the Province divide responsibility at the operational level may be the subject of evidence at trial. There may also be a legal issue as to whether any division of operational authority detracts from what may be joint responsibility under the law.

**31**  For the purpose of this application, all that can be said is that the plaintiff has raised an issue of legal responsibility on the part of the Province that I cannot say is bound to fail.

**32**  In summary, the plaintiff's claim for damages is dismissed as against both defendants as being out of time pursuant to the former *Limitation Act*. The application of the Province for dismissal of the claim against it for declaratory relief is dismissed.

**33**  Costs of this application will be in the cause.

N.H. SMITH J.

**End of Document**

[***Gillespie v. Yellow Cab Co., [2014] B.C.J. No. 2332***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G0CG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.C. Armstrong J.

Heard: January 6-8 and 14-15, 2014.

Judgment: September 17, 2014.

Docket: M131580

Registry: New Westminster

**[2014] B.C.J. No. 2332** | [*2014 BCSC 1745*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1V9-00000-00&context=)

Between Michael Gillespie, Plaintiff, and Yellow Cab Company Ltd., Ali Dowlatabadi, Jiaqiang Yu, Defendants

(317 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Head injuries — Brain damage — Headaches — Psychological injuries — Arising subsequent to incident — Action by Gillespie to recover damages for personal injuries sustained in two motor vehicle accidents allowed — Gillespie's head struck windshield in first accident — Court accepted family doctor's diagnosis of mild brain injury, ongoing headaches and anxiety — Gillespie awarded non-pecuniary damages of $85,000, $160,000 for past income loss, $140,000 for lost earning capacity, $2,500 for future care costs and $918 for special damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Retroactive loss of income — Non-pecuniary loss — Action by Gillespie to recover damages for personal injuries sustained in two motor vehicle accidents allowed — Gillespie's head struck windshield in first accident — Court accepted family doctor's diagnosis of mild brain injury, ongoing headaches and anxiety — Gillespie awarded non-pecuniary damages of $85,000, $160,000 for past income loss, $140,000 for lost earning capacity, $2,500 for future care costs and $918 for special damages.**

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| Action by Gillespie seeking damages for personal injuries sustained in two motor vehicle accidents. Liability for both accidents was admitted by the defendants. The first accident took place in December 2009. Gillespie was proceeding through an intersection when his vehicle was struck by a taxi that failed to stop for a stop sign, propelling Gillespie's vehicle into the path of an oncoming cube truck. Gillespie struck his head against his vehicle's windshield, cracking the glass and causing lacerations to his head. In January 2010, Gillespie was rear-ended while stopped at a red light. The impact was minor, but Gillespie claimed it aggravated his neck and back for the next seven to 10 days. Following the accidents, Gillespie was left with soft tissue injuries, an inner ear injury, and compromised brain functioning. He claimed he had memory problems that resulted in his work activities. He claimed he had headaches constantly for six months and that he continued to use pain medication for back pain and headaches. He denied experiencing anxiety prior to the accidents, despite a record of one doctor's visit for anxiety issues. He claimed he experienced anxiety after the accidents. His wife confirmed Gillespie's personality changed for the worse after the accidents. His family doctor relied on a neurologist's report in diagnosing a mild brain injury. The neurologist was not called to provide evidence. The family doctor opined that Gillespie would continue to suffer from the effects of the first accident indefinitely. A defence expert opined that Gillespie's cognitive impairment was attributable to metabolic syndrome rather than a brain injury.  HELD: Action allowed.  Gillespie was awarded $85,000 in non-pecuniary damages, $160,000 for past income loss, $140,000 for lost earning capacity, $2,500 for future care costs and $918 in special damages. Despite its shortcomings, the evidence of the family doctor was accepted as the best indicator of Gillespie's actual condition and its cause. The defence expert's opinion was given little weight because he did not understand the severity of the first accident. Inconsistencies in Gillespie's evidence were attributed to his injuries, not an attempt to misrepresent them. The court accepted he sustained a mild traumatic brain injury, inner ear dysfunction, headaches, and neck and back pain. He developed anxiety and his mood changed, impacting his daily life and work. His evidence about being limited in the work he could perform was not specific enough to convince the court of the figures he suggested for past and future income loss, so the court estimated those figures. His future care costs and special damages were limited to headache pain medication. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 98*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B06K-00000-00&context=)

**Counsel**

Counsel for Plaintiff: D.W. Darychuk, Q.C. and K. Deane-Cloutier.

Counsel for Defendants: N. Gill.

**Reasons for Judgment**

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| **T.C. ARMSTRONG J.** |

**Introduction**

**1**  This action concerns Mr. Gillespie's claim for damages for injuries he alleges were caused by motor vehicle accidents in December 2009 (the first accident) and January 2010 (the second accident).

**2**  On December 1, 2009, the plaintiff was driving a 2002 Honda Civic through an intersection in Vancouver when a taxi failed to stop at a stop sign and struck his vehicle. The plaintiff's car then collided with a cube van coming from the opposite direction, and he hit his head against his car's windshield. The impact cracked the glass, and the glass lacerated his head.

**3**  On January 22, 2010, the plaintiff was involved in a minor rear-end collision when he was stopped at a red light. He claims this incident aggravated his neck and back "a bit", and the symptoms lasted seven to 10 days.

**4**  The controversy in this case turns largely on the nature and extent of the injury to Mr. Gillespie's head from the first accident.

**5**  The defendants admit liability for both accidents and this trial concerned the extent of Mr. Gillespie's injuries and an assessment of damages that may have been caused by each accident.

**6**  The plaintiff seeks the following damages for injuries in both accidents:

1. non-pecuniary: $85,000 - $110,000 ($1,000 to $3,000 of that claim is for the second collision);
2. past income loss: $241,452;
3. future loss of earning capacity: $285,997;
4. special damages: $600 - $800; and
5. future care costs: $1,642 - $3,285.

**The Issues**

**7**  After the accidents the plaintiff presented with various minor soft tissue injuries, an injury to his inner ear, and symptoms indicating his brain function was compromised. There are two principal issues and two preliminary issues to be addressed in this trial. The findings on the secondary issues will impact the findings on the principal issues so I will discuss them first:

Principal issues:

1. After the accidents, did the plaintiff suffer symptoms from metabolic syndrome unrelated to the accidents or did he suffer a mild traumatic brain injury caused by the first accident?
2. What is the proper measure of the plaintiff's damages if:
3. the plaintiff suffered a mild traumatic brain injury, an inner ear injury and soft tissue injuries to his neck and back in the first accident and exacerbated by the second accident? or
4. the plaintiff did not suffer a brain injury in the first accident but suffered neck and back injuries resulting from both accidents?

Secondary issues:

1. Should I draw an adverse inference against the plaintiff for failing to call Dr. Foti?
2. How much weight should I give the expert medical opinion?

**The Facts**

**Before the Accident**

**8**  Mr. Gillespie is a 65-year-old married father of two adult children.

**9**  He lives with his wife in Burnaby, BC.

**10**  After graduating from high school, he attended Vancouver City College.

**11**  Sometime after finishing at City College, he entered the flooring business, and in 1984, opened his own business specializing in niche flooring products. He spent most of the next 16 years operating that business, but in approximately 2000, Mr. Gillespie and his wife were forced into bankruptcy because that business failed.

**12**  He then obtained employment selling "sun rooms" in BC and Alberta; he worked in that role until 2004.

**13**  In 2004, the plaintiff and his wife moved to Burnaby to facilitate her education at BCIT. She pursued a course in human relations and eventually obtained employment with the Genome Sciences Centre.

**14**  Between September 2004 and January 2005, the plaintiff was unemployed. In 2005 he took a position with AAA Flooring (AAA), a local flooring company. His role was to prepare quotes for prospective flooring customers, order materials and oversee installation work. After one and a half years, he became dissatisfied with his employer's work practices which he believed were adversely affecting his health.

**15**  He then began his own flooring proprietorship, and in January 2008, he incorporated a company to carry on the business. His plan was to accumulate sufficient funds in the company's retained earnings so he and his wife could retire to the Okanagan in approximately three years.

**16**  He testified that before the first accident he did not have any health problems and was not seeing a physician for specific concerns. He did have high cholesterol, but he had no history of concussion, hypertension, dizziness, concentration problems, and/or memory problems.

**17**  When working for his previous employer AAA, he experienced some difficulties with the sleep difficulties and saw a physician for advice in 2006; he related these physical problems with stress at his work with AAA. He did not receive any prescription medication to deal with sleep and these problems resolved after he left his employment.

**18**  He testified that he was not aware of having anxiety before the first accident, and he consulted his doctor only about sleep problems. He did not remember a meeting with his doctor in 2006 when his anxiety was discussed; there is a record of such a discussion but the author of the notes did not testify. Nevertheless, between 2006 and December 2009, he did not have any anxiety or sleep issues.

**19**  His current business is restricted to commercial and institutional flooring supply work. When he began this business, Mr. Gillespie was responsible for all aspects of the work, including bookkeeping, record-keeping, reviewing proposals, measuring, and preparing quotations. When his bids were successful, he ordered product from suppliers, rented trucks to transport material to job sites, attended to the unloading of materials, engaged sub-contract installers and reviewed the work after completion. He also attended work sites to correct deficiencies. He does not do the physical work himself; he engages subcontractors to do all flooring installations.

**20**  He performs his record keeping and book work manually. He prepares quotes and invoices for the business, and he uses a bookkeeper and a chartered accountant to complete his financial statements and reporting to Canada Revenue.

**21**  His typical work day starts at 5:30 am and concludes around 4:30 pm.

**22**  Mrs. Gillespie confirmed that prior to the accident the plaintiff was rarely sick and had no specific health concerns.

**23**  Regarding physical activities before the accident, the plaintiff and his wife regularly walked together. He used an elliptical trainer and treadmill and occasionally played golf.

**The Accident**

**24**  When the first collision happened, Mr. Gillespie was travelling in his 2002 Honda Civic with one of his flooring installers, Will Pingot. They were traveling westbound on 33rd Avenue when the defendant's taxi emerged from Culloden Avenue and struck the side of his vehicle, causing it to collide with a cube van.

**25**  The airbags deployed, and airbag powder filled the vehicle. The plaintiff's head struck and shattered the upper left side of the front windshield.

**26**  After the collision, Mr. Pingot asked the plaintiff what had happened; he replied that the airbag was going off. Once they were outside of the vehicle, Mr. Pingot then observed the plaintiff talking to someone on the telephone. He told the plaintiff to call 911 and Mr. Gillespie placed that call. Mr. Gillespie was walking around and sitting along the road. Mr. Gillespie requested Mr. Pingot to drive him to the Burnaby General Hospital. He left the plaintiff at the hospital.

**Immediately after the Accident**

**27**  Mr. Gillespie testified in chief that after the accident:

1. he felt woozy but did not have pain;
2. his head was bleeding;
3. his lip was cut;
4. he got out of the vehicle and walked around;
5. the damage to his vehicle and the taxi was considerable, and his vehicle was unrepairable;
6. a neighbor provided a towel for his head;
7. the fire department and an ambulance arrived;
8. the ambulance staff asked if he had lost consciousness;
9. he declined the ambulance staff's invitation to be taken to Vancouver General Hospital;
10. his passenger Mr. Pingot, drove him to Burnaby General Hospital;
11. he waited at Burnaby General Hospital, and they tested his blood pressure and his eyes and asked him about dizziness;
12. he did not remember any unconsciousness;
13. hospital staff repaired the hanging skin cut to his forehead;
14. he was dizzy and nauseous;
15. he had back, knee and ankle pain;
16. he had a headache on the left side;
17. he does not recall how long he remained at Burnaby General Hospital or when he left the hospital, but he recalls being advised not to go to sleep;
18. his wife and daughter arrived at Burnaby General Hospital and took him home;
19. he eventually went to sleep; and
20. his general and low back pain worsened.

**28**  When the plaintiff was cross-examined, he said he could recall very little of what transpired at the Burnaby General Hospital; he could not recall being dizzy, nauseous or experiencing headaches. When presented with his discovery evidence he acknowledged there were differences between his testimony at trial and his responses at the discovery. I will address that point below.

**29**  He could not remember how long he was at the accident scene or whether he had pain in his head. However, he specifically recalled that during the night, his dizziness, low back and neck pain worsened, although he did not recall having nausea. He denied the suggestion that his headaches and dizziness occurred only in the morning.

**30**  The plaintiff was not certain, but he believed that the next day (the visit was actually two days later on December 3) he saw his family doctor, Dr. Levis, who advised him to "take it easy". He testified that he told his doctor that his headaches were sharper over the eye area, that he had neck pain at the base of his skull, and that he had low back, leg, and ankle pain.

**31**  He was asked about his failure to mention his headaches to Dr. Levis on December 2 or 3, and he denied the suggestion that his headaches did not begin until the morning of December 3. And he framed his answers about dizziness as "to the best of my recollection I had dizziness." When Mr. Gillespie resorted to the phrase "to the best of my recollection" I inferred that he does not have a clear memory of such events and was doing his best to reconstruct what he thinks occurred.

**32**  He said he followed his doctor's advice, but during the following week his headaches worsened, and he became concerned about the prospects of a head injury.

**33**  After approximately one week, he obtained a CT scan at Royal Columbian Hospital; he was told that nothing was seriously wrong with his head.

**34**  His headaches were unrelenting for the first six months after the first accident.

**35**  He said there was a little bit of dizziness for one week after the first accident. He had low back pain for about one month, and the pain in his neck and right leg also improved within a month.

**36**  In the days after the accident, he was feeling some pressure to return to work, but he was finding it hard to concentrate and believed he was making mistakes. He would add numbers incorrectly and would reverse numbers even when using a calculator.

**37**  He does not recall telling his wife about these problems at the time, but he does recall Dr. Levis advising him to go to physiotherapy. He attended physiotherapy as prescribed.

**38**  The gash on his forehead healed within four to five months although a scar remains on his forehead.

**39**  Other than physiotherapy the only treatment he received was medication for his headaches and sleep issues.

**40**  Mr. Gillespie did not tell Dr. Levis that he had experienced anxiety before the accident and she did not review his medical records from before the accident, until well after writing her report. He was confronted with his family doctor's 2006 notes which reflected a comment that for two years he had been waking in the middle of the night feeling anxious. He testified that he had not had any pre-accident anxiety issues. He said he had been able to begin his new business in 2006 and had made a success of the business without problems relating to anxiety.

**The Second Accident**

**41**  On January 22, 2010, Mr. Gillespie was involved in the second accident. This rear-end collision caused a jolt that aggravated his neck and back pain. The changes to those symptoms lasted seven to 10 days. From then on, his neck problems came and went, but long drives aggravated this condition. If he turned his head sharply, he also experienced pain.

**Life after the Accidents**

**42**  Although Mr. Gillespie's low back discomfort improved, if he sits for prolonged periods, his back will ache.

**43**  His neck and right leg were not painful after the first one month.

**44**  He had some dizziness for approximately one week after the first accident, but that symptom has resolved.

**45**  In the first month after the first accident, his headaches worsened; they were constant and fluctuated from being bearable to unbelievably sharp pains during the first six months post-accident. His eyes became strained if he read too much.

**46**  During the first month after the first accident Mr. Gillespie did not stop working at any time. He does not remember ever refraining from driving and could not be sure if he reduced his number of hours worked. He said it was hard to concentrate and he was making mistakes in calculations.

**47**  He was having memory difficulties.

**48**  He was prescribed Tylenol 3's, but he found they made him dozy. He started taking over-the-counter medications and has used six to eight Tylenol pills per day ever since. He currently takes two in the morning, two during the day, and two at night. The Tylenol costs approximately $180 per year.

**49**  His wife's medical plan covered the prescription medication, and he paid for the over-the-counter drugs (Tylenol) personally.

**50**  He was referred to the Fraser Health Concussion Clinic on April 14, 2010 where he was advised:

1. to reduce the number of tasks he focused on at any one time;
2. to stop work if he became confused;
3. to avoid television, radio and noisy places;
4. to use sticky notes for reminders; and
5. to focus on smaller jobs rather than larger jobs that may involve multiple trades in confined areas (this strategy has resulted in him not doing large jobs).

**51**  In cross-examination, Mr. Gillespie said he had no memory of the visit to the concussion clinic. He said he went to the clinic because of problems with work, anxiety and memory, but he then said he could not remember which problems actually led to his attendance at the clinic. He did not remember the interview at the clinic or that he told them he was functioning at 90% of his physical, emotional, and cognitive capacity at the time. He also could not remember the questionnaire given to him at the clinic nor his responses. The concussion clinic recommended that he return for a second session; he declined.

**52**  He tried to maintain his routine but felt he was becoming confused; this confusion prompted him to stop work. When he worked on more than one project at a time, he felt his anxiety build up. He avoids using television and radios when he is working.

**53**  BC Housing was one of his clients, and he typically enjoyed a good working relationship with that institution. They often did work in single room occupancy buildings. However following the accidents, Mr. Gillespie claimed he had to stop taking on that type of work because the job sites were too confusing for him.

**54**  Mr. Gillespie claims that his memory has deteriorated since the accident. He said he forgets fax numbers, phone numbers, conversations and other details. He has word finding difficulties and transposes numbers when doing work related calculations. He sometimes forgets street names and numbers.

**55**  He makes sticky notes to remind himself of tasks that need to be done. He has a book where he lists the things he needs for specific jobs, and he has increased the amount of detail he keeps in his workbooks.

**56**  In May 2011, his family doctor referred him to a neurologist, Dr. Foti. The doctor did some concussion testing, and Mr. Gillespie said he was truthful in his answers to Dr. Foti. When he saw Dr. Foti he did not mention any word-finding difficulties and believed his day-to-day memory was reasonable. Nevertheless he currently asserts that his memory is not as good as it was before the accident.

**57**  The concussion clinic recommended that he adjust his activity level to avoid multi-tasking. After he made this change he found it easier to cope with his anxiety and headaches, although he feels that he was turning down too much business because of the limitations on his working ability.

**58**  Initially, he stopped taking on new work when he became confused. His anxiety over minor issues increased. The anxiety occurs mostly when he is in bed and subsides after he arises in the morning.

**59**  Before the accident he did not have anxiety, but now he feels that he is on the edge. He said that the things that cause anxiety are of no consequence, but he continues to go over and over issues that cause him to become anxious. Working on more than one task at a time seems to contribute to his anxiety.

**60**  He makes dinner for his wife at approximately 7:00 pm. He retires each night around 9:15 pm and gets up at 5:00 am. His wife does not go to bed until 11:00 pm. He said his intimate life with his wife has dropped off since the accidents. He avoids noisy places such as shopping malls.

**61**  Dr. Foti prescribed antidepressant medications for Mr. Gillespie; he said amitriptyline has improved his sleep quality, but he continues to have word-finding problems and difficulty recalling names, places, and street names.

**62**  He said his injuries do not affect his energy levels unless the symptoms become bad, and then he may sit in the dark until he improves. He finds that noisy places such as shopping malls bother him. Large job sites may have as many as seven trades in confined areas which seem to increase his level of stress. As a result, he stopped taking on large projects.

**63**  By October 2011 Mr. Gillespie was feeling better with improved energy. He could not recall if his condition at the time of trial was changed from how he felt in October 2011. He confirmed that at his examination for discovery of December 12, 2013 he was feeling better and that his cognitive functioning had improved since seeing Dr. Foti.

**64**  He testified that before the accident he could do a "takeoff", or a quote, in 30 to 60 minutes for a $10,000 project. The same work now takes between 90 and 180 minutes. He forces himself to redo takeoffs as many as three times because of his problems with numbers. If he reproduces a single quotation three times and the results are in the same range, Mr. Gillespie is satisfied with the quotation he has created.

**65**  He testifed that the risk of making an error on a $100,000 job is beyond his tolerance. On a projoct of that size, a $10,000 mistake would be very serious and too great a risk for him. He testified that he lost $25,000 on a project at UBC due to an installation error. There was no corroborating evidence detailing this loss. He has no memory of losing work due to his poor memory but claimed to have lost work (from Syd Pagliara) due to problems with a customer over pricing. He stopped responding to Syd's projects but continues to work for Syd's son.

**66**  He said that the reason he accepts only smaller jobs is due to his health; when defendants counsel suggested it was not because of the accident, he answered "I cannot say yes or no". But he believes the larger jobs exacerbate his symptoms.

**67**  Large jobs take weeks or months to complete whereas the smaller projects can be finished within one or two days.

**68**  Currently, he gets upset more easily than before the accident and is short with people. He has been told that his tone is aggressive, and he thinks he is slow to admit mistakes when at work and at home. He believes these personality changes and being easily upset has cost him business relationships.

**69**  He is concerned about changes in his memory; but he is unable to usefully compare his current memory with his capacity before the accident.

**70**  His current memory problems have not changed from the date of the first accident: they include difficulty in word-finding, reversing numbers, leaving pots on the stove (he has done it twice), needing to make notes, and being anxious about making errors in his project quotations. He believed these symptoms came on at the time of the accident, but he cannot be specific. He complains of ongoing headaches which develop throughout his day; he uses Tylenol medication to ameliorate the symptoms.

**71**  He was cross-examined about his memory problems. As an example, he had testified at his discovery that his memory difficulties were limited to numbers and names whereas at trial he claimed a much broader range of memory problems. He acknowledged that he could not remember his conversation with Mr. Pingot at the accident scene.

**72**  Both he and his wife testified that his personality has changed since the accidents. He is more aggressive now and is more easily upset by people and events. She said he has become mean and aggressive at times and can be rude to others. She has observed the plaintiff's difficulty in sleeping since the accident. She said there is a lot of tossing and turning and moaning when he is asleep.

**73**  Since the accident he uncharacteristically raises his voice in conversation and has become defensive.

**74**  She has observed difficulties with his memory. He now forgets conversations and appears to struggle with quotations and calculations. She said he leaves the fridge door open, his keys in the front door and leaves taps running and pots on the stove. She said that they talk about their plans on one night and he will have forgotten their discussions the next night.

**75**  He confirmed that does not experience anxiety during the day; it is confined to early mornings. He is able to enjoy holidays without interference with memory difficulties.

**76**  He plans to continue taking two holidays each year and to scale back his work until retirement.

**77**  He said that his injuries have resulted in lower business profits since the accident. In his first full year after the accident (fiscal 2011) his company net profit was $77,726, whereas the 2010 profit was $143,299. In 2012 he decided to put more effort into the projects and his business and the profit increased to $166,921. In 2012 when he was not feeling well, was anxious and was sleeping less; the income nonetheless rose by $90,000 for 2012.

**78**  He took 20 days off in May 2012 and three weeks off in October 2012 for vacation; these vacations occurred in fiscal 2013. When he returned from his holidays he felt better and was less anxious.

**79**  Since May 1, 2013 he has increased his workload and described his fiscal 2014 business as good. He said there is a lot of work and more pressure.

**80**  He could only guess that work now takes double the time he thought was required before the accident. He is no longer confident in giving the type of "rough estimates" he provided before the accident.

**81**  Mr. Gillespie acknowledged under cross-examination that the last job he turned down due to his injuries and the type of work involved was in August 2011. He testified that he is turning down larger jobs but produced no records of job turn-down despite knowing that in this case he was making a claim for past and future income loss based on those lost jobs.

**82**  He testified that his wife will retire from her position in three years and that they would like to return to the Okanagan to live. He said he wanted to accumulate between $700,000 and $800,000 in retained earnings in his company to be able to fund his retirement.

**83**  In sum, Mr. Gillespie's main complaint is that his memory and cognitive function were seriously compromised by the injury to his head and adversely affect his competitiveness in the flooring business.

**Medical Evidence**

**84**  The plaintiff relied on the April 30, 2013 written opinion of his family doctor, Dr. Nicole Levis. Dr. Levis appeared at trial and was cross-examined.

**85**  The plaintiff also relied on the August 28, 2013 written opinion evidence of Dr. E. David, a specialist in Otolaryngology who was initially retained by the defendants. He was not cross-examined.

**86**  The defendants relied on the September 12, 2013 written opinion of Dr. Andrew Eisen, a neurologist, who appeared at trial and was cross-examined.

**Dr. Levis**

**87**  Dr. Levis's written opinions included the following:

1. Mr. Gillespie was injured in the first accident and diagnosed with a mild traumatic head injury concussion with ongoing post-concussion symptoms. He experiences chronic headaches, sleep disturbances, anxiety, and persistent cognitive impairments;
2. The collision caused Mr. Gillespie's injuries. He did not have a pre-accident condition that made him more susceptible to injury nor was she aware of pre-existing injuries or conditions. Therefore, she attributed his symptoms to the accident;
3. His pre-accident diagnosis of hypertension proteinuria did not impact the accident related injuries;
4. Mr. Gillespie has a vocational disability. His injuries have rendered him able to take on 50% of his previous projects or workload. He is not accepting the larger, complex projects and only accepting the smaller ones. He experiences headaches throughout his work day and makes errors resulting in him rechecking his work more often than before. These impairments are likely to persist into the future;
5. Mr. Gillespie's injuries affect his recreational, social, household, and daily activities. He has sleep difficulties and anxiety. He does not work out or use an elliptical machine as he did before the collision. He is more irritable and anxious when planning or decision-making;
6. Mr. Gillespie is likely to require ongoing Tylenol and amitriptyline. Massage therapy may be helpful. Neuropsychological testing might help regarding his cognitive difficulties; and
7. Mr. Gillespie's symptoms have continued for three years and four months, and complete recovery is unlikely; the symptoms will persist into the future.

**88**  In cross-examination, Dr. Levis said she relied on Dr. Foti's opinion, i.e., that the plaintiff suffered a mild traumatic brain injury, when preparing her opinion.

**89**  When Dr. Levis first saw Mr. Gillespie on December 3, 2009, he described to her the sequence of events leading to the collision, the collision itself, the spinning of his car and striking another truck, the airbag deployment, the impact of his head on the windshield and his upper lip on the steering wheel. He said he did not lose consciousness. He was able to describe the events at Burnaby General Hospital, including the repair to his forehead laceration. He also described his headaches, body aches and poor sleep.

**90**  Dr. Levis's initial opinion was that Mr. Gillespie had a whiplash injury and forehead cut. She did not note any altered state of consciousness. But she opined that his concussion injury had lasted from then to now without improvement, and that the pattern and duration of his head injury is not in the usual course. She said an altered state of consciousness may be indicated if a person is dazed, confused or has mental fog and was suffering decreased memory.

**91**  Dr. Levis reported that Mr. Gillespie "stated he awoke on December 3, 2009 with a headache and body aches and poor sleep". Mr. Gillespie also complained of bilateral neck pain and rotation with low back pain, but had no blurry vision, tinnitus or dizziness. He did not report having a headache between December 1 and 3, 2009.

**92**  When Dr. Levis met Mr. Gillespie on December 21, 2009, he described some poor short-term memory, reversing numbers, intermittent headaches relieved by Tylenol, intermittent dizziness, and difficulty with word-finding. Her impression at that visit was post-concussion syndrome, and she referred him for a neurological consultation.

**93**  Mr. Gillespie told Dr. Levis that his intermittent headaches and sleep disturbances continued into June 2010. By August 30, 2010, he said he was doing well; he was working more hours and experiencing fewer headaches. But he told her that the insomnia was continuing, that he was using Zopiclone to help, and that if he failed to take it, he would wake at 3:00 am.

**94**  In her examinations of the plaintiff, Dr. Levis did not inquire about any history he might have had with anxiety or sleep issues. She missed reviewing his earlier records where those symptoms had been disclosed previously to his doctor.

**Dr. David**

**95**  Dr. David opined that it is likely Mr. Gillespie suffered a post-traumatic left inner ear otolith dysfunction. The mechanism for this injury was a direct impact, acoustic trauma from airbag deployment and explosive forces associated with airbag deployment.

**96**  Dr. David's opinion was based on an objective balance test that confirmed Mr. Gillespie had an inner ear dysfunction.

**97**  Dr. David opined that Mr. Gillespie's day-to-day activities are not currently limited due to the deficit because he has a compensatory mechanism that is activated.

**98**  Dr. David opined that the there is a possibility that the compensatory mechanism can be overridden, and his imbalance may become noticeable. This deficit is also in his opinion a contraindication to Mr. Gillespie working at elevations or around machinery or doing any commercial driving.

**99**  However, Dr. David opined that Mr. Gillespie achieved complete compensation (but not resolution) for this deficit.

**Dr. Eisen**

**100**  Dr. Eisen opined that the plaintiff suffered a whiplash type injury with no neurological deficits or radiological fractures. He reports that both motor vehicle accidents were "of mild nature". He did not believe the plaintiff suffered a mild traumatic brain injury even though he had a forehead laceration.

**101**  Regarding the second accident, he said this very mild collision aggravated the whiplash symptoms of the neck and back from the first accident. Those symptoms rapidly settled and were no longer a concern. He said that the plaintiff's cognitive symptoms did not commence until after the second accident. He learned from the plaintiff that his cognitive symptoms persisted and possibly worsened. He noted Dr. Foti's comment confirming his mild cognitive dysfunction one year after the accidents. Those deficits were not apparent to him at the time of his examination. Dr. Eisen seems to have accepted that the deficits were evident until January 22, 2011. He has not considered Dr. Levis' comments that cognitive deficits were apparent by December 21, 2009.

**102**  Dr. Eisen observed that the plaintiff did not stop work; rather he curtailed his work intensity due to memory impairment and lack of concentration. Dr. Eisen opined that Mr. Gillespie's headaches were not cervicogenic and related to the accident; he believed they were related to small vessel disease of the brain called concomitant of metabolic syndrome predating the accident.

**103**  A head MRI would have been helpful in detecting indications of small vessel disease of the brain, but I note that an MRI did was not done in this case.

**104**  Dr. Eisen also observed that there was no evidence of Mr. Gillespie experiencing amnesia as was noted by Dr. Foti.

**105**  Dr. Eisen said that the plaintiff had all four components of metabolic syndrome: abdominal obesity, hypertension, impaired glucose metabolism, and disordered lipid profile. The presence of metabolic syndrome increases the risk of cognitive impairment.

**Parties' Submissions**

**Plaintiff**

**106**  Mr. Gillespie contends that the first accident resulted in cuts to his head, neck, left shoulder, low back, knee and ankle pain. He developed severe, ongoing headaches.

**107**  Mr. Gillespie claims he suffered a mild traumatic brain injury on the basis of Dr. Levis's evidence. He claims that the injury resulted from his head hitting the car windshield, and his ongoing symptoms resulted from that blow to his head.

**108**  Mr. Gillespie felt dazed and woozy after the collision.

**109**  Mr. Gillespie argues that this post-accident conduct demonstrates the injuries of which he now complains result from damage to his brain. When his wife met him at the hospital, Mr. Gillespie was unsteady on his feet and very agitated. She could not have a coherent conversation with him because he did not make sense; he was going off on tangents. He was anxious and wanting to go home. Once at home he was disoriented, agitated and distressed. In short, his behavior was erratic.

**110**  Dr. Levis confirmed that mild traumatic brain injuries can be diagnosed when a loss of consciousness or alteration of consciousness occurs. An alteration of consciousness means a change in mental status; it could include being woozy, dazed, in a mental fog, confused or experiencing memory loss (I will pause to note that, curiously, this detail was not included in her written report and was only elicited in cross-examination).

**111**  Mr. Gillespie contends that the symptoms continuing from the date of the accident justify an award for past loss of income and that the amount of those damages should be estimated.

**112**  Mr. Gillespie also contends that future income loss has been proven because he suffers from cognitive difficulties that require him to triple check his work. He also takes longer to do his estimates, and the stresses and risks associated with large complex jobs have made it untenable for him to accept those types of projects.

**113**  Before the accident, Mr. Gillespie targeted accumulating retained earnings in his company between $700,000 and $800,000 as the amount needed to retire. Before the accident, his company had $36,472 in retained earnings. In 2010, that account rose to $106,827, and by 2013, it rose to $353,628.

**114**  Mr. Gillespie claims that if retained earnings continue to increase at $143,000 per year (the amount of increase in the fiscal year ending April 30, 2010) he would have reached his goal by working full time until 2015. These projections translate into a future income loss of $640,000. He calculates his actual post-accident loss for the years ending April 30, 2011, 2012 or 2013 at $309,832 and $103,277 per year. This amount is $59,131 less than his pre-accident capacity.

**115**  If Mr. Gillespie had continued to work to age 70, his loss of capacity would be $285,997. The plaintiff invited the Court to consider the capital asset approach outlined in *Brown v. Golaiy* [*(1985), 26 BCLR (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=).

**116**  Mr. Gillespie contends that he is overall less capable of earning income from all types of employment; less marketable or attractive to prospective employers, less able to take advantage of all job opportunities, and less valuable to himself as a person capable of earning income in a competitive market.

**117**  Mr. Gillespie's claims for special damages are limited to extra strength Tylenol and over-the-counter medication. He takes six to eight tablets per night at a cost of $15 for every 200 tablets. This claim is between $600 - $800.

**118**  Regarding cost of future care, Mr. Gillespie claims that extra-strength Tylenol will cost between $1,642 and $3,285 depending on his life expectancy.

**119**  Mr. Gillespie argues that Dr. Eisen's opinion should not be accepted because of his errors in assessing the plaintiff's pre-accident risk factors for metabolic syndrome. He argues that Dr. Eisen erred in concluding that Mr. Gillespie met the criteria for abdominal obesity, untreated hypertension or atherogenic dyslipidemia.

**Defendants**

**120**  The defendants argue that the plaintiff suffered mild soft tissue injuries in the December 2009 accident and no injuries from the January 2010 collision.

**121**  They argue that the plaintiff's evidence was inconsistent between his examination in chief and cross-examination and his discovery testimony. They argue that I should attribute a dishonest motive to the plaintiff and reject his evidence as not credible or reliable.

**122**  The defendants argue that usual indicia of a traumatic brain injury include evidence of an altered state of consciousness or unconsciousness shortly after injury. The defendants argue that no evidence demonstrates that Mr. Gillespie was experiencing either unconsciousness or altered consciousness in the moments after the collision. Therefore, Dr. Levis erred when she concluded that Mr. Gillespie suffered a brain injury. Indeed, Dr. Levis confirmed that headaches and dizziness are nonspecific symptoms that do not necessarily lead to the conclusion of traumatic brain injury.

**123**  The defendants contended that Dr. Levis's evidence should not be given great weight. They argue that she is a part-time practitioner who sees an average of five cases of concussion injury per year, and most of those concussions are sports related injuries. She is not a trained neurologist; rather she functions as a patient advocate accepting the complaints as stated without questioning the veracity or reliability of those complaints.

**124**  The defendants argue that the plaintiff exaggerated the impact of his cognitive deficits on his daily living.

**125**  The defendants argue that the plaintiff lacked credibility and reliability in his testimony at trial. Although Dr. Levis reported that the plaintiff was a good historian, his testimony at trial was quite inconsistent and suggests that he did not have a good memory.

**126**  In direct evidence, Mr. Gillespie gave a detailed account of the events leading up to the collision and what transpired at the scene of the accident. He said he got out of the vehicle, walked around, and noticed that the fire department and ambulance arrived. Someone gave him a towel for his head. The ambulance attendants wanted to take him to hospital; he declined in favor of going to Burnaby Hospital with his passenger.

**127**  At his September 21, 2011 examination for discovery he was asked about the fire department and police attendance at the scene. He responded:

147Q So I understand that the fire department and the police attended the scene; is that correct?

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|  | A |  | Yes. I believe the first person there was a fire department person. Again, I am just going on what I have been told about it. And then the police arrived and a fire - - and ambulance. Where emergency response vehicle or... |  |

148Q Do you not recall the fire department or ambulance attending?

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|  | A |  | Not really. I have very little memory of that at all. I remember the - - being in the emergency response vehicle, but I believe that the first person there was a fire person in his - - in a fire vehicle, not a big fire truck, but I guess like a fire car. And again, I think I am taking most of this from related stories. |  |

**128**  Under cross-examination he said that: he did not remember pain to his head or forehead; did not remember being dizzy, nauseous, or suffering back pain, neck pain or headache when he was at Burnaby Hospital.

**129**  Dr. Levis' records indicate that on December 3, 2009 the plaintiff reported no dizziness and headaches that began the morning of December 3. He did not deny saying this to Dr. Levis but insisted that his headaches and dizziness had begun the day of the accident. The defendants stressed that the discrepancy in the plaintiff's testimony in chief outlining his complaints when he arrived at Burnaby General Hospital and his discovery evidence wherein he lacked a memory of these details ought to erode my confidence in his reliability and credibility.

**130**  The defendants also contend that the plaintiff's report to Dr. Foti in August 2011 and October 2011 that, his day to day memory was reasonable, his geographic sense and concentration were reasonable, and he occasionally lost his train of thought, are against his complaint of more serious memory and concentration problems. They argue that his report to the concussion clinic that he was 90% recovered as of April 15, 2010 demonstrates the unreliability of his trial testimony.

**131**  They contend that, in the absence of corroborating evidence to support his claims and given his self-confessed poor memory, Mr. Gillespie has not proven that he suffered a concussion-type injury that impaired his ability to function and altered his personality.

**Applicable Law**

**Expert Evidence**

**132**  Analyzing conflicting medical opinions requires scrutinizing the facts underlying those opinions.

**133**  *Mazur v. Lucas*, [*2010 BCCA 473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B31M-00000-00&context=) is apposite to the issues in this case. It concerned hearsay evidence that experts relied on in forming opinions. At paras. 38-40, the Court said:

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|  | [38] |  | In *Cunningham v. Slubowski*, [*2003 BCSC 1854*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6160-00000-00&context=) (CanLII), [*2003 BCSC 1854*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6160-00000-00&context=), Madam Justice MacKenzie (now A.C.J.), described the proper use of clinical records, not otherwise in evidence, in the context of a ruling on the admissibility of those records. Although her ruling pertained to the admissibility of clinical records, part of her ruling is nevertheless apt to this case. She said at para. 13: |  |

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|  | [13] |  | Even had the plaintiff complied with s. 42 of the *Evidence Act* to make the clinical records admissible as business records, the consulting letters to Dr. Abelman of the three specialists to whom he referred the plaintiff amount to expert opinions which are inadmissible because of failure to comply with Rule 40A*: F.(K.E.) v. Daoust* [*1995 CanLII 1201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M26K-00000-00&context=) (BC CA), [*(1995), 3 B.C.L.R. (3d) 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M26K-00000-00&context=) (C.A.); *McTavish v. MacGillivray*. The proper use of the clinical records is thus very limited in this case: they can be used by the defendants on cross-examination of the plaintiff, by Dr. Abelman himself as notes to refresh his memory while giving evidence at trial, or in cross-examination of Dr. Abelman on his expert report with respect to the foundation for his opinion. The latter use would include reference to the plaintiff's statements and the opinion of other specialists, but not for proof of the content of those statements and opinions. |  |

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|  | [39] |  | As Watt J. observed after canvassing the jurisprudence on hearsay-based opinions in *R. v. Palma,* [*149 C.C.C. (3d) 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JJ1H-X1FV-00000-00&context=) (Ont. S.C.J.), there has not been "any reasoned departure from the principles stated and reiterated by the Supreme Court of Canada over the better part of three decades". This treatment of hearsay contained in an expert opinion as relevant to weight rather than admissibility has also been commented upon favourably by leading Canadian scholars in the field of evidence (see David Paciocco and L. Steusser, *The Law of Evidence, 5th ed.* (Toronto: Irwin Law, 2008) at 211-213; Alan Bryant et al., *The Law of Evidence in Canada, 3rd ed*. (Markham, Ont.: LexisNexis, 2009) at 838-849). Likewise, the notion of a relaxed hearsay rule in the context of expert evidence is reflected in the model civil jury instructions: R. Dean Wilson et al. *CIVJI: Civil Jury Instructions*, loose-leaf at s.<check-sect/> 4.20.8, which reads: |  |

1. Second, where [the expert witness] gave (his/ her) opinion, it was based (entirely/in part) on statements made to (him/her) by others who were not called to give evidence in this trial, such as [specify].

Because the person(s) who made these statements did not give evidence before you, the opinion of [the expert witness] is founded (entirely/in part) on hearsay evidence.

Normally, hearsay evidence is not admissible for any purpose, but in the case of an expert, the rule is not quite so strict. You may examine this hearsay evidence for the purpose of deciding the weight you will give the opinion of [the expert witness]. You cannot regard that hearsay evidence as evidence of the truth of what is alleged to have been said. However you may use it for the purpose of assessing the weight of the evidence of [the expert witness].

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|  | [40] |  | From these authorities, I would summarize the law on this question as to the admissibility of expert reports containing hearsay evidence as follows: |  |

\* An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others -- this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada,* at 834-835)

\* An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.

\* The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.

\* The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[Emphasis added.]

**134**  And at paras. 34-36, the Court addressed *R. v. Lavallee*, [*[1990] 1 S.C.R. 852*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6548-00000-00&context=) and *R. v. Abbey*, [*[1982] 2 S.C.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), namely in examining the issue of where an expert relies on information for which no admissible evidence exists:

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| 34 |  | Madam Justice Wilson extracted the following principles from *Abbey* (at 893): |  |

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

And she concluded (at 896-897):

In my view, as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion...

Where the factual basis of an expert's opinion is a melange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.

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|  | [35] |  | Mr. Justice Sopinka concurred with Wilson J. in the result in Lavallee, but made some clarifying remarks which are relevant to the present appeal. In his view, the four propositions from Abbey concerning the admissibility and weight of expert opinion evidence may yield a result which is self-contradictory (at 898-899): |  |

The combined effect of numbers 1, 3 and 4 is that an expert opinion relevant in the abstract to a material issue in a trial but based entirely on unproven hearsay (e.g., from the mouth of the accused, as in Abbey) is admissible but entitled to no weight whatsoever. The question that arises is how any evidence can be admissible and yet entitled to no weight. As one commentator has pointed out, an expert opinion based entirely on unproven hearsay must, if anything, be inadmissible by reason of irrelevance, since the facts underlying the expert opinion are the only connection between the opinion and the case: see Wardle, "R. v. Abbey and Psychiatric Opinion Evidence: Requiring the Accused to Testify" (1984), 17 Ottawa L. Rev. 116, at pp. 122-23.

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|  | [36] |  | To resolve the contradiction, he drew a practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise and evidence that an expert obtains from a party to litigation touching a matter directly in issue (at 899-900): |  |

In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in Ares v. Venner, [*1970 CanLII 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-2329-00000-00&context=) (SCC), [*1970 CanLII 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-2329-00000-00&context=) (SCC), [*[1970] S.C.R. 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-2329-00000-00&context=). In R. v. Jordan [*(1984), 39 C.R. (3d) 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M3B7-00000-00&context=) (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that Abbey does not apply in such circumstances. (See also R. v. Zundel [*1987 CanLII 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M19W-00000-00&context=) (ON CA), [*1987 CanLII 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M19W-00000-00&context=) (ON CA), [*(1987), 56 C.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M19W-00000-00&context=) (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field.")

Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with Abbey, has a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight.

[Emphasis added.]

**Credibility and Reliability of Evidence**

**135**  In *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) at para. 186, Dillon J. analyzed the factors to be considered when assessing credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [*[1926] 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont. H.C.); *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Faryna]*; R. v. S.(R.D.), [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

**136**  In *Andrusko v. Alexander*, [*2013 BCSC 985*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0R1-00000-00&context=), Fitzpatrick J. said at para. 49:

If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, [*2007 BCCA 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X443-00000-00&context=), at paras. 15, 49-50.

**Causation**

**137**  A plaintiff must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimus* range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paras. 13-17 [*Athey*].

**138**  The primary test for causation asks: but-for the defendant's ***negligence***, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at paras. 21-23.

**139**  Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. said in *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at para. 78:

... Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [Athey v. Leonati].

**140**  The basic goal of tort law to restore an injured person to the position he or she would have been if not for the defendant's ***negligence***, no better or worse. The tortfeasor must take his victim as they are when the injury happens, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.

**Non-Pecuniary Damages**

**141**  Non-pecuniary damages are awarded to compensate injured people for pain, suffering, loss of enjoyment of life and loss of amenities. Compensation must be fair and reasonable to reflect the impact of injuries on the past and future lives of victims of the ***negligence*** of others.

**142**  Fairness is measured against awards made in comparable cases but although those cases are helpful, they only represent a reference for the assessment of the facts unique to each person.

**143**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), Kirkpatrick J.A. outlined some of the important factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, [*2004 BCCA 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**144**  The measure of non-pecuniary damages must reflect the injured person's personal experiences in coping with injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25 [*Dilello*].

**Past Income Loss**

**145**  Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd*., [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=).

**146**  In *Smith v. Knudsen*, [*2004 BCCA 613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=) the Court said at para. 29:

That instruction accurately reflects the distinction made in the case authorities between proof of actual events and proof of future or hypothetical events. What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

**147**  The burden of proof of actual past events is on a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Drodge v. Kozak,* [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=) at para. 148 [*Drodge*].

**148**  This analysis involves estimating and not calculating the loss: *Steward v. Berezen*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at para. 7.

**Loss of Future Earning Capacity**

**149**  A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, 2) if the plaintiff is impaired, what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy,* [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.) [*Brown*]; *Pallos v. Insurance Corp. of British Columbia*, [*[1995] B.C.J. No. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (S.C.) [*Pallos*]; *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=).

**150**  The assessment of damages is also a matter of judgment, not calculation: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 18.

**151**  As much as possible, the plaintiff should be put in the position he would have been in but for the injuries caused by the defendant's ***negligence***: *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185.

**152**  The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32.

**153**  In *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) [*Perren*], the Court described the plaintiff's burden of proof to succeed in this claim at para. 32:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

**154**  The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach": *Brown*.

**155**  The capital asset approach involves considering factors such as:

1. whether the plaintiff has been rendered less capable overall of earning income from all types of employment;
2. is less marketable or attractive as a potential employee;
3. has lost the ability to take advantage of all job opportunities that might otherwise have been open; and,
4. is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 233.

**156**  The earnings approach involves a form of math-oriented methodology such as: (1) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (2) awarding the plaintiff's entire annual income for a year or two: *Pallos*.

**157**  Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measureable way: *Perren*.

**158**  The principles that apply in assessing loss of future earning capacity were summarized in *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: Athey v. Leonati, supra, at para. 27, Steenblok v. Funk [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: Milina v. Bartsch [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: Rosvold v. Dunlop [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11; Ryder v. Paquette, [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.) . Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: Mulholland (Guardian ad litem of) v. Riley Estate [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: Milina v. Bartsch, supra, at 79. In adjusting for contingencies, the remarks of Dickson J. in Andrews v. Grand & Toy Alberta Ltd., supra, at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ...

**Cost of Future Care**

**159**  A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible.

**160**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) medical evidence must justify claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch*, [*[1985] B.C.J. No. 2762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.) at para. 199 [*Milina*].

**161**  Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=) at para. 74.

**Special Damages**

**162**  An injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. The fundamental governing principle is that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y*., [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at para. 281.

**Discussion**

**1. Should I draw an adverse inference against the plaintiff for failing to call Dr. Foti?**

**163**  I conclude that the circumstances surrounding Dr. Foti's involvement in the plaintiff's treatment and his failure to adduce evidence from Dr. Foti do not warrant the drawing of an adverse inference.

**164**  The defence contends that an adverse inference should be drawn by reason of the plaintiff's failure to adduce evidence from Dr. Foti.

**165**  The plaintiff relies on MacKenzie J.'s comments in *Lipinski v. Mein*, [*2004 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G09S-00000-00&context=) [*Lipinski*]. In that case, the Court refused to draw an adverse inference regarding orthopedic surgeons who were not called at trial but who provided consultation reports to the family doctor. The Court said that it had no reason to draw an adverse inference because the orthopedic surgeons had seen the plaintiff only once. The Court concluded that the family doctor was able to rely on the orthopedic surgeons' opinions, but the absence of their opinions was a matter of weight to be accorded to the family doctor's opinion since she relied on their opinions.

**166**  The defendants submit that the current approach to adverse inferences in injury cases was addressed in *Buksh v. Miles*, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=). Saunders J.A. said at para. 33:

However, it bears reminding that the delivery of medical care is not now as it was in 1964 when Mr. Justice Davey made his comments in *Barker*. There is, today, a proliferation of "walk-in" medical clinics where the role of the "walk-in" clinic physician may be more limited than was the role of a family physician in 1964. Further, even people who have a family doctor may attend one or more such clinics as a matter of convenience, but still rely upon their family physician for core medical advice and treatment. The proposition stated by Mr. Justice Davey does not anticipate this present model of medicalcare. Likewise, the discovery process available to both sides of a lawsuit is not now as it was in 1964 when, in explaining his view on the need to call all treating physicians, Mr. Justice Davey referred to the professional confidence between a doctor and the patient. Today, the free exchange of information and provision of clinical records through document discovery raises the possibility that an adverse inference may be sought in circumstances where it is known to counsel asking for the inference that the opinion of the doctor in question was not adverse to the opposite party.

[Emphasis added]

**167**  Saunders J.A. described the type of detail that should be considered in determining whether an adverse inference might be made:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [35] |  | In this environment, and bearing in mind the position of a lawyer bound to be truthful to the court, it seems to me there is a threshold question that must be addressed before the instruction on adverse inferences is given to the jury: whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial (e.g., an initial agreement to introduce clinical records that work contrary to the inference, or incorporation of that witness's views or observations in the report of a witness called by the other side) a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case. |  |

[Emphasis added]

**168**  *Lipinski* is apposite to this case. Dr. Foti saw Mr. Gillespie only twice and his records were available to the defence. His opinion was contained in his consultation report to Dr. Levis and in the records relied on by Dr. Levis; the extent to which Dr. Levis relied on that opinion goes to the weight of Dr. Levis's evidence. Dr. Eisen also referred to the findings in Dr. Foti's consultation report.

**169**  I observe from the documents that Dr. Foti's opinion was not adverse to Mr. Gillespie's claim.

**170**  In my view the comments in *Buksh* regarding the revelation of a favorable opinion to the plaintiff from documents produced in the litigation are meant to inform the Court that, where a favorable opinion exists but is not produced in the trial, it would be unreasonable to draw an adverse inference due to the absence of such an opinion which is known to the parties to support the plaintiff. The discovery process is in place to shield the defendant from any prejudice that might result if a plaintiff obtains and withholds an adverse opinion from a treating doctor.

**171**  The weight of Dr. Levis's opinion may be adversely affected by the fact that Dr. Foti's evidence was an important feature in forming her opinion but was not tested in the trial. After considering these aspects to the defendants' request, I conclude that this is not an appropriate case to draw an adverse inference against the plaintiff for not adducing Dr. Foti's opinion and I will not draw such an inference.

**2. How much weight should I give the expert medical evidence?**

**172**  After hearing submissions on this issue and carefully examining the expert medical evidence, I give Dr. Levis's opinion diminished weight, and Dr. Eisen's opinion very little weight on the issue of metabolic syndrome.

**173**  Dr. David's evidence was tendered by the plaintiff and not challenged in any way; I give considerable weight to his opinions but I do not find them determinative of the main issues regarding the head injury.

**174**  I will examine each opinion in turn to explain why I prefer Dr. Levis's opinion notwithstanding its diminished weight.

***Dr. Levis***

**175**  Dr. Levis's letter raises significant issues regarding her opinion.

**176**  As an example, she concluded that Mr. Gillespie suffered injuries because of the accident, but she framed her opinion in an odd form; she said "he was diagnosed with mild traumatic head injury (concussion)" suggesting that the diagnosis was made by someone else. In cross-examination she clarified that it was her personal opinion that Mr. Gillespie suffered a traumatic head injury.

**177**  Dr. Levis referred the plaintiff to Dr. Foti, a neurologist, and appended a copy of his consultation report to her report. She said she relied on that opinion but Dr. Foti did not provide an opinion in the trial, and he was obviously not cross-examined on his opinion.

**178**  Dr. Levis has no special training in head injury medicine other than in her training as a family practitioner. She described her training as a family doctor and said she assesses head injury claims, on average, five times per year and usually in regard to sports injuries.

**179**  It is troubling that Dr. Levis relied on the Dr. Foti's neurological opinion without the plaintiff offering Dr. Foti for cross-examination. Indeed, his opinion goes to the heart of the issue to be decided in this case. The most salient factor described in both Dr. Eisen's evidence and Dr. Levis's evidence is the importance of identifying the presence of an altered state of consciousness shortly after the incident as a precondition diagnosing a brain injury following an accident.

**180**  I have not drawn an adverse inference from the fact that Dr. Foti did not testify, but Dr. Levis's opinion is, for that reason, less helpful. Because Dr. Levis relied on the Dr. Foti's opinion, I must assess the weight to be given to her opinion insofar as she has relied on hearsay evidence: *Mazur* at para. 40.

**181**  For the following reasons I accord diminished weight to her opinion based on several issues with the material she relied on.

**182**  Dr. Foti described Mr. Gillespie as being dazed at the scene with a brief amnesic period and imprecision in his recollection of the sequence of events in the following days. It does not appear to me that the evidence given by Mr. Gillespie supports the assumptions cited by Dr. Foti.

**183**  Dr. Levis's account of what the plaintiff told her on December 3, 2009 at this point differs from Dr. Foti.

**184**  Dr. Levis testified that in her December 3, 2009 meeting with the plaintiff, he was a good historian, and he had no troubling memory gaps in his account of the accident. She did not record any evidence of an altered state of consciousness after the accident.

**185**  Moreover, in her initial consultation with Mr. Gillespie, she did not report any concern about a concussion sustained by the plaintiff. She said he did not have dizziness. On her December 21 consultation, he described poor short term memory, reversing numbers and intermittent headaches. At "this visit" she concluded his diagnosis was "most likely post-concussion syndrome".

**186**  When pressed on the issue, Dr. Levis agreed that the first indication in her notes that Mr. Gillespie had suffered an alteration in consciousness was on February 8, 2010. Clearly, that date is well after her initial consultation.

**187**  In her February 8, 2011 consultation request to the concussion clinic, Dr. Levis said that the plaintiff did not suffer post-traumatic amnesia or a loss of consciousness within 30 minutes of the accident. This is directly contrary to Dr. Foti's assumption that Mr. Gillespie did suffer amnesia. Further in her note to the clinic she said the plaintiff had been dazed or confused and had suffered a concussion. It appears her comment could only have been based on Mr. Gillespie's self-report of things on December 21 and not December 3. She did not mention when his confusion or dazed state began or ended. Dr. Levis's first note of the plaintiff's memory problems was on December 21, 2009.

**188**  Dr. Levis did not speak with the plaintiff's wife about his symptoms until several years later. I would have expected his wife to have been an important source of information when Dr. Levis was considering the possibility of a head injury.

**189**  In other words, Dr. Levis did not diagnose an altered state of consciousness or a brain injury in 2009 or in early 2010; the first mention that he was "dazed or confused" was in her report to the clinic was on February 8, 2011.

**190**  Her opinion that the plaintiff had cognitive impairments due to a head injury is based on Mr. Gillespie's self-report and Dr. Foti's opinion. She said that Mr. Gillespie reported dizziness and headaches as "off and on" symptoms. Dr. Levis agreed that headaches, dizziness and cognitive difficulties are not specific indicators of brain injury, but in the current era of the head injury, they are also not required to diagnosis a brain injury. Nonetheless, she agreed that headaches, dizziness and cognitive difficulties can be consistent with whiplash type injuries and soft tissue strains.

**191**  Dr. Levis said that during her August 30, 2010 meeting with the plaintiff she assessed that his injury was improving and that he was doing well. She concurred that the usual course of recovery from a head injury is for the worst symptoms to appear shortly after the incident with gradual recovery over the ensuing six months. Dr. Levis confirmed that, with head injury victims, improvement occurs over time, and concussion symptoms do not usually regress. If a relapse occurs, physicians will usually look for an alternative explanation.

**192**  It is significant that on August 8, 2011, Dr. Foti described the plaintiff's condition to include chronic headaches with migraine features along with persistent cognitive symptoms and reduced concentration. He believed that Mr. Gillespie's headaches could improve with a migraine preventer and suggested neuropsychological testing to look for subtle cognitive deficits.

**193**  Dr. Foti saw the plaintiff in October 2011; he said "his severe headaches have resolved but he still has a mild background headache. He is not experiencing any dry mouth or lightheaded symptoms". His sleep pattern had improved to six hours before he would become restless. He was not tired in the morning and he felt better cognitively. When she saw him on November 14, 2011 he was generally feeling well with less headaches and better sleep. When she saw him on January 9, 2012 his medication was improving his sleep but he had "occasional tweaking and headaches".

**194**  Dr. Levis did not particularize which parts of Dr. Foti's consultation opinion informed her own opinion other than that her acceptance of his diagnosis that he likely suffered a mild traumatic brain injury. It is unclear what part of the temporal connection between the plaintiff's symptoms in the accident played in the formation of Dr. Levis's opinion.

**195**  In January 2013 Mr. Gillespie had run out of amitriptyline medication and was noticing poor sleep, headaches and increased anxiety.

**196**  Dr. Levis's opines that his prognosis for complete recovery of his cognitive impairment persisting and ongoing headaches, irritability, interrupted sleep, is unlikely. Although I have some concerns regarding the flaws in Dr. Levis's opinions, hers is the only evidence I have that addresses Mr. Gillespie's symptoms as resulting from the accident. On the balance of probabilities, her opinion is sufficient to establish that he will endure the effects of his injuries indefinitely.

***Dr. Eisen***

**197**  For reasons advanced by the plaintiff, I place little weight on Dr. Eisen's opinion that Mr. Gillespie's symptoms are the result of metabolic syndrome.

**198**  Dr. Eisen was qualified to give opinion evidence in the field of neurological medicine, including diagnosing and treating mild traumatic brain injuries and the cognitive effects of metabolic syndrome. He was also qualified to give opinions regarding whiplash injuries from a neurological viewpoint.

**199**  Dr. Eisen had extensive qualifications in his field, beginning with graduation from medical school in 1966 and completing his neurology residency in 1970. He acquired traumatic brain injury experience and clinical practice at McGill University and UBC. He was head of the neurology division at Vancouver General Hospital and the acting head of the department of medicine, and he also engaged in numerous professional societies, university committees, editorial boards, research and supervision of postdoctoral fellows.

**200**  Dr. Eisen was cross-examined on several articles addressing the diagnosis and features of mild traumatic brain injuries and metabolic syndrome. As I will mention later, I found that part of his evidence quite helpful.

**201**  Under his summary and conclusions, Dr. Eisen addressed Mr. Gillespie's cognitive problems and said the following:

1. he believed the plaintiff suffered a whiplash type injury in the December 2009 accident graded as a I-II (no neurological deficit or radiological fractures). He did not believe that Mr. Gillespie suffered a head injury (mild) in the accident even though he sustained a frontal scalp laceration;
2. the second accident aggravated his whiplash symptoms, neck and back pain;
3. Mr. Gillespie did not stop working; rather he curtailed his work intensity because of memory impairment and lack of concentration that Mr. Gillespie said resulted from the December 2009 accident. Dr. Eisen confirmed the plaintiff suffered from mild cognitive dysfunction in September 2013. Dr. Foti more than a year after the accident, described the plaintiff as suffering cognitive deficits with accompanying chronic headaches;
4. the plaintiff's cognitive impairment is independent of either motor vehicle accident; rather it is due to small vessel disease of the brain being impacted by the metabolic syndrome. The plaintiff has all four components of the disorder, namely obesity, hypertension, impaired glucose metabolism, and disordered lipid profile; and,
5. the plaintiff's background indicates he is at risk for cardiovascular events, transient ischemic attacks, strokes and progressive dementia.

**202**  Dr. Eisen's report described both accidents as being "of a mild nature".

**203**  He did not view photographs of the plaintiff's car in the first accident until after he presented his report. He was not aware his car was a total loss or that there was $4,900 damage to the taxi and $6,900 damage to the cube van. Although the doctor described the plaintiff's windshield as "shattered" he did not know where he obtained that information.

**204**  Although the second accident was evidently quite minor, in my view, Dr. Eisen was clearly in error in describing the December 2009 accident this way. Although no questions were asked to clarify "mild" "moderate" or "severe" the evidence points to the first accident being in the range of two moderate collisions involving two impacts. Dr. Eisen did not view the photographs of the damage to the three vehicles nor understand the force of impact that led to Mr. Gillespie striking his head. The apparent damage to all three vehicles, the blow to his head, and the description of the impacts during the accident are inconsistent with Dr. Eisen's conclusion that this was a mild impact collision.

**205**  In this regard I conclude that Dr. Eisen's opinion was based on a clear misapprehension of the accident and the injury mechanism. This factor alone diminishes the weight of his report.

**206**  The evidence is uncontroversial that Mr. Gillespie's head struck and shattered the windshield in spite of the airbag deploying.

**207**  I observed that Dr. David concluded that Mr. Gillespie's inner ear dysfunction occurred because of direct impact, acoustic trauma from airbag deployment, and the explosive forces associated with airbag deployment.

**208**  Dr. Eisen formed his opinion that Mr. Gillespie's ongoing cognitive symptoms following the accident are the product of metabolic syndrome based on his assumptions that Gillespie's past and ongoing health included evidence that he was diabetic and had impaired glucose function, was obese, had untreated hypertension, and had impaired lipid metabolism. He described his condition of metabolic syndrome on the basis of those four factors.

**209**  In cross-examination, Dr. Eisen acknowledged:

1. the plaintiff did not meet the diagnostic criteria for diabetes because his Fasting Blood Sugar reading was never greater than seven and his hemoglobin A1C was never greater than 6.5 M. Therefore, he clarified by saying that the plaintiff was pre-diabetic, and he acknowledged that he was wrong in stating that Mr. Gillespie was diabetic;
2. that he assumed that the plaintiff was abdominally obese for the purposes of diagnosing metabolic syndrome. He acknowledged that he had not measured the plaintiff's abdominal obesity and that there was no evidence of Mr. Gillespie being abdominally obese. When confronted with the fact that the accepted definition of obesity requires a body mass index ("BMI") of 30 he acknowledged that the plaintiff's BMI of 26.6 failed to meet the test and he was wrong in concluding that Mr. Gillespie was obese;
3. that he said Mr. Gillespie's impaired glucose function was a further feature supporting his metabolic syndrome diagnosis. Under cross-examination, however, counsel took Dr. Eisen to that part of the authoritative study that established that a linear association between fasting glucose and subclinical cerebrovascular disease is established only when the patient's education is less than Grade 12. Indeed, when education levels exceed Grade 12, the literature does not support the association between insulin resistance and the disease (in passing, I will note, Mr. Gillespie graduated Grade 12 and attended Vancouver City College);
4. that untreated hypertension is a risk factor for metabolic syndrome. However the plaintiff was being treated for hypertension; and,
5. that the fourth component of metabolic syndrome is impaired lipid metabolism/atherogenic dyslipidemia. On this point, the plaintiff began treatment for hypertension on May 16, 2011, and treatment began two days after his blood test showed a 4.1 reading. That reading was significantly below the risk range.

**210**  He described metabolic syndrome as a vascular condition affecting small blood vessels in the brain. These vessels bleed and can lead to larger lesions that may be visible on MRI scans.

**211**  Not only was the expert's opinion based on a clear misapprehension of the accident and the initial injury mechanism but also, in the end, Dr. Eisen's analysis of the underlying data was so flawed that his opinion that the plaintiff suffered from metabolic syndrome is markedly unreliable.

**212**  In his testimony, Dr. Eisen agreed that mild traumatic brain injuries can be diagnosed if the subject has demonstrated some confusion, disorientation and slow thinking. Indeed, an accident victim who is agitated speaks without making sense, is incoherent, fleets from subject to subject, and is disoriented may be exhibiting the type of altered mental state that defines a brain injury.

**213**  Dr. Eisen said that a mental state described as being a type of "brownout" might indicate an altered state of consciousness that in turn confirms the presence of a head injury.

**214**  Dr. Eisen also agreed that certain symptoms - e.g., headaches, dizziness, irritability, anxiety, personality change, fatigue, sleep disturbance, decreased libido, memory dysfunction and impaired concentration and attention - might indicate a head injury.

**215**  Dr. Eisen said that he, before examining the plaintiff, prepared a draft report based on documents that counsel provided to him. He did not produce a copy of that document to the plaintiff before this trial nor did he produce a copy of it at his cross-examination.

**216**  Dr. Eisen's opinion that the plaintiff did not suffer a brain injury or concussion was based on his assumption that the plaintiff's cognitive impairment lasted for one to two weeks after the collision and then disappeared. He believed that it was 11 or 12 months later that the plaintiff's cognitive symptoms of short-term memory loss, loss of concentration and sleep impairment returned.

**217**  However, Dr. Eisen seems to have ignored that Dr. Levis, Fraser Health Concussion Clinic and Dr. Foti recorded the plaintiff's complaints of short-term memory loss, reversing numbers, headaches, dizziness, and difficulty word-finding from December 21, 2009 until October 2011. Clearly, his cognitive problems persisted throughout the months after the accident without abatement; they did not re-emerge 11 -12 months later as assumed by Dr. Eisen. This error by Dr. Eisen relating to his ongoing cognitive impairment would likely have affected his opinion if he had relied on more accurate information.

**218**  Dr. Eisen's misconstruction of the facts leading to his conclusion that the plaintiff did not suffer a head injury in December 2009 is a significant flaw in his opinion. Further, his opinion that Mr. Gillespie developed unrelated cognitive problems in 2011 because he was experiencing metabolic syndrome is not supported by the facts or his own opinion that some of the indications of Mr. Gillespie's altered state of mind in the interval after the accident were indications of an accident related to mild traumatic brain injury.

**219**  While I treat his report with little to no weight, Dr. Eisen helpfully corroborated some things that Dr. Levis said, and I found that the following comments assist the Court.

**220**  Dr. Eisen confirmed as authoritative the conclusions in RW Evans, "Post-Traumatic Headaches" (2004) 22:1 Neurologic Clinics 237, that headaches are common occurrences following head trauma. He agreed that headaches, dizziness, fatigue, irritability, anxiety, insomnia, loss of concentration/memory, and noise sensitivity are the most common complaints of persons suffering post-concussion syndrome. Although he believed that the estimate that 50% of patients with head injuries display these symptoms was high, he accepted that these are the most common complaints that can persist for more than six months. He accepted that headaches can produce cognitive difficulties.

**221**  Dr. Eisen was referred to Menon et al, "Position Statement: Definition of Traumatic Brain Injury" (2010) 91 Arch Phys Med Rehabil 1637, and acknowledged it to be a peer-reviewed authoritative publication. He acknowledged that altered brain function is signaled by an altered mental state at the time of an injury (e.g., with confusion, disorientation, slowed thinking), and it is considered part of the altered consciousness used to establish a diagnosis of mild traumatic brain injury. That study concluded that a diagnosis of mild traumatic brain injury should be considered when these symptoms are reported even if any more objective criteria - e.g., LOC (loss of consciousness), PTA (posttraumatic amnesia), or other neurologic deficits - are absent.

**222**  Dr. Eisen also confirmed that disorientation is part of the altered state of consciousness, and it is a positive indication of brain injury. He also confirmed that persons with head injuries are not reliable reporters of historical events.

**223**  Dr. Eisen was referred to Sterr et al*, "*Are mild head injuries as mild as we think? Neurobehavioral concomitants of chronic post-concussion syndrome" (2006) 6 BMC Neurology 7, and he confirmed to be a good authoritative journal. He agreed that mild static brain injuries typically induce a range of symptoms such as headaches, blurred vision, poor concentration, sleep disturbance, depressed mood or ability. He also confirmed that post-concussion syndrome can occur without a loss of consciousness; indeed, loss of contact or confusion is sufficient.

**224**  Dr. Eisen was also referred to P McCorory et al, "Consensus statement on concussion in the sport: the 4th International Conference on Concussion in Sport held in Zurich, November 2012" (2013) 47 Br J Sport Med 250 with SCAT3, and he was satisfied that the British Journal of Sports Medicine was an authoritative publication. He accepts that loss of consciousness is not necessary to constitute a brain injury, and in some cases, signs may evolve over a number of minutes to hours. He accepts that although cognitive symptoms typically improve, symptoms may be prolonged. He said that "brownout" may be sufficient to indicate a brain injury - e.g., someone could speak to a person but not understand what was happening about them - and being woozy or dazed can also be a feature of a head injury.

**225**  Dr. Eisen agreed that concussed individuals will normally recover within seven to 10 days, but symptoms can be prolonged. He believes that after two to three months, patients begin to worry about their eventual recovery from the symptoms. He recognizes that sleep and cognitive impairment are important symptoms of people with head injuries. Difficulties with concentration and multitasking are evidence of changes in cognitive function of head injured patients.

**3. After the accidents, did the plaintiff suffer symptoms from metabolic syndrome unrelated to the accidents or did he suffer a mild traumatic brain injury caused by the first defendant?**

**226**  I conclude that Mr. Gillespie's brain was injured due to his impact with the front windshield during the first accident and that his symptoms are ongoing.

**227**  In making this decision, I have relied on Dr. Levis's opinion to a very limited extent and more so on Dr. Eisen's comments regarding the scholarly literature relating to diagnosing concussion syndrome.

**228**  Clearly, on the facts, Mr. Gillespie's head forcefully hit against the windshield, shattering the glass.

**229**  The generally accepted medical opinion consistently confirms that a diagnosis of mild traumatic brain injury requires evidence of an altered state of consciousness soon after the event in which the injury is sustained. I am mindful that the experts disagree on whether Mr. Gillespie suffered a mild traumatic head injury with ongoing concussion symptoms. However, headaches, dizziness, fatigue, irritability, anxiety, insomnia, loss of concentration and memory, and noise sensitivity are all indicative of post-concussion syndrome. Confusion, disorientation, and slowed thinking are considered part of the altered consciousness used to establish a diagnosis of mild traumatic brain injury.

**230**  I am mindful that a plaintiff's ability to accurately recall and express post-accident experiences can be hampered by the very injury that is to be assessed. Even the defendants' expert noted that individuals with head injuries are not reliable reporters of historical events. He may have been somewhat unreliable in his testimony; I ascribe that unreliability to the nature of his injury and not to any willful attempt to mislead the Court. I have been able to find the facts necessary to decide this issue in spite of the flaws in Mr. Gillespie's evidence.

**231**  There is always a difficulty in rejecting the connection between an injury and subsequent symptoms based solely on the temporal connection between them. In this case, I am satisfied that the temporal connection is not the only evidence connecting Mr. Gillespie's blow to the head and ongoing cognitive difficulties he described as affecting his work in day-to-day life.

**232**  I accept that, in spite of his memory difficulties, Mr. Gillespie was accurate when he said he" felt woozy" after the accident. He did not report pain at that time and was a very poor historian about the events at the scene and afterwards. However, I accept his wife's evidence that when she saw him at the hospital he was waiting to be treated, he had a bandage on the top of his head, and he appeared disoriented. She said he seemed to be in shock and did not make sense when speaking to her. He was normally an easy-going person but at the hospital seemed agitated, incoherent and erratic. She said he was unsteady on his feet.

**233**  She said Mr. Gillespie would start talking about the accident but his sentences were disjointed. She tried to get him back on track.

**234**  When they returned to their home, he continued to demonstrate erratic behavior. He did not seem to be able to follow through with any task he started, such as making himself a sandwich.

**235**  Where Mr. Gillespie was contradictory in his testimony regarding some of these events and symptoms, I ascribe his lack of consistency to the effects of his injuries. He was not a good historian and struggled to resolve inconsistencies with his previous evidence. I accept that he may have exaggerated his inability to perform his duties as effectively as before the accidents, but his evidence was generally convincing on the important aspects of his current function.

**236**  On the evidence I accept that Mr. Gillespie experienced and continues to experience some of the accepted indicators of post-concussion syndrome and mild traumatic brain injury. Indeed, the concussion clinic treated him as a person who was experiencing those symptoms, and Mr. Gillespie is still following their initial advice. This point would be more forceful if he had returned to the clinic for the suggested second visit and someone from the clinic had testified at the trial. But for the December 2009 collision, I find Mr. Gillespie would not have experienced or continued to experience cognitive impairment, continuing headaches, personality change, sleep disturbance, memory dysfunction, impaired concentration and attention. These are the symptoms associated with post-concussion syndrome and a mild traumatic brain injury.

**237**  Therefore, I have concluded on the balance of probabilities that Mr. Gillespie suffered a mild traumatic head injury with ongoing concussion symptoms. He also suffered inner ear dysfunction that resulted in intermittent imbalance. Those symptoms resolved through a compensation mechanism involving the ear, the brain and his visual systems. He is at risk for further imbalance problems.

**238**  Mr. Gillespie also developed neck and low back pain that worsened in the immediate aftermath of the accident. The second accident exacerbated these symptoms although he recovered within 7 to 10 days. He also had leg and right ankle pain that resolved within a short time.

**239**  Mr. Gillespie does not have any other soft tissue or orthopedic injuries.

**4. If the plaintiff suffered a mild traumatic brain injury that the defendant caused, what are the appropriate damages?**

**240**  For the reasons that follow, the plaintiff's claims are allowed at the following:

1. $85,000 for non-pecuniary damages;
2. $160,000 for past income loss;
3. $140,000 for loss of future income capacity;
4. $2,500 for cost of future care; and,
5. $918 for special damages.

**241**  I will address each category in turn.

***Non-Pecuniary Damages***

**242**  Mr. Gillespie has experienced personality changes - including irritability, aggressiveness, agitation, and a shortened temper - and all these changes impact his ongoing business and social life. Mr. Gillespie also suffers from some sleep interruption, headaches and some limited anxiety that usually occurs for a short time in the early morning and does not appear to affect him during the day.

**243**  Mr. Gillespie injuries have also affected his personal and intimate relationship with his wife.

**244**  Mr. Gillespie worries about his work performance, but these worries do not appear to create the type of anxiety that stresses him in the morning.

**245**  Mr. Gillespie is slower at his work and believes he makes more mistakes due to his cognitive changes. Both Dr. Eisen and Dr. Levis agreed that he has cognitive impairment.

**246**  Regarding recreation, Mr. Gillespie has not returned to golf, but he has a new dog and walks regularly.

**247**  Mr. Gillespie's symptoms have persisted for more than four years, and I find that that he will likely not return to his pre-accident state of health.

**248**  Mr. Gillespie referred to various authorities that I have considered in this analysis: *Drodge*; *Joel v. Paivarinta et al*., [*2005 BCSC 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0XJ-00000-00&context=); *Greaves v. Grace*, [*2008 BCSC 1529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2SB-00000-00&context=); *Mackie v. Gruber*, [*2009 BCSC 1106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624R-00000-00&context=) aff'd in [*2010 BCCA 464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4G2-00000-00&context=); *Phoutharath v. Moscrop*, [*2002 BCSC 686*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G13K-00000-00&context=).

**249**  The defendants referred to *Warren v. Morgan*, [*2013 BCSC 708*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-208H-00000-00&context=) [*Warren*] in suggesting the plaintiff's claim for non-pecuniary damages should be $50,000.

**250**  Of these cases, the most helpful analysis is in *Drodge.*

**251**  In *Drodge*, the claimant suffered chronic headaches with mild cognitive impairments associated with memory and concentration problems. His intimate relationship with his wife and recreational activities were significantly restricted. He suffered chronic low back pain before the accident, but the accident increased its frequency and intensity. The plaintiff had claimed to have suffered a mild traumatic brain injury at the time of the collision; the Court rejected this contention because there was insufficient evidence to confirm that he had a reduced level of consciousness or mentation after the impact.

**252**  Although rejecting the claim of post traumatic brain injury, the Court accepted that the plaintiff had suffered chronic headaches and associated cognitive symptoms for four and a half years following the accident. Dardi J. accepted that the plaintiff suffered severe persistent headaches and mild impairment to his memory and concentration associated with headaches. He was described as having a "crumbling skull" and was awarded $85,000.

**253**  In *Warren*, the claimant was involved in two motor vehicle accidents resulting in soft tissue injuries to her back and a concussion. The first accident was a mere tap and the second caused more substantial damage. She claimed to have severe chronic pain, cognitive impairment and psychological issues. The Court found the plaintiff untruthful and rejected her submissions regarding the trajectory of recovery. The Court concluded that her reaction to the accident was disproportionate and rejected the possibility of ongoing concussion symptoms. The plaintiff was found to be completely recovered from her accident related injuries and awarded $50,000.

**254**  In my view, Mr. Gillespie's circumstances were closely accord with those of the plaintiff in *Drodge.* The details of the plaintiff's post-accident circumstances and ongoing symptoms are not similar to those referred to in *Warren.* Although Mr. Gillespie's evidence was punctuated with some inconsistencies, I do not reject his evidence regarding ongoing symptoms and complaints as was done in *Warren.*

**255**  Although the authorities cited by the plaintiff are helpful, they are only a general guideline. Each case requires an assessment of an individual's circumstances.

**256**  I accept that Mr. Gillespie has suffered from ongoing headaches since the accident and that there has been a significant impairment in his concentration and cognitive function caused by the injury to his head. He suffered soft tissue injuries to his neck and low back which were exacerbated by the second accident.

**257**  His headaches worsened within one week of the accident and shortly after he developed cognitive difficulties that affected his memory and mathematical functions associated with his work. His outward personality changed and he encountered problems with sleeping. He also developed anxiety and a change in mood which have affected his day-to-day life.

**258**  Mr. Gillespie pursued treatment at the concussion clinic and with a neuropsychiatric; regrettably he did not persist with treatment that might have been available from these health professionals. There was no claim that Mr. Gillespie failed to mitigate his damages and I have no evidence to suggest that his current circumstances would have been improved if he had grasped those opportunities.

**259**  Dr. Levis opined that Mr. Gillespie will continue to experience these symptoms of headache, irritability, anxiety, interrupted sleep and cognitive difficulties into the future. The evidence of neither doctor indicated these features of Mr. Gillespie's current condition would be permanent continuing into the future.

**260**  I also take into account that Mr. Gillespie has suffered in vestibular complaint and otolith dysfunction which is not currently symptomatic. The condition may become symptomatic in the future and if this should happen he will be restricted from commercial driving or working around heavy machinery.

**261**  I conclude that a fair and reasonable award reflecting the past and future reality of how Mr. Gillespie's life has been and will be affected due to the accident is $85,000.

***Past Income Loss***

**262**  I am satisfied that the plaintiff's capacity to earn income after the December 2009 accident was impaired because of the injuries he sustained in that collision.

**263**  I do not accept that the plaintiff suffered any impairment to his income earning capacity because of the January 2010 accident.

**264**  His past gross and net incomes were:

|  |  |  |  |
| --- | --- | --- | --- |
| M Gillespie - December 31, 2007 | $489,661 | $62,938 |  |
| M Gillespie - December 31, 2008 | $65,238 | $48,747 |  |
| MG Flooring - April 30, 2009 | $958,180 | ($36,472) |  |
| MG Flooring - April 30, 2010 | $854,173 | $143,529 |  |
| MG Flooring - April 30, 2011 | $628,726 | $77,726 |  |
| MG Flooring - April 30, 2012 | $827,850 | $166,921 |  |
| MG Flooring April 30, 2013 | $420,926 | $22,352 |  |

**265**  For the assessment of income Mr. Gillespie might expect from his efforts, I have used the after tax profit of MG Flooring. This is the amount that accumulates in the company's retained earnings account. I expect it will be paid out as dividend income in due course.

**266**  The plaintiff testified to changes in his cognitive ability, his memory and his personality. He suggests that the combined effect of these symptoms limit his ability to earn the same level of income he would have earned but for the accident and resulting injuries.

**267**  In general, Mr. Gillespie said small jobs are taking him longer, in part, because he needed to repeat his estimate work to be comfortable that he had not made an error.

**268**  Mr. Gillespie said he believes he is working at half of his pre-accident pace. He currently works nine hour days, but I found it difficult to discern the full extent of the work he was not bidding on or capable of performing.

**269**  It is important to note that he "guessed" he was taking twice as long to perform his work before submitting quotes. Before the accident he could do three "takeoffs" (quotes) in a day but would do that work only once; now he repeats his work before submitting his quote. He said that before the accident he could quote a job within 2-3% of his projected profit level; now he is not as accurate and relies on his bookkeeper to keep track of the profit.

**270**  On the whole, Mr. Gillespie was unable to provide any details about projects he quoted on but failed to win the contracts. He said he erases those details from his computer when he fails to secure the work. Despite the fact that he is making a substantial income loss claim in this proceeding, Mr. Gillespie has unfortunately kept no records of the jobs he has turned down or avoided since the accident.

**271**  I will proceed through the various years from the date of the accident to the trial to assess how the accident impacted Mr. Gillespie's work.

**272**  Initially, Mr. Gillespie testified that he did very little work after the accident except for those projects that were already in the mix for the end of the year. However he later testified he could not recall how much work he performed after the accident.

**273**  In any event, it appears he did very few jobs until summer 2010.

**274**  In 2010, he took a two week holiday, and on returning, he was able to function well. He said the work eventually became more computer driven, and he found the stress of large jobs overwhelming. In cross-examination, however, he curiously could not remember taking any holidays in 2010.

**275**  The 2010 profit was $162,000, but some of his 2010 income was earned before the December 2009 accident.

**276**  In 2011, the first full year after the accident, Mr. Gillespie's net profit was $90,808.

**277**  The last job he turned down before trial was a 22,000 square foot flooring replacement job in August 2011. He said he found the job had too much detail, so it was too confusing for him.

**278**  Mr. Gillespie testified that the company's 2012 gross income was $827,850. This amount was up from $628,726 in 2011 and down from $854,173 in 2010. The 2013 gross income fell to $420,926.

**279**  In 2012, he was anxious and not feeling well, but in May 2012, he took 20 days off for vacation during which time the company did no business (he took an additional three weeks off in October 2012 and was generally cutting back his work).

**280**  After returning from his vacation, he felt his health was improved. He was then able to work full time and expend more effort at his work in 2012, but that effort resulted in a decrease of net profit for fiscal 2013 to only $22,352. This was down from fiscal 2012 income of $166,921. This decrease in profit by $100,000, is hard to reconcile with his evidence of better functioning but likely reflects, in part, the added holidays he took in fiscal 2013.

**281**  His 2013 gross revenue dropped to $420,926. Curiously, his gross profit for 2013 declined to $73,306 (17% of gross sales) from $246,869 (30% of gross sales) in 2012. His 2013 cost of goods sold was inordinately higher than 2012, and he did not explain this difference.

**282**  Although the 2013 sales were almost one half of 2012 sales, he testified that 2014 was a good year but no sales numbers were put into evidence. Since May 2013 he has increased his workload. His anxiety, headaches, and sleep disturbance remain at the same level as he has experienced over the last three years.

**283**  In 2014, Mr. Gillespie did one large job for the Salvation Army. He did not have to attend at this jobsite because he was out of town.

**284**  Mr. Gillespie's wife will retire in three years, and he would like to move back to the Okanagan with her. He believes that he needs between $700,000 and $800,000 to fund his retirement. As of 2013, his company's retained earnings were $329,000.

**285**  Mr. Gillespie still enjoys his work in the flooring business, and his business activity is more rewarding when his customers can accommodate his pace. In this case, the plaintiff has kept no records of the work that he might have obtained if he had been fit to investigate and prepare quotes. He did not tender any evidence from prospective customers, other than Mr. Pingot, detailing the larger jobs that could have been available to him but for his injuries.

**286**  The evidence is, in essence, Mr. Gillespie's personal assessment and an anecdotal discussion about the type of work he would have done or would have qualified to do if he had not been limited in his cognitive functioning and memory-loss qualities that were compromised by his injuries.

**287**  Mr. Gillespie bore the burden of proof in this claim. I am not satisfied that his evidence permits me to make any mathematical calculation of the quantum of his loss.

**288**  Mr. Gillespie's company earned revenues of $958,000 and $854,000 in 2009 2010. The company lost money in 2009 (during its first year of operations) because sales costs were $942,677. Net income for 2011 (the first full year after the accident) was almost one half of the income for 2010 and less than one half of the 2012 net income.

**289**  I accept that Mr. Gillespie's capacity to work was reduced during much of 2011, but his holidays that year were a factor in that reduction.

**290**  I am equally satisfied that his injuries did not significantly impact his ability to earn income in fiscal 2012.

**291**  I do not accept Mr. Gillespie's statement that he was working in the order of half-time or at half capacity between the date of the accident and the trial.

**292**  Indeed, his 2011 sales were 74% of his 2010 sales and 65% of 2009 sales. His 2012 post-accident income is substantially greater than his pre-accident income. After taking two extended holidays totaling some 40 days during fiscal 2013, sales of the business were almost one half of the sales for fiscal 2012. Nevertheless, I am satisfied that he has sustained a loss of his capacity overall to earn income from the date of this accident to the present.

**293**  I also keep in mind that this is an assessment and not a calculation.

**294**  The data regarding Mr. Gillespie's historical capacity to earn income from this business in his post-accident performance is uncertain. No evidence was given to inform the Court on his level of sales for fiscal 2014. There was no evidence of efforts by the plaintiff to make accommodations or changes that might have ameliorated the consequences of his injuries.

**295**  Based on all the evidence, I estimate that the impairment to Mr. Gillespie's ability to earn income before the trial is $160,000.

**296**  I recognize this award must be adjusted to reflect the principles in *Hudniuk v. Warkentin,* [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=) [*Hudniuk*].

**297**  Pursuant to s. 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231* (the "Act"), a plaintiff is entitled to recover damages for only his or her past net income loss and the Court must deduct the amounts prescribed by s. 98 of the Act from gross earnings lost: *Hudniuk*.

**298**  Nevertheless, as the income is paid out to Mr. Gillespie, it will likely be subject only to small business tax rates. He will personally pay the difference between his marginal rate of tax and what the company pays. The calculation of the tax impact on these earnings will be determined after the award has been assessed and in accordance with the *Hudniak* principle.

**299**  The parties have leave to address this issue once they have reviewed these reasons.

***Loss of Future Earning Capacity***

**300**  In this case, I am not satisfied that the historical performance of the business enables me to perform a mathematical calculation of future income stream with any degree of confidence; indeed, such a calculation would not reasonably measure what might have happened if the accident had not occurred. No evidence helps identify the economic longevity of a person in Mr. Gillespie's circumstances.

**301**  Counsel suggested I could consider negative and positive contingencies based on the data presented. I am satisfied that there is a real and substantial possibility that, but for the accident, Mr. Gillespie would have earned significantly more income than he is now able to earn confined by the limitations of the effects of his injuries.

**302**  I am satisfied that he was pursuing two objectives: he wanted to accumulate sufficient income to enjoy a comfortable retirement, and he wanted to embrace the optimum vacation opportunities that coincided with his wife's employment.

**303**  The plaintiff invites the Court to assume that he would have continued to work and earn income at the same levels that were open to him before the accident. The vicissitudes in evidence do not warrant such an assumption.

**304**  Mr. Gillespie's income from 2008 - 2009 were well below those incomes he achieved in 2010 and later. He offered no explanation for the differences and he did not address the differences in his businesses performance over those years.

**305**  Income projections depend on levels of commercial construction and renovation ongoing at any given time. No evidence assisted the Court in estimating or anticipating the future prospects in flooring from now until Mr. Gillespie's suggested retirement date.

**306**  In the end, I accept that Mr. Gillespie is less capable overall from earning income from other types of employment; that he would be less marketable or attractive as an employee; that there has been some restriction in his income earning opportunities and he overall is less valuable as a person capable of earning income in a competitive marketplace. His physical and mental resources have been compromised. Nonetheless, he retains the ability to earn income in his flooring business and the task is to assess the impact these injuries will have on his future performance. There will be some diminution in that performance.

**307**  In the end, I will assess his damages with the view to incorporating the principles in *Brown* as the plaintiff argued. I will also consider that some empirical evidence pointed to Mr. Gillespie's economic success achieved in fiscal 2010 to 2012.

**308**  In an effort to find a balance between these two principles, I have concluded that Mr. Gillespie's impaired earning capacity should be assessed at $140,000.

**309**  I observe that the cumulative sums awarded for past and future income losses, when added to his 2013 retained earnings will leave him with $653,000 toward his "nest egg" for retirement.

**310**  He has been busy through 2014, and I expect he will shortly achieve the $800,000 he targeted as the amount he wanted for his retirement and relocation to the Okanagan. I am not satisfied on the balance of probabilities that Mr. Gillespie would have worked beyond 2016 if the accident had not happened.

**311**  I conclude that he is likely to retire shortly after he achieves his financial goal, and he would have retired at the same time if the accident had not happened.

***Costs of Future Care***

**312**  The only amount Mr. Gillespie seeks to cover for future care costs is his requirements for ongoing extra strength Tylenol.

**313**  I am satisfied that he will likely require ongoing medication to deal with his headaches and that the amount claimed to compensate for his future care costs should be allowed at $2,500.

***Special Damages***

**314**  I am equally satisfied that Mr. Gillespie has incurred modest expenses for extra strength Tylenol consumed to date as necessary to ameliorate the headaches that have plagued him since the accident.

**315**  I will allow $918.

**Summary**

**316**  In summary, damages are awarded as follows:

1. $85,000 dollars for non-pecuniary damages;
2. $160,000 for past income loss,
3. $140,000 for loss of future income capacity,
4. $2,500 for cost of future care,
5. $918 for special damages.

**Costs**

**317**  If the parties are unable to agree on costs, they may speak to the issue.

T.C. ARMSTRONG J.

**End of Document**

[***Gregory v. Penner, [2010] B.C.J. No. 32***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251W-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

E.A. Arnold-Bailey J.

Heard: July 13-16, 27 and 28, 2009.

Judgment: January 11, 2010.

Docket: M108105

Registry: New Westminster

**[2010] B.C.J. No. 32** | [*2010 BCSC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23V8-00000-00&context=) | [*2010 CarswellBC 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23V8-00000-00&context=) | [*184 A.C.W.S. (3d) 701*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23V8-00000-00&context=)

Between Lisa Marie Gregory, Plaintiff, and Dustin Patrick Penner a.k.a. Dustin Patrick Donald Penner a.k.a. Dustin Penner, Defendant

(206 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Chest — Neck — Whiplash — Arm injuries — Wrist — Recoverable losses — Loss of income — Housekeeping service — Action by Gregory for damages suffered in a motor vehicle accident — Liability not in issue — Gregory suffered soft tissue injuries to her neck, left arm, shoulder and wrist and a ruptured breast implant — $95,000 non-pecuniary damages — No loss of future income or earning capacity award — No award for housekeeping services — $8,400 for past wage loss, $6,383 for cost of future care, $4,038 for special damages.**

**Damages — Types of damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Employment income — Non-pecuniary loss — Action by Gregory for damages suffered in a motor vehicle accident — Liability not in issue — Gregory suffered soft tissue injuries to her neck, left arm, shoulder and wrist and a ruptured breast implant — $95,000 non-pecuniary damages — No loss of future income or earning capacity award — No award for housekeeping services — $8,400 for past wage loss, $6,383 for cost of future care, $4,038 for special damages.**

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| Action by Gregory for damages suffered in a motor vehicle accident. Liability for the accident was admitted by Penner. Gregory claimed to have suffered soft tissue injuries to the left side of her body, resulting in increased migraine headaches, reduced mobility of her left arm and hand, and a ruptured breast implant that has deformed her left breast. Gregory left her job in a grocery store as a result of the injury and commenced training to become a welder. She held one welding position then eventually gained employment as a driver.  HELD: Action allowed.  Gregory suffered soft tissue, whiplash-related injuries to her neck, left shoulder, arm and wrist in the accident, from which she was substantially recovered 12 months after the accident. The rupture of her left breast implant was caused by the accident, which caused considerable additional pain and discomfort associated with the injury to her left breast and the ongoing disfigurement. Gregory was awarded $65,000 non-pecuniary damages for the ruptured breast implant and $30,000 non-pecuniary damages for her soft tissue injuries. Gregory did not establish that her injuries resulted in a substantial possibility of a future event leading to an income loss. There was no award for loss of future income or future earning capacity. Gregory was awarded $8,400 for past wage loss. It was impossible to quantify the housekeeping services performed by Gregory's daughter. Gregory was awarded $6,383 for cost of future care for the replacement of her breast implant and $4,038 in special damages. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *RSBC 1996, CHAPTER 79*,

**Counsel**

Counsel for the Plaintiff: Thomas L. Spraggs and Afeeza Sovani.

Counsel for the Defendant: Raymon Pici.

**Reasons for Judgment**

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| **E.A. ARNOLD-BAILEY J.** |

**1**   Lisa Marie Gregory (the "plaintiff") is suing Dustin Patrick Penner (the "defendant") for personal injuries she claims to have sustained in a motor vehicle collision that occurred on September 11, 2006, on the Mary Hill Bypass in the City of Port Coquitlam, British Columbia (the "accident"). Liability for the accident is admitted on behalf of the defendant.

**2**  In the accident the rear of the plaintiff's vehicle was struck by the left front of the defendant's vehicle, and as a result of the impact the plaintiff claims to have sustained soft tissue injuries to the left side of her body, resulting in increased migraine headaches, reduced mobility of her left arm and hand, and a ruptured breast implant that has deformed her left breast.

**3**  As a result of these injuries the plaintiff seeks non-pecuniary damages for pain and suffering, an award for diminished capacity to earn income in the future, past wage loss, awards for loss of housekeeping ability, cost of future care, and special damages. After the accident, due to the injuries she sustained, the plaintiff claims that she was unable to maintain her former occupation as a meat packer, and then was unable to work as a welder upon retraining. She also claims to have been financially unable to have her deflated breast implant replaced. In relation to the latter she was unsuccessful in obtaining an advance from the defendant's insurer, the Insurance Corporation of British Columbia ("ICBC"), to facilitate the same: *Gregory v. Penner*, [*2009 BCSC 1661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2KF-00000-00&context=).

**4**  The defendant disputes the extent and duration of the injuries claimed by the plaintiff. The defendant's position is that the plaintiff indicated to a doctor on August 2, 2007, that she was recovered from the accident-related injuries so as to qualify for re-training as a welder. Counsel for the defendant submits that the evidence linking an increase in the number and severity of the plaintiff's migraine headaches to the accident is equivocal, and that causation has not been established in relation to the rupture of the plaintiff's left breast implant.

**Issues to be Decided**

**5**  The substantive issues to be decided in this case are:

1. Which of the injuries and symptoms the plaintiff claims to suffer from, since the date of the accident to the trial, are proven on a balance of probabilities to have been contributed to or caused by the defendant's ***negligence*** in the accident, as opposed to being pre-existing, unrelated, or not proven to exist.
2. What is the extent of the losses suffered by the plaintiff proven to arise from the accident and what is the appropriate quantum of damages in relation to those losses under the various heads of damages claimed, namely:
3. non-pecuniary loss;
4. loss of future income and future earning capacity;
5. past wage loss;
6. loss of housekeeping ability;
7. cost of future care; and
8. special damages.
9. To what extent, if any, has the plaintiff failed to mitigate the injuries and symptoms attributable to the accident by not following the prescribed treatment plan or engaging in activities not conducive to a full recovery.

**The Trial**

**6**  At the trial the plaintiff testified, as did Dr. Ross Horton, a plastic surgeon. Also called on behalf of the plaintiff was Mr. John Banks, a rehabilitation consultant with a specialty in vocational evaluation and work capacity assessment; Mr. Darren Benning, an economist and an expert in the past and future income loss; Ms. Marion Nihls, a physiotherapist and a specialist in musculoskeletal rehabilitation; Mr. Fred Chaloner, a long-time friend of the plaintiff; Ms. Irene Mayoh, the plaintiff's mother; and Ms. Chandra Mayoh, the plaintiff's daughter. After sustained efforts by counsel for the plaintiff and an adjournment of the trial for several weeks, the plaintiff was also able to call her family doctor, Dr. Cremona Ticea, who failed to attend in response to the first subpoena.

**7**  In response the defendant, Dustin Penner, testified; as did Mr. Leonard Solstad, an estimator employed by ICBC. Counsel for the defendant also presented the video disposition evidence of Dr. Karen Wardill.

**Relevant Evidence and Findings**

**8**  I have reviewed the evidence at trial in order to determine the issues I have identified. What follows is a summary of the relevant facts derived from the evidence and my findings as to the credibility and reliability of the testimony of each witness. I will conclude this section with my findings as to the nature and extent of the plaintiff's injuries that I find were caused by the accident.

*Evidence called on behalf of the plaintiff*

*The Plaintiff, Lisa Marie Gregory*

**9**  The plaintiff is a 44 year old separated mother of two: a 20 year old daughter (Chandra Mayoh, who testified); and a son, aged 11 years. On the date of the accident, September 11, 2006, the plaintiff was going to pick up her son up from school when she got caught in stop and go traffic on the Mary Hill Bypass and her vehicle, a leased white 2002 Impala, was struck from behind by a black Volkswagen vehicle, owned and driven by the defendant. She recalled feeling "a big jolt", but was not sure what had happened. She said she had difficulty undoing her seat belt. The plaintiff recalled being asked by a female police officer, who was attending another accident nearby, if she wanted an ambulance to be called, which she declined because she was anxious to collect her son from school. She was asked by the officer to move her car to the side, which she did. When she got out of her car she saw black marks on the rear of her vehicle. She saw that the front left signal light and the front bumper of the Volkswagen were damaged. After the police officer wrote up the report, the plaintiff continued on her way.

**10**  In terms of how she recalled the moment of the collision and how she felt immediately afterwards, the plaintiff said she remembered "a big jolt" in which her head was flung forward and that her chest was very sore afterwards. She said that her chest must have been hit as she was flung forward.

**11**  The plaintiff said that she was wearing her shoulder seat belt across her chest and lap, her head rest was properly adjusted, and, if the car had an air bag, it did not go off. Within a few minutes of the accident the plaintiff said she felt pain in her chest and the back of her neck. Right after the accident she considered herself to be in shock, a nervous wreck, very disoriented, and only thinking of picking up her son. She said that she reported the accident immediately to ICBC. Later that evening she experienced nausea, chest pain, and a very severe migraine for which she took Gravol and four Advil.

**12**  Upon waking up the next day the plaintiff said that her neck was stiff and sore, she had an excruciating migraine, her chest was sore, and her left arm felt "like almost I had to unfold it". She described tingling feelings in both hands and she found that her left wrist was hard to rotate, unlike her right one. She said that her chest, and specifically the area of her left breast, was very sore. She also noticed bruises on her inner left forearm in the area of her bicep. She described the pain as being a "9 out of 10". She said that she went from being very physically fit to feeling like she had been beaten up.

**13**  The plaintiff testified that prior to the accident she had not been in any motor vehicle accidents in the previous two years or undergone any surgeries except the breast augmentation surgery in Florida in 2005. She said that she had breast augmentation surgery at the age of 39 to improve her appearance and her self-esteem. She chose to have saline implants as she understood them to be the safest.

**14**  The day after the accident the plaintiff went to work at Hill's Foods, an organic meat, poultry and game processing and packing plant ("Hill's"), where she worked packing their products. Prior to the accident she had been working there for a year, full-time with some over-time, for $12 per hour plus benefits. She had a problem her first day back to work, when she was unable to lift a tray of chicken breasts and it collapsed to the floor. She said that lifting like this was something that she did many times every day at work. She recalled starting the day with a migraine and experiencing numbness and tingling in her hands and fingers, which she described as "the weirdest sensation". She said that when she rotated her left wrist it felt really stiff and it got stiffer throughout the day. The plaintiff recalls telling her supervisor that she was not feeling well and thinks that she left early. She also recalls experiencing nausea that day and taking more Advil and Gravol before going to bed early.

**15**  Several days after the accident the plaintiff found that her left arm was very stiff and sore, more towards the area of her left shoulder. When she went to get dressed she found it difficult to put clothes on if she had to raise her arms. The plaintiff described the tingling sensation in her hands to be accompanied by a burning sensation in the area of her left breast, and that at times she would feel like there was electricity going through her left breast.

**16**  Three weeks after the accident, the plaintiff recalled that she woke up with a stiff neck and a migraine, tingling in her hands, and experienced difficulty in rotating her left wrist and in moving her left shoulder while putting on her tops and bras. Upon getting out of the shower, she noticed that her left breast was quite a bit smaller than her right breast and she asked her daughter to take a look. The plaintiff also noticed that a lump was present in her left breast. She recalled sitting on her couch in excruciating pain and in tears, taking four to six Ibuprofen or Advil at a time. She became concerned that she had breast cancer. She described the pain she experienced in her left breast at this time as approaching the pain of child birth.

**17**  As a result, the plaintiff went to the Emergency Department at Eagle Ridge Hospital on October 4, 2006. She said that she waited until then because as a single mother with two children she felt that it was imperative that she continue working.

**18**  The plaintiff indicated that she did work between September 12 and October 5, 2006, on "light duties", which she was initially able to manage, but after time she found that she could not perform the required light duties as the burning sensation in her breast, the pain in her left wrist, soreness in her left shoulder, and tingling in her fingers were still there. About a month after the accident the plaintiff said that she still could not drive as she could not shoulder check. She continued to experience a burning feeling in her chest all the time, and periodically she felt the electrical-like sensation.

**19**  The plaintiff went to her family doctor, Dr. Shehata, on October 5, 2006, and told her about the accident. She reported experiencing the worst migraines ever, pain and soreness in her neck, left shoulder and left wrist, and that her chest was hurting as a result of the accident. At this time, the plaintiff said she was having a lot of trouble getting dressed and was experiencing a lot of burning and pain in her chest. Dr. Shehata arranged for the plaintiff to have an ultra sound of her left breast on October 11, 2006, upon which the plaintiff learned that the saline implant in her left breast had ruptured and the lump was caused by fat necrosis.

**20**  The plaintiff was referred to Dr. Horton, a plastic surgeon, whom she saw on October 31, 2006. She learned from Dr. Horton that she would need to have surgery to replace the implant. He gave her a series of cortisone shots over several appointments to dissipate the fat necrosis in her left breast. The plaintiff found the injections very upsetting as she is scared of needles. However, she said that she was prepared to do anything to get rid of the lump, which was about an inch and a half in diameter. On one occasion, the needle broke in the course of Dr. Horton trying to inject the lump. She said that the treatments reduced the size of the lump but that the burning and electrical sensations in her left breast persisted.

**21**  The plaintiff understood that as of early 2007 she should have the left breast implant replaced, but said that she had not done so because she could not afford it. She was advised it would cost about $6,000. She said that she did not have the funds, nor was she able to borrow them. She said that the ICBC claims adjuster declined to provide her with the necessary funds because he took the position that the ruptured breast implant was not connected to the accident.

**22**  At the time of trial the plaintiff had not had the surgery to replace the ruptured left breast implant. She understood that the lump of necrotic fat was gone. She indicated that she was still experiencing the burning and electrical sensations in the area of her left breast on a sporadic basis throughout the day, every day. She said that when she had the lump the pain was a "9", whereas now it is a "7". She continues to take Ibuprofen and Advil. She remains concerned about the presence of a foreign object in her left breast and worries about cancer, as she previously had cervical cancer. She indicated that she is able to have the surgery when she can pay for it as long as Dr. Horton is available, and that it will take about two weeks for her to recover. She is worried that because of scar tissue in her left breast she may not be able to have a size "D" cup again when she gets the left implant replaced and, if that is the case, then she will have to have the size of her right breast implant reduced. At present, to create the appearance of breasts of equal size the plaintiff wears an artificial rubber breast inside the left side of her bra.

**23**  From October 5, 2006, until just prior to trial, the plaintiff continued to see physicians to help her recover, in terms of diagnosing the extent of her injuries and recommending treatment, including physiotherapy. Initially, she saw Dr. Shehata, and then switched to the Kensington Clinic where she primarily saw Dr. Ticea, and on other occasions saw other doctors, including Dr. Wardill, who testified by video deposition on behalf of the defendant. Between October 2006 and April 2007, the doctors provided the plaintiff with a series of notes regarding her employment, initially recommending her for light duties, and then explaining absences of varying length due to accident-related complaints.

**24**  The plaintiff testified that this ongoing injury has affected her life considerably. She will not date and has found that she is less outgoing and sociable, which has caused her relationship with her children to deteriorate somewhat. She likes to express her love for her children with physical gestures and finds this is hampered by her injuries and the on-going pain and discomfort. She also finds that since the accident she has started to experience panic attacks that happen quite frequently and "out of the blue", in which her heart races, her hands shake, and she cannot control her breathing. Also, about a year after the accident the plaintiff said that she became "very gloomy". On January 19, 2007, Dr. Ticea recommended that the plaintiff see a psychologist. The plaintiff advised that she was unable to see a psychologist due to the cost. She was also assessed by a psychiatrist upon referral from a doctor at the clinic.

**25**  The plaintiff obtained an initial referral for physiotherapy from Dr. Shehata, which was followed up by subsequent referrals from Dr. Ticea. The plaintiff underwent physiotherapy with Ms. Marion Nihls. She attended a number of appointments before taking a more intensive program of active rehabilitation, which ended in March 2007. The plaintiff considered that for about six months afterwards she slowly came to have greater movement in her neck and left wrist.

**26**  With regards to her neck, the plaintiff says she still experiences pain and stiffness. She still experiences pain in her left shoulder and has problems with the rotation in her left wrist. When she gets up in the morning she regularly has a migraine. She sleeps with two pillows under her head and shoulders as she learned in the active rehabilitation program. She continues to do the exercises she learned in that program to strengthen her neck, her left arm and wrist, and her core. She does stretching exercises for 10 to 15 minutes in the morning, and found on the day she testified that her neck was "not too bad", as she could bend it quite well to the right, but was more limited to the left, and could only rotate it about 25 degrees from straight ahead.

**27**  Prior to the accident, the plaintiff testified that she was very physically active and in excellent shape. She rode her bike and liked to wrestle and play physically with her children. She was a serious recreational swimmer, having been a competitive swimmer when she was young. She also played tennis, hiked, played co-ed baseball and taught swimming. As a young woman, she indicated that she had set national records for the butterfly and breast strokes, and had held the 100 meter national record in the butterfly stroke for the 30 to 35 year old age group. She was also a long distance runner at 12 years old and held a record for running the mile. She had then cross-trained between running and swimming to build up her endurance.

**28**  Since the accident the plaintiff testified that she cannot run as the movement causes her left breast to hurt, so now she walks quickly and wears a sports bra to reduce movement of her left breast. She said that she has not returned to swimming recreationally since the accident. She stated that when she goes to the pool she has a cappuccino while watching her son swim. She says that her neck is always sore and to exercise she takes Ibuprofen so as not to "end up as big as a house".

**29**  In terms of the plaintiff's ability to lift things, she said that in the first month after the accident she was unable to lift things like she had previously, as indicated with the collapse of the tray of chicken at Hill's. She said her employment at Hill's involved being on her feet all day, moving and lifting meat and poultry products on racks and trays. Initially, when she was on light duties in October 2006, she was able to perform the required tasks, but then as her left breast became more sore and the fat necrosis accumulated her chest became very painful, the pain in her neck affected her arm, and she found the pain to be more severe in the rotator cuff of her left shoulder. When she was no longer able to work she was on medical unemployment and then regular employment insurance.

**30**  In the spring of 2007, the plaintiff took an active rehabilitation program recommended by her doctor and supported by ICBC. This consisted of a "full-time" rehabilitation program for four days a week, for a period of four to six weeks. She said that her breast pain was not diminished by this program, but found that it was a great help in terms of increasing her mobility and reducing the pain in the area of her neck, left shoulder, arm and wrist, and in increasing her mobility. She found that it reduced her migraines. She considered that it reduced the pain in these areas from "a nine" to "a seven". It was recommended at the end of the program that she return to light duties at Hill's, but she had been laid off.

**31**  The plaintiff explained that prior to the accident she had wanted to go to welding school at BCIT to become a qualified welder. The program took a year and she believed she was strong enough to do the work. She considered the rate of pay and employment opportunities to be desirable. In order to be approved for the welding course, the plaintiff required medical clearance. She testified that she considered herself not to be completely recovered, but well enough to go to welding school. She saw Dr. Wardill at the Kensington Clinic on August 2, 2007, to obtain the necessary medical approval to take the welding course, although the plaintiff disagrees that she ever said she was "fully recovered" from the accident. The plaintiff actually attended twice for this purpose as she saw Dr. Wardill again the next day to have the note permitting her to take the welding course reworded to make it more explicit.

**32**  The plaintiff started in the welding course in August 2007, having been involved in the preceding months arranging for Employment Insurance to pay for it. She indicated that the course started at 7 a.m. with several hours of classes and then the rest of the training was "hands on" until 1:30 p.m. During this time, she said that she was still experiencing the burning and electrical sensations in her left breast. She found that her left arm was sore and she missed some classes due to migraines. However, she testified that she continued because she thought she was going to have "a good career" as a welder that would be good for her family. In particular, the plaintiff found that the welding and lifting of cast iron to be heavy work. It took her a long time to pass a particular part of the course that involved lifting over her head and much bending of her neck. She said she had to take two to six Advil a day to manage the course.

**33**  The plaintiff completed the welding program in March 2008. Whereas in the beginning she was at the top of the class, she was one of the last three students to complete it. She said that she "staggered" at the end with her migraines really bothering her. When she considered how she felt in March 2008, as compared to March 2007, the plaintiff said that her migraines had increased and her left arm was bothering her more than it had.

**34**  In April 2008, the plaintiff found welding work at Vedder Steel at $15 per hour. She worked with structural steel, which was not her preference, but as she was just out of training she took the position. She was given a blue print and was to produce what was set out on it. She found that the first several days were not bad and she was getting her tasks done, with some assistance in terms of heavy lifting. However, she found that as she continued her left shoulder became more sore, her neck very tense, and her left wrist very stiff. The plaintiff worked for Vedder Steel for about a month until she quit on April 23, 2008. During that time she thought that she called in sick once.

**35**  The plaintiff then sought work at a pulp mill, where she worked for a month. She took a position running a "barker", which she understood would not be physically demanding. She found that the long periods of sitting aggravated her neck, and that the job entailed more physical work than she had appreciated, including the lifting of heavy chains. During this time, she experienced on-going soreness in her left shoulder and found that her left wrist was not strong. She continued to experience the burning and electrical sensations in her left breast, which she considered to be present all the time, but which she noticed sporadically. She recalled that she missed one or two days during the month that she worked at the pulp mill.

**36**  Then the plaintiff went to work for a construction company doing site clean-up for $15 per hour. Her duties entailed cleaning the inside of houses, emptying garbage, carrying wood to a pile, raking, and the tamping of sand with a machine. She found that the more she raked and did the heavier outside duties, the more her left shoulder and left wrist hurt. She experienced "quite a few" migraines and found that she was taking up to four Advil or Ibuprofen per day to manage the pain. In particular, she found that the pulling motion in raking aggravated her left shoulder and caused pain in her left breast by movement of the implant. Over the period of four months that she held this employment, the plaintiff said that she missed between two to four days. She left to seek other employment.

**37**  The plaintiff then found full-time employment with Transparent Glazing as a driver. She delivered prefabricated windows to job sites. This employment did not require any heavy lifting, although she found it difficult to look over her left shoulder. She remained working for Transparent Glass for ten months, until she was laid off in July 2009. During that time she missed about four days of work. The plaintiff said that this work involved a variety of tasks that permitted her to change positions often.

**38**  In terms of her employment aspirations, the plaintiff said that before the accident her career goal was to be a welder, and while she obtained her level C, she had hoped to get her level B and work making kitchen equipment. Since the accident she said her goals have changed and she now thinks she would like to take a course at Douglas College to qualify to teach sports to children, particularly aboriginal children. She said that she had high hopes for her recovery after the active rehabilitation program, but she has had to switch gears because of the ongoing pain in her neck, left shoulder and the stiffness in her left wrist.

**39**  The plaintiff testified at some length about her other concerns regarding being able to provide for her children as a single parent and pay for basic living expenses. She said that her relationship with her children is diminished by the financial stress she is experiencing. She said she is short money for rent all the time and cannot remember when she last had a fridge full of food.

**40**  Prior to the accident the plaintiff testified that she did all her own housekeeping chores, which included vacuuming, washing windows, cleaning bathrooms, doing laundry and washing floors. She had also worked cleaning at a townhouse complex for $17 per hour. She liked to move her furniture around to vacuum. Since the accident, the plaintiff said she does some housekeeping chores but her children help more. Right after the accident her daughter did the vacuuming for several months. Now the plaintiff finds the vacuum heavy and does not move the furniture. Her son sweeps the floors and her daughter washes them. At present she says she can do housekeeping chores, but it takes her longer than it did prior to the accident.

**41**  The plaintiff described a long history of migraine headaches that pre-dated the accident but she claims that since the accident her migraine headaches increased in frequency and severity. While living in Florida prior to 2005, she said she sought medical attention for migraines once every three months and that she had also attended the hospital emergency department a couple of times. The plaintiff testified that prior to the accident she might have a really bad migraine such that she went to the hospital emergency department for an injection once every three months. In addition, once every six months she would have a less severe one that she could treat by staying at home and taking prescribed medication. She recalled during one week in December 2006 she had to attend the hospital emergency room three times.

**42**  Since the accident, the plaintiff testified that she experiences a really severe migraine once a week and she often has to attend the emergency department. She said the longest a migraine lasts is two days and her symptoms post-accident are much more severe. She has intense pain all over her head, her eyes are very sensitive to light, and her vomiting is much worse, extending at times for more than 24 hours. A less severe migraine lasts a few hours. The plaintiff said she wakes up with tension in her neck every day and has less severe migraines a couple of times a week. She stated she does not get headaches, as to her a headache is a migraine. She said that her family doctor, Dr. Ticea, prescribed her a medication called Imitrex for headaches, which is very expensive. After the accident, she was referred to a specialist for her headaches, Dr. Bozak, a neurologist, who prescribed medication called Topamax and referred her to specialized acupuncture treatments.

**43**  The plaintiff said she is puzzled as to why in the last four months she has found her left shoulder to be significantly worse. She finds that the pain has become excruciating when she tries to reach overhead, or to undo her bra. She testified that she wakes up every day with migraines, has pain down her neck into her left shoulder and finds that her mobility in her left wrist is reduced by stiffness. She says she is still experiencing the electrical and burning sensations in her left breast. The plaintiff said she now feels like she has gone back to "square one" and that the pain seems to come from nowhere and catch her off guard.

**44**  At the time of trial, the plaintiff said she experiences about two good days a week when she is able to wake up in the morning and do her stretching exercises and not take pain medications. On the bad days she wakes up with tension in her neck, her left arm feels sore such that she has to "unfold it". She has to take two Advil or Ibuprofen to do her neck exercises. She has a migraine that she would rate as a three or four in terms of the level of discomfort. The pain in her left shoulder does not subside and she experiences the burning and electrical sensations in her left breast. She often goes for a walk with the hope that fresh air will help. The plaintiff says she has three or four bad days a week and some days are a combination of good and bad. Overall she is taking four to six Advil a day to manage her discomfort. For her migraine headaches since the accident she takes Topamax, and a nasal spray. She said she would take Imitrex as prescribed if she was able to afford it.

**45**  In cross-examination, the plaintiff was questioned about the accident itself. She agreed the traffic had just started to move forward when her vehicle was hit from behind. She said she was looking ahead and did not anticipate the accident. The plaintiff said she felt a jolt and that she is not certain exactly what happened because she was disoriented. When pressed about this later in cross-examination, the plaintiff said she recalled a jolt and being flung forward, and that she believed she hit the steering wheel, but she could not say for sure. She put her car in park, got out without assistance and remained conscious. She recalls looking at the black marks on the rear of her vehicle, which she said did not appear to be accurately shown on the photographs taken later. At the time of the accident, she did not speak to the defendant, but recalls the defendant saying that it did not look too bad. When it was put to the plaintiff that she did not go to a hospital emergency or a walk-in clinic right after the accident because she had no symptoms she vigorously denied that was so, stressing that her only concern was getting to school to pick up her son.

**46**  The plaintiff admitted that she had panic attacks and experienced depression before the accident. She agreed she had taken Adivan in 2006. At one time she also started taking a medication for depression, Effexor, but was not sure how long she took it.

**47**  In terms of stress the plaintiff agreed that in 2005 and 2006 her son was experiencing learning disabilities, which had not been diagnosed as anxiety-related at the time. She was worried about him and took him for treatment and to appointments. She agreed that her son's lack of well-being causes her stress, but said he is better now. She agreed her son had a serious incident at school after the accident that she had to deal with. Her spouse's lack of involvement with the children has also caused problems, since her separation in early 2005. She agreed that her lay off from Transparent Glazing was due to a combination of shortage of work and issues related to her son.

**48**  The plaintiff confirmed that she found the active rehabilitation program to be helpful and agreed that she talked to the physiotherapist, Ms. Nihls, about how she was feeling. However, she denied ever telling Ms. Nihls that she was virtually pain free. Once the program finished she said she would have been able to go back to Hill's on light duties, but as there was no position for her, she applied for Employment Insurance. She said that since the active rehabilitation program ended in April 2007 she has continued with the stretches and other exercises at home and has gone to physiotherapy. She also said that at the end of the program she did go into the pool and did kicking. She said she could not do the butterfly stroke, but admitted she could get a workout by swimming. She also resumed hiking and went to the gym to exercise and do active physiotherapy until her 30 day pass ran out. She can lift weights but not as heavy as before the accident and she cannot use some of the machines as she did before. She also confirmed that she drove for the first month after the accident and then found it difficult and uncomfortable to do so, at which time her daughter took over taking her son to school and driving to the grocery store. However, the plaintiff then resumed driving.

**49**  The plaintiff agreed that she saw Dr. Wardill in August 2007 because Dr. Ticea was not available. She needed a note for the welding program to confirm that she was well enough to take the course. However, the plaintiff denies telling Dr. Wardill that she was completely recovered. When she was shown the note from Dr. Wardill dated August 2, 2007, she recalled that she had gone back to Dr. Wardill a day later to get a further note that specified she was physically able to do the duties of a welder.

**50**  She agreed that several weeks later she injured her right shoulder while playing with her son on the monkey bars for which she also saw her doctor. She was prescribed pain medication including Selebrex, Tylenol 3, and Naproxen and was then referred to physiotherapy for her right shoulder.

**51**  In terms of getting her left breast implant replaced, the plaintiff indicated that she did contact the plastic surgeon in Florida who performed the surgery, and she understood that for Mentor implants a person has to buy a warranty with the implants. The warranty only covers the cost of the replacement implant itself. The surgeon suggested to her that she have her surgery done in British Columbia because of all the associated costs. She agreed that she had not looked into the costs of accommodations and flights to Florida to have the replacement surgery performed there.

*Dr. Ross Horton, plastic surgeon*

**52**  Dr. Horton, a physician with specialty in plastic and reconstructive surgery, first saw the plaintiff on October 31, 2006, and then on four further occasions prior to trial.

**53**  According to his report, dated March 6, 2008, Dr. Horton noted the following upon his first examination of the plaintiff's left breast on October 31, 2006:

On examination in the office, she was found to have a D cup size breast on the right side. The breast was soft and non-tender. There was a well-healed periareolar scar. The implant was palpable and had a capsular contracture of a Baker II/IV level. Examination of the left side revealed that there is an obvious asymmetry with a lack of superior fullness. The implant was not palpable. There was a retraction of the areola with muscle contraction. There was a well-healed periareolar scar. There was a 4 centimeter area just superior to the areola which was very tender and an obvious palpable mass within the breast tissue.

It is my impression in seeing her that she had a ruptured saline implant on the left side. As well as fat necrosis on the left side due to a blow to the left breast. [sic] I arranged for her to have a mammogram. This was done on November 17, 2006, which revealed, "collapsed left subgladular saline implant. Fat necrosis with cluster of adjacent dystrophic calcification at 12 o'clock. Follow up left breast mammogram is suggested in six months to reassess the calcification and fatty necrosis." This mammogram correlated with the ultra sound done on October 11, 2006, which suggested of a traumatic implant rupture. The mammogram also confirmed the clinical impression of the fat necrosis.

**54**  Dr. Horton came to the following conclusion in his report:

In conclusion this patient has had a blow to the left chest secondary to a motor vehicle accident which has resulted in force significant enough to rupture the saline implant and to cause some fat necrosis to the left breast. Although the fat necrosis has improved, she has been left with a ruptured implant. This will leave her with a permanent disability with breast asymmetry. At some point in time she should have the ruptured implant removed and replaced with a new intact implant. This may be complicated somewhat due to the additional scarring to the left breast subsequent to the injury. I would expect that when she does undergo the correction of the left breast deformity, she will require a general anaesthetic done under a daycare procedure and will require 2-3 weeks recovery for this. Despite the corrective surgery she may still have some permanent residual asymmetry of the breasts.

**55**  In an update to his report dated September 22, 2008, Dr. Horton stated the following:

She had an MRI done on November 17, 2006, which revealed a collapsed left subglandular saline implant as well as fat necrosis adjacent to the implant. While there are many causes of implant rupture, trauma to the chest is certainly known to be one of these. The fat necrosis on the MRI suggests that there was significant left breast trauma. Since I did not examine her before her accident I can only assume she had an intact implant before the accident.

[...]

Removal of the implant and examination of the implant may or may not collaborate the trauma.

**56**  In his direct examination, Dr. Horton explained that with age natural breasts sag and there is a lack of projection in the upper half of the breast. Implants restore the breasts. According to Dr. Horton, an experienced plastic surgeon is able to distinguish between an implant and a natural breast.

**57**  A saline breast implant involves implanting a silicone bag with a small valve into which the physician injects the saline to create volume, the saline being the same as used for intravenous fluids. If the implant leaks saline, the body absorbs it.

**58**  Dr. Horton also explained that the fat necrosis he observed on the left side of the plaintiff's chest is "fat death" that occurs as a result of a tissue injury in which some of the cells die. He said that fat necrosis is associated with trauma and that it is commonly seen in thighs or buttocks.

**59**  Dr. Horton's interpretation of the plaintiff's mammogram results were that they revealed a sub-glandular collapsed implant, which means a ruptured breast implant that has shrunken down because of compression forces. He indicated that when he first examined the plaintiff's left breast he observed the lack of fullness and found that he could not palpate the implant. He said that the fact that he noted she had a mass near the left areola meant that she had experienced enough trauma to rupture the implant and to have the fat die, thus forming a four centimetre lump of scar tissue.

**60**  Dr. Horton then explained the procedure, involving a series of injections, which he used to try to reduce the size of the lump of necrotic scar tissue in the plaintiff's left breast. He indicated that without the injections to soften the lump it would tend to calcify and then would have to be cut out. Generally, he said that he would not want to make an incision on the upper part of the plaintiff's left breast as large as a golf ball to remove the lump, which is how he referred to the initial size of the lump. Thus, he set about to reduce its size so that by February 28, 2007, with the injections, he considered she had improved to the point that the implant could be replaced. In terms of timing of the replacement surgery, Dr. Horton said that an earlier time is better, but he declined to say optimal.

**61**  In terms of the outcome of the replacement surgery, Dr. Horton indicated that residual asymmetry could occur as the scar tissue remaining in the plaintiff's left breast would probably have to be cut out with the insertion of the new implant, and this could affect healing such that the breast size with the new implant may not be exactly the same.

**62**  On cross-examination Dr. Horton agreed that there were all kinds of circumstances in which implants may rupture, including by spontaneous leaking due to a faulty product or improper surgical procedures. He indicated that he was familiar with the Mentor type of implants used by the plaintiff and had used them in the past, although he now preferred a different brand. With regards to Mentor products, Dr. Horton indicated that the spontaneous leak rate is between one and five percent, and that would have been the rate prior to May 2005, when the plaintiff had her augmentation surgery. In the present case, Dr. Horton said that he does not know where the source of the leak is and upon removal the implant is sent back to the manufacturer. He assumes that a Mentor implant has a warranty and if the implant is defective the manufacturer provides a new implant. He said usually in such circumstances the original surgeon will do the replacement surgery without charge.

**63**  When asked about his conclusion in this case that the force of the accident ruptured the implant, Dr. Horton agreed that was an assumption on his part, although he said he had seen many patients who had been in traffic accidents. Key to his finding that the plaintiff's left breast implant ruptured in the accident was the presence of the fat necrosis. He indicated without that, the deflation of the implant could have been spontaneous, but with the presence of the necrotic fat there was "a pretty good likelihood" the deflation was caused by trauma.

**64**  Dr. Horton agreed that without replacement the plaintiff has a permanent disability, and with replacement the plaintiff may also have a permanent disability, but the latter was difficult to determine at this point. He also agreed that it was not uncommon for non-augmented breasts to be asymmetrical, and that even when augmentation surgery goes as planned some asymmetry may occur.

**65**  Dr. Horton impressed the Court as a highly knowledgeable, professional, and honest witness. I accept all of his testimony without hesitation.

*Dr. Cremona Ticea, the plaintiff's family physician*

**66**  Dr. Ticea, a specialist in general family medicine, saw the plaintiff on a number of occasions through the Kensington Medical Clinic, including with regards to injuries related to the accident and other concerns. Interspersed between the appointments the plaintiff had with Dr. Ticea were appointments with other doctors in the clinic. Dr. Ticea indicated that she relied on entries to the plaintiff's chart made by the other doctors.

**67**  Initially, after the accident the plaintiff saw Dr. Shehata, and then she moved to the Kensington Clinic, where on November 1, 2006, she first saw Dr. Symon.

**68**  In her testimony, Dr. Ticea reviewed the various appointments she had with the plaintiff starting on November 7, 2006, when she noted that the plaintiff had seen Dr. Horton due the ruptured left breast implant and fat necrosis. She also noted that the plaintiff had been off work for a week and reviewed the medication the plaintiff was taking for pain: Toradol and Tylenol. The plaintiff indicated to her that the pain her left arm and left breast was constant. The plaintiff's range of motion in her neck was full but she had pain on the right side with all motions. Her range of motion in her shoulders was full. Dr. Ticea's assessment was that the plaintiff was suffering from a ruptured breast implant and whiplash associated disorder. The plaintiff was to transfer her medical records, attend physiotherapy and come back in a week.

**69**  When Dr. Ticea saw the plaintiff on November 21, 2006, she diagnosed left arm strain and the ruptured left breast implant and recommended three weeks off work with continued physiotherapy. She provided a note indicating that the plaintiff was unable to work for medical reasons related to the accident from November 21 to December 15, 2006.

**70**  Dr. Ticea next saw the plaintiff on November 28, 2006, for follow up and to coordinate an appointment with Dr. Horton on December 1, 2006, for an evaluation of the ruptured implant. Dr. Ticea signed an Employment Insurance form for the plaintiff that applied until the end of January 2007. She recommended that the plaintiff have physiotherapy twice a week.

**71**  Dr. Ticea saw the plaintiff on December 14, 2006, by which time she had seen Dr. Horton and had a steroid injection in the lump in her breast. When Dr. Ticea examined the plaintiff she noted that she had a reduced range of motion in her left wrist, which was stiff, that her left hand was weaker, and she had pain in her left shoulder joint. The plaintiff was advised to continue physiotherapy, she was to attend to have her left shoulder x-rayed, and if that was negative, she was to have nerve conduction studies done. In addition to the other medication she was taking she was to take Flexeril, a muscle relaxant, three times a day.

**72**  Dr. Ticea saw the plaintiff on January 11, 2007, at which time she was still off work, unable to work with her left arm. She considered the plaintiff to be worse since she had last seen her, as her wrist was stiff and she had pain coming from her shoulder. The plaintiff advised that she had been in hospital for migraines, and had been given a head scan, which was normal. She had been given a nasal spray called Axert and a trial of Eletriptan, both migraine medications. She was on an antihypertensive medication for fluid retention from the non-steroidal anti-inflammatory drugs. Dr. Ticea recommended physiotherapy and nerve conduction studies.

**73**  When Dr. Ticea saw the plaintiff on January 19, 2007, she noted three reasons for the visit: the first to do with the accident and the lump in the plaintiff's left breast that required another steroid injection by Dr. Horton; the second to do with migraines; and the third regarding counselling for divorce and the accident. Dr. Ticea said that she did not treat the plaintiff for depression, but noted that Dr. Wardill had referred her to Dr. Rana, a psychiatrist who works out of their clinic.

**74**  On February 5, 2007, Dr. Ticea saw the plaintiff because she needed a note for work. She reported feeling similar pain in the left side of her neck, left arm and spoke of changing work. Dr. Ticea recommended that the plaintiff not work until February 28, 2007, when she was next scheduled to see Dr. Horton.

**75**  On February 8, 2007, the plaintiff attended to see Dr. Ticea to obtain a prescription for active rehabilitation which was to be approved by ICBC.

**76**  On March 8, 2007, Dr. Ticea saw the plaintiff for an assessment prior to her starting active rehabilitation. The plaintiff advised that she was having two to three migraines per month, and that she was taking a migraine medication, Relpax. The plaintiff reported that she had seen Dr. Horton the prior week and the breast lump was 'nice and soft' and that if ICBC paid, she was going to replace the saline implant. The nerve conduction studies were negative, having been conducted by a neurologist, Dr. Bozek. Dr. Ticea recommended a CT scan of the plaintiff's cervical spine.

**77**  On March 21, 2007, Dr. Ticea saw the plaintiff, who had experienced a bad migraine for several days. The plaintiff had been to a hospital emergency department that day and given morphine and another migraine medication to try. She continued to be unable to work and Dr. Ticea provided her with a note that recommended she be off work until April 21, 2007. The plaintiff also complained of experiencing panic attacks, in relation to which Dr. Ticea recommended breathing exercises and Clinazapan, in addition to prescribing Ativan sublingually as needed.

**78**  Dr. Ticea examined the plaintiff on April 12, 2007, for the purpose of completing a report at the request of ICBC. By this time the plaintiff had substantially completed the active rehabilitation program and it was suggested that she was ready to return to work on light duties. In the report, Dr. Ticea noted that the plaintiff's current complaints were that her left wrist was weak, and she was experiencing neck pain, migraines, left breast pain, and depression. Dr. Ticea listed the following as accident-related clinical diagnoses: left shoulder soft-tissue injuries, left wrist sprain, and ruptured left breast implant. She considered the plaintiff's upper back injuries at a Grade II in terms of severity (with Grade I indicating no physical signs and Grade IV indicating a fracture or dislocation) according to ICBC's categories on the report.

**79**  Dr. Ticea said that on April 12, 2007, when she completed the report, she was of the view that the injuries sustained by the plaintiff in the accident were having an impact on her ability to work full-time, as the plaintiff had advised her that she worked in a factory doing heavy lifting. Dr. Ticea recommended that the plaintiff try a gradual return to work but the plaintiff advised her that there were no light duties available at her previous employment.

**80**  On April 26, 2007, Dr. Ticea saw the plaintiff in relation to migraines, and for a pelvic examination. She called the plaintiff back on May 2, 2007, to provide a prescription for a symptom unrelated to the accident, at which time the plaintiff advised that she had finished the active rehabilitation program and was doing the exercises at home.

**81**  On May 20, 2007, Dr. Ticea saw the plaintiff in relation to migraines.

**82**  On July 20, 2007, Dr. Ticea saw the plaintiff in relation to the injury to her right shoulder, in relation to which she had seen another physician on July 8, 2007. She was in considerable pain on July 20, 2007, and was having trouble managing the pain with Naproxen and was unable to take Tylenol 3. It was shortly after this that Dr. Ticea noted the plaintiff saw Dr. Wardill and sought the note saying she was completely recovered from the accident.

**83**  On August 16, 2007, Dr. Ticea saw the plaintiff to review the x-ray of her right shoulder.

**84**  On August 24, 2007, Dr. Ticea saw the plaintiff in relation to migraines and she reported that she had been seen in the Emergency Department the previous night. She was taking Topamax for migraines and would continue to do so. She was also taking Ativan sublingually, and Melatonin for insomnia.

**85**  On September 7, 2007, Dr. Ticea again saw the plaintiff, who complained of excruciating pain in her left shoulder related to the accident. Dr. Ticea noted that the plaintiff advised that Tylenol 3 helped.

**86**  The plaintiff then saw Dr. Ticea for four appointments unrelated to the injuries from the accident between September 19, 2007, and October 24, 2007.

**87**  Dr. Ticea last saw the plaintiff on December 4, 2007, in relation to continuing problems arising from the accident regarding her left breast and left wrist.

**88**  On January 8, 2008, Dr. Ticea saw the plaintiff for tendonitis in her right shoulder, for which she was to continue with physiotherapy and take Advil as needed. Dr. Ticea noted that the plaintiff had experienced the worst month of her life due to school problems. She was to continue to take Adivan and Topamax.

**89**  As Dr. Ticea had been away until recently, she examined the plaintiff on July 24, 2009, before testifying. Prior to that Dr. Ticea had not seen the plaintiff for a year. At the recent examination of the plaintiff Dr. Ticea advised that the plaintiff was still complaining of difficulties arising from the accident. Dr. Ticea noted that the plaintiff had a decreased range of motion in her neck and in her left shoulder and arm, as well as asymmetry in breast size, with her left breast being smaller than her right. She noted that the plaintiff's right shoulder was not bothering her.

*Marion Nihls, physiotherapist*

**90**  Ms. Nihls, a physiotherapist with a specialty in muscular skeletal rehabilitation, treated the plaintiff from November 22, 2006, to April 20, 2007. She described her treatment sessions with the plaintiff and reviewed the detailed notes she made of each visit.

**91**  During her initial assessment of the plaintiff on November 22, 2006, Ms. Nihls noted that the plaintiff's left breast was softer and lower than her right, and that she complained of pain in her left shoulder and upper arm, as well as numbness in both hands. The plaintiff described no prior injury to her neck and back but did report a long history of migraine headaches, including severe ones every three to six months that required her to attend a hospital emergency for treatment. During the physical examination of the plaintiff Ms. Nihls noted that there was a muscle spasm between her C 4 and C 6 vertebrae, some weakness between the fourth and fifth fingers on her left hand, and some stiffness and pain in T 4 to T 9 region of the thoracic spine.

**92**  Ms. Nihls saw the plaintiff again on November 24, 2006, at which time she complained of increased soreness and localized pain in the left anterior of her shoulder and down her arm. On November 29, 2006, the plaintiff advised that her shoulder had improved after the prior treatment. On November 30, 2006, the plaintiff cancelled her appointment because of a migraine headache. On December 5, 2006, she apparently called to advise that she was ceasing treatment until ICBC covered the cost because she could not afford to continue.

**93**  The plaintiff resumed physiotherapy on February 27, 2007, at which time she advised she was experiencing frequent migraines, right neck stiffness, pain in her left arm to her hand, and stiffness and trouble grasping with her left hand. She also advised of a burning sensation in her left breast and that the breast lump was less sore and softer after two injections from Dr. Horton. The plaintiff attended several sessions in early March 2007 before she commenced more frequent attendances as part of the active rehabilitation program that commenced March 8, 2007.

**94**  As the active rehabilitation program progressed Ms. Nihls noted improvement in relation to the plaintiff's neck, left shoulder and arm, and gradually in relation to her left wrist. Ms. Nihls noted in her interim report, dated April 5, 2007, that the plaintiff had improved in terms of her strength and level of functional activity. She was cleared for a graduated return to work as of April 18, 2007, but had been laid off, and was planning to go to BCIT in August.

**95**  The last time Ms. Nihls treated the plaintiff was April 20, 2007, at which time she noted that her cervical spine had improved but she continued to feel tightness on the right side at the base of the neck with left neck rotation. Ms. Nihls manipulated the T 5 area of the spine between the shoulder blades and the muscles on the right side of the neck. Thereafter, she was seen by another physiotherapist.

**96**  Ms. Nihls followed up with the plaintiff by calling her at home on May 29, 2007, which she reported upon in her letter to ICBC of the same date. In that letter Ms. Nihls notes "I spoke with Lisa today and she reported she is managing well and is virtually pain free".

*John J. Banks, rehabilitation consultant*

**97**  Mr. Banks is a rehabilitation consultant with a specialty in vocational evaluation and work capacity assessment. He conducted a work capacity assessment of the plaintiff on August 18, 2008. In his detailed report he assessed many different aspects of the plaintiff's physical ability to perform many tasks and activities related to her physical ability to work.

**98**  Mr. Banks had the following specific observations in his report regarding the plaintiff's ability to sit for periods of time:

Ms. Gregory demonstrated the ability to continuously sit for variable periods of time during the assessment, ranging from 33 minutes while involved in upper extremity static strength testing activities, to 2 hours during the intake interview. Ms. Gregory did not stand or stretch during the seated intake interview. No shifting of position was noted while seated however; Ms. Gregory reported increased neck and left wrist discomfort at the completion of 120 minutes of sustained sitting during the intake interview, and increased left wrist discomfort change was reported following 33 minutes of continuous sitting while participating in repetitive upper extremity tasks towards the end of the assessment day. Overall, Ms. Gregory's tolerance for brief duration and prolonged sitting was rated as functional, with increased left wrist discomfort noted with upper extremity use while seated.

**99**  In relation to the plaintiff's ability to reach overhead in terms of discomfort he noted the following:

Ms. Gregory demonstrated marginally functional tolerances for sustained overhead reaching while standing, with increased subjective neck discomfort reported while working for prolonged periods of time with her arms extended overhead while standing. Repetitive forward and overhead reaching activities were performed at a level of speed and efficiency consistent with competitive employment standards. She demonstrated functional unilateral hand dexterity, scoring within the above competitive employment standards using the left and right hands.

**100**  Mr. Banks did observe some weakness in the plaintiff's left hand that he noted as follows:

No weakness was noted in the right or left hands for grasping/holding during bilateral lifting and carrying activities in the range from 10-40 pounds however; biomechanical compensation was noted in the left hand when lifting and carrying in excess of this range. Functional isometric grip strength was measured in the MEDIUM strength range for the right and left hands. Isometric pinch strength was also measured in the MEDIUM strength range for both hands during key grip and 3-point pinch assessment, when compared to industrial standards.

**101**  Mr. Banks concluded as following about the plaintiff's overall physical condition:

From a vocational perspective, the results of the current assessment suggest Ms. Gregory has demonstrated sufficient body dexterity and limb coordination but has not demonstrated sufficient strength to tolerate all of the physical demands of her previous job as a meat packer (NOC# 9462.2: PA=V2, C0, H1, B2, L1, S4), including the related occupations of meat roll tier, meat portion cutter, poultry preparer, meat cutter, bench woman, meat trimmer and meat boner. These occupations are considered by the NOC to be HEAVY (S4) strength occupations, with work activities involving lifting, carrying, pushing, pulling and handling loads greater than 20 kg (44 pounds); a body dexterity requirement for standing and/or walking (B2) and; a requirement for upper limb coordination (L1). Specific limitations relate to a reduced tolerance for repetitively lifting at a HEAVY (S4) strength level, especially above shoulder height, with biomechanical breakdown noted when lifting and carrying weights in excess of 40 pounds. Similarly, Ms. Gregory has exhibited limitations on activities requiring pushing or weight bearing with the left wrist as measured during isometric testing on the ERGOS work simulator, as well as a reduced tolerance for pinching and gripping strength. This places her functional ability for pushing, pinching and gripping in the MEDIUM (S#) strength range, with limitations in functional frequency of loading the left wrist.

The results of assessment indicate that Ms. Gregory currently is able to perform her current job duties as a new construction cleaner (NOC# 6661: PA=V2, C0, H1, B4, L1, S3), including the related occupations of building cleaner, cleaner, cleaning woman light duty cleaner, residence cleaner and sweeper. These occupations are considered by the NOC to be MEDIUM (S3) strength occupations, with work activities involving lifting, carrying, pushing, pulling and handling loads from 10 kg (22 pounds) to 20 kg (44 pounds); a body dexterity requirement for sitting, standing and/or walking as well as other body positions such as stooping kneeling and crouching (B2) and; a requirement for upper limb coordination (L1).

Ms. Gregory's ability to perform in her current job duties is dependent on her ability to be able to change position during the work day. This has allowed her to tolerate her job duties especially with her limited ability to load the left wrist.

**102**  In his testimony, Mr. Banks reviewed the findings in his report. He focused on the plaintiff's weaknesses, which included that she could not maintain a functional lateral grasp with her left hand that forced her to use her wrist or ulna. He noted signs of neck strain with sitting beyond 120 minutes. He found the plaintiff had no limitations in terms of her use of her right hand, but in relation to her left hand within two minutes she would be compensating for limitations. According to Mr. Banks if there is a significant difference in a person's ability to pronate and supinate a hand it is indicative of a functional limitation. In the plaintiff's case the pronation of left hand was compromised and she experienced pain in her elbow and in a distribution down the side of her left hand.

**103**  On cross-examination, Mr. Banks indicated that in his report, when he states that the pronation and supination of her hand were good, that was without loading the hands. He agreed that he had not assessed the plaintiff prior to accident and that he did not know what her limitations were prior to it. He agreed that the National Occupational Classification ("NOC") definitions of the job requirements for a meat packer and a new construction cleaner were not job specific and so they may not apply to the job that the plaintiff was doing at Hill's. He confirmed that he terminated dynamic lifting because the plaintiff was showing weakness on her left side. In terms of his testing for the range of motion in both of the plaintiff's shoulders, Mr. Banks considered both shoulders were functional but he noted that if the plaintiff used her left shoulder there was mild recruitment of other muscles to help. In terms of neck flexion, Mr. Banks noted that while performing lateral flexion there was pulling on the right when bending to the left.

*Darren Benning, economist*

**104**  Mr. Benning, an economist, was qualified to provide expert opinion evidence in the area of past and future income loss. His report assumes that the plaintiff, absent the accident, would have completed the training necessary to work as a welder and thereafter would have pursued employment in that occupation through to an assumed retirement at no later than age 65 years. It also assumes that as a result of the accident the plaintiff would continue what was her current employment at Transparent Glazing, working 40 hours per week at a wage rate of $15.50 per hour. In the alternative, he assumed that the plaintiff will retain and seek employment as a child and youth care counsellor. Mr. Benning included various negative contingencies in his calculations including non-participation in the labour force, unemployment, working less than fulltime, and premature death. The plaintiff was 43 years old at the time he wrote his report.

**105**  Mr. Benning estimates future loss of employment income with the plaintiff continuing with employment at Transparent Glazing or a comparable employer as compared to working as a welder to be $323,481. In the event that she were to continue after the accident as a child and youth care counsellor as opposed to a welder, and assuming two years training in relation to the former, he estimates her future loss of employment income to be $341,089.

**106**  It is relevant to note that Mr. Benning reviewed the plaintiff's income: for 2003 and 2004 -- $1 per year; for 2005 -- $6,872 (of which $4,272 was reported as T4 Earnings and $2,600 was Other Employment Income); for 2006 -- $18,497 (primarily T4 Earnings); for 2007 -- $20,619 (all but $95 of which was from Employment Insurance benefits); and for 2008 -- $22,994 (of which $11,644 was reported as T4 Earnings, $7,238 was Other Employment Income, and $4,112 was from Employment Insurance benefits). Mr. Benning reviewed the plaintiff's recent employment at Vedder Steel from April 2 to April 23, 2008, her employment at Fraser Ridge Industries as a construction site cleaner between April 25 and May 14, 2008, followed by her employment at Transparent Glazing as a delivery driver, which commenced in September 2008. He reports that as of April 20, 2009, when he wrote his report, the plaintiff was on a leave of absence from Transparent Glazing to care for her son that was anticipated to last four to six weeks.

**107**  On cross-examination, Mr. Benning admitted that his calculations were based on a wage rate as a welder of $20 per hour, and to the extent she was earning $15 per hour at Vedder Steel he overestimated her past loss. He said that his census data was based on male welders as there is insufficient data available for female welders. He agreed that typically women do have lower career earnings influenced by time out for child rearing, less tenure and less experience, and the fact that men tend to work more hours per week than women even in the same type of employment. As there was no evidence that the plaintiff would get her trade certificate in welding he used data for all welders.

*Chandra Mayoh, the plaintiff's daughter*

**108**  Chandra Mayoh, the plaintiff's daughter ("Chandra"), is 20 years old. She is in her second year pursuing a Bachelor of Arts with a major in criminology. She lives with her mother and was aware of the accident. She recalled seeing her mother the day of the accident when she was complaining about pain in her neck and left shoulder and arm. She thought that her mother took a couple of days off work because her arm was hurting and then she went back to work. Chandra recalled that her mother found the pain in her left arm to be too much, so she applied for medical leave from work for a few months.

**109**  Chandra recalled that as her mother's pain worsened, she started to get migraines from the tension in her neck, and to experience sharp pain in her left breast. She described her mother asking her to look at the latter's left breast when she was naked. Chandra said that she saw that her mother's left breast had changed in size and that it was "now flat" and there was a significant size difference between her left and right breasts. She said that her mother is still bothered by this and that she still experiences pain and discomfort in both her left arm and left breast. She has seen her mother get a sharp pain and lean over and grab her arm. She said her mother has to rest and not use her arm. She understood her mother to take Tylenol and Aspirin and Topamax for her migraines and that she has lost track of the number of doctors her mother has attended. She confirmed that her mother had a very bad migraine after the prior day in court, and she had to take her to the hospital for a shot to stop her vomiting. She indicated that her mother started to take Topamax for migraines after the accident because she was getting migraines several times a week, whereas before the accident her mother was getting migraines once a month or once every couple of months.

**110**  Chandra said that she does not swim with her mother anymore as her mother cannot rotate her arm, and her mother does not "rough house" with her little brother because that hurts her arm. She said her mother has gained 15 pounds since she has stopped swimming.

**111**  Chandra indicated that prior to the accident her mother did the house cleaning but now she helps out by moving everything that has to be moved. Chandra said she helps because she is older and because her mother is in pain.

**112**  Chandra has also noticed that her mother is more stressed and less social since the accident. She says her mother goes out less with friends now and that she feels down. She recalled that after her rehabilitation program her mother's injuries got better but then they seemed to return.

**113**  On cross-examination, Chandra indicated that prior to the accident she was in high school and would keep her own room clean and do her dishes. She did not take her brother to school as she was in high school herself.

*Irene Mayoh, the plaintiff's mother*

**114**  Ms. Mayoh, a registered nurse with over 30 years' experience, testified in relation to her daughter, the plaintiff. Ms. Mayoh said that as a young woman the plaintiff was very physically active. She was a competitive swimmer, had many friends, and seemed to be a very happy person. Prior to the accident, Ms. Mayoh indicated that the plaintiff had no serious health problems except migraines, which she managed. To Ms. Mayoh her daughter seemed fine, busy with her children, doing her own house work that included washing walls and vacuuming, and shopping for and carrying the groceries for her family. She recalled that the plaintiff wore clothing in a size three or four, whereas since the accident she wears a size 10 to 12. She believes that the plaintiff has gained about 30 pounds since the accident. Ms. Mayoh recalled that at age 26 or 27 the plaintiff had surgery for cervical cancer.

**115**  Ms. Mayoh recalled that the plaintiff called her the day of the accident and that she saw her about two weeks afterwards. At that time, Ms. Mayoh recalled that the plaintiff complained of pain in her neck and down her left arm, and weakness in her left wrist. The plaintiff moved her head tentatively and complained of pain in her left shoulder and wrist when she lifted things.

**116**  Ms. Mayoh testified that she noticed that the plaintiff's injuries from the accident did not seem to improve. They appeared to be worsening and came to affect her mental state. She observed the plaintiff to become stressed out and increasingly worried about how she was going to provide for her children. The plaintiff continued to complain of pain at the back of her neck, down her left shoulder and into her left wrist. She also observed that the plaintiff still had trouble putting on her seat belt.

**117**  Ms. Mayoh indicated that she was aware that the plaintiff had breast augmentation surgery in 2005. She also knew of the plaintiff's problem with the left implant bursting "pretty quick right after the accident" after she had noticed it while taking a shower. Ms. Mayoh indicated that the plaintiff's left breast is really deformed as it resembles "a bag with nothing in it." She also indicated that she was not aware of her daughter having any problems with her breasts or any deformities in her breasts prior to the accident. Ms. Mayoh said that after the accident she helped the plaintiff as much as she could in terms of helping with her grandson and with household chores, including laundry, cleaning and cooking. She indicated that she does not do as much at present but that she still prepares dinner for the plaintiff and her family about twice a month. Ms. Mayoh said that she did not know the cost of repairing the plaintiff's left breast, and that her daughter had not asked her for money for that purpose.

**118**  On cross-examination Ms. Mayoh said that she had never gone with the plaintiff to a hospital emergency department for treatment for the latter's migraines, but she was aware that her daughter had done so. Ms. Mayoh said she was with the plaintiff in 2005 for a month when the latter had the breast implant surgery and changed the dressings for her. She confirmed that she had seen the plaintiff's bare breasts since the surgery and more recently since the accident.

*Fred Chaloner, family friend*

**119**  Mr. Chaloner is a long-time family friend of the plaintiff's. In particular, his recently-deceased wife was a very close friend to the plaintiff for almost 20 years, from the time the plaintiff had her first child. He said his wife used to babysit when the plaintiff's children were young and he would go over and help her with chores.

**120**  Mr. Chaloner said that he was aware that the plaintiff was in an accident in 2006 but said she never elaborated on the details. He said after 2006 she was fairly active in terms of swimming and other activities. He encouraged her to go into welding. He said she was enthusiastic about welding and did not need a lot of encouragement. He recalled that once she finished the welding course and got a job as a welder she would come over and complain that her back, shoulder and breasts were giving her trouble. She would take Tylenol and then go home. She indicated that the job at Vedder Steel was "just killing her". He noticed she had slowed down and was not as active as she had been. She seemed moodier, less upbeat, and quieter when she came over to visit. Whereas the plaintiff and his wife got along perfectly before the accident, he recalled that they had a few squabbles after it. He was aware that the plaintiff was not feeling well and that something had gone wrong with her breast. He also recalled that after she was working for the window business she would drop by to see him after work and ask for a Tylenol. She talked about having to quit that job. Mr. Chaloner's impression was that prior to the accident she was "a fireball". His view was that she was no longer that way and seemed to have slowed down a lot.

**121**  On cross-examination Mr. Chaloner agreed that while his wife had cancer and during the times when the plaintiff seemed moody, he was busy working, and thus, did not interfere. He recalled that the plaintiff would complain about her shoulder and her back and always talked about trying to get the money to pay for cortisone shots. He understood she had to leave her employment as her shoulder would not take it.

*Evidence called on behalf of the defendant*

*Dustin Penner, the defendant*

**122**  Mr. Penner testified that he was travelling east in his Volkswagen in stop and go traffic on the Mary Hill bypass between 2 and 4 p.m. on September 11, 2006, when he noticed an accident on the other side of the road. It distracted him and when he looked back it was too late for him to avoid a collision with the rear bumper of the plaintiff's vehicle directly in front of him. He estimated his speed to have been about 10 to 15 kilometres per hour when he slammed on his brakes as his vehicle stuck the plaintiff's vehicle. He recalled getting out and checking the damage, a police officer attending to take statements, and that he received a ticket for several infractions. He said that he did not talk to the driver of the other vehicle at the scene.

**123**  On cross-examination Mr. Penner admitted that he was in first gear and that 10 to 15 kilometres per hour was probably his minimum speed. He admitted that he had his foot off the clutch and had just begun to accelerate before he hit the brake. He admitted that he could have been travelling up to a speed of 25 kilometres per hour at that point.

*Leonard Solstad, an estimator with ICBC*

**124**  Mr. Solstad, an estimator with ICBC, examined the defendant's vehicle on November 7, 2006, and estimated the amount of damage and the costs of repair. Mr. Solstad considered the damage to the Volkswagen to be cosmetic damage to the left side and centre of the hood, which had buckled. The grille was broken and had already been replaced by the defendant. The left signal light was broken and there was some damage to the center and front of the left bumper. He estimated the cost of repair to be $1,069.76. He estimated that the cost of the grille repaired directly by the defendant to be from $36 upwards depending on the quality of the replacement part.

*Dr. Karen Wardill, a physician in the same clinic as Dr. Ticea*

**125**  Counsel for the defendant tendered the video deposition evidence of Dr. Wardill at trial. She testified that she saw the plaintiff on several occasions at the Kensington Clinic where Dr. Ticea also worked. Dr. Wardill recalled that she saw the plaintiff on August 2 and again on August 3, 2007, and then on a number of subsequent occasions.

**126**  On August 2, 2007, Dr. Wardill had a discussion with the plaintiff because she wanted a note saying she was fully recovered from the accident and able to return to work. Dr. Wardill provided the note. The next day she saw the plaintiff again when she provided a reworded note that specifically referred to the plaintiff as physically able to perform all the duties of a welder.

**127**  Dr. Wardill recalled that she also treated the plaintiff on several occasions later in August 2007 for an injury to the plaintiff's right shoulder (first treated in July 2007), for which she prescribed Tylenol 3. She again saw the plaintiff on November 11, 2007, for "chronic shoulder tendonitis" and again on July 25, 2008, for anxiety and panic attacks, as well as a complaint of stiffness in her left wrist. On October 18, 2008, she referred the plaintiff to a psychiatrist.

**128**  On cross-examination, Dr. Wardill agreed, based on the notes on her file, that she did not physically examine the plaintiff on August 2, 2007. Therefore, her notation referencing the plaintiff's return to work was based on what the plaintiff told her. She recalled that the purpose of the visit was for the plaintiff to obtain a note permitting her to return to work and the purpose of the visit the next day was to obtain a reworded note. Dr. Wardill indicated that she could not recall what kind of work the plaintiff was returning to.

*Findings as to Reliability and Credibility*

**129**  First, I will set out my findings in relation to the testimony of the plaintiff.

**130**  At trial the plaintiff did her best to be a reliable and credible witness. She presented as an unsophisticated, rather naive person who was generally truthful, at times against her own interest. It is clear that her life preceding the accident and since is very stressful for many reasons unrelated to the accident. However, the accident has added to her stress and her financial concerns as it interrupted and ultimately caused her to lose her employment at Hill's.

**131**  I accept that from the accident until September 2007, a period of 12 months, the plaintiff experienced considerable pain, discomfort, weakness, and limitations on movement in relation to the soft tissue injuries to her neck and left arm and shoulder as she described. This time frame recognizes the plaintiff's attendances on Dr. Wardill in early August 2007 and a further visit to Dr. Ticea on September 7, 2007, when she complained of pain and discomfort in relation to injuries sustained in the accident. It also takes into account a further period of time to recover after the plaintiff reported to Ms. Nihls on May 29, 2007, that she was "managing well" and was "virtually pain free".

**132**  I also accept that the plaintiff experienced considerable additional pain and discomfort associated with the injury to her left breast and the treatment of the necrotic fat, as well as the ongoing disfigurement. I do not doubt that for the plaintiff to continue to live with the ruptured left breast implant has added considerable stress and pain to an already complicated and difficult life.

**133**  However, I find that the plaintiff also was prone to exaggerate the severity and duration of some of her symptoms, including the level of pain and the degree of incapacity she experienced, particularly in relation to her migraines. If the migraines had truly approached the frequency and severity she described after the accident, she would have been unable to function at all. On the totality of the evidence I do not accept that injuries she sustained in the accident exacerbated her migraines to the extent she described, or that the migraines she experienced after September 2007 to the present are related to the accident.

**134**  I accept that the injury to her left breast, the trauma that produced the lump of necrotic far and the ruptured implant, was caused by the accident as I will explain later. I accept the plaintiff's evidence that the pain, the burning, tingling, and electrical sensations that she has experienced in her left breast, and the ongoing discomfort, worry, stress, humiliation and lack of self-confidence, due to trying to go about her daily life with a collapsed breast implant still in her chest are considerable.

**135**  I remain somewhat puzzled as to how it was that the Medical Services Plan was not called upon to cover the removal of the collapsed implant, or why the plaintiff was not able to borrow sufficient funds in the past three years to have the surgery to replace it, either from her mother, other family members, or even from her good family friend, Mr. Chaloner, in the event that she truly could not afford to pay for it herself. However, this matter was not canvassed in any detail before the Court, except that the plaintiff made it clear that she was of very limited means when it came to supporting herself and her children.

**136**  In terms of the plaintiff's testimony about her employment and aspiration to become a welder, I accept that she had the goal to become a welder, and was determined to take the training and try it. However, it is significant in my view that the plaintiff's planning to take the welding course commenced about six months prior to August 2007, which means that practically speaking she anticipated being able to take it as early as January 2007. This course was further training that she chose to do and it obviously required significant physical strength. It seems that she was prepared to undertake the course with a collapsed breast implant in her chest. She pursued funding to support her training and saw Dr. Wardill in early August 2007, not once but twice, to get the appropriately-worded note to indicate that she was recovered from the accident to the extent she could do the heavy physical work of a welder.

**137**  I do not accept based on her employment history prior to the accident, to the extent it was disclosed, or her conduct after she took the course and worked for less than a month as a welder at Vedder Steel, that she was committed to a long-term future career in welding, or indeed, in any particular occupation or employment. Her pre- and post-accident employment history as revealed by the evidence does not support any such inference. Three weeks on the job as a welder at Vedder Steel does not demonstrate commitment to a career in welding, particularly when the next job the plaintiff sought and obtained had nothing to do with welding.

**138**  The only reasonable inference to be drawn from her conduct is that, based on how she felt in August 2007 and after September 7, 2007, when she saw Dr. Ticea for accident-related pain, is that she was sufficiently recovered to undertake such training. This is so even after the injury to her right shoulder in July 2007 that required significant medication for pain and physiotherapy. I find that logically this must mean she was no longer suffering from the considerable ill effects she attributed to the accident, except in relation to her left breast, which she had decided to endure.

**139**  I further find that the plaintiff's evidence about an increased intensity and frequency of migraine headaches after the accident is unreliable, as is her evidence about the level of physical activity she was able to sustain, as shown in her contradictory testimony about being able to go swimming. I am of the view that her accident-related injuries were compounded by the considerable stress and worry in her life related to being able to care for and be the sole supporting parent of her children, particularly her young son. My impression is that these stresses, unrelated to the accident, compounded by the discomfort and worry caused by her ruptured breast implant and how she was going to manage its repair, had a significant impact on her being able to deal with the physical and mental stresses of the work place. I find they contributed to her exaggeration of the severity and frequency of her migraine headaches after the accident. To accept her evidence as to her migraine headaches after the accident would essentially mean that she was completely debilitated by them, which obviously she was not. I do, however, accept that the pain from her soft-tissue injuries and her ruptured implant caused some increase in the intensity and frequency of her migraine headaches from the date of the accident to September 2007.

**140**  I also accept the plaintiff's testimony regarding her observations in relation to her ruptured breast implant and the significant associated ongoing pain and discomfort in light of the corroborative and highly reliable, independent evidence of Dr. Horton, which I accept in its entirety.

**141**  In terms of the testimony of the other witnesses called on behalf of the plaintiff and the defendant I find that each testified in a reliable and credible manner, and I accept their evidence.

**Findings and Analysis**

*Finding as to Causation Regarding the Breast Implant Rupture*

**142**  The plaintiff submits that the evidence of the plaintiff and Dr. Horton establishes that a cause of the ruptured breast implant was the accident.

**143**  The defendant, on the other hand, submits that causation as between the accident and the plaintiff's ruptured breast implant has not been established.

**144**  The legal test for causation in civil cases was discussed by Major J. in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) [*Athey*] at 466-467:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: Snell v. Farrell, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=); McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.).

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the ***negligence*** of the defendant: Horsley v. MacLaren, [*[1972] S.C.R. 441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B01P-00000-00&context=).

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's ***negligence*** "materially contributed" to the occurrence of the injury: Myers v. Peel County Board of Education; [*[1981] 2 S.C.R. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M21F-00000-00&context=), Bonnington Castings, Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.); McGhee v. National Coal Board, supra. A contributing factor is material if it falls outside the de minimis range: Bonnington Castings, Ltd. v. Wardlaw, supra; see also R. v. Pinske [*(1988), 30 B.C.L.R. (2d) 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2P6-00000-00&context=) (B.C.C.A.), aff'd [*[1989] 2 S.C.R. 979*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6524-00000-00&context=).

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

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. [...] As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their ***negligence***.

**145**  Causation must be determined prior to the assessment of damages, and must not be confused with the rules of assessing damages once causation is established: *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at para. 78.

**146**  Applying the test set out in *Athey*, I must decide whether the evidence establishes that the accident caused the plaintiff's injuries to her left breast, in terms of the rupture of her breast implant and the formation of the necrotic lump, as well as the pain and other discomfort she experienced in the area of her left breast. It is not necessary that the accident be the sole cause, or that causation be established to scientific precision. To succeed the plaintiff must prove on a balance of probabilities that the accident was a contributing factor, outside the *de minimis* range.

**147**  In *Wilson v. MacKay*, [*[1993] B.C.J. No. 739*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23B9-00000-00&context=) (S.C.) [*Wilson*], Dorgan J., after reviewing the judgment of Sopinka J. in *Snell v. Farrell*, [*[1990] S.C.J. No. 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGK1-JJ1H-X4XG-00000-00&context=), considered the burden of proof and the inference of causation in the context of alleged medical malpractice that resulted in breast asymmetry and scarring following breast reduction surgery. Dorgan J. stated the following at para. 89:

In summary, the plaintiff need not prove causation with scientific precision. The plaintiff may present evidence which, if believed, may lead to an inference adverse to the defendant.

The learned judge then found that the plaintiff had not discharged the onus of proof upon her, except in relation to an extra incision made to her right breast.

**148**  In the present case I accept the testimony of the plaintiff that prior to the accident she had symmetrical breasts after breast augmentation surgery. I accept that she noticed that she had a substantially smaller left breast about three weeks after the accident, and that since the accident she had experiencing pain and burning sensations in the area of her left breast. I further accept her evidence that at the same time she found the lump in her left breast. Several weeks later, Dr. Horton diagnosed the lump to be a lump of necrotic fat due to trauma in the area of the ruptured left breast implant. When I combine their evidence and consider that the plaintiff as the driver of a motor vehicle was wearing the usual shoulder/lap seatbelt across the area of her left upper body including her left breast, I find without hesitation that the plaintiff has established that the accident was at least a partial cause of rupture of the left breast implant and the associated complications. Thus, the defendant is liable for the injuries sustained by the plaintiff to the area of her left breast, including the rupture of the implant.

**149**  In relation to the soft-tissue injuries suffered by the plaintiff to her neck, left shoulder, arm and wrist caused by the accident, the defendant submits that the plaintiff was substantially recovered by August 2007 when she enrolled in the welding course. Thus, any continuing weakness, pain, or disability that the plaintiff claims continues to exist in her left arm and wrist past that time, the defendant submits is not proven to be caused or contributed to by the accident. On the totality of the evidence before me I agree with that submission, except that I find the date to be in September 2007 after her visit to Dr. Ticea on September 7, 2007. I find that the preponderance of the evidence points towards the plaintiff being substantially recovered from injuries to her neck, left shoulder, and left arm as of August 2007, when she then injured her right arm, and in any event by mid-September 2007.

**150**  I find that the continuing weakness in her left wrist and hand as identified by Mr. Banks is not established to be related to the accident. While he identifies this weakness and restricted motion in the plaintiff's left wrist and hand well after August 2007, there is no reliable medical evidence to support any continuing weakness and disability beyond that date as being caused or contributed to by the accident. I do not find the plaintiff to be a sufficiently accurate or reliable witness to accept her evidence that this was not a pre-existing problem or caused by some unrelated activity. It is also possible the disparity may be related to right-hand dominance, if the plaintiff is indeed right-handed. I note that Mr. Banks assessed the plaintiff on August 18, 2008, which was almost two years after the accident and after the intervening events of the plaintiff taking the welding course and attempting to work as a welder.

**151**  I also find that Dr. Ticea's evidence does not establish an ongoing weakness in the plaintiff's left wrist beyond September 7, 2007. This is because the plaintiff's complaints regarding pain in her neck, left shoulder, arm and wrist are only sporadic at best after this point and were in the main eclipsed by other presumably more pressing medical concerns unrelated to the accident. It is equally likely that the plaintiff's complaints of pain in relation to those areas of her body have been caused or substantially aggravated by taking the welding course and trying to work as a welder, an occupation for which she may have been not physically well-suited from the outset. I also note that the nerve conduction studies sought by Dr. Ticea in relation to injuries sustained in the accident were apparently negative. No neurological or other expert medical evidence was called to support an inference that the plaintiff's ongoing weakness in her left wrist and hand is related to the accident. It is also possible that continuing to have the ruptured left breast implant in her chest has contributed to pain in her left shoulder and arm. There is, quite simply, insufficient evidence to establish that the plaintiff's present complaints and some weakness in her left wrist and hand are related to the accident, except for her specific discomfort in the area of her left breast.

**152**  Therefore, I find that the plaintiff suffered soft tissue, whiplash-related injuries to her neck, left shoulder, arm and wrist in the accident and that these injuries, classified at a "Grade II" by Dr. Ticea caused her considerable pain and discomfort that abated with the active rehabilitation program she took in March and April 2007 to the point that she was substantially recovered by September 2007. Any remaining pain or residual weakness in the plaintiff's left wrist after that time is not proven to be caused in whole or in part by the accident.

**153**  In relation to her ruptured left breast implant, I find that the plaintiff has experienced considerable pain, discomfort, disfigurement, and mental stress and anxiety that continue to the present time.

**Damage Awards Sought by the Plaintiff**

**154**  I turn now to determine the extent of the losses suffered by the plaintiff proven to arise from the accident and the appropriate quantum of damages in relation to these losses under the various heads of damages claimed.

**155**  Counsel for the plaintiff submits that in this case an appropriate range of the total damages under all the headings is in the range of $506,949 to $691,595. He submits that significant awards under the various heads of damages are warranted because of the debilitating and painful injuries the plaintiff sustained in the accident and their protracted impact on her life, in terms of pain, loss of enjoyment, limitations on physical exercise and housekeeping, loss of income from employment, and the loss of greater income, job security, and job satisfaction that she was unable to achieve due to being unable to work as a welder.

**156**  Counsel for the defendant takes a completely different view of this case. Having submitted that the plaintiff's ruptured breast implant is not proven to have been caused by the accident, and that the accident was a minor one with minimal damage to both vehicles and the only sign of physical injury to the plaintiff being the bruising to her left arm, he submits that an appropriate award in all the circumstances is in the range of $25,000 for non-pecuniary damages. He consents to an award for past wage loss of $9,336 in gross income. Otherwise, it is submitted on behalf of the defendant that no other damage awards are appropriate on the facts of this case.

1. **Non-pecuniary loss**

**157**  The plaintiff seeks a total award of non-pecuniary damages in the range of $153,881 to $194,213, comprised of an award of non-pecuniary damages in the range of $58,881 to $81,363 related to the plaintiff's ruptured left breast implant; an award in the range of $60,000 to $77,850 in relation to the plaintiff's soft-tissue injuries and the increased frequency and intensity of migraine headaches she claims to have suffered after the accident, and an award in the range of $35,000 for emotional distress.

**158**  As stated, the defendant's position is that a total award for non-pecuniary damages in this case ought to be in the range of $25,000.

1. *The ruptured left breast implant*

**159**  To support an award in the range sought, the plaintiff relies upon the following authorities: *Hollis v. Birch*, [*[1990] B.C.J. No. 1059*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4K5-00000-00&context=) (S.C.) [*Hollis*]; *Rennick v. Miller*, [*[1996] B.C.J. No. 1229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1MT-00000-00&context=) (S.C.) [*Rennick*]; and *Wilson*.

**160**  I have reviewed the above cases and considered their similarities and differences to the case at bar. In *Hollis*, a 1990 decision, the judge awarded $50,000 in relation to non-pecuniary damages arising from the surgical replacement of negligently manufactured breast implant. In *Rennick*, a 1996 decision, the award was $45,000 in the case of a left breast implant that was ruptured in a motor vehicle accident. The plaintiff in that case required both implants to be surgically replaced and suffered left-arm strain and bruising that resolved shortly, as well as headaches. In *Wilson*, a 1993 decision, the plaintiff was awarded $40,000 for disfigurement of her right breast that required corrective surgery. She also suffered ongoing physical and psychological pain.

**161**  In the present case the left implant will be replaced. It is not known if the right implant will also have to be replaced to achieve breasts of a similar size. The plaintiff has endured considerable pain and suffering, the painful and difficult injections of the lump of necrotic fat by Dr. Horton. She has also had to endure the ongoing discomfort and emotional and psychological upset and distress caused by the ruptured implant remaining in her chest and the very significant disparity in the size of her breasts for a period of three years and three months. In all the circumstances I find that a fit and proper award in non-pecuniary damages for this injury is $65,000.

1. *Soft-tissue Injuries and Migraine Headaches*

**162**  To support an award in the range of $60,000 to $77,850, the plaintiff relies upon the following authorities: *Andres v. Leslie*, [*2005 BCSC 1096*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B149-00000-00&context=) [*Andres*]; *Bancroft-Wilson v. Murphy*, [*2008 BCSC 1035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M324-00000-00&context=) [*Bancroft-Wilson*]; *Ghataurah v. Fike*, [*2008 BCSC 533*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B208-00000-00&context=) [*Ghataurah*]*; Heartt v. Royal*, [*2000 BCSC 1122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22T1-00000-00&context=) [*Heartt*]; *Heppner v. Zia*, [*2008 BCSC 782*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G2X8-00000-00&context=) [*Heppner*]*; Klein v. Dowhy*, [*2007 BCSC 1151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3VB-00000-00&context=) [*Klein*]*; Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) [*Kuskis*]*;* and *Pratt v. Barlow*, [*2008 BCSC 1764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0NN-00000-00&context=) [*Pratt*].

**163**  To support an award in the range the defendant finds to be appropriate, namely in the range of $25,000, the defendant relies upon the following authorities: *Price v. Kostryb* a [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) [*Price*]; *Reyes v. Pascual*, [*2008 BCSC 1324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3KX-00000-00&context=) [*Reyes*]; *Job v. Van Blankers*, [*2009 BCSC 230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3P3-00000-00&context=) [*Job*]; *Aulakh v. Poirier*, [*2006 BCSC 2027*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21DW-00000-00&context=) [*Aulakh*]; and *Garcha v. Gill*, [*2008 BCSC 1756*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B37W-00000-00&context=) [*Garcha*].

**164**  Having reviewed the authorities provided in the context of the present case with regards to the plaintiff's the soft-tissue injuries to her neck, left shoulder, and left arm and wrist, and taking into account a modest increase in the frequency and severity of her chronic and pre-existing migraine headaches, from which I have found she was substantially recovered in September 2007, I find that an award of $30,000 is appropriate as non-pecuniary damages for these injuries.

1. *Emotional Distress*

**165**  Plaintiff's counsel seeks an award of up to $35,000 for emotional distress. He submits that the plaintiff has suffered significant mental distress and psychological problems as a result of the injuries she sustained in the accident, most specifically in relation to the rupture of her left breast implant and the complications arising from it. He submits that the testimony of Mr. Chaloner and the plaintiff's daughter, Chandra Mayoh, supports the testimony of the plaintiff in this regard.

**166**  In her testimony, the plaintiff said that she has suffered periods of depression, sadness, distress, and lower-self esteem from the injuries she sustained in the accident, her ongoing pain in her left shoulder and reduced mobility in her left wrist, and increased problems with migraines, in addition to the stress, worry, and discomfort arising from her collapsed left breast implant. Her evidence is that feeling depressed, sad, and in pain has caused her to withdraw socially, impacted negatively on her relationships with her children, and prevented her from dating and exercising as she has in the past.

**167**  Her claim under this head of damages is not supported by any medical, psychiatric or psychological evidence. I note that Dr. Ticea referred the plaintiff to a psychologist but the plaintiff said that she could not afford to go, and did not attend counselling. Although the plaintiff was referred to a psychiatrist, Dr. Rana, there is no evidence from this person.

**168**  Damages for psychological injuries were recently discussed by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=) [*Mustapha*] at para. 9:

[P]sychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see Hinz v. Berry, [1970] 2 Q.B. 40 (C.A.), at p. 42; Page v. Smith, [1996] 1 A.C. 155, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from Vanek v. Great Atlantic & Pacific Co. of Canada [*(1999), 48 O.R. (3d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4T6-00000-00&context=) (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

**169**  That case dealt with a tort where there was no physical injury at all, but the discussion of compensable injury is relevant nonetheless. In a very recent case, *Kotai v. Queen of the North (The)*, [*2009 BCSC 1405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B225-00000-00&context=), Joyce J. conducted a very thorough review of the case law around emotional distress, including *Mustapha*, when determining whether damages for emotional distress would result from the sinking of a ferry that the plaintiffs were aboard and concluded, at para. 69:

Accordingly, I conclude that there remains a requirement that the claimants prove not just psychological disturbance or upset as a result of the defendant's ***negligence*** but also that their psychological disturbance rises to the level of a recognizable psychiatric illness.

**170**  Based on these cases, I decline to make a separate award of damages for the plaintiff's emotional distress. The plaintiff simply did not provide any evidence which suggests that her emotional distress came to the level of a recognizable psychiatric illness. Nor do I attribute her emotional distress entirely to the accident and her collapsed breast implant, but also to other life stressors including her separation, being a single parent, financial worries, problems with her son, and her lack of success in the welding trade, all of which I find to be unrelated to the accident. In addition, to my mind, the specific claims above for non-pecuniary damages by definition include a measure of pain and suffering related to the injuries sustained in the accident and their aftermath, including in relation to the ruptured breast implant.

1. **Loss of Future Income and Future Earning Capacity**

**171**  The plaintiff seeks an award in the range of $300,000 to $400,000 for loss of future income and future earning capacity as a result of injuries she sustained in the accident. She relies on the approach taken by Finch J.A., as he then was, in *Pallos v. Insurance Corporation of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) at paras. 24-27. In addition, the plaintiff relies upon *Earnshaw v. Despins* [*(1990), 45 B.C.L.R. (2d) 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4DT-00000-00&context=) (C.A.) at 399; *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.) at 59; *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 9; and *Kuskis* at paras. 151-154.

**172**  The defendant's position is that there is no evidence upon which to make an award for loss of future earning capacity. The defendant refers to the following authorities in relation to future income loss: *Job* at para. 47; *Steward*, [*[2007] B.C.J. No. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), at para. 14; *Bedwell v. McGill*, [*2008 BCCA 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3JN-00000-00&context=) [*Bedwell*]; and *Chang v. Feng,* [*2008 BCSC 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=) at paras. 73-79 [*Chang*].

**173**  The law in British Columbia around the awarding of damages for loss of future earning capacity has been interpreted differently over the last fifteen years, with differences between a "capital asset" approach and a "future possibility" approach. However, two recent Court of Appeal decisions have given strong direction to trial judges in the way in which these damages should be determined.

**174**  In *Rosvold*, Huddart J.A. reviewed the principles relating to these awards and stated, at para. 8, that an "award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away ... What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset". This has been referred to as the capital asset approach. Huddart J.A. continued, at para. 10, to canvas several other cases to come up with a list of four factors the trial judge should consider in this regard:

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**175**  However, the capital asset approach appears to have been overtaken in two more recent Court of Appeal decisions. In *Steward*, a 2007 decision, the trial judge, [*[2005] B.C.J. No. 2838*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S313-00000-00&context=), found that the plaintiff may have earned as much in the future as he would have if not injured in his current profession, but awarded $50,000 for "compensation for the impairment of his earning capacity in other occupations that may now be closed to him." The Court of Appeal rejected this analysis, and held, at para. 17, that "the claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur" [emphasis added]. Donald J.A. went on to hold that because there was no other realistic alternative occupation that would be impaired by the plaintiff's injuries, the claim for future loss must fail, and reduced the award to zero.

**176**  Then, in *Bedwell*, a 2008 decision, the trial judge, [*[2006] B.C.J. No. 498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23S1-00000-00&context=), found that the plaintiff's injuries did not make her less marketable, less valuable, or less capable overall of earning income from all types of employment. The Court of Appeal upheld the trial judge and stated, at para. 53, that "it was necessary for the appellant to have proven a substantial possibility of a future event leading to an income loss" [emphasis added], and that based on the findings of the trial judge and "lack of evidence that such injuries could lead to a future income loss, it follows that she did not prove such a substantial possibility".

**177**  The confusion between the two approaches was discussed by Bauman J., as he then was, in *Chang*. After reviewing *Steward*, Bauman J. held, at para. 76, that Donald J.A.'s reasons "appears to be an express direction to first enquire into whether there is a substantial possibility of future income loss before one is to embark on assessing the loss under either approach to this head of loss, in particular, under the capital asset approach as well".

**178**  Another recent decision discussed the factors identified in *Rosvold*, and their relevance to the analysis. In *Job*, Ker J. did not decide whether to use the capital asset approach or the future possibility approach, but found, at para. 134, that to be able to claim any damages under either approach:

[T]he plaintiff must put forward cogent evidence that she has been rendered less capable overall of earning income from all types of employment, that she is less marketable, that she cannot take advantage of job opportunities she otherwise might have, or is less valuable as a person capable of earning income.

**179**  Given this case law, I find that in order to succeed in her claim for loss of future income, the plaintiff must first prove a substantial possibility of a future event leading to an income loss. This possibility can be proven with reference to the four factors identified by Huddart J.A. in *Rosvold*. If the plaintiff proves that possibility, it is then open to the Court to value that loss based on either the capital asset approach or based on what the plaintiff would have earned but for her injuries.

**180**  I find that the evidence placed before the court falls significantly short of establishing that her injuries from the accident have resulted in a substantial possibility of a future event leading to an income loss. I have come to this finding with reference to the four factors referred to in *Rosvold*. Firstly and as indicated previously, I am not satisfied that the residual weaknesses identified by Mr. Banks in the plaintiff's left wrist and hand were caused or contributed to by the accident. On the evidence those would be the injuries that would render the plaintiff less capable overall of earning income in the future. Second, given that I have found that she was substantially recovered from the soft-tissue injuries by September 2007, with the exception of the replacement of the left breast implant yet to be repaired, there is no evidence that she is less marketable as a result of injuries sustained in the accident, as there is no suggestion that the implant surgery will leave her with a lasting injury or deficit that will impact future employment. Third, in terms of job opportunities that she otherwise would have taken advantage of absent injuries from the accident, there is very little evidence of the plaintiff's work history prior to the accident before the court with the exception of her year of employment as a meat packer at Hill's immediately preceding the accident. Her income in recent past years does not lend support to an inference that the plaintiff has job opportunities available that are likely to be adversely impacted by injuries sustained in the accident. She reported to Mr. Banks that she had worked previously for an unspecified time as a bartender but no details were provided. Her plan to become a welder did not materialize beyond her struggling with the training and less than a month of welding employment. I find that it is too big a leap to assume that the plaintiff would have worked for many future years as a welder, or indeed regularly in any job or occupation, and then to assess loss of future capacity based on the projections by Mr. Benning.

**181**  For these reasons I decline to award any amount for loss of future income and future earning capacity.

1. **Past Wage Loss and Past Loss of Opportunities**

**182**  The plaintiff and the defendant have agreed that the plaintiff lost $9,336 in gross income due to being unable to work after the accident, resulting in a net figure of approximately $8,400. Accordingly, I award $8,400 in past wage loss.

1. **Loss of Housekeeping Capacity**

**183**  The plaintiff claims damages for loss of housekeeping capacity in the range of $17,235 to $40,392. This is based on the claim that she is less able at present and in the future to clean her house and perform the household duties as she did prior to the accident. The proposed range is based on a cost of $15 per hour with five hours a week being required and then projections of the future costs over the next five, ten, and 15 years, discounted for present value.

**184**  The defendant submits that the evidence of the plaintiff was that she was able to do her own housekeeping, just with some additional difficulty.

**185**  The law recognizes that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss; that the loss of housekeeping ability is that of the plaintiff and not her family; and that when family members have gratuitously done the work that the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered which enables the court to assign a monetary value: *Kroeker v. Jansen* [*(1995), 123 D.L.R. (4th) 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (B.C.C.A.) leave to appeal to S.C.C. refused, [*[1995] S.C.C.A. No. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-JX8W-M10D-00000-00&context=); *McTavish v. MacGillivray*, [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) [*McTavish*].

**186**  However, in the present case, given that I have found that the plaintiff was substantially recovered from the accident by September 2007, I must dismiss her claim for loss of future housekeeping capacity.

**187**  In terms of replacement housekeeping services performed for the plaintiff by her daughter from the date of the accident to September 2007, a period of 12 months, the evidence before the court is not specific as to the number of hours spent. Nor does it provide a clear list of the kinds of tasks the plaintiff's daughter assumed in her stead beyond shopping for groceries, driving her younger brother to school and, as her mother recovered, moving heavy items for cleaning. There is no indication of the frequency with which she performed these tasks or the time she spent. Without this type of evidence I find that I am unable to quantify and value the replacement services provided by the plaintiff's daughter to assist the plaintiff during this 12 month period. Therefore, I am unable to make a specific award to compensate the plaintiff for these housekeeping tasks, as is contemplated in *McTavish* at para. 68.

1. **Cost of Future Care**

**188**  The plaintiff claims future care costs related to the replacement of the ruptured left breast implant ($5,883), and double that amount if both breasts require replacement implants to achieve symmetry.

**189**  She also seeks an award for future care costs for her on-going injuries to cover medications (Advil, Topimax, Imitrex, and a nasal spray) and water therapy, physiotherapy and a gym membership, calculated over the next five, ten, or 15 years, resulting in a present value range of $28,776 to $59,316.

**190**  The defendant submits that there is no evidence upon which to base an award for future care costs.

**191**  The test to be applied when the court considers awarding the cost of future care is set out by McLachlin J., as she then was, in *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 84 [*Milina*] as follows:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish:

1. that there must be a medical justification for claims for cost of future care; and
2. that the claims must be reasonable.

[...]

The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health.

**192**  Given that I have found that the plaintiff has not proven on-going injury related to the accident after September 2007, I find that there is no legal basis for an award in relation to the future care costs as sought by the plaintiff, with the exception of the cost to replace the ruptured left breast implant.

**193**  In relation to the surgery required to replace the left breast implant, I award $5,883 as a onetime cost for that purpose. Based on the evidence it is likely that the plaintiff will require medication related to that surgery for pain management and to reduce the risk of infection. As no amount is specifically allocated to this purpose but rather there are much larger amounts claimed as part of the plaintiff's claim for future care, somewhat arbitrarily I award the plaintiff an additional $500 for medications related to the breast implant replacement surgery, for a total amount of $6,383. However, I decline to order double that amount for future breast implant replacement surgery to cover the possibility that the plaintiff's right breast implant may also have to be exchanged to achieve breasts of more or less equal size. The evidence of Dr. Horton acknowledges that as a possibility only.

1. **Special Damages**

**194**  The plaintiff claims $4,038.71 for special damages for physiotherapy sessions, various prescribed medications, a doctor's note, and a visit to an occupational therapist.

**195**  It is well established that the plaintiff is entitled to recover as special damages all the pre-trial expenses she incurred as a result of her injuries, so long as they were caused by the tort and the decision to incur them was reasonable: see Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law Inc., 2000) at p. 116. When assessing the quantum of damages under any recognized head, the court is concerned, ultimately, with making the party whole. McLachlin J., as she then was, described this animating principle in *Milina* at 78:

The fundamental governing precept is restitutio in integrum. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.

**196**  I have reviewed the schedule of special expenses claimed and find the amount claimed to be in order. Therefore, I award $4,038.71.

**Mitigation**

**197**  The issue arises as to what extent, if any, the plaintiff failed to mitigate the injuries and symptoms caused by the accident by not following the prescribed treatment plan or engaging in activities not conducive to full recovery.

**198**  In particular, counsel for the defendant submits that the plaintiff has failed to mitigate her losses by failing to return to Florida to have the ruptured breast implant replaced by the plastic surgeon who implanted it, given that Dr. Horton testified that is it common for there to be warranties on breast implants and for the original surgeons to perform follow-up operations without additional charge when an implant ruptures. He submits that the plaintiff indicated that she was aware that there was a five year warranty on her implants, and that she had failed to make any inquiries as to the cost of travelling to Florida to have the ruptured implant replaced, as opposed to continuing to seek coverage for the replacement through her insurer.

**199**  He also submits that although the plaintiff testified that she had sought loans from a number of people to assist her with this procedure she failed to call evidence to that effect, and her mother, Ms. Mayoh, denied being asked by her daughter for a loan to contribute to the payment for the procedure. The position taken on behalf of the defendant is ultimately not that she ought to have found and paid the estimated cost of $6,000 to replace the ruptured implant, but that her efforts to investigate alternatives were not adequate.

**200**  In reference to his submission that the plaintiff has failed to take reasonable steps to mitigate her damages, particularly in relation to the collapsed implant, counsel for the defendant refers to *Antoniali v. Massey*, [*2008 BCSC 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M34T-00000-00&context=), in which Preston J. considered whether the plaintiff had unreasonably failed to mitigate by failing to embark on an exercise program under the supervision of a personal trainer to rehabilitate herself or alleviate the continuing effect of her injuries. He also referred to *Job*, where Ker J. reduced an award of non-pecuniary damages by 10% due to the plaintiff's failure to mitigate by following the treatment regime recommended by her physician at the time the recommendation was made, even though she found, at para. 114, "it meant some initial financial hardship in terms of ability to pay for the treatments".

**201**  In response, counsel for the plaintiff submits that the plaintiff has mitigated honourably by attending physiotherapy, then fully participating in the active rehabilitation program recommended by her physician and available to her through ICBC, followed by doing the recommended exercises and stretching thereafter. He submits that it is simply too much to expect a plaintiff, particularly someone in his client's position to come up with $6,000 for this kind of surgery, particularly when she is dealing with other injuries arising from the accident, and no longer lives in Florida.

**202**  The law imposes upon plaintiffs the duty to mitigate their losses. This includes taking reasonable steps to minimize any loss relating to their injuries. Its purpose is to prevent plaintiffs from seeking recovery from defendants for harm and loss caused or contributed to by their own neglect. The onus of proof rests upon the defendant to establish a failure on the part of the plaintiff to mitigate, and whether a plaintiff has been reasonable in refusing to accept the recommended medical treatment is a decision for the trier of fact:  *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

**203**  I find, considering the plaintiff's overall circumstances, including the other injuries she sustained in the accident and her conduct in terms of regular attendances to her doctor, and fully participating in the physiotherapy and the rehabilitation program that were recommended to her, that it cannot be said that she unreasonably failed to mitigate. I have taken into account her failure to take psychological and psychiatric counselling in terms of making no award for emotional distress, but I am firmly of the view that it is unreasonable for counsel for the defendant to assert that she ought to have flown to Florida and incurred whatever costs were associated with having the ruptured implant replaced there. As her counsel pointed out, there is a significant difference between a $15 user fee and personally incurring significant costs associated with such a surgery, which is estimated to cost approximately $6,000 if performed in British Columbia by Dr. Horton.

**Conclusion**

**204**  For these reasons I find that the plaintiff has established the following claims in damages in the following amounts arising from the accident, for a total of $113,821.71:

1. Non-pecuniary damages -- $95,000;
2. Loss of future income and future earning capacity -- nil;
3. Past wage loss -- $8,400;
4. Loss of housekeeping ability -- nil;
5. Cost of future care -- $6,383; and
6. Special damages -- $4,038.71.

**205**  The plaintiff is also entitled to interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*.

**206**  I find that the plaintiff is entitled to costs at Scale B payable forthwith, unless the parties provide notification to the Registry and Trial Scheduling within 21 days of the date of filing of this judgment. In the event further submission are to be made they are to be in writing and the plaintiff is to file such written submissions within 21 days of the notice referred to above, the defendant is to respond within 14 days thereafter, and the plaintiff is to file any further brief written reply within a further 7 days.

E.A. ARNOLD-BAILEY J.

**End of Document**

[***Hodgson v. Saeed, [2015] B.C.J. No. 166***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4N2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

M.A. Maisonville J.

Heard: December 15-19, 2014.

Judgment: February 3, 2015.

Docket: M125047

Registry: Vancouver

**[2015] B.C.J. No. 166** | 2015 BCSC 147

Between Bryan Hodgson, Plaintiff, and Muhammad Saeed, Defendant

(127 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Fibromyalgia or chronic pain — Considerations impacting on award — Degree of impairment — Age of claimant — Action by plaintiff for damages for injuries arising from motor vehicle accident allowed — Plaintiff was driving through intersection when defendant's vehicle pulled into it from stop sign to start left turn and was struck by plaintiff's vehicle — Plaintiff was 23 and worked as heavy equipment operator — Defendant was 100 per cent liable — Plaintiff was awarded $80,000 in non-pecuniary damages, $22,968 for past loss of income and $75,000 for loss of future earning capacity — Plaintiff suffered ongoing chronic neck pain — His abilities had significantly changed, affecting his work and personal life.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Employment status — Extent of incapacity — Loss of earning capacity — Retroactive loss of income — Non-pecuniary loss — Action by plaintiff for damages for injuries arising from motor vehicle accident allowed — Plaintiff was driving through intersection when defendant's vehicle pulled into it from stop sign to start left turn and was struck by plaintiff's vehicle — Plaintiff was 23 and worked as heavy equipment operator — Defendant was 100 per cent liable — Plaintiff was awarded $80,000 in non-pecuniary damages, $22,968 for past loss of income and $75,000 for loss of future earning capacity — Plaintiff suffered ongoing chronic neck pain — His abilities had significantly changed, affecting his work and personal life.**

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| Action by the plaintiff for damages for injuries arising from a motor vehicle accident. The plaintiff was driving through an intersection at 60 kilometres per hour, in a 50-kilometre zone, when the defendant's vehicle pulled into the intersection from a stop sign to start a left turn, without ascertaining that it was clear to do so, and was struck by the plaintiff's vehicle. The plaintiff was 23, lived with his girlfriend, had a child and worked as a heavy equipment operator. He asked to be laid off for several months due to his pain.  HELD: Action allowed.  The defendant was 100 per cent liable for the accident. There was no evidence that the plaintiff's excess speed caused it. The plaintiff was awarded $80,000 in non-pecuniary damages, $22,968 for past loss of income, $75,000 for loss of future earning capacity, $15,000 for cost of future care and $1009 in special damages. The plaintiff suffered ongoing chronic neck pain. His abilities had significantly changed, affecting his work and personal life. He was no longer able to take joy in all activities, including his hobbies and caring for his child. Given the remote locations where he worked and the scarcity of doctors there, he was not faulted for not seeing one more regularly. He was less valuable to a potential employer. The award for cost of future care was for pain medications. |

**Statutes, Regulations and Rules Cited:**

Insurance (Motor Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 98*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B06K-00000-00&context=)

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 176*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0HC-00000-00&context=), s. 186

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

**Counsel**

Counsel for Plaintiff: J.F. Chouinard.

Counsel for Defendant: R.G. Dempsey.

**Reasons for Judgment**

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| **M.A. MAISONVILLE J.** |

**I. BACKGROUND**

**1**  The plaintiff Bryan Hodgson was in a motor vehicle accident on September 23, 2010. The plaintiff was 23 years of age at the time of the accident. The plaintiff is a heavy equipment operator and has worked at a number of different jobs over the past several years.

**2**  He has lived with his girlfriend, Ashley McKenzie, on and off, for the past three years and they have a son together.

**3**  The weather on the day of the accident was rainy and the roads were wet. Visibility however was fine. The accident occurred in the middle of the day.

**4**  The plaintiff was travelling southbound on 160th Street in Surrey, British Columbia. At the intersection of 160th Street at Croydon Drive, there are two southbound lanes. The plaintiff was in the lane closest to the center of the road. He had just passed through the intersection at 24th Avenue. He believes he was travelling at 60 kilometres per hour in a 50 kilometre per hour speed zone. There is a stop sign on Croydon Drive where vehicles are to stop before entering onto 160th Street. The plaintiff was driving southbound but a vehicle driven by the defendant Muhammad Saeed came out suddenly from the stop sign. The plaintiff could not stop, inevitably and immediately colliding with the front part of the defendant's vehicle with such force that the airbags deployed. The whole front end of the defendant's car hope was caved in.

**5**  Immediately after the accident, the plaintiff noticed a burning sensation on the top of his head where he had sustained an abrasion. This is believed to have occurred from the striking airbag raising him so that his head came into contact with the roof. He also felt pain from where the airbag had hit him. Shane Hakeem, one of the individuals who witnessed the accident, approached the plaintiff and provided him with his contact information. As well, the defendant testified to the accident.

**II. THE ISSUES**

**6**  The issues before the Court for determination are:

1. liability for the accident;
2. non-pecuniary damages;
3. damages for loss of income, both past and future; and
4. causation for the plaintiff's injuries and loss of income.

**III. FACTS**

**A. Prior to the Accident**

**7**  At the time of trial, Mr. Hodgson was 27-years of age.

**8**  A number of individuals testified as to what the plaintiff was like prior to the accident.

**9**  The plaintiff had always been independent. His mother testified this was due to him coping with the loss of his father at a young age. He spent part of his high school in Alberta, but afterward returned to British Columbia.

**10**  Ms. Hodgson testified that prior to the accident, her son was a jokester, a prankster, the life of the party, happy, motivated and active. Physically he enjoyed snowboarding, sea-dooing in the summer, and that he enjoyed learning how to do mixed martial arts fighting, particularly with his brother. She said that he enjoyed doing anything physical. He was in good shape and he was healthy.

**11**  After the accident, she testified that her son's sense of humour was lessened. She did not want to say that he was depressed, but she believed he could have been. His sense of motivation was not the same and he had to lie around quite a bit.

**12**  At the time of the accident, Mr. Hodgson was 24 years of age. He had been living with his mother and his stepfather, and was working for his stepfather's contracting company, E.J. Jones Contracting. The company was in a difficult financial situation at the time, but Mr. Hodgson worked for months without pay out of loyalty to his stepfather. It turned out to be a good opportunity for Mr. Hodgson in that he learned how to use heavy equipment and today he is employed doing what he learned at that time.

**13**  Ms. Hodgson was aware of the difficulties of her husband's company and despite the fact that many people had told the couple they should have declared bankruptcy, they have not done so, and are slowly paying back the monies owing by the company. Her son would run the digging machines, excavators and Bobcats. He was also working as a labourer.

**14**  The plaintiff's next work was when he started working for Integrated Contractors Limited, a subsidiary of IDL Projects Inc. ("IDL"), in Fort Nelson as a labourer. In May 2011, he started driving a rock truck. This is a very difficult job, as the terrain is rough, and it would increase and worsen his pain. He continued with that company through to August 2011 at which time he asked to be laid off because he found it too difficult to work in the rock truck as it was too aggravating to his pain.

**15**  His supervisor in Fort Nelson was Keith Evans, who was the father of his friend Kaitlin, who also testified at the trial.

**16**  Following his work in Fort Nelson moved to Cold Lake, Alberta, where he once again worked for IDL. He worked from May 2011 to December 2012 when he was laid off. This is typical for the industry as winter conditions make it impossible to work. The plaintiff started again in January 30, 2013, working through to July 26, 2013. In September 2013, he moved to Terrace and in October and November, he worked on the Spirit Pipeline Ltd. There he drove the excavator, the rock truck and a skid-steer loader, which is a small rigid frame, engine-powered machine with lift arms used to attach a wide variety of labour-saving tools or attachments.

**17**  In 2014, commencing in February, he was working for IDL at Cold Lake. In July 2014, he started work at Fort St. John for Tracker Contracting Ltd. to early September 2014; then he briefly worked for Jacob Brothers Construction in Saskatchewan. His earnings were as follows:

|  |  |  |
| --- | --- | --- |
| 2006: | $3,561; |  |
| 2007: | $13,540; |  |
| 2008: | $33,420; |  |
| 2009: | $24,784; |  |
| 2010: | EI benefits -- $12,963; |  |
| 2011: | $25,874; |  |
| 2012: | $72,458; |  |
| 2013: | $96,501.31 |  |

**18**  At IDL, his rate of paid was $33.09/hr and for overtime it was $49.63. For Spirit Pipelines, his rate was $34/ hr and overtime was $52/hr. Travel would be $34/hr. For Tracker Contracting, his rate was $32/hr and overtime was $48/ hr and double time was $64/hr.

**19**  At present, he operates an excavator, digging canals for pipelines. Recently he has been working in Saskatchewan for $34 an hour plus his truck expenses and his live-out allowance of $150. He works 12-hour days and often a 34-hour week plus overtime after eight hours a day. After 40 straight-time hours, he earns time-and-a-half.

**20**  Mr. Hodgson frequently works one month straight or sometimes two weeks in a row straight without taking a break. His mail is received at the nearest centre, which is Etonia, Saskatchewan.

**B. The Accident**

**21**  Mr. Hodgson testified that he was driving prudently at the time of the accident.

**22**  At the accident, he could not stop his vehicle so he "t-boned" the defendant's car. The whole front of the defendant's car caved in. As noted, the plaintiff ended up with a burn on the top of his head and he had facial pain for about ten days due to the air bags' deployment.

**C. Following the Accident**

**1. Testimony of Mr. Hodgson**

**23**  Immediately following the accident, Mr. Hodgson suffered headaches and neck aches. His ankle was sore. He had chest pain. The burn on his head and face and his lower back and neck hurt.

**24**  The day following the accident, the plaintiff attended at Peace Arch Community Medical Clinic and was seen by a physician, Dr. Dalton Chen, whose records were reviewed by some of the experts that submitted reports to the Court.

**25**  At the time of his testimony, he still felt stiff and sore from the accident. He experiences pain between his shoulder blades to the middle of his neck, and he feels soreness. He can be sore all day, depending on what he has been doing, and which equipment, in particular, he has been operating. However, he endeavours to live as healthy a life as possible and that includes avoiding taking medication whenever possible. Accordingly he only takes Tylenol, Aleve and Robaxacet.

**26**  Before the accident he would attend the gym six days a week. Now he is only able to go three days a week and he misses his training in mixed martial arts.

**27**  He testified that he still suffers from pain to his neck and shoulder. His ankle injury and the abrasion to his head and the face pain from the accident, as well as the lower back pain and the chest pain have resolved. He still suffers from headaches and dizziness and these are aggravated by the type of work that he does. He is conscious that his body has changed. He has gone from 185-190 pounds to 165-170 pounds due to being unable to maintain his muscle mass.

**2. Testimony of the Plaintiff's Mother**

**28**  The plaintiff's mother, Wendy Hodgson, testified that after the accident, the plaintiff was in pain, lying around the house, with a sore neck and headaches. He would ask his mother to help him by giving him massages. She saw him taking Advil. She was aware that he tried to go snowboarding after the accident, but compared to going for day after day as he had before, he was unable to much more than a day or half a day.

**29**  His work involves driving his equipment over rough terrain to create the channels for the pipelines. There are no paved roads; he has to drive over terrain, and he has to endure heavy jerking movements in the truck as it traverses the land. This causes headaches and leads to a migraine which starts as a dark line in front of his eyes, continues to a pounding feeling, and testifies, "it doesn't go away" until he goes to sleep. He has to keep his job, however, so he keeps going.

**30**  Since the accident, Mr. Hodgson has been having difficulty with his hands. After 18 months, he began to get a tingling feeling in his pinky fingers, like both of his hands were falling asleep. He also suffers from anxiety while driving. If someone is at an intersection, stopped but signaling they are turning, and he is going straight, he fears that the person is going to come out into the intersection. He fears that person, who does not have the right of way, will collide with him.

**31**  His mother has noticed his anxiety driving. She recounted one incident in particular when they were driving along Highway 7. A car came out of a Superstore parking lot and her son just about slammed on the brakes. She cried out and he responded, "Okay, okay -- it just didn't look like it was going to stop. It scared me." She had never witnessed this sort of behaviour from him before, and she realized that it was a consequence of his experience in the accident.

**32**  Ms. Hodgson has noted that the birth of his child has shown her son to be a wonderful father. She became emotional in describing the fallout from his own father's death and her son's manner of coping by becoming independent and growing apart from her as a way of avoiding seeing her in pain.

**3. Testimony of Kaitlin Evans**

**33**  Mr. Hodgson's friend, Kaitlin Evans, gave evidence. She has known Mr. Hodgson for eight years, from high school. She considers him a good friend. He dated her sister, Tess, and worked for her father, Keith, who also testified at the trial. She and her boyfriend have vacationed with him and his partner.

**34**  Ms. Evans studies social work at University of Fraser Valley, and she is a server at target at a restaurant in Abbotsford. She indicated that the time she saw him in Terrace was in late 2013 when she saw him approximately three times.

**35**  After the accident, she noticed that he was often in physical pain. He would lie down after work. This occurred when they were living in Terrace, B.C. She has also seen him working out and commented that he is not physically able to do the same amount, and can't take part in his training. He has lost weight and she knew him to be bigger and more muscular. She estimates that he has lost 15-20 pounds in muscle from his upper body and his arms.

**36**  Respecting his driving, she notes that he asked Ashley, his partner, to drive when his son was in the car. She felt he was also battling a bit with depression.

**4. Testimony of Michael Heldt**

**37**  The Court heard from Mike Heldt, who has known Mr. Hodgson for six years. Mr. Heldt was in a relationship with the plaintiff's sister. They worked together in 2014 but not before that. They had labourers together in Cold Lake at J.B. Drivers and were roommates there, so he was able to observe Mr. Hodgson well. The two worked together at Cold Lake. Mr. Heldt would mostly see Mr. Hodgson after work and he would notice that he was in pain. He knew that the plaintiff was labouring and also operating the skid-steer.

**38**  He recalled doing some snowboarding with Mr. Hodgson after the accident, but says he could only do one to two runs and that would be it. Before the accident, the plaintiff would be fine all day, snowboarding until closing time. They would also fish together in places where they would hike in. Now Mr. Hodgson does not want to go as he is in pain. Mr. Heldt has noticed a decrease in the plaintiff's weight.

**39**  He also remarked Mr. Hodgson is no longer as outgoing as he was and suffers from a change in energy.

**5. Keith Evans**

**40**  The Court also heard from Keith Evans, who had been the plaintiff's employer at IDL in Fort Nelson and was his former girlfriend's father. Mr. Evans invited the plaintiff to work because he felt he was a responsible individual who would work well. Mr. Evans was immediately happy with his work. He felt he was enthusiastic and intelligent. He could look after himself and overall he worked "very well". He worked the big machines including the rock truck and did a good job.

**41**  Mr. Evans explained the different rates in pay and how it was regular rate of pay until time-and-a-half after eight hours or after 40 hours in a week pursuant to Operating Engineers Union Agreement. Saturday would be eight hours at time-and-a-half and if it went 12 hours the last four hours would be double time.

**42**  The plaintiff did complain that to Mr. Evans, however, of the "beating" he took car driving the rock truck and that he would do have a sore neck and a sore back afterwards. He recalled when there needed to be layoffs that Mr. Hodgson was on a protected list, and was not one of the first that would have been laid off given the amount of time that he had put in; however he indicated to Mr. Evans that he preferred to be laid off because of the neck and back difficulties he was sustaining driving the rock truck. Had he continued working, that would have likely been to November or early December. He would have earned what he was earning: $364.58 a day, including holiday pay at 10%. Mr. Evans testified that the contract with IDL at Fort Nelson indeed continues to this day.

**6. Ashley Rose McKenzie**

**43**  Ms. McKenzie testified in the plaintiff's case. She has been with Mr. Hodgson for three years now and is the mother of his child. She has only known him since the accident but she has been with him in a number of remote locations where he works, including Fort St. John, Cold Lake and Terrace. She testified to the lengthy hours, from 12 to 13 hours a day, that he works each day. She testified he was a very good provider, a hard worker and a proud father.

**44**  She testified that he has a hard time physically going to the gym and said that physically he cannot play with their son as he finds it too difficult.

**45**  The medications that she sees him taking are Tylenol, Aleve and Robaxacet. He also takes melatonin to help him sleep. She notes in connection with his sleeping that he has to move around and has difficulty getting comfortable.

**46**  She spoke about the anxiety that he has in a vehicle, particularly when he is driving and his son is in the vehicle. If he is feeling anxious, which is often, he will ask her to drive.

**47**  Ms. McKenzie also explained why Mr. Hodgson has not been to see more doctors. In the remote locations they live, there is inadequate medical coverage for all of the residents. Even when she was pregnant, she said she found it difficult getting a physician and there definitely were no physicians for anyone who did not have extenuating circumstances such as pregnancy.

**48**  Mr. Hodgson had headaches, usually after work, and would take some kind of pain reliever for it, she told the Court.

**D. Credibility and Reliability of Evidence**

**49**  In *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=), aff'd [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=), Dillon J. stated:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* [*(1926), 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont.H.C.); *Farnya v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

**50**  I find that at the plaintiff's witnesses were credible and to be believed. I do not find that there was any exaggeration or reason to disbelieve their evidence -- they were endeavouring to help the Court with candid descriptions of the plaintiff and his activities, both before and after the accident. I accept their evidence in its entirety.

**51**  His mother, Wendy Hodgson, testified and I accept her evidence. I find she was a straightforward, honest witness, who was endeavouring to give the Court the most accurate picture of her son especially as he was prior to the accident and in the immediate aftermath.

**52**  In respect of the plaintiff, I accept his evidence. He was candid and thoughtful. I also accept he was not exaggerating and indeed find he was a stoic working through his pain to provide for his family.

**E. Liability**

**1. The Plaintiff's Position**

**53**  The plaintiff's position is that he had the right-of-way and the defendant turned into his lane instead of waiting for another vehicle to have carried on past. This vehicle obstructed his view of the roadway and the plaintiff was right behind the other vehicle.

**54**  The plaintiff submits the applicable legislation are sections 176 and 186 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*, provide as follows:

176 (1) The driver of a vehicle in a business or residence district and emerging from an alley, driveway, building or private road must stop the vehicle immediately before driving onto the sidewalk or the sidewalk area extending across an alleyway or private driveway, and must yield the right of way to a pedestrian on the sidewalk or sidewalk area.

1. The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard.

186 Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop

1. at the marked stop line, if any,
2. before entering the marked crosswalk on the near side of the intersection, or
3. when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

**55**  In the alternative it is argued, the defendant, Mr. Saeed, ought to have proceeded slowly into the intersection until he had an unobstructed view of the roadway before making his turn. The plaintiff's position is, had the defendant taken either of those precautions the collision would have been avoided.

**2. Defence Position**

**56**  The defence position, in contrast, was that the plaintiff should have taken care to realize that at each stop sign there is the possibility of such a collision occurring and that he should have slowed accordingly.

**3. Case Law**

**57**  In *Glavica v. Lott*, [*2014 BCSC 2238*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S4T1-00000-00&context=), Watchuk J. held that the onus was on the defendant left turning vehicle, exiting from a parking lot. The driver had to take care to ensure that no collision occurred. She stated:

[35] The defendant's actions on his evidence that he turned into the left lane when the plaintiff was in the right lane at that location are not indicative of careful driving but of haste. There were no other vehicles on the road at the time. If his intention was as stated to make a safe left turn into the left lane, there was no need for haste when seconds later the plaintiff's vehicle would have passed by and the road would be clear. This was not a situation where a driver was attempting to fit into a line of traffic.

...

[40] Section 144(1)(a) and (b) of the *MVA* prohibit driving a motor vehicle on a highway without due care and attention, or without reasonable consideration for other persons using the highway.

[41] Section 186 of the *MVA* requires a driver of a vehicle to stop at a stop sign at an intersection. In this case, there was a stop sign at the exit of the parking lot. Since there was no marked stop line or marked crosswalk, the defendant was required to stop, pursuant to s. 186(c), before entering the intersection, at the point nearest the intersecting highway from which he had a view of approaching traffic on the intersecting highway.

[42] Once the defendant stopped pursuant to s. 186 to wait to enter the highway, s. 176 of the *MVA* was engaged and required him to yield the right of way to traffic on the highway which was approaching so closely that it constituted an immediate hazard. The plaintiff's vehicle constituted an immediate hazard when the defendant turned onto Zorkin Road. Hers was the dominant vehicle.

**58**  Justice Watchuk held that the plaintiff was entitled to assume that the defendant would not leave the parking lot exit until she had passed and the turn could be made in safety. The plaintiff vehicle, accordingly, was an immediate hazard and the defendant was required to yield:

[51] The plaintiff, like the defendant in [*Niloufari v. Movahedi*, [*2014 BCSC 680*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-6257-00000-00&context=)], was entitled to assume that Mr. Lott would not leave the parking lot exit until she had passed by him and his turn could be made in safety. The plaintiff's vehicle was clearly an immediate hazard and Mr. Lott was required to yield to her.

**59**  Consequently the defendant was 100% liable for the accident.

**60**  In *Kerr v. Hall*, [*2013 BCSC 2347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2B9-00000-00&context=), Melnick J. reviewed a case in which the plaintiff was attempting to turn right onto a highway from a parking lot. The plaintiff's vehicle was then struck by the defendant's vehicle who was already proceeding along the highway. The Court held:

[15] Thus, Ms. Kerr must establish that when she entered Highway 3B from the Gerick Cycle parking lot it was safe for her to do so in that Mr. Hall's vehicle was not approaching so closely that it constituted an immediate hazard.

**61**  A person must not drive without due care and attention on a highway. Justice Melnick helpfully quoted Justice Armstrong in *Currie v. Taylor*, [*2012 BCSC 1553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2DF-00000-00&context=), to note that the dominant driver does not have the burden of proving the servient vehicle was not an immediate hazard unless there was some fault with the defendant driving. He adopted the immediate hazard definition stated by Justice Davey in *Keen v. Stene* [*(1964), 44 D.L.R. (2d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3RS-00000-00&context=) (B.C.C.A.), being "an approaching car is an immediate hazard if the circumstances are such as to require the driver of that car to take some sudden or violent action to avoid threat of a collision if the servient driver fails to yield the right-of-way".

**62**  At para. 20, Melnick J. noted:

[20] ...In *Currie v. Taylor*, [*2012 BCSC 1553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2DF-00000-00&context=), Mr. Justice Armstrong, in a case involving an accident in an intersection where s. 175 of the *MVA* was engaged, helpfully summarized the law as follows at paras. 65 to 68:

[65] The leading authorities that inform the Court on liability assessment in these kinds of collisions are: *Keen v. Stene* [*(1964), 44 D.L.R. (2d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3RS-00000-00&context=) (B.C.C.A.); *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.); and, *Walker v. Brownlee and Harmon*, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.). The principles include the following:

1. a vehicle is an immediate hazard in circumstances where the oncoming driver is required to take a sudden or violent action to avoid threat of the collision if the servient driver fails to yield the right-of-way: *Raie* at 406.
2. it is the movement of the servient vehicle into the through street in the absence of an immediate hazard that gives it the right-of-way, rather than its mere presence at the stop sign; *Keen* at 360.
3. consideration is given to the interval of time elapsing to allow a careful oncoming driver to realize that the servient driver is making an entry resulting in the danger of collision; *Keen* at 360.
4. the hazard is immediate if a reasonable danger of such future collision may be apprehended at the time of the proposed entry by the servient driver; *Keen* at 364 and *Raie* at 405.
5. if the dominant driver has become aware, or should become aware that the servient driver has entered the intersection in disregard of the law, then a duty arises to take sufficient steps to avoid the accident was; *Keen* at 367.

[66] In *Keen*, Mr. Justice Davey adopted the following definition of "immediate hazard" at 359:

[A]n approaching car is an immediate hazard if the circumstances are such as to require the driver of that car to take some sudden or violent action to avoid threat of a collision if the servient driver fails to yield the right-of-way. ...

[67] Mr. Justice Harris (as he then was ) in *Knight v. Li*, [*2011 BCSC 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33M-00000-00&context=) said:

[12] Note that it is the action required of the servient driver to avoid the threat of collision -- and not to avoid the collision itself -- which is relevant to assessing whether the dominant driver constituted an immediate hazard.

[68] The observations of Davey J.A. at 359 are pertinent to the facts of this claim:

..."Speed and distance generally determine what constitutes an immediate hazard", or as it was put by Cannon J., in *Swartz Bros. Ltd. v. Wills*, [*[1935] 3 D.L.R. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1BS-00000-00&context=) at 279, [*[1935] S.C.R. 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1BS-00000-00&context=) at p. 632: "...distances must be translated into time in order to determine what are the rights of the parties."

But having said that, I must add that in most automobile collision cases estimates of time, speed and distance do not lend themselves to exact mathematical analysis, because the estimates are by their very nature uncertain[...]

In my opinion s. 165 [now s. 175], dealing with rights-of-way of drivers proceeding along through streets, and stopped at stop signs on intersecting streets, is to be applied broadly from the point of view of the motorist sitting in the driver's seat, and not meticulously by a Judge with the benefit of afterthought. The situation confronting a motorist, even one waiting at a stop sign, is not a static, but a fluid one, calling for quick appreciation and judgment. A driver waiting at a stop sign ought not to enter a through street unless it is clear that oncoming traffic does not constitute an immediate hazard. Excessive refinement of what traffic is an immediate hazard will defeat the purpose of the right-of-way regulations contained in s. 165 [now s. 175], and make them an inadequate and confusing method of regulating traffic at intersections on through streets.

**63**  Similarly in *Walker v. Leung*, [*2014 BCSC 1623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G06X-00000-00&context=), Hinkson C.J. was considering a case in which the plaintiff was in the curb lane approaching an intersection when she struck a left-turning vehicle which crossed into her oncoming path. The Chief Justice adopted the earlier reasoning of Legg J. in *Pacheco (Guardian ad litem of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=):

[45] Support for the plaintiff's position can be found in the decision of our Court of Appeal in *Pacheco (Guardian ad litem of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=), [*22 B.C.A.C. 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=). In that case, at paras. 15 and 18, Mr. Justice Legg, writing for the Court, held:

[15] In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. Where the defendant, as here, has totally failed to determine whether a turn can be made safely, the defendant should be held 100 percent at fault for a collision which occurs.

...

[18] In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver. As stated by Cartwright J. in *Walker v. Brownlee*, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.), at 461:

While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

**64**  Consequently the Chief Justice found that the defendant was completely at fault for the accident.

**65**  The defendant's position in this case is that the plaintiff should have exercised caution going past intersections and access roads where there were stop signs. I do not agree. The dominant vehicle is entitled to assume that the servient vehicle will not create a hazard. Were vehicles to have to slow at every intersection to check to see if the servient vehicle was to drive out, this would create a hazard in and of itself.

**66**  In this case, the plaintiff testified to the fact that the defendant vehicle pulled out so close in front of him that he could not react and he consequently struck the front end of the defendant's vehicle. However, the plaintiff was traveling 60 km in a 50-km zone.

**67**  The defendant, Mr. Muhammad Saeed, testified and candidly admitted that he pulled out into the intersection. I found him to be straightforward, candid, and truthful witness. He testified he had some communication with the driver on the other side of the road. A woman had gestured to him to come forward and make his left turn. In reliance on that, the defendant moved forward and his view was at that time obstructed by the Hakeem vehicle and he consequently was struck by the plaintiff's vehicle as it came through. The defendant clearly was facing a stop sign on Croydon and I accept his evidence that he pulled through without having clear view as to the traffic that was coming down 160th Street.

**68**  The Court heard as well from Mr. Shane Hakeem who was travelling southbound on 160th Street. He testified that the accident occurred in the early afternoon. He testified that he was paying attention to his surroundings. There were no vehicles that in front of him. He saw the defendant vehicle and he is not sure if he came to a full stop or more of rolling stop. He could not give an estimate of the speeds; however, he saw the accident which he described as more than a fender bender, and that it was a significant accident. He gave his information to the gentleman in the black car, being the plaintiff. Mr. Hakeem importantly stated that the gentleman in the black car had no chance to stop. "He couldn't stop."

**69**  Mr. Hodgson had testified that the accident had taken place in the early morning; however he could not recall exactly when it was. He candidly admitted he was going approximately 60 km/hour. I find that there was no evidence to suggest that it would have made a significant difference if he had been going 50 km/hour and stopped this accident from happening. I am mindful of the case law notably Justice Davey's comments above that speed and distance are to be taken into account in deciding an immediate hazard, however that in these cases time and distance are more often than not estimates and cannot translate into mathematical certainty such that it is a certainty the speed cause the accident. Here I am also mindful of the evidence that there was no time for the plaintiff to stop and that had more time elapsed it is possible that the impact would have been to the cab of the defendant vehicle severely injuring him rather than destroying the front end of his vehicle. In all of the circumstances, I find that the defendant is 100% liable for the damages to the plaintiff.

**IV. CONTRIBUTORY *NEGLIGENCE***

**70**  The defence seeks that the plaintiff be held to be partially at fault having contributed negligently to the cause of his own injury. Section 4 of ***Negligence*** *Act,* *R.S.B.C. 1996, c. 333*, provides:

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

1. Except as provided in section 5 if 2 or more persons are found at fault
2. they are jointly and severally liable to the person suffering the damage or loss, and
3. as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

**71**  The inquiry for the Court is whether the plaintiff failed to take reasonable care for his own safety and as well whether that failure is one of the causes of the accident: see *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=), where Tysoe J.A. states on behalf of the Court:

[27] In my respectful view, the trial judge did not ask the correct question. The proper question was not whether a jogger, rollerblader or pedestrian could have been hit by the defendant's vehicle. The correct inquiry was to determine whether the plaintiff failed to take reasonable care for his own safety and whether his failure to do so was one of the causes of the accident. While the judge acknowledged that the plaintiff was under a heightened duty of care because he was in breach of the law by riding his bicycle on the sidewalk, she failed to give effect to the heightened duty because she did not consider what care had been taken by the plaintiff when he saw the defendant's vehicle moving towards the exit from the gas station.

**72**  The Court must consider the respective blameworthiness of each party. This requires an evaluation of the party's conduct in the circumstances and the extent to which it departed from the standard of reasonable care: see *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), where Finch J.A., as he then was, writing for the Court, stated:

[45] In my view, the test to be applied here is that expressed by Lambert, J.A. in [*Cempel v. Harrison Hot Springs Hotel Ltd.* [*(1997), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (C.A.)] and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

[46] Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

Further, in *Bradley*, *supra*, Tysoe J.A. stated:

[24] At common law, contributory ***negligence*** on the part of a plaintiff was a complete defence to his or her claim. This was considered to be unjust, and legislatures in many common law jurisdictions passed contributory ***negligence*** statutes (also referred to as apportionment legislation). The statute in this province is currently called the ***Negligence*** *Act*, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1) of which reads as follows:

If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

If damage or loss has been caused by the fault of two or more persons, s. 4 of the *Act* requires the court to determine the degree to which each person was at fault. While the prerequisite to apportionment is that the damage or loss has been caused by the fault of two or more persons, the apportionment must be done on the basis of the degree to which each person was at fault, not on the basis to which each person's fault caused the damage: *Cempel* [*supra*].

**73**  As set out above, I find the defendant here is 100% at fault for the accident, there being no evidence that driving 10 km/hour above the speed indicated caused the accident given that the defendant candidly admitted that he pulled onto the roadway to commence his left turn without ascertaining that it was clear to do so. In part this was due to the gesture that had occurred from the driver on the other side of the roadway, indicating to him to drive forward. He resulting action in driving forward without a clear view based on the gesture of the other motorist was negligent and underscores that such gestures from other motorists should be ignored. The focus of the driver should be on one's own safety and the safety of others. A driver should never rely upon another's gesture to presume it is safe to leave a stop sign and place of safety.

**V. CAUSATION**

**74**  The plaintiff must establish, on the balance of probabilities, that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause as long as it is part of the cause beyond the range of *de minimis*.

**75**  Causation does not have to be determined by scientific precision: see *Athey v. Leonati* [*(1996), 3 SCR 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), at paras. 13-17, and *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=), at para. 9. The question is, but for the defence ***negligence*** would the plaintiff has suffered injury: see *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), at paras. 21-23.

**76**  Causation must be established on a balance of probabilities before damages are assessed: see the comments of McLachlin C.J. in *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), at para. 78. The purpose is to put the plaintiff into the position they would have been in but for the defendant's ***negligence***.

**VI. MEDICAL EVIDENCE**

**A. Dr. John Le Nobel**

**77**  Dr. Le Nobel, who is a specialist in physical medicine and rehabilitation, provided a report that was put into evidence. He wrote in his report: "Bryan Hodgson has missed time from work. He is less capable with his non-work recreational pastimes. In these respects, he is disabled." He also noted that Mr. Hodgson is deconditioned based on his reduced capacity of strength training over the past three years.

**78**  He noted Mr. Hodgson's abnormal "pins and needles" symptoms in his right and left small fingers, which Dr. Le Nobel felt was consistent with irritation of the nerves supplying the fingers. At the time of writing the report, however, the nerve irritation had not been confirmed.

**79**  Given that it has been three years and ten months since the motor vehicle accident, Dr. Le Nobel felt that Mr. Hodgson was suffering from chronic pain. He defined chronic pain to be "a pain which continues for longer than tissue healing is felt to progress. Tissue healing is generally felt to subside within 10 to 12 months of injury." He went on to state:

I diagnose his neck and upper body pain as due to injury to this often connected myofascial tissues in or near the symptomatic areas in his cervical spine, paraspinal areas and shoulder girdles. Injury to these tissues is at times deep to the body surface and not fully evaluated with techniques such as inspection and palpation. Myofascial injuries are felt to be a cause of chronic pain. Greater understanding of his myofascial pain may be achieved through magnetic resonance scanning.

**80**  Dr. Le Nobel recommended that helpful measures for Mr. Hodgson would be multidisciplinary rehabilitation to try to reduce his deconditioning and that he work with a kinesiology and exercise-based physiotherapist to develop a program which would include stretching and low impact cardiovascular training and strength training. He felt he should have time with a kinesiologist over a period of 8 to 10 months with an understanding that the time allotment may change in the future.

**81**  He was of the opinion that Mr. Hodgson would be subject to pain increase when increasing his activity level. Even with that treatment, however, in respect of prognosis, he wrote:

Some benefit may be achieved through these steps. There is no other treatment which will predictably produce a superior result. A return to all of his prior capabilities in a symptom-free state is not likely. In that respect, his prognosis is guarded.

**82**  Dr. Le Nobel noted that Mr. Hodgson had no difficulties, nor any neck pain or numbness in his hands, before the motor vehicle collision. At the time of his writing the report in August 2014, he noted that Mr. Hodgson now has neck pain present most or all of the time, radiating on occasion to the back of his head and to the top of his head and the back of his eyes. This occurs, he noted, at the end of the work day. Mr. Hodgson also has difficulties tilting his head up or to the right or the left. He noted that Mr. Hodgson takes micro-breaks at work in order to cope.

**B. Dr. Mark Boyle**

**83**  The defence called Dr. Boyle, an orthopedic surgeon, who indicated that the medical management of the plaintiff would be in the form of stretching and strengthening exercises and the use of over-the-counter anti-inflammatory medication. He was cross-examined on this and it was noted that this would not be a cure. He testified, however, that there were positive prognostic factors including his gender, age and absence of prior history, as well as an absence of degenerative changes and of neural upper extremity complaints.

**84**  In his report he wrote that no loss of function as expected over time. Dr. Le Nobel had been critical of this finding as time has passed indeed and yet there has been no return of complete function that the plaintiff enjoyed before the accident.

**85**  Dr. Boyle noted that the plaintiff stated that his neck pain was almost constant, being worse in the winter, as he had similarly stated to Dr. Le Nobel. He also indicated to him that the heavy equipment can be difficult as it is bumpy and not on level which will cause him irritation. He will have soreness and be stiff after busy days and there is occasional grinding. Dr. Boyle also noted the occasional sleep interruption.

**86**  In cross-examination, Dr. Boyle agreed that the grinding sound is not good and it suggests degenerative changes. However, he was not of the opinion that it starts small then progresses. He agreed that he presented with symptoms but overall he felt there were no negative prognostic factors.

**C. Dr. Morgan Campbell**

**87**  Dr. Morgan Campbell also testified in respect of the plaintiff's injuries. He was qualified as an expert witness in the area of general medicine and he gave the following statement:

Mr. Hodgson will suffer ongoing, evolving cervical spine degeneration over many years as a result of high-energy extension forward flexion motor vehicle accident related cervical spine soft tissue injury, as well as episodic ongoing cervical spine pain and periodic disability. He will require time off work and physical therapy during these exacerbations.

**88**  Dr. Campbell noted that Mr. Hodgson has a stoic-type personality and he opined it was important to consider the accident. This was a high-energy posterior followed by anterior flexion whiplash injury to the plaintiff's cervical spine and a similar injury to his lumbar region.

**89**  Dr. Campbell commented that Mr. Hodgson continued to work because of his stoic nature at his physically demanding work. Accordingly, the fact that this is noted in Dr. Boyle's opinion is not to be counted against him. He had to provide for his family and consequently was unable to continue pursuing ongoing physical therapy, as well as his own inability to afford the cost of the therapy

**90**  Dr. Campbell, based his opinion in large part on his experience and on his practice of medicine for 30 years. He believed that Mr. Hodgson will have difficulty getting back to normal given the amount of time that has passed and the degenerative changes that were likely in existence in this case. He noted that this is particularly evident from the grinding which was testified to and noted by both Dr. Boyle and Dr. Le Nobel. He testified that Mr. Hodgson will inevitably have degeneration not of the bones and disc but of the soft tissue. He is using his neck heavily and ultimately, he is going to have issues with his neck and, in fact, already is.

**91**  Time off work and physiotherapy, Dr. Campbell noted, can alleviate the pain for a time but it will not be a cure. He testified how the grinding is one of the first signs of ongoing degenerative changes in the vertebrate, as scar tissue is formed which makes a grinding noise. To Dr. Campbell it was an indication of how much damage has been done.

**92**  He also noted the discomfort the plaintiff feels and the pain radiating to his back and the left side of his neck. Dr. Campbell felt that the plaintiff's pain had plateaued. It was a chronic pain-type syndrome resulting in sleep interruption. From the chronic pain he will experience a loss of function; hopefully, the doctor testified, the plaintiff can work around it, as that is how he has performed to date. He did not agree with Dr. Le Nobel's opinion that there is no long-term loss of function, given the fact that that the plaintiff is still having symptoms which is evidence of damage. In his view, the pain in effect leads to a functional disability.

**93**  Dr. Campbell did not agree, in cross-examination, that physiotherapy and, in particular, early physiotherapy would have cured the plaintiff. Instead, he indicated that it would offer relief but would not be a cure. As well, he noted the plaintiff had an x-ray and the radiologist noted that the plaintiff had torticollis. His alignment is normal but he had a curve. While Dr. Boyle had discounted this, Dr. Campbell deferred to the radiologist and felt there should be further exploration by way of magnetic resonance imaging. He did not believe, however, that Mr. Hodgson had nerve root injury, and he agreed that there is no evidence he would require surgery. Dr. Campbell opined however that there is a permanent functional impairment and he felt that the best "hard" sign of that was the grinding.

**94**  He would not agree on cross-examination that the plaintiff would not have cervical spine degeneration in the future. On re-examination he was asked why. He indicated that over his 30 years of practice, he had seen the type of injury sustained by the plaintiff many times before. The mechanics of the accident are important to him.

**VII. DISCUSSION**

**95**  I accept the evidence of Dr. Campbell and Dr. Le Nobel of the plaintiff's ongoing pain and its chronic nature and that he is a stoic individual who is working at best to cope with his pain. Dr. Boyle testified that physiotherapy would not cure the plaintiff. He noted the grinding. While he was hopeful for the plaintiff, indicating positive prognostic factors, I find these to be only general, hopeful observations. I prefer the evidence of Drs. Campbell and Le Nobel.

**96**  I find that the accident caused the plaintiff's injuries.

**97**  I find that the plaintiff's injuries here were caused by the defendant's ***negligence***.

**VIII. DAMAGES**

**98**  The plaintiff has a duty to mitigate and in this case there was some issue as to whether the plaintiff should have been seeking more frequent medical attention. I find however that given the remote locations and the scarcity of doctors at the remote locations where the plaintiff was working, there is no fault on the plaintiff for not seeing a physician more regularly: see *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=):

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

See also *Wahl v. Sidhu*, [*2012 BCCA 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626S-00000-00&context=), at para. 32, and *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=), at para. 78.

**A. Non-Pecuniary Damages**

**99**  Non-pecuniary damages are awarded to compensate the plaintiff for pain and suffering, loss of enjoyment of life and loss of amenities. This award should be fair to all parties and fairness is measured against awards made in comparable cases.

**100**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), the Court of Appeal outlined factors to be considered when assessing damages:

[46] The inexhaustive list of common factors cited in [*Boyd v. Harris* [*(2004), 237 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**101**  A plaintiff should not be punished for stoicism. It is important to bear in mind that the assessment non-pecuniary damages is influenced by the plaintiff's personal experiences in dealing with his injuries and their consequences: see *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**1. Plaintiff position on non-pecuniary damages**

**102**  The plaintiff cited the *Walker* decision, *supra*, at para. 101, in which Hinkson C.J. reviewed *Guthrie v. Narayan*, [*2012 BCSC 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3S1-00000-00&context=). In this case, a 26-year old woman had been injured in a motor vehicle accident and at the date of trial she was experiencing pain that varied in intensity and was concentrated on right side of her neck and shoulders. She experienced that pain on a daily basis and, while she had been able to resume full-time employment, this is only after accommodations were made to assist her work. She could no longer perform certain household tasks. Her injuries affected her relationship with her boyfriend. Sitting for extended periods was uncomfortable. In *Guthrie*, the plaintiff was awarded $65,000 in non-pecuniary damages by Goepel J. (as he then was).

**103**  In the case of *Azuma-Dao v. MKA Leasing Ltd.*, [*2012 BCSC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1DM-00000-00&context=), a 28-year-old woman was injured in a motor vehicle accident and suffered from chronic pain as a result. Prior to the accident, she was a fit and active person and the accident caused her to be withdrawn and moody. As well she became deconditioned. She was awarded $65,000 in non-pecuniary damages.

**104**  In *Raun v. Suran*, [*2010 BCSC 793*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-2243-00000-00&context=), a 17-year-old male suffered injury to his right shoulder, left knee, neck and his middle and upper back as a result of a motor vehicle accident. The prognosis for his right shoulder was good; however the prognosis for his neck and low back pain was guarded, and it was found that the continuing pain had significantly affected him. The Court awarded $75,000 for non-pecuniary damages.

**105**  In *Bergman v. Standen*, [*2010 BCSC 1692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4GM-00000-00&context=), a 32-year-old woman suffered whiplash injuries which caused mechanical injury to her lower back, causing her significant pain and discomfort for 4-1/2 years from the date of the accident, and it was believed that she would be symptomatic indefinitely. She was awarded $77,500 for non-pecuniary damages.

**106**  In *Clark v. Kouba*, [*2012 BCSC 1607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2GP-00000-00&context=), a 49-year-old woman sustained soft tissue injuries to her neck, shoulders and mid and upper back in a motor vehicle accident, resulting in chronic pain, headaches, emotional and cognitive distress and sleep disorder. Her prognosis for the future was guarded. The court awarded her $85,000 for non-pecuniary damages.

**2. Defence position on non-pecuniary damages**

**107**  The defendant submitted that an award in the range of $3,500 to $15,000 was appropriate, citing *Clark v. Lumgair*, [*[1999] B.C.J. No. 2571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22PD-00000-00&context=), in which $9,000 was awarded; however I note in that case that Edwards J. stated at para. 16 of that decision that the plaintiff's injuries did not prevent him from carrying on recreational and other activities including extensive renovation work on a house, he did not have constant pain with certain activities, extended periods of sitting or awkward neck postures, when biking or golfing exacerbated symptoms. He concluded at para. 19 that the plaintiff did not have ongoing pain and had sustained only a mild to moderate soft tissue injury.

**108**  *Best v. Hoyle* [*[1999] B.C.J. No. 2457*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1XJ-00000-00&context=) was also cited for the proposition that damages in the amount of $15,000 were appropriate. In that case, again a decision of Edwards J., he noted at para. 8 that "the plaintiff's symptoms had significantly abated within three months of the accident". He also noted that the symptoms were not disabling although they impacted on the plaintiff's enjoyment of life.

**109**  I do not find that the cases submitted by the defendant are similar to the situation before the Court faced by the plaintiff who suffers from chronic pain. I find that this case is more akin that of *Clark v. Kouba*.

**110**  I find the plaintiff has suffered a significant change in his abilities since the accident affecting his family, work and personal life. He is no longer able to take joy in all activities including his hobbies and caring for his young son. In all the circumstances, I make an award of $80,000 for non-pecuniary damages.

**B. Past Loss of Capacity**

**111**  I accept the evidence of Keith Evans, Wendy Hodgson, Michael Heldt and the plaintiff that, as a consequence of his injuries, he was unable to continue with his employment at Fort Nelson working for ICL, the division of IDL where he was making $27.28/hour. He had asked to be laid off due to his pain and as a consequence he sustained a loss of income. Had Mr. Hodgson continued to November 1, which was the usual time that the work was able to become conducted up to according to Mr. Evans's evidence which I accept, the law and past loss of earning capacity, compensation for past loss of earning capacity is to be based on what plaintiff would have, not could have, earned but for the injury that will sustained: see *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30, and *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=), at para. 49.

**112**  The plaintiff is only entitled to recover damages on his net income loss: see s. 98 of the *Insurance (Motor Vehicle) Act*, *R.S.B.C. 1996, c. 231*. The Court must consequently deduct the amount of income tax payable from lost gross earnings: see *Hudniak v. Warkentin*, [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=).

**113**  The burden of proof on income loss is on a balance of probabilities.

**114**  I accept that this loss is been incurred by Mr. Hodgson and, given that taxes, Employment Insurance and CPP must be deducted, I award Mr. Hodgson $22,968.54.

**C. Future Loss of Capacity**

**115**  The plaintiff has a young family and intends to work to provide for them. I accept his evidence in that regard. By Dr. Campbell and Dr. Le Nobel's evidence, the plaintiff is now disabled from doing all the things he would normally have been able to do. He is going to become less and less able, according to Dr. Campbell, to earn income in labouring and the construction industry as a consequence of his injuries. He is consequently less valuable to a potential employer.

**116**  A claim for loss of earning capacity must consider whether the plaintiff's earning capacity is been impaired by his or her injuries and, if so, what compensation should be awarded for the resulting financial harm that will accrue. This assessment is not based on an application of a purely mathematical calculation and instead will vary from case to case: see *Brown v. Golaiy* [*(1985), 26 B.C.L.R (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.); (1995), *Pallos v. I.C.B.C.*, [*100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); and *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=).

**117**  The damages assessment in this regard is a matter of judgment and not calculation: see *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), at para. 18. There are two possible approaches, being at the *Pallos* approach and the earnings approach, and the approach in *Brown*. The earnings approach will be more useful if the loss is easy measurable: see *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32; however where it is not, the capital asset approach advocated in *Brown* is more appropriate. This approach involves considering factors such as:

1. whether the plaintiff is rendered less capable overall of earning income from all types of employments;
2. whether the plaintiff is less marketable or attractive as a potential employee;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open to him; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income.

**118**  In the circumstances, I accept that the plaintiff at present is suffering pain daily after working, and that he must that take analgesics and is endeavouring to take only Aleve or Robaxacet and Tylenol to help with the pain; however it is clear that the plaintiff suffers from ongoing difficulties and, according to Dr. Campbell, he will in the future.

**119**  In all of the circumstances, considering all of the factors and the fact that Mr. Hodgson is 40 years away from retirement, I award $75,000 for this loss.

**D. Cost of Future Care**

**120**  The plaintiff is entitled to be compensated for the cost of future care based on what is reasonably necessary to restore him or her to the pre-accident condition in so far as that is possible: see *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=), and *Spehar (Guardian ad litem of) v. Beazley*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=).

**121**  The future care that is foreseen as a consequence of these injuries is that Mr. Hodgson will continue to have to pay for pain relieving medications. I am satisfied that the medications are justified as both medically necessary and likely to be incurred by the plaintiff. An assessment of damages for the cost of future care is not to be a precise accounting exercise: see *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), at para. 21.

**122**  I accept that Mr. Hodgson has a daily need for pain medication.

**123**  In all the circumstances, I award Mr. Hodgson $15,000 in cost of future care for medications which he will incur in the future.

**E. Special Damages**

**124**  In evidence before the Court were special damages being pain medication from November 20, 2012 to May 8, 2013 in the amount of $65.40, on November 28, 2013, acetaminophen and Aleve in the amount of $23.94; from October 8 to October 18, 2010, three physiotherapy treatments at $60 apiece, and from August 5 to August 6, 2014, various receipts totalling $109.45.

**125**  It is well-established that an injured person is entitled to recover reasonable out-of-pocket expenses incurred. Given that this is governed by the principle that a person is to be restored to the position they would have been the accident not taken place: see *X. v. Y.*, [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=), at para. 281, *Milina* at para. 78. Accordingly, the plaintiff is entitled to $1,009.45.

**F. Summary of Damages**

**126**  In summary, damages are awarded as follows:

\* non-pecuniary damages $80,000 \* past loss of income $22,968.54 \* future loss of capacity $75,000 \* cost of future care $15,000 \* special damages $1,009.45 TOTAL: $193,977.99

**IX. COSTS**

**127**  In the event that counsel is unable to reach an agreement respecting costs, counsel may, within 60 days of the release of this judgment, arrange to address costs by contacting the Registry.

M.A. MAISONVILLE J.

**End of Document**

[***Hubbs v. Escueta, [2013] B.C.J. No. 118***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M34X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.J. Ross J.

Heard: September 24-28 and October 9-12, 2012.

Judgment: January 25, 2013.

Dockets: M096253, M122275

Registry: Vancouver

**[2013] B.C.J. No. 118** | [*2013 BCSC 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1D4-00000-00&context=)

Between Randall Matthew Hubbs, Plaintiff, and Basilio Ramos Escueta, Defendant And between Randall Matthew Hubbs, Plaintiff, and Derek Martin, Defendant

(171 paras.)

**Case Summary**

**Damages — Types of damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Non-pecuniary loss — Pain and suffering — Prospective pecuniary loss — Plaintiff awarded damages of $13,009 for non-pecuniary damages for a 2011 motor vehicle accident and damages of $916,664 for a 2009 motor vehicle accident — In 2009 accident, plaintiff suffered serious ankle fracture that required two surgeries — Although plaintiff returned to his job as an electrician for Via Rail in 2012, he still had severe ankle pain and would likely have to seek other employment in near future — Even with retraining, plaintiff would likely earn substantially less — In 2011 accident, plaintiff did not re-injure ankle and suffered soft tissue injuries that resolved themselves.**

**Tort law — *Negligence* — Motor vehicles — Rules of the road — Action for damages resulting from a 2009 motor vehicle accident allowed — Defendant disputed liability — Plaintiff alleged defendant cut him off as defendant drove into plaintiff's lane from a parked position, thereby causing the collision — Defendant alleged he never saw plaintiff's motorcycle prior to collision — Defendant was solely liable for the accident — He failed to keep a proper lookout when he drove into plaintiff's lane — Not reasonable to expect that plaintiff would have seen the defendant's van before he did.**

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| Actions for damages resulting from two motor vehicle accidents. The plaintiff was injured in 2009 when his motorcycle was struck by a vehicle driven by the defendant Escueta. The plaintiff alleged Escueta cut him off as Escueta drove into the plaintiff's lane from a parked position, thereby causing the collision. Escueta alleged he never saw the plaintiff's motor cycle prior to the collision. Escueta denied liability. The second accident occurred in 2011 when the plaintiff was struck by the vehicle driven by the defendant Martin while in a crosswalk. Martin admitted liability. The plaintiff, now 43, was an electrician. In 2009 he worked part-time for his own home renovation company and full-time as an electrician with Via Rail. In the 2009 accident, the plaintiff sustained soft tissue injuries and a significant injury to his left ankle which was fractured both on the outside and the inside. He required two surgeries and continued to experience considerable pain and problems with his balance. During the course of the active rehabilitation program, the plaintiff was involved in the Martin accident. He did not reinjure his ankle in this accident. Most of the after effects of the Martin accident had resolved in four to six weeks. There was an injury to the thumbs that had not fully resolved but the prognosis for a full recovery was good. He returned to work at VIA Rail on schedule in February 2012. His balance was improved, but that he was still experiencing pain. Although the plaintiff was presently doing his job, he was only managing by enduring significant pain, sacrificing the quality of his family life, hastening the degeneration of his ankle and risking further injury.  HELD: Actions allowed.  Plaintiff was awarded damages of $13,009 for non-pecuniary damages of the 2011 accident and damages of $916,664 for the 2009 accident. Escueta was liable for the 2009 accident. His evidence was contradictory and not credible. The plaintiff's version was accepted and was corroborated by an independent witness. Escueta failed to keep a proper lookout when he drove into the plaintiff's lane. It was not reasonable to expect that the plaintiff would have seen the Escueta van before he did. Once he saw the van, the plaintiff attempted to avoid the collision, but was not able to do so. The plaintiff was not contributorily negligent. The plaintiff suffered separate injuries in each accident. The injuries did not overlap. The neck and thumb complaints arose from the Martin accident. That accident did not aggravate the ankle symptoms. It was, therefore, not appropriate to make a global award for non-pecuniary loss. In the 2001 accident, the plaintiff suffered soft tissue injury to his neck, shoulders and thumbs. The symptoms were intermittent, and while bothersome, had not interfered with his functioning. His prognosis for a full recovery was good. The ankle injury from the 2009 accident had impaired his ability to earn his living. The plaintiff was no longer able to enjoy the active lifestyle he loved and faced a future of increased deterioration and vulnerability to injury. He was awarded $130,000 for non-pecuniary loss and $65,833 for past loss of wages. The plaintiff established that his ability to earn income had been significantly impaired. He was not truly capable of discharging his job functions in a safe fashion at present and would likely be required to leave his current job in the relatively near future due to the ankle injury. Even with retraining, the plaintiff would likely earn substantially less. He was awarded $600,000 for loss of future income, $66,200 with respect to the costs and income loss associated with retraining and 53,040 for the cost of future care. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 98*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B06K-00000-00&context=)

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Brahm Martz.

Counsel for the Defendant Basilio Ramos Escueta: Meelie Dong.

Counsel for the Defendant Derek Martin: Amanda Meade.

**Reasons for Judgment**

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| **C.J. ROSS J.** |

**Introduction**

**1**  The plaintiff, Randall Hubbs, was injured in two motor vehicle accidents. The first occurred on July 3, 2009 when the motorcycle Mr. Hubbs was riding was involved in a collision with the vehicle driven by the defendant Basilio Escueta (the "Escueta Accident"). The second accident occurred on November 30, 2011 when Mr. Hubbs was struck by the vehicle driven by the defendant Derek Martin (the "Martin Accident") while in a crosswalk. The two actions arising out of the accidents have been heard together.

**2**  Liability is at issue with respect to the Escueta Accident. Liability has been admitted with respect to the Martin Accident.

**Facts**

**Pre Escueta Accident**

**3**  Mr. Hubbs was born in 1969. He is now 43 years old and married to Barbara Hubbs who is a self-employed kinesiologist. They have been together for 19 years and have two children, a four year old son, Cooper and a two year old daughter, Bailey.

**4**  Mr. Hubbs attended Grade 11 at Sutherland Secondary School in North Vancouver and then left school to find employment. He worked at a number of different jobs until he decided to train to become an electrician in 1992. He then obtained his GED and took a one year course at BCIT, followed by a four year apprenticeship with Advanco Electric. He received his Red Seal certification as a journeyman electrician in 1999.

**5**  In 2000, he and a partner operated a company called W.J. Windebank Ltd. Windebank's primary business was heavy industrial electrical work. The company had a number of contracts to provide maintenance service to lumber mills in the Mission area. This work was very physically challenging. Mr. Hubbs described it as dangerous because the servicing had to be undertaken while the mills were operating. He and his partner made efforts to expand the business into other areas, such as residential construction, but met with limited success.

**6**  In 2005, Mr. Hubbs decided to look for different employment. He was not entrepreneurial and wanted to find work that was less dangerous. He was looking for a good union position with long-term benefits and stability. He felt that this would be more compatible with raising a family.

**7**  After leaving Windebank, Mr. Hubbs returned to work for Advanco for a period of time. During that time, he did some electrical installation for a condominium development. It was his evidence that, because of the injuries suffered in the Escueta Accident, he would not be able to perform that job today as it required work without breaks and working on steel beams in a crouched over position.

**8**  At about this time Mr. Hubbs incorporated Contact Electric Ltd. He has operated Contact as a home based electrical contractor, undertaking relatively small jobs, primarily residential, from the time of incorporation to the present. The work Mr. Hubbs undertakes through Contact is mostly residential renovation. He stated that the physical demands of this type of work are relatively modest. There is limited walking and the work is easier. He is able to control the pace of the work. Work done through Contact has never been a significant source of revenue for Mr. Hubbs, nor is it likely to be in the future.

**9**  In July 2006, Mr. Hubbs secured a position as a journeyman electrician with VIA Rail. He has been employed there on a full-time basis ever since. The position at VIA Rail was everything Mr. Hubbs had been looking for. He enjoyed the work and was good at it. It was a well paying, secure position with good benefits and good job security.

**10**  The position involves servicing the West Coast Express commuter trains. It is very physically demanding work. The job requires a great deal of walking, several miles each shift, often on uneven surfaces. Every shift involves repeated climbing ladders and stairs to access the railway cars and working in cramped and awkward positions. The electricians must lift and carry heavy components such as motors and blowers. Sometimes they must carry the heavy equipment up ladders. One very demanding task which is performed each shift is connecting and disconnecting the power cables that connect the trains to the power station. The cables are large, about 5 inches in diameter and 15 to 20 feet long, made of solid copper. Each shift two of the cables must be either plugged or unplugged for each of the five trains. The task requires full exertion, with the legs used to push and the whole body strength required to make the connection.

**11**  At the time of the Escueta Accident, Mr. Hubbs was working full-time at VIA Rail and operating Contact as a part-time business. He was undertaking substantial renovations to the family home. At VIA Rail he had a lead hand designation. He worked a split shift which he liked.

**12**  Mr. Hubbs describes a full and happy life before the Escueta Accident. He and his wife enjoyed active outdoor recreation - hiking, mountain biking, skiing, riding motorcycles. Their marriage was very happy. They had a large dog who required regular long walks and Mr. Hubbs enjoyed taking him. Mr. Hubbs was a very engaged father. He was looking forward to introducing his son to all of the physical activities and sports that he loved. He loved to play with children, both his son and their friends' children, getting down on the floor with them, carrying them around.

**13**  Mr. Hubbs described himself as a happy man with a wonderful life and a bright future before the Escueta Accident. The evidence of his wife and family friend Elinor Matheson confirms his energy, productivity, positive outlook and sense of humour.

**Escueta Accident**

**14**  The Escueta Accident occurred on July 3, 2009 when the motorcycle Mr. Hubbs was riding collided with the van driven by Mr. Escueta in circumstances that are detailed below in the section dealing with liability.

**15**  Mr. Hubbs injured his head, neck, right arm and right shoulder, his right leg and right knee, his back, left wrist and his left ankle as a result of the collision. All of his injuries except for the scar on his left wrist and the injury to his left ankle resolved within several months. His left wrist bears a small circular scar that continues to be painful with strenuous use. The significant injury is to his left ankle which was fractured both on the outside and the inside.

**Recovery from the First Surgery**

**16**  The day following the Escueta Accident Mr. Hubbs had surgery to repair his ankle with the insertion of plates and screws. He remained off work until November 3, 2009. During his recovery he progressed from a wheelchair to crutches and then to a cane. He was in a great deal of pain and required oxycodone for pain relief.

**17**  He attended physiotherapy and had weaned himself off the oxycodone by the time of his return to work. He was not fully recovered at that point but hoped that further recovery would occur in time, a view shared by Dr. Chow, his family physician who was following his recovery.

**18**  During the recovery period Dr. Chow's clinical records refer to complaints of pain, abnormalities in Mr. Hubbs' gait and limitations in function; for example Mr. Hubbs could not walk on his toes and had a reduced ability to do toe raises. Dr. Chow explained that this function is important for activities such as running, climbing stairs, jumping, leaning forward to pick things up.

**19**  After his return to work Mr. Hubbs experienced increased pain. Dr. Chow prescribed more oxycodone on November 13, 2009. Her clinical records note that Mr. Hubbs was limping by the end of his shift. He told her that he could do the work, but in considerable pain.

**20**  Mr. Hubbs stated that he was experiencing considerable pain on the job as well as problems with his balance. He had difficulty climbing and working in the crouched positions the job required. He stated that he did the work as best he could, that he did not want to bring attention to his condition because he was afraid he would lose his job.

**21**  Dr. Chow followed up with Mr. Hubbs a month later. She noted that Mr. Hubbs had good range of motion, but was continuing to experience pain, showed decreased power and had balance issues. Mr. Hubbs reported that the balance issues were interfering with his performance at work. He also reported that he had gone over on his ankle several times at work.

**22**  In March 2010, Dr. Chow followed up with Mr. Hubbs again. His ankle continued to be unsteady and showed a decreased range of motion. He was experiencing sharp pain. Mr. Hubbs was referred to the surgeon for a consultation.

**23**  Mr. Hubbs remained working full-time until the birth of his daughter on May 5, 2010. He was then off work on parental leave from May 6, 2010 until February 3, 2011.

**24**  Mr. Hubbs stated that while he was on parental leave he explored the possibility of securing a different job. He testified that he secured a position as a longshoreman electrician. It was his evidence that the work was very physically demanding. He stated he was not able to perform well at the job because of the problems with his ankle. He stated that he was not kept on at the end of his trial period and that he did not have the choice to stay. It was his evidence that his position at VIA Rail, while physically very demanding, is at the easy end of physical demands in the field of industrial electrical work.

**25**  Dr. Chow examined Mr. Hubbs in May 2010. The ankle continued to be unstable and painful. In July these symptoms continued. Mr. Hubbs reported that he was very tentative at work, experienced a sharp pain if he stepped on his left side the wrong way and that he could not run because of excruciating pain.

**26**  Dr. Chow examined Mr. Hubbs again in October 2010. He was waiting for surgery to remove the hardware. He reported that the ankle was giving him fewer problems now that his activities were putting less strain on it.

**27**  In January 2011, Dr. Chow noted that his gait was normal, but with pain walking on tip toes. There was good range of motion, but reduced balance on the left side. Mr. Hubbs reported that the ankle became swollen after activity.

**28**  Mr. Hubbs returned to work from parental leave on February 3, 2011 and continued to May 16, 2011. He was continuing to experience significant problems with his ankle. Dr. Chow examined him on February 25, 2011. He reported that the foot and ankle were sore, that he was very tentative on ladders, his balance was slightly off. He was very sore at the end of the day and experiencing sharp pains in the ankle.

**29**  Dr. Chow examined Mr. Hubbs in April 2011. She noted that Mr. Hubbs had returned to full duties at work, but the ankle was very painful. He had again rolled over on it. He experienced pain in walking on his toes and with a half squat. He was cautious climbing ladders and experienced pain. Eversion of the ankle produced a sharp pain.

**30**  Mr. Hubbs testified that during the period from February 2011 to the second surgery he felt that his life was going down the tubes. Work was extremely difficult. Each day was worse than the day before. It was all he could do to manage the day's work and then go home to rest up for the next day.

**31**  Mr. Hubbs was awarded a permanent Electrician Lead Hand position on April 29, 2011. However, he was displaced from this position by a more senior employee while he was on leave for the second surgery. He was not able to bid on any new positions while on leave.

**Recovery from the Second Surgery**

**32**  Mr. Hubbs had a second surgery to remove the plates and screws on May 6, 2011. It was hoped that the surgery would reduce his pain and restore his previous level of function in the ankle.

**33**  VIA Rail had informed Mr. Hubbs that he was not to return to work following the surgery until he was capable of performing 100% of his duties. There was no graduated return to work program. Initially, it was hoped that he would be ready to return to work by mid-July, however his recovery was slower than anticipated.

**34**  In June 2011, Dr. Chow noted that there was still swelling at the surgical site, especially at the end of the day. Mr. Hubbs' gait was normal, but he reported that he was limping by the end of the day. She observed decreased strength and balance with toe raise and balance problems on the left side.

**35**  Dr. Chow examined Mr. Hubbs twice in July. On July 11, 2011, she observed that the ankle was weak; he was unable to do a complete toe raise and had difficulty walking on his toes. Mr. Hubbs reported pain with hopping and lost his balance with a hop and half turn. On July 29, 2011, Dr. Chow noted that the physiotherapy was helping with strength. However, Mr. Hubbs' pain level was still high. He had limited ability to do the exercises, weakness and problems with balance and coordination on the left side. He was still limping.

**36**  Dr. Chow examined Mr. Hubbs twice during the month of August. On August 9, 2011, she noted that he was still having problems with strength, balance and pain, and had not recovered sufficiently to return to work. On August 30, 2011, she noted some improvement in strength, but found motor control for balance was still weak. Mr. Hubbs' strength in toe raises had improved, but was still deficient on the left side.

**37**  Mr. Hubbs went to physiotherapy until the end of September 2011. He continued to see Dr. Chow every three weeks so that she could monitor his progress and determine when she could certify him fit to carry out his duties as required by VIA Rail.

**38**  At the conclusion of the physiotherapy, Mr. Hubbs undertook an active rehabilitation work hardening program, working one on one with a kinesiologist in order to make further progress with his ongoing weakness, and issues with strength and balance. The program lasted 12 weeks with one session per week.

**39**  In October 2011, Dr. Chow noted further improvement, but continued deficits on the left side, difficulty balancing and pain. She noted that he had clearly improved, but that he was not ready or safe to return to work.

**The Martin Accident**

**40**  During the course of the active rehabilitation program, on November 30, 2011 Mr. Hubbs was struck by a motor vehicle driven by Mr. Martin. Mr. Hubbs was a pedestrian, crossing West Broadway on Heather Street in the crosswalk. Mr. Martin's vehicle was on Heather Street, stopped in the intersection waiting to turn left. He then commenced his turn and struck Mr. Hubbs in the crosswalk.

**41**  Mr. Hubbs saw the vehicle approach and jumped onto the hood of the vehicle, rolled off and landed on his feet. Mr. Hubbs suffered soft tissue injury to his neck and upper back. He had contusions on both elbows, knees, thumbs and wrists, and thumb pain with gripping.

**42**  Mr. Hubbs testified that he did not reinjure his ankle in this accident. He stated that most of the after effects of the Martin Accident had resolved in four to six weeks. There are lingering problems with his neck which is stiff and painful when he turns his head for extended periods and with his thumbs, which are painful at work.

**43**  Following the second surgery, and while he was engaged in the rehabilitation program, Mr. Hubbs continued to do some work through Contact. It was his evidence that he had discussed this with his physiotherapist who advised him to be as active as possible. He stated that he was told that the worst thing he could do was to be stationary. It was his evidence that the Contact work was easier for him than yard work or playing with the children. He was able to control the pace. It was painful, but he was able to do the work. At the time Mr. Hubbs performed the work for Contact, Dr. Chow had issued a medical certificate stating that she had examined Mr. Hubbs and that he continued to be unable to attend work at VIA Rail.

**44**  The work Mr. Hubbs undertook with Contact was the subject of an investigation by Great West Life, the provider of his disability benefits through his employment. He was observed doing a project for Contact. This resulted in an allegation that Mr. Hubbs was fraudulent in that he was in receipt of benefits while capable of working.

**45**  There was a discipline hearing with respect to this matter. Mr. Hubbs was exonerated of the allegation that he had been fraudulent. The employer did impose a modest number of demerits citing a failure to provide complete information with respect to his medical status.

**Return to Work to Present**

**46**  Although Mr. Hubbs' progress in the active rehabilitation program was set back by the injury, the program was not extended and he returned to work at VIA Rail on schedule on February 22, 2012. Dr. Chow examined him on February 17 and 20, 2012, just prior to his return to work. She noted that his balance was improved, but that he was still experiencing pain.

**47**  Mr. Hubbs stated that he approached his return to work with a positive attitude, resolved to give it his best effort. However, he had not recovered his strength and stability. He hoped for more improvement following his return to work. However, that is not what occurred. Instead, he experienced pain increasing through the week, continuing problems with balance and stability. He stated that after a few weeks he was in despair.

**48**  He returned to work as a reliever. This is a permanent position with the same base pay as he received in his earlier position. He does not get the lead hand salary differential unless he is relieving someone who has that designation.

**49**  Mr. Hubbs reported that he was experiencing pain, increasing by the end of the day and when he undertook certain activities on the job. He was more cautious climbing ladders and was working more slowly.

**50**  On March 27, 2012, Dr. Chow examined Mr. Hubbs in relation to the Martin Accident. She noted that the elbow pain had resolved and abrasions had healed. There was still discomfort in the cervical spine and thumbs.

**51**  In June 2012, Dr. Chow examined Mr. Hubbs and noted that he had not missed work because of his ankle, but was limping in pain by the end of the day. He suffered a mild eversion injury on June 5, 2012. She noted pain and decreased strength with heel raises on the left side. Dr. Chow's records make reference to anxiety in relation to the motor vehicle accidents in her entries for July 2012.

**52**  In August 2012, Dr. Chow recorded that Mr. Hubbs was continuing to experience pain and stiffness in the ankle. He reported that the discomfort increased as the work week progressed. She noted pain in the thumbs and upper back and neck stiffness when turning to look back. The latter two observations related to the Martin Accident.

**53**  On September 17, 2012, Dr. Chow examined Mr. Hubbs and recorded the following observations:

Objective:

no limp with walking with bare feet, right foot is slightly externally rotated and slightly pronated

unable to walk the distance of the hallway on his toes and unable to rise as fully on the left side, signs of collapsing from a full toe rise on the left only walked 6 steps up on his toes and had to stop, steps were wide based, slow and with short stride and progressively shorter and slower stride with successive steps

has pain shooting up the medial and lateral sides of the ankle when toe walking

heal walking pulls on the medial side of the ankle and has shooting pains medially as well

heel walking is also wide based, slow and with a short stride but was able to walk 30 steps

tender to palpation over the malleoll, swelling around the entire ankle, sore over the extensor tendons and does not wear a boot with lacings (wearing Blundstone boots) on the front as this causes more pain, clicking of the joint with passive eversion of the foot, range of motion of the ankle passively was only mildly uncomfortable at the extremes of range

patient stated that there was more pain with active eversion and inversion of the foot

active range of the ankle is equal except for in dorsiflexion in which there is a 10 degree deficit on the left side

**54**  Mr. Hubbs stated that since his return to work he has never told his employer that he is having difficulty performing his duties. His explanation was that he was afraid that to do so would put his job in jeopardy. The company is scaling down the workforce. Moreover, he is not aware of any electrician positions in the company that have lighter physical demands.

**55**  Mr. Hubbs stated that the continued pain and problems with strength and balance make it very difficult for him to perform his tasks at work. He is barely holding on from day to day.

**56**  Mr. Hubbs stated that these days his home is not a happy place. The pain makes him irritable. There is more arguing and yelling. He finds himself pushing his children away. He feels that he does not have the bond he once had with his wife. He feels that he has turned into a miserable person and feels that his marriage is failing as a consequence. By the end of the workday he has no energy left for his family or for any activities. He just rests with his leg elevated to alleviate the swelling and tries to collect himself for the next day.

**57**  He stated that he is not able to take part in the activities he hoped to do with his children. He tried to ski with Cooper, but found the boot too painful after a short time. He tried to skate, but found that he was not able to tolerate the pressure of the boot. It was his evidence that the present situation is not sustainable. He believes that he will need to change how he earns his living so that he can limit his pain and improve the quality of his life with his family.

**Lay Witnesses**

**Barbara Hubbs**

**58**  Ms. Hubbs has been Mr. Hubbs' partner for over 19 years, married for 7 1/2 years. Ms. Hubbs described Mr. Hubbs before the injury as a happy, energetic man. He was very active and adventurous, a supportive partner and great father. She stated that they enjoyed many activities together including hiking, mountain biking, skiing, skating. Mr. Hubbs did much of the heavy work when the couple undertook a major renovation of their home. She stated that before the Escueta Accident, Mr. Hubbs had lots of energy when he came home from work. He would play with the children, do projects around the home, walk the dog. She said he never really sat still.

**59**  She testified that Mr. Hubbs has been a profoundly changed man since the Escueta Accident. He is irritable and moody, more easily set off. Mr. Hubbs is less patient with the children. He no longer plays with them to anything like the extent he did before. The children, in particular Cooper, have responded with anxiety at the rejection.

**60**  Ms. Hubbs stated that Mr. Hubbs does not communicate with her as he used to. By the end of the workday he is exhausted and just rests for the next day. She feels that he has nothing left for her and the children. Their social life has all but ceased. Ms. Hubbs is very concerned about the future of their relationship.

**61**  She stated that Mr. Hubbs moves very differently. He limps if he tries to move quickly and gets up and down in an unnatural way. He cannot carry the children for any length of time. She stated that Mr. Hubbs' ankle is swollen and he is in pain by the end of a workday. She stated that although he works through the pain, it appears to her to be getting worse.

**Elinor Matheson**

**62**  Ms. Matheson is a family friend of the Hubbs'. She met Ms. Hubbs in a prenatal class in 2007. A relationship developed. They shared childcare and began to socialize together with their spouses.

**63**  She described the Hubbs prior to the Escueta Accident as a happy couple. Mr. Hubbs was an energetic, happy man, very involved with the children, always busy around the house. He was very athletic.

**64**  She recalled that following the Escueta Accident Mr. Hubbs was initially very positive about his prospects for recovery. His mood was good. However, as time passed she observed a change following September 2011. Mr. Hubbs was increasingly no longer patient with the children as he had been before. He did not seem to be happy. He spoke about frustration and his mood seemed to be low. He did not play with the children as he had in the past. She noted that Mr. Hubbs does not move with ease. He moves slowly, positioning himself carefully.

**65**  She observed that the Hubbs did not seem to be as happy as a couple. They no longer shared the childcare as they had. They did not speak in a positive way about the future. They did not joke and laugh together. They seem to be careworn.

**Wesley Young**

**66**  Wesley Young has been employed as an electrician at VIA Rail since 1989. He was Mr. Hubbs' supervisor for four years and has now resumed doing the same job as Mr. Hubbs. He noted that he and Mr. Hubbs are not friends; they have not socialized.

**67**  Mr. Young's description of the very physically demanding requirements of the electrician's job at VIA Rail was consistent with the description provided by Mr. Hubbs.

**68**  Mr. Young stated that prior to the Escueta Accident, Mr. Hubbs was a good worker; a big strong, competent guy. He had no difficulty with his work. He noted that Mr. Hubbs never refused a job.

**69**  He stated that since the injury they had worked together. He observed Mr. Hubbs was in pain during a job that required him to carry a heavy blower motor up a ladder. He stated that Mr. Hubbs walks slowly and with an abnormal gait - feet wide apart taking short steps. He said that Mr. Hubbs works more slowly now. He appears to be struggling to complete his tasks.

**Diego Mendez**

**70**  Mr. Mendez is a senior manager of equipment maintenance in Vancouver with VIA Rail. Mr. Hubbs works in his department.

**71**  Mr. Mendez stated that the split shift that Mr. Hubbs had worked prior to the accident was eliminated in November 2009 at the request of the union. However, while the union was in general unhappy with split shifts, he cannot say that they would have sought to have the position eliminated as long as Mr. Hubbs had been in the position and happy with it.

**72**  Mr. Hubbs was displaced in May 2011 while off work by a more senior employee. This could have occurred even if he had been on the job. However, Mr. Hubbs was not able to bid on another position due to his absence.

**73**  Mr. Mendez stated that if an employee is unable to do his job because of injury or illness the employee could request an accommodation. The request would be submitted to head office in Montreal. The company would consult with the chief medical officer and the union would be consulted. Mr. Mendez stated that there have been situations where no accommodation was provided. Two important issues, from the company's perspective, are the nature of the employee's restrictions and the duration of the accommodation requested. He stated that the company would not create a job specifically to accommodate a worker.

**74**  Mr. Mendez confirmed that Mr. Hubbs was told when he was injured that the company did not have a graduated return to work program in place and that he was not to return to work until his doctor certified that he was able to perform 100% of his job functions.

**75**  The company created a graduated return to work program in 2011 in conjunction with WorkSafe BC to provide for modified duties for workers with WCB claims. However, there was and is no similar program for workers such as Mr. Hubbs who do not have a WCB injury. Mr. Mendez confirmed that all the VIA Rail electrician jobs have equal physical demands.

**David Honsberger**

**76**  Mr. Honsberger is the director of human resources at Westshore Terminals. His records show that in June 2010 Mr. Hubbs was briefly employed at Westshore. He was hired as a temporary electrician and employed from June 3 to 12, 2010. The site is a union shop organized by the International Longshoreman Union. The union recruits members who are dispatched to the employer. He stated that normally the employer will schedule three sets of six shifts as a probation period for new hires. Mr. Hubbs did not appear to have completed this length of service.

**77**  Mr. Honsberger described the work that Mr. Hubbs would have done on the basis of the codes on the time records. He stated that this work was not heavy, but required climbing and some walking. Mr. Honsberger stated that the records do not indicate why Mr. Hubbs did not complete his term.

**Expert Opinions**

**Dr. Susan Chow**

**78**  Dr. Chow has been Mr. Hubbs' family physician since December 2005. She has assessed Mr. Hubbs on 35 occasions in relation to the injuries at issue in this litigation. She has also had the opportunity to observe Mr. Hubbs at appointments for his children.

**79**  Dr. Chow provided a medical legal report dated March 11, 2012, which states in part:

In summary, Randall Hubbs is an electrician who works in maintenance at the West Coast Express Railway. He sustained a left bimalleolar ankle fracture which was treated with an initial surgery of open reduction and internal fixation followed by a second surgery to remove hardware. He has successfully returned to work with an estimated 70-75% recovery in function and efficiency. The discomfort and limitations he now experiences are expected to be lifelong. He will likely be at risk for accelerated degenerative changes and early onset arthritis as a result of the fracture, which may decrease his future work capacity and duration of time that he can work on a physical job. He may require regularly dosed prescription ant-inflammatory or analgesic medication in the future or even repeat surgical intervention. If he should sustain a future left ankle injury, the treatment would be more complicated, the recovery would be prolonged and, depending up on the injury, he would likely lose more functional ability.

**80**  Dr. Chow's clinical records include repeated references to restrictions in Mr. Hubbs' power and balance. She noted objective evidence of continuing injury, notably his weakness in the left leg, resulting in limited ability to rise up on his toes on his left foot and to balance on his left leg.

**81**  Dr. Chow testified that Mr. Hubbs consistently was unable to walk raised up on his toes on his left leg for more than six steps before fatiguing and failing to rise fully. She noted this finding on several occasions, including as recently as September 17, 2012 and noted his ability had not changed in over a year, despite extensive rehabilitative therapy. Dr. Chow explained that this weakness resulted in a restricted ability to push off with his left foot, which she testified was necessary for leaning forward to pick up an object, walking, climbing or descending stairs, climbing ladders and balancing on his left foot.

**82**  Dr. Chow stated that Mr. Hubbs' condition was likely to continue to deteriorate at an accelerating pace in direct proportion to how much he used the affected joint. She described how damage to the surface of the ligamentous tissue in Mr. Hubbs' ankle was like "sandpaper" as it moved against adjacent tissue, sanding it down over time.

**83**  Dr. Chow provided a detailed description of the manner in which Mr. Hubbs currently walks with a wider stance and a short stride which shortens as he fatigues. She explained how this stride results from the injuries sustained to the ankle. Wes Young described Mr. Hubbs' walking in this manner at work.

**84**  It was Dr. Chow's evidence that the chronic pain experienced by Mr. Hubbs, his anxiety about his declining physical abilities and his concerns regarding his future ability to support his family have resulted in Mr. Hubbs suffering from a generalized form of low mood, depression that she diagnosed as dysthymia. Dr. Chow noted that low mood falling short of clinical depression is a common feature in patients who are experiencing chronic pain. She stated that Mr. Hubbs' subjective complaints were consistent with the reports from Dr. Brooks and the physiotherapists and with her own observations.

**85**  Dr. Chow also noted that Mr. Hubbs has shown signs of anxiety and hypervigilance.

**Louise Craig**

**86**  Ms. Craig is a physiotherapist and functional capacity evaluator. She assessed Mr. Hubbs on March 30, 2012 for the purpose of a functional capacity evaluation. She provided a report dated April 11, 2012 which states in part:

In summary, during this Functional Capacity Evaluation Mr. Hubbs does not meet the full (physical demands of his job as an Electrician (NOC #7241) and experiences symptom aggravation with task similar to those encountered at work. Mr. Hubbs would most likely be further restricted for a typical Electrician's job in the construction field as this is likely to be more physically demanding than his current position, thus his competitive employability is reduced both with his current position and in the more broader marketplace (construction). Mr. Hubbs' left ankle injury (and resultant limitations) is the primary factor restricting his capacity for performing his current occupation and other potential jobs within his field.

Mr. Hubbs' limitations are as follows: Mr. Hubbs is limited for prolonged periods of walking. He has slight limitation to attaining a kneeling position - he is slow to do so. He is limited for crouching and sustaining this position. He shows ankle joint and calf tightness on the left. Mr. Hubbs' advanced balance is reduced on the left side and bilaterally which will affect his ability to walk on uneven ground and climb tall ladders in wet conditions. In wet conditions or uneven ground or on a ladder, he is at increased risk for falls or injury due to his left ankle. He is limited to the mid to full range for lifting and carrying (carrying up to 40lbs for shorter distances and Iifting up to 50 lbs infrequently). He reports symptom increase in his thumbs with repetitive gripping and handling however this does not restrict his ability to perform these tasks.

Mr. Hubbs does not appear to have reached maximum physical rehabilitation. He has not been able to keep up his exercise program as he states that he is 'wiped out' after work and that he has a young family to look after outside of work hours. He would benefit from further rehabilitation focused on joint mobility of the ankle, stretching and strengthening of the ankle, plyometric work on the lower extremities and balance/proprioceptive exercises. A program guided by a physiotherapist, in accordance with the following outline, is recommended.

1. Twelve-week individualized program;
2. one day per week;
3. continue independently with home program including a low impact cardiovascular component (swimming or stationary bike) for general fitness.

Review of Consistency, Reliability and Validity protocols indicates that Mr. Hubbs provided a consistent and good physical effort during this evaluation.

Mr. Hubbs will require assistance for heavier or repetitive garden and yard care if the need arises.

**87**  It was her opinion that Mr. Hubbs is working beyond his safe capacity and that he should not continue. If he does so she expects that he will experience further deterioration that will further limit the scope of work he is able to do.

**88**  Ms. Craig clarified that she did not expect that the individualized rehabilitation program that she recommended would lead to further progress, but she hoped that it would assist in slowing the rate of deterioration. She noted that Mr. Hubbs had already completed a good focused rehabilitation program.

**Dr. David Brooks**

**89**  Dr. Brooks is a medical specialist in occupational medicine. He assessed Mr. Hubbs on March 29, 2012 and provided a report dated April 11, 2012.

**90**  His report states in part:

It is my opinion that Mr. Hubbs' current complaints and limitations related to his left ankle are solely the consequence of the motor vehicle accident that occurred on July 3, 2009. As a result of his ongoing pain and functional impairment he has also lost the ability to participate in as fully in personal, social and recreational activities as pre-accident and his injuries have impacted his quality of life.

He now appears to have chronic ankle pain that has failed to adequately resolve despite various therapies, including surgical removal of hardware placed to stabilize the fractures in July 2009.

He also likely sustained some degree of psychological trauma. He remains somewhat fearful of returning to regularly riding his motorcycle, which he very much enjoyed prior to the accident. He had been a regular rider for a number of years but now appears reluctant to take his (repaired) motorcycle for anything more than short neighbourhood rides and has anxiety when riding, particularly noticeable at intersections.

His mood appears chronically affected by his pain and perceived physical limitations.

He appears to have some neck and upper back pain that are a result of the injuries from MVA #2. Also in this later accident he has suffered from chronic hand and particularly right thumb pain, presumably related to soft tissue trauma.

**91**  Dr. Brooks stated that Mr. Hubbs has plateaued. No amount of rehabilitation will restore his function. He is likely to experience further deterioration and he is more vulnerable to further injury.

**Derek Nordin**

**92**  Mr. Nordin is a vocational specialist who prepared a report dated June 26, 2012 concerning Mr. Hubbs. Mr. Nordin's report states in part:

1. From a vocational rehabilitation perspective it would be my recommendation that he give consideration to changing his career.
2. From my point of view, it is not realistic to expect an individual to continue working in an occupation that causes him constant pain and loss of enjoyment of life.
3. He would be far better served, in my opinion, to seek alternate employment which does not place the same physical demands on his left lower extremity.
4. From my perspective, Mr. Hubbs essentially has two basic options.
5. The first is to continue in his current employment for as long as he can and try to cope with his pain.
6. Eventually, however, it is likely (as I understand it from the medical reports) his condition will continue to worsen to the point where he can no longer continue in his present employment.
7. At that point in time, he will have to change careers.
8. The alternative for him is to consider changing his career now, when he is younger and somewhat less disabled than is anticipated will be the case in five to ten years from now.
9. If he continues to work in his present employment until he can no longer continue, he will at that point in time be anywhere from five to ten years older than he is now and even more disabled.
10. In my opinion, that will place him in a very difficult position in terms of finding alternate employment.
11. In the alternative, if he looks to change careers now, he is still relatively young and not as limited as he will be down the road.
12. In my opinion, now is the time for him to consider changing careers.
13. From a vocational rehabilitation perspective, the most realistic option for Mr. Hubbs will be to try to find a career which draws upon his training and experience as an electrician.
14. As an alternative, I considered the occupational group electrical mechanics, which includes such occupations as electrical transformer repairer; industrial motor winder/repairer; power transformer repairer; and electrical motor systems technician.
15. Unfortunately, the National Occupational Classification categorizes this work as requiring heavy strength as well as other body positions.
16. This is a heavier strength category than his present employment as an industrial electrician and thus these occupations do not appear to represent viable alternatives for him.
17. A better alternative, from a physical perspective, would be to consider some short training as a small appliance servicer/repairer and/or a major appliance repairer/technician.
18. While Mr. Hubbs is a qualified industrial electrician, he is not qualified as an appliance repair technician. However, he could consider a training program which is offered at Kwantlen Polytechnic University.
19. Specifically, the university offers an appliance servicing technician program. This program is offered at the Cloverdale campus and is of nine months duration with start dates of September or March of each year. Tuition costs for this program are approximately $5,200 and an additional $1,000 for books and supplies.
20. In terms of Mr. Hubbs' pre and post-accident earning potential, a review of census data show for those males who worked full-year/full-time as industrial electricians (this would include Mr. Hubbs' present employment) earned, on average, $78,338 per year (expressed in 2010 $).
21. Furthermore, census data shows for those males who worked full-year/full-time as major appliance repairers earned, on average, $43,333 per year (again in 2010 $).
22. It can be seen, therefore, Mr. Hubbs' residual earning capacity may well be negatively impacted by the July 2009 motor vehicle accident and its sequelae.
23. Unfortunately, given Mr. Hubbs' educational background (and vocational test battery results) I do not view him as an individual who is able to take more advanced education/training.

**93**  In cross-examination, Mr. Nordin agreed that Mr. Hubbs has a number of transferrable skills as an electrician. However, he noted that these skills are concentrated in the heavier work, which in his opinion, is no longer a suitable option. He stated that while he was not suggesting that appliance repair was Mr. Hubbs' only option, his alternatives were limited given his physical limitations and lack of academic inclination.

**Curtis Peever**

**94**  Mr. Peever is a labour economist who prepared a report dated June 28, 2012 which provided calculations based upon certain stated assumptions concerning Mr. Hubbs' past and future wage loss.

**95**  Mr. Peever calculated Mr. Hubbs' past wage loss based on "without accident" earnings as a lead hand electrician with VIA Rail from January 1, 2009 to the date of trial (September 24, 2012) including estimates of his "with accident" earnings as lead hand electrician with VIA Rail from January 1, 2009 to May 12, 2011, and as an electrician with VIA Rail from May 13, 2011 to the date of trial to total $92,137. He then provided a calculation of the net wage loss after tax totalling $65,883.

**96**  Mr. Peever provided a calculation of the present value of future loss of wages based upon certain stated assumptions as follows:

Assume ...

1. that absent the accident, Mr. Hubbs could have worked full-time plus 200 hours of overtime per year as a lead hand electrician with Via Rail from the date of the trial to his retirement by age 65. Further assume that he could have faced "risk-only" labour market contingencies. The present value of Mr. Hubbs' future "without accident" earnings is estimated at about $1,068,500 (rounded), as shown in column (6) of Table 10 across from Table 3.
2. that given the effects of the accident, Mr. Hubbs could work full-time plus 200 hours of overtime per year as an electrician (not lead hand) with Via Rail from the trial date to June 30, 2013. In addition, assume that he may encounter "risk-only" labour market contingencies. The present value of Mr. Hubbs' future "with accident" earnings is estimated at about $48,400 (rounded), as shown in column (6) of Table 10 across from Table 5.
3. that due to the effects of the accident, Mr. Hubbs may work full-time as an appliance service technician from July 1, 2014 to his retirement by age 65. Further assume that his earnings could be lagged by 15 years relative to his age peers, and that he may face "risk-only" labour market contingencies. The present value of Mr. Hubbs' future "with accident" earnings is estimated at about $548,000 (rounded), as shown in column (6.) of Table 10 across from Table 6.
4. that Mr. Hubbs' future "net" VRPP benefits should take into consideration the impacts of "risk-only" labour market contingencies. As shown in column (4) of Table 11, his "without accident" VRPP benefits are then estimated to have a present value of about $95,100, while his "with accident" VRPP benefits are estimated to have a present value of about $6,700.
5. that Mr. Hubbs' mandatory and voluntary non-wage benefits with Via Rail (excluding his VRPP benefits) could be valued at 12% of his "without accident" and "with accident" earnings. Further assume that his mandatory and voluntary benefits as an appliance service technician could be valued at about 13% of his "with accident" earnings.

The present value of "without accident" earnings and benefits is about:

(1.12 x $1,068,500) + $95,100 = $1,291,820.

"With accident" earnings and benefits have a present value of about:

(1.12 x $48,400) + $6,700 + (1.13 x $548,000) = $680,148.

The present value of Mr. Hubbs' future loss of earnings and benefits is about:

$1,291,820 - $680,148 = $611,672, or $611,700

after rounding.

**Credibility**

**97**  The defendants submitted that Mr. Hubbs was not a credible witness. However, while the credibility of any plaintiff is a very important consideration, in this case it is of somewhat less significance because of the extent to which Mr. Hubbs' evidence with respect to the accident and his injury is corroborated by the evidence of other witnesses.

**98**  His account of the Escueta Accident is consistent with that of the independent witness Mr. Meghji, whose evidence I found to be credible and reliable.

**99**  With respect to evidence concerning his employment, Mr. Young, Mr. Hubbs' former supervisor at VIA Rail, described changes he observed in Mr. Hubbs' ability to do his work at VIA Rail that were consistent with the difficulties Mr. Hubbs described in his testimony. Mr. Mendez confirmed that VIA Rail did not offer Mr. Hubbs a graduated return to work program and that he was instructed not to return to work until he was able to perform 100% of his duties. He also confirmed that there are no electrician positions at VIA Rail that are less physically demanding.

**100**  The changes in Mr. Hubbs' activities, in his mental and emotional outlook, and in his family life that Mr. Hubbs described, were confirmed in the evidence of Barbara Hubbs and Elinor Matheson.

**101**  Moreover, the expert evidence is consistent with Mr. Hubbs' testimony concerning his injuries and uncontradicted. There is a body of medical evidence that does not depend upon Mr. Hubbs' subjective accounts of pain and disability. The objective observations are consistent with the deficits Mr. Hubbs has described.

**102**  I found Mr. Hubbs to be a credible witness who gave his evidence in a straightforward manner without exaggeration. I found him to be generally a good historian although there were some relatively minor examples of inconsistency in his recollection. Considerable attention was directed in cross-examination to Mr. Hubbs' applications for employment insurance and disability claims. I found the explanation he offered of his understanding at the time to be credible.

**103**  One area of potentially more significant inconsistency concerns Mr. Hubbs' evidence with respect to the work he performed at Westshore Terminals. Mr. Hubbs characterized the work as very physically demanding. He stated that he was not kept on at the conclusion of his probation period. Mr. Honsberger stated that according to the employment records Mr. Hubbs' duties were relatively light, although they did require considerable climbing. He stated that it did not appear that Mr. Hubbs completed his probationary period.

**104**  It is somewhat difficult to assess the significance, if any, of these apparent contradictions because Mr. Honsberger's evidence was never put to Mr. Hubbs in cross-examination. I have concluded that they both agreed that the job entailed considerable climbing, one area in which Mr. Hubbs' abilities are compromised. Accordingly, I did not conclude that Mr. Honsberger's evidence undermined Mr. Hubbs' contention that he was not able to do the work.

**Liability**

**105**  Mr. Hubbs testified that he was driving his motorcycle westbound on Powell Street on his way to work at about 6:50 a.m. on July 3, 2009. He stated that he was travelling at approximately 50 km per hour as he approached the intersection at Victoria Drive and that the green light was in his favour.

**106**  He testified that he first noticed the van driven by Mr. Escueta as it entered his lane from the right. He stated he attempted an evasive manoeuvre, moving to the left toward the centre line. However, the van turned left in front of him, cutting him off leaving him no alternative but to lock up his brakes.

**107**  He described skidding for approximately six feet into the left side of the van, striking it with the right side of his body. He stated that his motorcycle fell over, pinning his left ankle underneath.

**108**  Mr. Hubbs' account is supported by the evidence of Mr. Fidali Meghji who witnessed the accident. Mr. Meghji testified that he was travelling behind Mr. Hubbs when the collision occurred, also on his way to work. He stated that he was following fairly closely behind Mr. Hubbs. He observed that there were other vehicles some distance further in front of Mr. Hubbs down the block, but no vehicles immediately in front of Mr. Hubbs.

**109**  He stated that both he and Mr. Hubbs were travelling at approximately 50 km per hour. It was his evidence that the green light was in their favour. Mr. Meghji stated that he first noticed Mr. Escueta's van when it entered Mr. Hubbs' lane of travel right beside his motorcycle. He stated the van was in Mr. Hubbs' lane, beside and to the right of the motorcycle.

**110**  He stated that Mr. Hubbs tried to avoid being struck by moving to the left, but before anything else could occur, the van accelerated and turned left in front of Mr. Hubbs, cutting him off and causing the collision. He described Mr. Hubbs' motorcycle striking the left side of the van, with the collision taking place in the intersection just south of the centre line. He stated that the van did not have its turn signals on.

**111**  Mr. Meghji stated that he proceeded through the intersection, parked his car and went back to the intersection. He observed that Mr. Hubbs was lying on the ground, and gave him his card, telling Mr. Hubbs that he would be a witness.

**112**  Mr. Escueta admits that he was driving the white Chevrolet Astro van that was involved in the collision. Mr. Escueta worked as a cleaner at the Princeton Hotel. On the morning of the accident he was parked in front of the Princeton Pub, approximately 30 to 35 feet from the intersection at Victoria Drive. Mr. Escueta stated that he moved from that location to make a left hand turn at the Victoria intersection.

**113**  It was his evidence that he got into his car, put on his seatbelt and started the car. He turned on the left turn signal, drove into the centre lane where he stopped at a red light. He stated that he was stopped at the red light for a few seconds. He stated that when the light turned green he commenced his left turn and then the motorcycle collided with his van.

**114**  It was his evidence that he did not see the motorcycle before the collision. He stated that he only saw the motorcycle when it drove into his van.

**115**  At the time of the accident, Mr. Escueta was living with his wife, who also worked as a cleaner at the Princeton Hotel. His wife was working at the hotel on the morning of the accident, however, she was not in the car with Mr. Escueta. Mr. Escueta is not able to communicate in English. He acknowledged that his wife acted as a translator for him when he spoke with police at the scene. He and his wife have since separated.

**116**  ICBC produced a document headed "Statement from Basilio Escueta" taken on July 3, 2009. The document states that it was taken over the telephone with Mr. Escueta's wife acting as a translator. The document contains that statement that the light was green as Mr. Escueta approached the intersection.

**117**  Mr. Escueta was cross-examined about this statement both at trial and on discovery. His evidence contained many significant contradictions. At the discovery when asked if he recalled giving a statement to ICBC with his wife helping to translate, his answer was "I don't recall anything like that." He said he was asked if he recalled someone talking over the phone, his wife translating. His answer was "I don't know because I don't have a phone". He then said "I don't recall saying anything because all I recall is that there was nothing that was written".

**118**  When asked about this in cross-examination, he answered that he did not know because they were the ones talking and that he did not know who his wife was talking to. He stated that he recalled his wife speaking on the phone, but she was outside the van and he could not hear what she was saying. He denied that he knew she was speaking with ICBC. Later, however, he agreed that she was speaking with ICBC. However, he said that he did not tell her what he wanted her to say. He said he never told her anything except that he was hit. When pressed, he returned to the evidence that he knew she was on the phone, but did not know who she was talking to and that he does not remember because it was so long ago.

**119**  I concluded that Mr. Escueta's evidence was not credible. He gave evidence that was evasive and contradictory in cross-examination, leaving me with the impression that his responses were self-serving attempts to distance himself from what he believed to be an unhelpful statement recorded in the ICBC document. Moreover, in my view, his account of the accident is not plausible.

**120**  I have concluded that Mr. Hubbs has provided an accurate and honest account of the accident. In that regard, I note that his evidence is corroborated by that of Mr. Meghji who is an independent witness. I was very impressed with Mr. Meghji's testimony. He was a careful witness, well situated to observe what transpired.

**121**  I find that Mr. Hubbs was proceeding along Powell Street. The light was green in his favour. I find that Mr. Escueta failed to exercise due care when he entered the roadway from a parked position. He entered Mr. Hubbs' lane of travel when it was not safe to do so and he cut Mr. Hubbs off, causing the collision.

**122**  Counsel for Mr. Escueta submits that in the event the court concludes that Mr. Escueta was negligent, there should be a finding of contributory ***negligence*** on the part of Mr. Hubbs. Counsel submits that Mr. Hubbs failed to see the van driven by Mr. Escueta when it was "there to be seen" in the middle of the intersection.

**123**  Pursuant to s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, when a plaintiff contributes negligently to causing his or her own injury, the court must determine relative degrees of fault. The correct inquiry is whether the plaintiff failed to take reasonable care for his or her own safety and whether that failure was one of the causes of the accident: *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=), at para. 27.

**124**  The court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each. Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care, see *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), at paras. 45-46.

**125**  I find that Mr. Hubbs did not see the van driven by Mr. Escueta until it was in his lane of travel. The van was not, in my view, "there to be seen". Rather, it pulled into Mr. Hubbs' line of travel at a sharp angle. I find that it was not reasonable to expect that he would have seen the van before he did. Once he saw the van, Mr. Hubbs attempted to avoid the collision, but was not able to do so. I have concluded that Mr. Hubbs was not at fault. Mr. Escueta's ***negligence*** was the sole cause of the accident which Mr. Hubbs had no opportunity to avoid.

**Damages**

**126**  Counsel for Mr. Escueta seeks to have the court make a global award for non-pecuniary loss, encompassing loss under this arising from both the Escueta and Martin matters. The approach to be taken was summarized by Mr. Justice Savage in *Perry v. Vargas*, [*2012 BCSC 1925*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X33M-00000-00&context=), as follows:

Similarly, if separate injuries are caused by two or more defendants, and it is possible to determine which defendant caused which injury, the injuries must be divided and each defendant is only liable for those injuries that he or she caused. The example given in *Athey* is of two tortfeasors: one of whom injures the plaintiff's foot and the other of whom injures the plaintiff's arm. This recognizes the principles that a defendant should only be liable for those injuries that he or she causes: *Athey* at para. 24.

**127**  The issue is, therefore, whether Mr. Hubbs suffered separate injuries and whether it is possible to determine which defendant caused which injury. I am satisfied that Mr. Hubbs did suffer separate injuries and that it is possible to determine which defendant caused which injury. First, the two accidents were separated in time. I agree with the submission of Mr. Martin's counsel that the injuries did not overlap. The neck and thumb complaints arose from the Martin Accident. That accident did not aggravate Mr. Hubbs' ankle symptoms. It is, therefore, not appropriate to make a global award for non-pecuniary loss.

**Martin Accident**

**128**  The only head of damage claimed in relation to the Martin Accident is non-pecuniary loss. Counsel for Mr. Hubbs submitted that the appropriate range of damages in relation to the Martin Accident is $30,000 to $35,000. Counsel notes that there is an injury to the thumbs that has not fully resolved. While the neck and shoulder injury has mostly resolved, there is some persistence when Mr. Hubbs turns his head for prolonged periods of time or holds his head in an awkward position. Counsel cited *Sidhu v. Kiraly*, [*2009 BCSC 1202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62BF-00000-00&context=).

**129**  Counsel for Mr. Martin submits that Mr. Hubbs sustained a mild soft tissue injury to the neck and thumbs in the accident, which occurred approximately ten months before the start of trial. The injuries are resolving and the prognosis for a full recovery is good. The residual injuries do not interfere with Mr. Hubbs' functioning or require any treatment.

**130**  Counsel submitted that the symptoms are mild and intermittent, they have not interfered with Mr. Hubbs' function, have not required specific treatment and have not resulted in any pecuniary loss. Counsel submitted that in such circumstances the appropriate range for damages for non-pecuniary loss is $10,000 to $15,000, citing: *Dolha v. Heft*, [*2011 BCSC 738*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S240-00000-00&context=); *Mohamadi v. Tremblay*, [*2009 BCSC 898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0B7-00000-00&context=); *Parmar v. Lahay*, [*2011 BCSC 1628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22M8-00000-00&context=); *Morrison v. Peng*, [*2010 BCSC 562*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62WP-00000-00&context=); *Powar v. Hussain*, [*2008 BCPC 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3N9-00000-00&context=); *Ward v. Zhu*, [*2012 BCSC 782*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3WH-00000-00&context=).

**131**  Mr. Hubbs suffered soft tissue injury to his neck, shoulders and thumbs. The symptoms are intermittent, and while bothersome, have not interfered with his functioning. His prognosis for a full recovery is good. I award $13,000 for non-pecuniary loss in relation to the Martin Accident.

**Escueta Accident**

**Non-Pecuniary Loss**

**132**  Counsel for Mr. Hubbs submitted that the range for non-pecuniary loss for circumstances similar to those in the present case is $130,000 to $150,000. Counsel cited the following: *Rizzolo v. Brett*, [*2009 BCSC 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2JJ-00000-00&context=); *Kharitonov v. Coupland*, [*[1997] B.C.J. No. 1430*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61DK-00000-00&context=) (S.C.); *Hildebrand v. Musseau*, [*2010 BCSC 1022*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20TT-00000-00&context=); *Zicari v. Young*, [*2001 BCSC 1549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3W1-00000-00&context=).

**133**  Counsel for Mr. Escueta submits that the range for non-pecuniary loss in the circumstances is $55,000 to $85,000, citing *Druet v. Sandman Hotels, Inns & Suites Ltd.*, [*2011 BCSC 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B18G-00000-00&context=), and the authorities referred to in that decision.

**134**  The approach to be taken by the court in the assessment of damages for non-pecuniary loss was summarized by Madam Justice Wedge in *O'Rourke v. Kenworthy*, [*2009 BCSC 1277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62G2-00000-00&context=), as follows at paras. 84 and 85:

An award of damages for non-pecuniary loss must address the specific circumstances of the individual case. It is not possible to develop or point to a tariff to set the award: *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 45, [*263 D.L.R. (4th) 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=).

Various factors have been considered by the courts when assessing a claim for non-pecuniary loss. In *Stapley*, Kirkpatrick J.A., writing for the majority of the Court of Appeal, identified the following factors at para. 46: the age of the plaintiff; the nature of the injury; the severity and duration of pain; ongoing disability; emotional suffering; loss or impairment of enjoyment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. The Court also observed that the plaintiff should not be penalized for his or her stoicism.

**135**  This case highlights the importance of the individual circumstances. The injury suffered by Mr. Hubbs is serious. While the consequences for someone of more sedentary occupation and lifestyle might not have been so significant, for Mr. Hubbs the injury has proven to be life changing. He is a relatively young man who now faces a lifetime of limitation and disability. Mr. Hubbs' livelihood requires strength, agility and balance, all of which have been impaired by the injury. The injury has impaired his ability to earn his living. He has worked through the pain, but at a terrible cost to his family life. He is no longer able to enjoy the active lifestyle he loved. His mood is depressed and he has little energy for anything except the struggle to put in a day at work. His relations with his wife and children have been damaged. It appears that he has reached a plateau in his recovery and faces a future of increased deterioration and vulnerability to injury.

**136**  In my view, the cases cited by plaintiff's counsel are more representative of the circumstances in the present case. I award $130,000 for non-pecuniary loss.

**Past Wage Loss**

**137**  Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=); *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=).

**138**  Pursuant to s. 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=).

**139**  Mr. Hubbs seeks an award of $65,833 for net past wage loss. He relies upon the calculation provided by Mr. Peever, the labour economist.

**140**  Counsel for Mr. Escueta submits that $50,000 should be awarded for past wage loss. Counsel submits that this represents a net "rule of thumb" calculation based on the premise that Mr. Hubbs should have returned to work in late 2011.

**141**  I find that the contention that Mr. Hubbs should have returned to work in late 2011 is not supported. VIA Rail instructed Mr. Hubbs not to return to work until his doctor certified that he was able to perform 100% of his duties. Dr. Chow was closely monitoring Mr. Hubbs' progress and did not certify him as able to return to work until shortly before Mr. Hubbs returned to work, after he had concluded the active rehabilitation program.

**142**  Counsel for Mr. Escueta has placed reliance on the work that Mr. Hubbs did as Contact Electric in the late fall of 2011. However, the Contact work was far less demanding than the requirements of the position at VIA Rail. The fact that he was able to perform some residential work does not mean that Mr. Hubbs was fit to return to the strenuous requirements of his position at VIA Rail. In fact, he returned to work with significant deficits, as evidenced from the functional assessment conducted by Ms. Craig. I find that he was not able to return to his position at VIA Rail prior to the date of his actual return to work. I find further that Mr. Peever's calculations appropriately represent the loss and award Mr. Hubbs $65,833 for past loss of wages.

**Future Wage Loss/Loss of Capacity**

**143**  Mr. Hubbs seeks an award of $611,700 for loss of future wages/loss of capacity, in addition to an award of $66,200 representing the cost of retraining. The submission was based upon Mr. Hubbs following the recommendation of Mr. Nordin and completing a course to retrain for certification in appliance repair, then finding employment in that field. Mr. Peever's estimates of an annual loss of wages and benefits of $30,000 did not include any positive contingencies and did not account for the loss of income during retraining and the cost of retraining.

**144**  Counsel submitted that Mr. Peever's calculations were very conservative because they do not account for the fact that, but for the accident, Mr. Hubbs had the opportunity to obtain work in the wider field of industrial electrician work at even higher wages than he earned in his position at VIA Rail. An example of such an opportunity was the Westshore Terminals position, which was a union position at a higher rate of pay.

**145**  Counsel submits that although Mr. Hubbs is presently doing his job, he is only managing by enduring significant pain, sacrificing the quality of his family life, hastening the degeneration of his ankle and risking further injury. In fact, he is not fit to perform his duties, as the medical evidence confirms. Within a relatively short period of time he will not be able to perform his job functions even at the level he is currently managing and will be forced to stop.

**146**  Counsel submits that Mr. Hubbs faces limited alternatives that suit his experience, education, aptitude and interests. His injury will prevent him from continuing in the relatively high paying field of industrial electrician. Accordingly, he will suffer a future loss of income.

**147**  The defendant's position is that there is no evidence of a substantial possibility that Mr. Hubbs will suffer a future income loss. Counsel notes that Mr. Hubbs has returned to his employment, has been doing his job and has not sought any accommodation from his employer.

**148**  It was counsel's further submission that the field of appliance repair is obsolete and that it would not be appropriate for Mr. Hubbs to retrain in this field. In any event, it was counsel's submission that Mr. Hubbs does not require retraining as there are "many many jobs in the electrical field where his skills can be transferred".

**149**  In the alternative, counsel submitted that if the court concludes that there is some "remote possibility" that Mr. Hubbs will have to leave his position at VIA Rail, compensation for the damage to his capital asset should fall in the range of $70,000 to $80,000.

**150**  In *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=), the majority reviewed the principles to be applied to the assessment of damages for loss of future capacity to earn income at paras. 99 to 101 as follows:

We cannot alter a damage award simply because, on the evidence, we would come to a conclusion different from that of the trial judge. However, we may vary a damage award if we conclude that the trial judge in assessing the damage award applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or if the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The two cases often cited in this court in this regard are *Woelk v. Halvorson*, [*[1980] 2 S.C.R. 430*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1X7-00000-00&context=) and *Cory v. Marsh* [*(1993), 77 B.C.L.R. (2d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1HG-00000-00&context=) (C.A.).

An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, [*[1965] 2 O.R. 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JWJ0-G3F8-00000-00&context=)]. A capital asset has been lost: what was its value?

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11; *Ryder v. Paquette*, [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd., supra*, at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ... (emphasis in original)

**151**  In *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=), Madam Justice Garson stated the test at para. 32 as follows:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, [*[2007] B.C.J. No. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), by Bauman J. in *Chang*, [*[2008] B.C.J. No. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=), and by Tysoe J.A. in *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=), that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach, as in *Brown,* [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=)*.*

**152**  The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two, see *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 233.

**153**  I have no hesitation in concluding that Mr. Hubbs has established that his ability to earn income has been significantly impaired, or in the words of Garson J.A., that there is a real and substantial possibility of a future event leading to an income loss. As noted earlier, his livelihood has required considerable strength, agility and balance all of which are impaired as a result of the injuries he suffered to his ankle. Although he has returned to his job at VIA Rail, it has been at a huge cost - constant pain, fatigue and the deterioration of his family life. There is evidence, which I accept, that he is not truly capable of discharging his job functions in a safe fashion at present. In any event, his condition is expected to deteriorate and he will likely be no longer able to cope in the future. While he has not sought accommodation from his employer, there is no reason to believe that his limitations could or would be accommodated by VIA Rail. There are no less physically demanding positions for electricians at VIA Rail. VIA Rail will not create new positions to accommodate a worker. The duration of accommodation is an important factor to VIA Rail and Mr. Hubbs' limitations are permanent with the expectation of further deterioration.

**154**  Mr. Hubbs is a very skilled electrician, but the industrial work for which he is so well qualified is physically demanding. Other work, for example of the type he performs at Contact, for which he has the qualifications and remains able to perform, pays less. Mr. Nordin has given the opinion that with retraining Mr. Hubbs is suited by aptitude and ability to work in the field of appliance repair. However, the evidence provided by Mr. Peever shows that wages for that field are substantially lower than those in the field of industrial electrician.

**155**  In my view, it is not a "remote possibility" that Mr. Hubbs will be forced to leave his position at VIA Rail. I accept the expert evidence that his injuries will require him to leave that position in the relatively near future.

**156**  I accept the evidence that even with retraining Mr. Hubbs is likely to earn substantially less. Counsel for Mr. Escueta submitted that Mr. Hubbs' skills are transferrable beyond the suggested field of appliance repair. I accept that this is so, however, no occupation was identified for which Mr. Hubbs has interest, aptitude and the ability to undertake that has a higher salary than the appliance repair identified by Mr. Nordin.

**157**  In the result, I find that Mr. Hubbs has established a real and substantial possibility of a future income loss. The earnings approach is appropriate in the present case. I find that the assumptions used by Mr. Peever are reasonable and supported by the evidence; however, the award is to be an assessment not a quantification. I award $600,000 for loss of future income.

**158**  In addition, I award $66,200 with respect to the costs and income loss associated with retraining. Mr. Hubbs will require some retraining in order to obtain employment in the field of appliance repair. He has stated that he will need to seek out such an alternative in order to salvage his family life.

**Cost of Future Care**

**159**  Mr. Hubbs sought an award of $57,000 for the costs of future care. This was based in part upon the recommendations for future care made by Dr. Brooks and Ms. Craig.

**160**  In their reports, Dr. Brooks and Ms. Craig suggest that Mr. Hubbs' future care requirements include:

1. A comprehensive rehabilitation program
2. Access to gymnasium and swimming pool facilities
3. Custom orthotics
4. Assistance for seasonal or heavy yard and garden care
5. Psychotherapy
6. Vocational assistance

**161**  Dr. Chow has also opined that Mr. Hubbs will need prescription anti-inflammatory or analgesic medication, estimated at a cost of $35 per month.

**162**  The one time expenditures total:

|  |  |  |  |
| --- | --- | --- | --- |
| $1,020 |  | 12 week rehabilitation program |  |
| $1,960 |  | psychotherapy ($160 x 12 sessions) |  |

|  |  |  |  |
| --- | --- | --- | --- |
| $ 900 |  | orthotics |  |

|  |  |
| --- | --- |
| $3,880 |  |

**163**  The current annual cost of the balance of the recommendations:

|  |  |  |  |
| --- | --- | --- | --- |
| $ 720 |  | sports facility pass |  |
| $ 450 |  | orthotics |  |
| $ 870 |  | yard maintenance |  |
| $ 420 |  | medication |  |

|  |  |
| --- | --- |
| $2,460 |  |

**164**  The present value of incurring an annual cost of $2,460 for the rest of Mr. Hubbs' life using the appropriate multiplier at the required discount of 3.5% is $51,500.

**165**  In addition, counsel submitted, citing *Rizzolo,* at para. 39 that even though there was no expert evidence on this issue, it was evident from the evidence of Mr. Hubbs and his wife that the family needed counselling and sought a further amount for family counselling, bringing the total claimed to $57,000.

**166**  The position of the defendant was that neither Mr. Hubbs nor his family required counselling and in any event counselling was available through his employment. Counsel stated that the recommendation for orthotics is accepted, but that the defendant does not accept that there is any need for ongoing care costs. In the result, counsel submits that there should be an award of $6,960 being a one-time award of $5,000 plus $1,960 for orthotics.

**167**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.); *Williams (Guardian ad litem of) v. Low*, [*2000 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X038-00000-00&context=); *Spehar (Guardian ad litem of) v. Beazley*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=).

**168**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* at p. 84.

**169**  In the present case, with the exception of the award sought for family counselling, the claims are based upon medical evidence and the recommendations of the expert: I note that Mr. Hubbs can obtain counselling through his employment. I find that the balance of the claim is both reasonable and justified and award $53,040 for the cost of future care.

**Special Damages**

**170**  Mr. Hubbs claimed $1,591.32 as special damages, which was accepted by the defendant.

**Summary**

**171**  I have awarded the following:

**Escueta Accident**

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| --- | --- | --- | --- | --- |
|  | (a) | non-pecuniary loss | $130,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (b) | past wage loss | $ 65,833.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (c) | future wage loss | $600,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (d) | retraining | $ 66,200.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (e) | cost of future care | $ 53,040.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (f) | special damages | $ 1,591.32 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $916,664.32 |  |

**Martin Accident**

|  |  |  |  |
| --- | --- | --- | --- |
|  | non-pecuniary loss | $13,000 |  |

C.J. ROSS J.

**End of Document**

[***Hutchings v. Dow, [2006] B.C.J. No. 891***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1YM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Cullen J.

Heard: October 11 - 14, 17 - 21, 24 - 28 and 31,

and November 1, 4 and 7, 2005.

Judgment: April 20, 2006.

Vancouver Registry No. M034816

**[2006] B.C.J. No. 891** | 2006 BCSC 629 | 150 A.C.W.S. (3d) 371

Between Jonathan Hutchings, plaintiff, and Stephen Barry Dow, Meleana Michelle Markovich, Essra Vischon, and Marine Drive Collision Ltd., defendants

(421 paras.)

**Case Summary**

**Damages — General damages — Loss of income — For personal injuries — Considerations — Extent of incapacity — Cost of future care — Loss of earning capacity — Non-pecuniary damages, including pain and suffering — Special damages — Medical expenses — Physical injuries — Arm injuries — Hand — Body injuries — Back — Neck — Head injuries — Brain damage — Headaches — Psychological injuries — Depression — Action by Hutchings for damages for injuries he suffered in a motor vehicle accident allowed — Hutchings suffered soft tissue injuries to his neck and back, a ligament injury to his right acromioclavicular shoulder joint, and a closed head injury, which had interfered with his ability to keep jobs involving heavy lifting, had caused memory loss, and depression — Twenty months after the accident, Hutchings was assaulted by being struck on the head with a beer bottle outside a night club, causing a closed head injury involving an intraparmenchyl haemorrhage, provoking a seizure, a neurological deficit in his left hand, facial numbness, and exacerbating some of his pre-existing injuries from the accident — General non-pecuniary damages were awarded in the amount of $135,000; special damages were awarded in the amount of $4,455; damages for past loss of income were awarded in the amount of $25,000; damages for loss of earning capacity were assessed at $625,000; and damages for cost of future care were awarded in the amount of $168,203 — Motor Vehicle Act, R.S.B.C. 1996, c. 318, s. 125, s. 129(1).**

|  |
| --- |
| Action by Hutchings for damages for injuries he suffered in a motor vehicle accident that occurred in November 2001 -- Hutchings was seated in the passenger seat of a car being driven by Vischon and owned by Marine Drive Collision -- Vischon had partially completed a left-hand turn when a Dodge Caravan, being driven by Dow and owned by Markovich, stuck it -- The Dodge Caravan entered the intersection at or around the time when the traffic light facing it had turned from amber to red -- Hutchings suffered soft tissue injuries to his neck and back, a ligament injury to his right acromioclavicular shoulder joint, and a closed head injury -- A CT scan revealed two bi-frontal lobe shear haemorrhages -- The non-physical injuries that he suffered from included post-traumatic amnesia, headaches, impairment of memory and concentration, changes to his personality and depression -- Hutchings contended that the injuries he suffered in the accident interfered with his ability to pursue his long-standing ambition to become a fireman -- Hutchings was employed on a permanent part-time basis by the Vancouver Board of Parks and Recreation earning $17 per hour -- Following the accident, Hutchings had moved in with his girlfriend, then some roommates, then moved back in with his mother -- At the time of the accident, Hutchings was enrolled in a carpentry course but could not complete it due to his injuries -- After the accident, Hutchings re-enrolled in the course, completed it in July 2002 and completed a First Aid Certificate in October 2002 -- After the accident, he worked at a job in which he held snowboards over the grinding and cutting machines, moving them from side to side, but had to quit due to extreme back pain -- He worked for several weeks as a landscaper but also had to quit due to back pain -- In July 2003, Hutchings was assaulted by being struck on the head with a beer bottle outside a night club causing a closed head injury involving an intraparmenchyl haemorrhage -- The assault provoked a seizure, a neurological deficit in his left hand, facial numbness, and exacerbated some of his pre-existing injuries from the accident -- During his testimony, Hutchings claimed that he had not disclosed the extent of his back pain to his doctors for fear of such disclosure hindering his chances to become a firefighter -- An employment evaluation concluded that Hutchings was restricted from employment involving heavy lifting due to his injuries -- Following the accident, Hutchings was not able to continue his high involvement in sports and other physical activities -- HELD: Action allowed -- The liability for the accident was assessed at 90 per cent Dow's fault for running the red light and at 10 per cent Vischon's fault for turning his attention elsewhere and not seeing Dow's vehicle -- On the basis of a preponderance of the evidence, Hutchings was found to have had a realistic possibility of becoming a fireman as he took deliberate steps conducive to achieving his goal at a young age -- Hutchings' back pain was found to be an enduring obstacle in his future choice of vocation -- He was found to have existing and on-going cognitive difficulties negatively affecting his confidence, his ability to organize himself, and his ability to function in the real world -- The accident was found to have caused injury to Hutchings' neck, shoulder, back and head -- His back injury was found to be a chronic condition and his head injury had only partially resolved -- Although the cause of Hutchings' depression was attributed in the proportion of 60 per cent to the accident and 40 per cent to the assault, the depression was found to be a non-divisible injury so the defendants were jointly or severally liable for the damage or loss flowing from the depression -- General non-pecuniary damages were awarded in the amount of $135,000; special damages were awarded in the amount of $4,455; damages for past loss of income were awarded in the amount of $25,000; damages for loss of earning capacity were assessed at $625,000; and damages for cost of future care were awarded in the amount of $168,203. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 125*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F1-00000-00&context=), s. 129(1)

***Negligence*** Act, *R.S.B.C. 1996, c. 333*,

**Counsel**

Counsel for the plaintiff: H. Rubin

Counsel for the defendants, Stephen Barry Dow and Meleana Michelle Markovich: P.M.E. Abrioux L. Morphy

Counsel for the defendants, Essra Vischon and Marine Drive Collision: S. Rowed

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| **(f)** |  | **Dr. Kaushansky's Initial Examinations and Assessment** |  |

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| **(h)** |  | **Dr. Wickremasinghe's Contact with the Plaintiff up to the Assault** |  |

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| **(i)** | **Physiotherapy Treatments** |  |

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| **(j)** |  | **The Plaintiff's Treatment by Dr. Lui** |  |

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| **(k)** | **The CBI Assessment and** |  |
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| **(l)** | **The Assault and its** |  |
|  | **Aftermath** |  |

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| **(m)** | **The Seizure Post-Assault** |  |

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| **(u)** | **Dr. Toyota's Reports and** |  |
|  | **Evidence** |  |

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| **(v)** |  | **Evidence of the Plaintiff's Ability to Function in the Community** |  |

**(i)** **The Plaintiff's Evidence** **(ii)** **Anita Hutchings** **(iii)** **Kristy Seymour** **(iv)** **Monica English** **(v)** **Kate Pilgrim** **(vi)** **Herb Sallens** **(vii)** **Don Conway-Brown** **(viii)John Palinsky** **(ix)** **Natalie Vermis** **(x)** **Dean Powers** **(xi)** **Derek Nordin**

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| **(b)** | **Cross-Examination of the** |  |
|  | **Plaintiff** |  |

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| **(c)** |  | **Cross-Examination of Anita Hutchings** |  |
| **(d)** |  | **Cross-Examination of Kristy Seymour** |  |

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| **(e)** | **The Evidence of Dennis** |  |
|  | **Regan** |  |

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| **(f)** | **The Evidence of Essra** |  |
|  | **Vischon** |  |

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| **CULLEN J.** |

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| **I.** | **INTRODUCTION AND OVERVIEW** |  |

**1**  This action was brought by the plaintiff, Jonathan Hutchings, a 24 year old man whose life has not, to date, followed the course he had charted for himself. His claim against the defendants attributed the impairment of his aspirations and its economic consequence to a variety of physical and non-physical effects of musculoskeletal trauma and a closed head injury suffered in a motor vehicle accident which occurred on November 9, 2001, at the intersection of Oak Street and 41st Avenue in Vancouver (the "Accident").

**2**  At the time of the Accident, the plaintiff was seated in the right hand front passenger seat of a Toyota Corolla being driven by the defendant Essra Vischon and owned by the defendant Marine Drive Collision Ltd. (the "Vischon Vehicle"). The Vischon Vehicle had partially completed a left turn from the southbound left turn lane of Oak Street in order to continue its travel eastbound on 41st Avenue when it was struck by a Dodge Caravan van being driven by the defendant Stephen Barry Dow and owned by the defendant Meleana Michelle Markovich (the "Dow Vehicle"). The Dow Vehicle was travelling northbound on Oak Street in the lane just adjacent to the northbound left turn lane. It entered the intersection at or around the time the traffic light governing traffic travelling north and south on Oak Street turned from amber to red.

**3**  The plaintiff contended that his long standing ambition to become a fireman has been thwarted or significantly impeded by the physical and non-physical effects of the Accident. In particular, the plaintiff pointed to the physical effects initially consisting of neck, back and shoulder musculoskeletal injuries with concomitant headaches, and non-physical injuries consisting of impairment of memory and concentration, changes to his personality and depression.

**4**  The plaintiff is presently employed on a permanent part-time basis by the Vancouver Board of Parks and Recreation as a Program Assistant II - Building Supervisor at the West End Community Centre (the "WECC") in Vancouver, earning $17 per hour. He previously worked at the WECC both on a volunteer and casual basis until he was able to secure his present permanent position in September of 2005.

**5**  The plaintiff has had a long standing but fitful relationship with a young woman named Kristy Seymour whom he first met when he transferred to King George High School in the West End of Vancouver in his Grade 10 year in 1997/1998. The plaintiff and Ms. Seymour cohabited for a year following the Accident between November of 2002 and November of 2003. From November of 2003 to September of 2004, the plaintiff lived in an apartment on Beach Avenue in the West End that he shared with two friends, one of whom was the defendant Essra Vischon and the other being a young man named Chris MacDonald. In September of 2004, the plaintiff moved out of the Beach Avenue apartment and back in with his mother, Anita Hutchings. The plaintiff still presently resides with his mother in an apartment on East 2nd Avenue in Vancouver.

**6**  Throughout his youth and adult life, the plaintiff's family doctor has been Dr. Layla Wickremasinghe, who has also been his mother's doctor. Dr. Wickremasinghe practices at the Reach Community Health Clinic on Commercial Drive in Vancouver (the "Reach Clinic").

**7**  A complicating feature of this case was that the plaintiff was assaulted by being struck on the head with a beer bottle outside a night club in the early morning hours of July 26, 2003, a little over 20 months after the Accident (the "Assault").

**8**  Not only did the Assault appear to provoke distinct consequences, including a seizure and a neurological deficit to the plaintiff's left hand, but also, in its aftermath, aspects of the plaintiff's complaints which he asserted were caused by the Accident became dominant concerns.

**9**  At issue in this case were the nature, extent and consequences of the plaintiff's injuries caused by the Accident, the extent of his recovery, the nature, extent and consequences of new injuries caused by the Assault, whether aspects of the plaintiff's non-physical complaints manifested in the aftermath of the Assault were indivisible as between the two events or were subject to the concept of *novus actus interveniens*, whether the plaintiff has proved to the required degree that his earning capacity has been impaired as a result of the Accident and whether he has proved to the requisite degree that he has required, and will continue to require, care into the future.

**10**  The plaintiff's claim encompassed a claim for general damages for pain and suffering, special damages for his expenses associated with the effects of the Accident, damages for past loss of wages, damages for impairment of his earning capacity, an in-trust claim for his mother's past care of him, a claim for cost of future care and a management fee.

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| **II.** | **THE CASE FOR THE PLAINTIFF** |  |

**11**  The plaintiff advanced his action against the defendants by calling evidence consisting of his intimates - his mother and his girlfriend Kristy Seymour - some of his present and past co-workers, those providing him with medical care following the Accident and those conducting medical and occupational assessments of him. He also testified on his own behalf.

**12**  The current observations, recollections and opinions of those witnesses describing the course of events since the Accident and since the Assault formed an important part of the case the plaintiff relied on in pursuit of his claim for damages. Of equal importance in assessing the nature, extent and consequences of the Accident and the Assault to the plaintiff were the contents of the contemporaneous records recording the plaintiff's caregivers' observations, reactions and opinions.

1. **Liability**

**13**  The issue of liability arose as between the defendant Dow and the defendant Vischon; there was no issue of ***negligence*** or contributory ***negligence*** as concerns the plaintiff. It was the position of the defendant Dow that his ***negligence***, which he conceded, was complemented by the ***negligence*** of the defendant Vischon, justifying a 15% - 35% apportionment of liability to him. The defendant Vischon contended that he was not negligent in any way, and thus sole liability rested with the defendant Dow. The plaintiff supported the position of the defendant Dow to the extent of urging some finding of liability against the defendant Vischon.

**14**  The plaintiff was unable to recall or testify about the Accident. The principal evidence as to what occurred came through the pre-trial deposition of Kevin Neary, a driver who was travelling northbound on Oak Street toward the intersection and who witnessed the Accident, a statement and portions of the examination for discovery of the defendant Dow, the evidence of the defendant Vischon and the opinion evidence of Dr. Amrit Toor, an engineer and expert in accident reconstruction.

**15**  The facts were not in significant dispute. At about 11:15 p.m. on November 9, 2001, the defendant Vischon was travelling southbound on Oak Street toward 41st Avenue, where he intended to turn left and travel east. The plaintiff was seated in the right front passenger seat. Both the Dow Vehicle and the witness Mr. Neary's vehicle were travelling northbound on Oak Street. The defendant Vischon and the plaintiff were going to a house, the precise location of which they did not know. They were following a car that carried an occupant who knew the address of the intended location (the "Schmidt Vehicle").

**16**  Oak Street at 41st Avenue has three through lanes and a left hand turn lane running in each direction. The intersection is governed by traffic lights. In the transition between a green light and a red light, there is a 3.5 second yellow light. When the light turns red for one corridor of travel, it remains red for the intersecting corridor of travel for a period of one second before turning green.

**17**  Mr. Neary's evidence was that he was driving northbound on Oak Street in the middle through lane ("Lane Number Two"). The Dow Vehicle was behind him. Mr. Neary began to brake as he noticed the light governing his path of travel change from green to yellow. There were several other vehicles in the vicinity also travelling northbound. As he slowed, he noticed the Dow Vehicle move into the lane to his left ("Lane Number Three") and pass him. He estimated the yellow light was a few seconds old at that point and that he was about 10 to 12 car lengths from the intersection when the Dow Vehicle passed him. He noticed that it was at that time that the Schmidt Vehicle made its left turn. Mr. Neary testified that the light changed from yellow to red just as the Dow Vehicle entered into the northbound crosswalk without any change in speed.

**18**  According to the defendant Vischon, the Schmidt Vehicle entered the intersection on a green light and commenced its turn on the yellow light, at which point the Vischon Vehicle had just crossed over the crosswalk line and was moving at somewhere between two to five kilometres per hour. The defendant Vischon testified he noticed a group of northbound vehicles slowing down or stopped. He testified that as he made his left turn, the traffic light had been yellow for some time and was about to turn red. He accelerated into the left turn and focussed his attention to the east toward his anticipated direction of travel. As he did so, the north/south light was red.

**19**  The defendant Vischon testified he never saw the Dow Vehicle before the impact. The Dow Vehicle struck the Vischon Vehicle in the mid centre B pillar on the passenger side.

**20**  In his statement to the police, the defendant Dow said he was travelling north on Oak Street, approaching 41st, and the light had changed to yellow, but he decided to proceed through the intersection and did not brake. He said he should have stopped for the yellow light.

**21**  It was Dr. Toor's opinion, based on his examination and reconstruction of the Accident, that the impact speed of the Dow Vehicle "was likely about 67 km per hour" and the impact speed of the Vischon Vehicle "was likely about 31 km per hour". Dr. Toor estimated that the pre-braking speed of the Dow Vehicle was between 71 and 75 kilometres per hour. The defendant Dow acknowledged that he had consumed two beer earlier in the evening and had smoked some marijuana.

**22**  At the time of the impact, the Vischon Vehicle had proceeded about 15 metres into the intersection. Dr. Toor opined based on its impact speed, it was unlikely the Vischon Vehicle came to a complete stop before turning left and that if its speed was constant, the Vischon Vehicle was in the intersection for 1.5 seconds before impact; if entering the intersection at 5 kilometres per hour it was in the intersection for 3 seconds; if it was travelling at 10 kilometres per hour, it was in the intersection for 2.6 seconds; and, if it was travelling at 20 kilometres per hour, it was in the intersection for 2.1 seconds.

**23**  The Dow Vehicle, given its speed, was in the intersection for about 0.7 seconds prior to impact. Dr. Toor estimated the Vischon Vehicle entered the intersection about 1.0 to 2.3 seconds before the Dow Vehicle, depending on the former's speed. If the Dow Vehicle entered the intersection as the light turned red, the Vischon Vehicle entered the intersection between 1.2 and 2.5 seconds after the light turned amber, depending on whether his speed was 5 or 31 kilometres per hour at entry.

**24**  Dr. Toor opined that in the circumstances, a perception response time of 1.5 seconds was appropriate, which meant Mr. Dow would have responded to the Vischon Vehicle about 33.6 to 38.3 metres from impact. If his perception response time was longer, the distance would have been greater. He concluded if the Dow Vehicle had been travelling at 60 to 65 kilometres per hour or less, the impact would have been avoided.

**25**  It is clear in all the evidence that the Vischon Vehicle had not completed its turn at the moment of impact. Dr. Toor opined that the light may have been red for 0.7 to 1.15 seconds before impact.

**26**  The essence of the position of the defendant Dow was that the evidence as a whole engaged the liability of the defendant Vischon because he should have seen the oncoming Dow Vehicle as it approached the intersection since it was there to be seen. Accordingly, the defendant Vischon should have given way to the Dow Vehicle or waited for it to stop, notwithstanding that the lights were in his favour, as a matter of reasonable prudence. The defendant Dow argued his vehicle was, in effect, a manifest and immediate hazard which the defendant Vischon should have responded to in order to fulfill his duty of care to the plaintiff. The defendant Dow relied on ***Goodburn v. Nissinen***, [*[2000] B.C.J. No. 2020*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1B6-00000-00&context=), [*2000 BCSC 1487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1B6-00000-00&context=), and ***Tejani (Guardian ad litem of) v. Greenan***, [*[2001] B.C.J. No. 1749*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-242C-00000-00&context=), [*2001 BCSC 803*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-242C-00000-00&context=). In the latter case, McEwan J. ruled as follows, at para. 29:

I have considered this case carefully as it applies to the matters I must decide. Here I have really no evidence as to the defendant Peerbhoy's specific exercise of care. This is not a case where, for instance, there were several lines of traffic to cross, and the exigencies of traffic must be weighed. I am of the view that the Greenan vehicle must have been visible, and the fact that it was not slowing down should have been apparent to a person in Ms. Peerbhoy's position. While a left turning driver does not have an obligation to ensure all traffic has stopped before proceeding on a yellow light, he or she must take account of manifest hazards. I do not think the right to assume other drivers will obey the law negates the duty to react to what is there to be seen. Accordingly, I am of the view that in the circumstances of this case liability ought to be divided.

[emphasis in original]

**27**  In the circumstances of that case, Justice McEwan apportioned liability at 50% to each of the defendants.

**28**  It was the theory of the defendant Dow that the defendant Vischon's attention was distracted by his desire not to fall behind the Schmidt Vehicle which he was following to get to a specific destination.

**29**  The position of the defendant Vischon was that he was entitled in the circumstances to assume that the northbound vehicles would yield to the yellow light and would not enter on the red. He submitted that based on his view that a number of vehicles were coming to a stop and the light was late amber turning to red as he made his turn to the east, this justified his conclusion or assumption. Furthermore, the defendant Vischon contended that shifting his focus to the east to look out for possible pedestrians was a reasonable thing to do as he made his turn.

**30**  The defendant Vischon submitted he did everything he could to exercise reasonable care and that his failure to see the Dow Vehicle in light of all the circumstances, including the fact the Schmidt Vehicle had perfected its turn in front of him, was not a breach of the standard of care. In addition, he submitted there was really nothing he could have done to avoid the Accident, given the speed of the Dow Vehicle and the juxtaposition of the traffic lights against his course of travel.

**31**  The defendant Vischon relied on ss. 125, 129(1) and 174 of the ***Motor Vehicle Act***, *R.S.B.C. 1996, c. 318*. Those sections read as follows:

**125** Unless otherwise directed by a peace officer or a person authorized by a peace officer to direct traffic, every driver of a vehicle and every pedestrian must obey the instructions of an applicable traffic control device.

...

**129**(1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that he or she is permitted to do so.

...

**174** When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

**32**  The defendant Vischon, in relying on the concept that he was entitled to assume traffic would comply with the law and come to a stop, referred to the judgment of Lord Atkinson in ***Toronto Railway Company v. King et al.***, [*[1908] A.C. 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4SM-00000-00&context=) at 269 (P.C.), which reads as follows:

But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely observe the rules regulating the traffic of the streets.

**33**  As well, the defendant Vischon relied on the observations of Newbury J.A. in ***Kokkinis v. Hall*** [*(1996), 19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) at para. 10 where she stated as follows:

Drivers approaching intersections must expect that [others will be turning left]. Putting a burden on a left-turning driver to wait until he or she *sees* that all approaching drivers have stopped *would*, in my view, bring traffic to a standstill. We should not endorse such a result.

[emphasis in original]

**34**  The defendant Vischon also relied on ***Snow v. Toth***, [*[1994] B.C.J. No. 563*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0X0-00000-00&context=) (S.C.), aff'd [*[1997] B.C.J. No. 607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21RY-00000-00&context=) (C.A.), in support of the proposition that changing lanes in an attempt to beat a traffic light is a dangerous manoeuvre which engages 100% liability for a driver attempting such a manoeuvre.

**35**  The defendant Vischon further relied on the cases of ***Lam v. Cumming***, [*[2002] B.C.J. No. 2412*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60HM-00000-00&context=), [*2002 BCSC 1413*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60HM-00000-00&context=) [***Lam***]; ***Aerabi-Boosheri v. Retallick***, [*[1996] B.C.J. No. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2K1-00000-00&context=) (S.C.) [***Aerabi-Boosheri***]; and ***Uyeyama (Guardian ad litem of) v. Wittenberg***, [*[1985] B.C.J. No. 1883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61N3-00000-00&context=) (C.A.) [***Uyeyama***], in support of the general proposition that left turning drivers cannot be faulted for assuming that approaching traffic will come to a stop when confronted with a yellow light turning to red, depending on all the circumstances.

**36**  Counsel for the defendant Vischon submitted as follows in support of his position:

It is submitted that Vischon was lawfully in the intersection, intending to turn left and was clearly indicating that intention. At the time he yielded in the intersection it cannot be said that Dow was an immediate hazard. At that time, Dow was about 10 to 12 car lengths from the intersection and facing a yellow light. There was ample distance and time for Dow to lawfully bring his vehicle to a stop as he was required to do. Instead, he chose not to yield and to pass a slowing vehicle in an attempt to "run the red light" the speed of the Dow vehicle and its deliberate disregard of the yellow light were the sole causes of this accident.

**37**  Counsel for the defendant Vischon emphasized that whether the circumstances justified a finding of an immediate hazard should be assessed in light of where the legal obligation was placed and which driver was in the dominant position and which was in the servient. The defendant Vischon submitted the Vischon Vehicle was in the dominant position and the Dow Vehicle was in the servient. In that regard, the defendant Vischon relied on the decision of ***Walker v. Brownlee***, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) at 461 (S.C.C.), where Cartwright J. stated as follows:

While the decision of every motor vehicle accident collision case must depend on particular facts, I am of the opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali* [origin of the malice].

**38**  The defendant Vischon submitted that if any doubt existed, it should be resolved in favour of the dominant driver, citing ***McCowan v. Arjune*** [*(2002), 169 B.C.A.C. 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0YV-00000-00&context=), [*2002 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0YV-00000-00&context=).

**39**  The principle governing an assessment of ***negligence*** in circumstances where one driver fails to obey the rules of the road and another driver relies on them to execute a manoeuvre was succinctly stated by Taylor J.A. in ***Brucks v. Caslavsky*** [*(1994), 45 B.C.A.C. 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M260-00000-00&context=) at para. 10 [***Brucks***]:

In this, as in other situations, a driver is entitled, in my view, to assume that others will obey the rules of the road, and until the contrary becomes apparent to rely on that assumption in deciding whether or not an oncoming vehicle constitutes an "immediate hazard". The principle has been many times stated and was put many years ago by Lord Atkinson, giving the judgment of the Judicial Committee in ***Toronto Railway Company v. King et al.***, [*[1908] A.C. 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4SM-00000-00&context=) (at p. 269 (P.C.)) ...

**40**  In each of the cases the defendant Vischon relied on, including ***Brucks***, there was evidence that the left turning driver saw the through driver and made a determination based on distance and speed that the through driver had sufficient time to obey the light and stop and therefore, it was not apparent that the through vehicle was an immediate hazard to the left turning driver before he commenced the turn.

**41**  In the present case, the defendant Vischon did not see the Dow Vehicle at all before his own vehicle was struck by it, although according to Mr. Neary, the Dow Vehicle passed him about 10 to 12 car lengths before the intersection in Lane Number Three, which was the closest lane to the defendant Vischon and directly in his line of vision as he proceeded forward. If the defendant Dow passed Mr. Neary's vehicle approximately 10 to 12 car lengths before the intersection, it would follow that he had moved into Lane Number Three some time before that. In all the circumstances including the estimate of speed given by Dr. Toor of the Dow Vehicle, I am satisfied that the defendant Dow would have been in Lane Number Three and visible to the defendant Vischon for a period of approximately 1.5 to 2.0 seconds before the defendant Vischon commenced his left turn.

**42**  On this issue of whether the Dow Vehicle represented an immediate hazard to the defendant Vischon, the evidence of Mr. Neary was cogent. He testified that as the Dow Vehicle passed him, it was apparent to him that the Dow Vehicle was not going to stop and was going to run a red light as he did nothing to indicate that he was going to slow down. It seems to me that if it was apparent to Mr. Neary, had the defendant Vischon seen the Dow Vehicle at that point, it would have similarly been apparent to him.

**43**  In this case, the evidence is that the defendant Vischon did not advert to what was immediately in front of him as he commenced his left turn. Had he done so, I find it would have been apparent to him as it was to Mr. Neary that the Dow Vehicle, given its speed and lack of contrary action, was going to attempt to run the red light.

**44**  In my view, this is a case where there is no question that the defendant Dow was predominantly responsible for the Accident by ignoring his obligation to slow and stop for the amber light as he was clearly able to do. He also ignored the clear danger of entering an intersection at speed where there was a left turning vehicle, which he ought to have seen and given way to.

**45**  The question as I see it, however, is whether the defendant Vischon's failure to see the Dow Vehicle represented a failure to keep a proper lookout, such that it engaged, to some extent, his liability for the Accident. While the period of time in which the Dow Vehicle was available to be seen was relatively brief, in my view, prudence dictates that the defendant Vischon ought to have checked the lane which he was immediately turning into before commencing his left turn given the exigencies of moving through an intersection. As noted, this is not a case where the defendant Vischon had accounted for all the traffic approaching him and determined that the traffic ought not to represent a hazard to him or his passenger. This is a case, I find, where the defendant Vischon's attention moved away from what was immediately in front of him, at a critical time in his manoeuvre. This is not a case like ***Uyeyama***, where the left turning driver maintained a lookout while turning left across several lanes of traffic and was able to come to a stop to avoid a collision. Rather, it is a case where the defendant Vischon, having turned his attention elsewhere, turned into a lane of traffic in which there was a car which represented a hazard to him and to his passenger. In the circumstances, I conclude that some degree of responsibility for the Accident must fall on the shoulders of the defendant Vischon and I conclude that it is appropriate to apportion his liability at 10% and the defendant Dow's at 90%.

1. **The Plaintiff's Career Aspirations**

**46**  For some time before the Accident, reaching back into his childhood, the plaintiff wanted to be a fireman. He testified that unlike other childhood preoccupations, his ambition to be a fireman intensified rather than diminished as he grew older. He said he had always been involved with athletics and physical activity and excelled in school at his physical education courses. He testified that throughout high school and following his graduation in June of 2000, he regularly went to and worked out at the gym, building his strength and athleticism. He also testified to his success at break dancing, a form of dancing involving gymnastics and martial arts moves. The plaintiff testified that he found out through his own investigations that in order to become a fireman, he needed to not only graduate from high school, but he also had to acquire 30 post secondary credits, preferably in the building trades. He was aware that volunteering in the community would also assist him in his application to be a fireman, as would obtaining a first aid certificate.

**47**  He acknowledged that he had not excelled as a student throughout his high school years, but testified he became motivated in Grade 12 to the point where in his first term, he made the honour roll. His high school transcript revealed that even given his first term's success in Grade 12, his final grades, except for Physical Education and Career And Personal Planning, were average or below average. He testified however that he achieved his goal of graduating from high school and that he continued to pursue his goal of becoming a fireman. To that end, the plaintiff worked for a period of time in a clothing store before enrolling at the British Columbia Institute of Technology ("BCIT") on June 4, 2001 in the Carpentry Entry Level Training program. He testified he believed that taking a carpentry course would enhance his chances of becoming a fireman because of the knowledge of building construction that it would give him. He testified that he had no interest in becoming a carpenter, but merely took the course to advance his goal of becoming a fireman. The Accident occurred when the plaintiff was one month short of completing that course and as a result, the plaintiff did not complete the course at that time.

**48**  The plaintiff was, however, able to resume his carpentry course after recuperation from the immediate effects of the Accident, when he re-enrolled on April 8, 2002 and successfully completed the course work, getting the necessary credits on July 19, 2002. His average was 86% on completing his course work, which compared favourably with the 81% average he received on the course work which he had completed prior to the Accident. He testified that he was able to rely on what he had previously learned when he resumed his studies in 2002. Subsequently in October of 2002, the plaintiff took a two week first aid course and received an Occupational First Aid Level III Certificate. He testified that on his first practicum for the test he was unsuccessful, but was able to pass it when he repeated it. The plaintiff also testified that he did volunteer work at the WECC beginning when he was 16. He also volunteered at Grandview Elementary School and was a Big Brother to one of the students there.

**49**  The plaintiff obtained his Canadian Red Cross First Aid Certificate in March of 2005 and received the Lifesaving Society's National Lifeguard Service certification on May 21, 2005, although he testified that he failed the test when he first wrote it. During the summer of 2005 the plaintiff worked as a lifeguard.

**50**  The plaintiff testified he was aware that he required a Class 3 Driver's Licence with airbrake certification to be a fireman and he had not taken this test as of the date of the Assault. The plaintiff agreed that because of a seizure he suffered as a result of the Assault, he had been prescribed the drug Dilantin and he could not take his Class 3 test until he had been off Dilantin for a year.

**51**  The plaintiff testified he still hoped to be a firefighter. He recognized there was significant competition for firefighting jobs and he agreed in cross-examination that by applying in his mid to late 20s, rather than in his early 20s after he had gained significant work experience, he might have an advantage over younger, less experienced applicants. He expressed uncertainty as to whether in his present condition he would qualify to become a fireman.

1. **The Accident and its Aftermath**

**52**  The Accident occurred between 11:00 p.m. and 11:25 p.m. on November 9, 2001. An ambulance was called at 11:25 p.m. and arrived on the scene at 11:32 p.m. At the time of its arrival, the plaintiff was still in the Vischon Vehicle. Upon the arrival of the attendant, the plaintiff was "awake but confused". He evidently was able to describe areas of pain and was able to deny consuming alcohol or drugs to the attendants. There was an indication on the ambulance report that the plaintiff had suffered some loss of consciousness at the scene for an unknown period of time. The attendants recorded the plaintiff's Glasgow Coma Scale ("GCS") at 14.

**53**  The plaintiff was taken and admitted to Vancouver General Hospital ("VGH") on November 9 and was discharged three days later on November 12. He was diagnosed with soft tissue injuries to his neck and back, a ligament injury to his right acromioclavicular ("a/c") shoulder joint and a closed head injury. He was given a CT scan on November 10, 2001, which revealed at least two bi-frontal lobe shear haemorrhages. He reported amnesia for several minutes before the Accident and for between 12 and 18 hours following the Accident.

**54**  During the night hours of November 9 and running into November 10, the nurse's notes revealed a GCS of 14 and 13 and it was noted at 3:00 a.m. that the plaintiff was difficult to rouse, confused and not oriented as to time or place. By November 11 at 7:30 a.m., the plaintiff was described as being fully oriented and having a GCS of 15, although he was described as easily irritated and preferring to rest quietly.

**55**  Following his release from VGH on November 12, the plaintiff went to the Reach Clinic initially on November 13 and thereafter up to the time of the Assault, saw Dr. Wickremasinghe or her locums, 17 times, including November 19, 21 and 29, December 13 and 15 of 2001, January 7 and 31, March 7, April 11, August 10 and September 19 of 2002, January 7, February 18, April 17, May 8 and 14 and June 10 of 2003.

**56**  In the meantime, the plaintiff was referred to Dr. Mackie, an orthopaedic specialist, for his right a/c joint injury. He saw Dr. Mackie on three occasions: December 21, 2001, January 4, 2002 and February 4, 2002.

**57**  The plaintiff was also referred by his counsel engaged in relation to this matter to see Dr. Kaushansky, a neuropsychologist, on January 20, 2002, and he was referred by Dr. Wickremasinghe to see Dr. Brian Theissen, a neurologist, on May 17, 2002.

**58**  In addition, from January 9 to March 25, 2002, the plaintiff had 21 physiotherapy sessions at the City Sports and Physio Centre. He also had a number of massage therapy and chiropractic treatments, the former between December 15, 2001 and February 15, 2002, and the latter between January 5, 2002 and March 25, 2003.

**59**  After ending his physiotherapy sessions in March of 2002, the plaintiff resumed them on May 1, 2003 and carried on with the sessions until June 3rd, 2003.

1. **The Plaintiff's Living and Working Circumstances from the Accident to November of 2003**

**60**  Apart from dealing with the effects of his physical and non-physical injuries and his ongoing attempts to qualify for a firefighting career, the plaintiff made several changes to his jobs and living circumstances in the two years following the Accident. At the time of the Accident, the plaintiff was living with his mother and was not romantically involved with Ms. Seymour. Subsequent to the Accident, the plaintiff and Ms. Seymour resumed their relationship and he moved in with her into an apartment on Nelson Street in the West End of Vancouver in November of 2002. They remained together in the apartment until the end of November 2003 when he moved into a penthouse apartment on Beach Avenue with the defendant Vischon and Chris MacDonald.

**61**  Following the Accident, the plaintiff did not return to work until the summer of 2002. As noted, he resumed his carpentry course at BCIT in April of 2002 and then went to work at the WECC as a summer day camp leader in July and August of 2002. After completing his first aid course in October of 2002 and obtaining his certificate, he went to work at Options Snowboards ("Options"), where he filled the role of a first aid attendant while initially working in the warehouse, and subsequently while working in the grinding department. The plaintiff worked for Options for a total of approximately six and a half months, spending about half of his time in each of those two departments. His job in the grinding department involved holding snowboards over the grinding or cutting machines and moving them from side to side.

**62**  The plaintiff testified the grinding job caused extreme pain in his back and that he told Dr. Wickremasinghe and Dennis Regan, his supervisor at Options, about his pain. The plaintiff ended his employment at Options in May of 2003 because of the effect on his back. He also testified he worked for several weeks at a landscaping job which he left because of similar complaints of back pain, as reflected in Dr. Wickremasinghe's notes.

**63**  The plaintiff stated he then went back to work at the WECC for the summer of 2003 as a summer day camp leader where he missed a few weeks of work as a result of the Assault. At the conclusion of the summer day camp, the plaintiff obtained employment with the Vancouver School Board, running lunch time and after school sports activities at two schools. He also taught soccer and other sports at the WECC. Eventually, in 2004, he obtained a third job as a valet at the Sutton Place Hotel. He described his valet job as fast paced and one that he enjoyed because he got along well with his co-workers and supervisors. He said although he damaged three vehicles during his employment at the Sutton Place Hotel, he managed to avoid losing his job because he was well liked. He testified, however, he did not like the paperwork and got his co-workers to help him with this task.

**64**  In late fall of 2003, the plaintiff moved from the apartment he shared with Ms. Seymour into a penthouse apartment on Beach Avenue. He testified his relationship with his girlfriend was not going well, but that they stayed together until the lease ended at the end of November of 2003.

**65**  The plaintiff also became a Big Brother to one of the children he was interacting with at Grandview School. He testified that overall, he found holding down the two school jobs and the WECC job in addition to being a Big Brother, was difficult. The plaintiff felt as if he had no time for himself and he had some difficulties managing his time. Ultimately, the plaintiff terminated his Big Brother relationship because he did not feel that he was "in a condition to be a Big Brother".

1. **Dr. Mackie's Report**

**66**  In his report, Dr. Mackie noted "visible and palpable step deformity at his right Acromioclavicular joint." He also noted "a second degree Acromioclavicular separation." On January 4, Dr. Mackie noted "pain was now present over the anterior chest wall" and he diagnosed costochondritis. Dr. Mackie noted the joint "was again bothering him" on February 4, 2002, and advised him "regarding safe return to sport and work over the next month."

**67**  According to the plaintiff, he was advised by Dr. Mackie that he "wouldn't be doing any gymnastics" as a result of his injury.

1. **Dr. Kaushansky's Initial Examinations and Assessment**

**68**  Following his initial examination and testing of the plaintiff on January 20 and February 5, 2002, Dr. Kaushansky reported in a letter dated April 12, 2002, that the plaintiff suffered a moderate brain injury based on "a description of the trauma and the degrees of post traumatic amnesia." According to Dr. Kaushansky, his testing of the plaintiff "suggests some cognitive problems on measures of memory (verbal) and attention (both simple and complex)." Dr. Kaushansky did not conduct personality testing until June 19, 2002, when a personality assessment inventory was performed. In relation to clinical features, the Personality Assessment Inventory ("PAI") clinical report noted:

The PAI clinical profile reveals no elevations which should be considered to indicate the presence of clinical psychopathology. If the respondent is presenting for evaluation or treatment in a clinical setting, some denial or defensiveness is likely to be responsible for the generally trouble-free picture that he is reporting as he seems to be reluctant to admit to dysfunction or problems across many areas.

**69**  In dealing with the validity of the test scores, the report commented:

The clinical profile may underrepresent the extent and degree of any significant findings in certain areas due to the client's reluctance to acknowledge personal problems or failings.

**70**  In his initial report dated April 12, 2002, Dr. Kaushansky recommended continuing to monitor the plaintiff's functioning, counselling a "wait and see" attitude.

**71**  In his final report dated June 16, 2005, Dr. Kaushansky referenced his first meeting with the plaintiff on January 20, 2002, noting:

When initially seen in our office Mr. Hutchings complained of physical injuries, specifically a ligamental tear in the right shoulder; his neck and back pain which had been significant in the period following the trauma was considered 95% better.

Cognitively, he reported that during the initial post-accident, because of taking a narcotic for physical pain, he often felt "zoned out"; he also stuttered during that time. At the time of the interview he was not taking any medication. He believed that his memory was impaired - although this was not noticed initially, he stated that it became evident when he was mentally taxed. For example, he was forgetting appointments.

Mr. Hutchings stated that initially his mood was unstable but had improved.

[emphasis in original]

**72**  Dr. Kaushansky, in his testimony, indicated that the plaintiff's mother was present at the January 20, 2002 meeting when the plaintiff expressed those views.

1. **Dr. Theissen's Examination**

**73**  Dr. Theissen prepared a report dated May 21, 2002, outlining his examination of the plaintiff on May 17. The report indicated the following:

Apart from concentration difficulties, Mr. Hutchings's mental status and neurologic examination are normal. He has sustained a mild to moderate traumatic brain injury from his motor vehicle accident. Problems with short-term memory and distractibility are to be expected from this. However, the prognosis for recovery is good and I do not think the injury will effect his ability to seek gainful employment in the future. I do not think any further investigation is necessary but certainly would recommend precautions against further head injuries. At this point I do not think his cognitive problems are severe enough to warrant enrolment in the G.F. Strong Traumatic Brain Injury Program.

1. **Dr. Wickremasinghe's Contact with the Plaintiff up to the Assault**

**74**  The most comprehensive, contemporaneous and ongoing account of the plaintiff's condition and progress in the aftermath of the Accident before the physical, psychological and emotional impact of the Assault came into play were found in the clinical notes of Dr. Wickremasinghe. At his appointment with her on November 13, 2001, the plaintiff reported headaches, nausea, dizziness, poor memory and musculoskeletal pain. On November 19, he reported that Oxycet was controlling his pain, but he was moving stiffly, holding his neck stiffly and moving in a "shuffling posture". He reported significant pain to his right shoulder. His speech appeared slower than usual, but with normal content; his eyes closed frequently and he appeared tired.

**75**  On November 29, the plaintiff reported severe neck pain, but that he no longer suffered from headaches. He reported pain present in his mid and upper back, but also told Dr. Wickremasinghe that his lower back was fine. Dr. Wickremasinghe further noted the plaintiff told her he was worried because he wanted to be a firefighter and was concerned that his shoulder injury would decrease his chances of becoming one.

**76**  On December 13, 2001, Dr. Wickremasinghe reported the plaintiff to be "getting better overall" and that he had no headaches but did go to a club the previous night and developed a headache. According to the doctor's notes, the plaintiff reported his shoulder injury as improving and his lower back to be fine, though he continued to feel soreness in his mid and upper back. Dr. Wickremasinghe noted the plaintiff looked much brighter and more animated; his speech was almost normal and was not slurred. The plaintiff told Dr. Wickremasinghe that he no longer needed Percocet to control his pain.

**77**  Two days later on December 15, the plaintiff's mother, with whom he was living with at that time, called the Reach Clinic asserting that the plaintiff did in fact need Percocet; as a result, a new prescription was issued.

**78**  On January 7, 2002, the plaintiff reported to Dr. Wickremasinghe his right shoulder felt much better and that he had been off all medications since around December 17. He also told her he had been able to sleep through the night without pain and was even able to lay on his right side. He reported his back pain (upper and lower) was completely resolved. He further reported that he had no headaches and felt his memory was almost back to normal. He said he still forgot doctor's appointments, but remembered contact with friends and phone numbers.

**79**  On January 31, 2002, the plaintiff reported to Dr. Wickremasinghe that he thought he was ready to return to school. On February 11, 2002, Dr. Wickremasinghe's notes indicated the plaintiff reported that Dr. Mackie (the sports medicine doctor) had told him he was fine to return to school and that there was no problem with the plaintiff resuming his training in pursuit of his firefighter goal.

**80**  On April 11, 2002, the plaintiff told Dr. Wickremasinghe he had resumed school on April 8 and found it easy to recall information that he had previously learned. He reported that the hardest part was getting up in the morning and getting going. He further reported that he was maybe forgetting simple things at home, like giving his mother a phone message. The plaintiff indicated he had studied for a first aid and lifeguard course, but had failed to pass the course. He reported working out with weights at the gym during this period, but had difficulty in pressing certain weights due to shoulder pain. He asserted he was not limited by back pain and he continued to break dance regularly, including performing hand stands, and was doing everything he did before, all without pain. He said he had done no hammering at school and he reported he could lay on his right side with minimal discomfort.

**81**  The plaintiff stated that since the Accident, he experienced difficulty in mastering new information. It was at that time that Dr. Wickremasinghe referred him to see Dr. Theissen, a neurologist.

**82**  On August 10, 2002, the plaintiff attended the Reach Clinic after falling on his left shoulder while on wheelies, which are shoes with wheels built into the soles.

**83**  On September 19, he attended the Reach Clinic seeking a physical examination for admittance to an occupational first aid course, indicating to the locum, Dr. Meakes, that he wanted to qualify as a firefighter. She noted the plaintiff had some short term losses and he required more effort and concentration to learn and study. The plaintiff told Dr. Meakes that while he had completed all the course work for carpentry, he did not wish to become a carpenter. The doctor noted:

Speech slightly decreased inflection. Says has some feeling of flatness' over several months but enjoys friends, activity. No episodes of loss time, mood not increasingly labile.

**84**  On January 7, 2003, the plaintiff reported to Dr. Wickremasinghe he wanted to become a forestry firefighter and that there was a one week boot camp in Merritt. He told her he had completed the Grouse Grind and did it in 45 minutes. He described that activity in the context of telling her that he no longer had asthma or environmental allergies. He reported a slight decrease in assimilating new information, noting that sometimes he had to be told twice, but said he was coping well at work and socially and his mood was fine. He told Dr. Wickremasinghe he was working at a snowboarding company and felt no pain while working, particularly from his back or shoulder. Dr. Wickremasinghe reported the plaintiff was able to perform concentration tasks such as reciting months backwards, but was slower with serial sevens. According to her notes, the plaintiff was prescribed Paxil for sexual dysfunction problems that were unrelated to, and that pre-existed, the Accident.

**85**  On February 18, 2003, the plaintiff saw Dr. Wickremasinghe for complaints that were unrelated to the Accident. On April 17, he saw a locum and complained of right shoulder pain and mid back pain that had been persisting for the past two months. He told the locum that he was working out more at the gym and he complained of back pain in the C-12 region that increased at work when he was snowboard grinding, but that was not aggravated by other activities. The doctor diagnosed exacerbation of the a/c joint separation injury and repetitive work related stress injury to the left mid-thoracic area. The doctor noted the plaintiff was reluctant to take time off work as he wanted a good reference. The doctor provided the plaintiff with a note for modified duties at work and recommended rest from exacerbating injuries and physiotherapy. The plaintiff was told to follow up in four to six weeks unless the pain worsened.

**86**  Approximately three weeks later on May 8, 2003, the plaintiff re-attended the Reach Clinic and complained of continuing mid-thoracic back pain. He indicated that he was going to physiotherapy and had put in his notice at work. He stated the pain increased at work and his back was painful for two to three hours after work. He reported that since the Accident, he had been unable to return to his previous activities, such as break dancing, due to his back pain. He had applied for a job as a landscaper and he still hoped to be a fireman one day. He indicated that he slept okay, but tended to toss and turn all night. He said he was discouraged with ongoing pain and had been very down about five months ago, but his mood was fine now. Dr. Wickremasinghe noted the plaintiff to have "a flat effect" and noted the need to check for a depressed mood.

**87**  On May 14, 2003, the plaintiff informed Dr. Wickremasinghe that he had ongoing pain, specifically in his upper mid back, since the Accident but had been trying to deny the symptoms to himself and to others. The plaintiff was worried he would not be accepted as a firefighter if he had documented back problems. He told Dr. Wickremasinghe he had frequently complained to his mother of back pains and had tried to help her move several months previously, resulting in severe pain that caused him to lay down on the floor. He also told Dr. Wickremasinghe he had completely given up break dancing at least eight months ago due to ongoing back pain. He said he had tried to deny the pain and had tried to work out to get better, but now felt overwhelmed by the pain and by his financial problems.

**88**  Dr. Wickremasinghe noted at this appointment that "Jonathan and [his] mom agree that his cognitive skills, memory, etc. are now back to normal". She noted the plaintiff was recovering well from his head injury suffered in the Accident, but that his upper back problems persisted and were not adequately treated due to other injuries and the plaintiff's attempts to exercise on his own. Dr. Wickremasinghe undertook to try and get coverage for the plaintiff's physiotherapy visits from ICBC.

**89**  The plaintiff had his last pre-Assault appointment with Dr. Wickremasinghe on June 10, 2003, after going for x-rays for his back at St. Paul's Hospital. At that time, Dr. Wickremasinghe noted the plaintiff had started a landscaping job on May 19, but by the second week, began to feel severe low back pain while at work that worsened to the point that the plaintiff had difficulty sitting. The plaintiff also developed headaches and was having difficulty sleeping due to the pain. He had completely ceased to break dance and work out.

**90**  The plaintiff told Dr. Wickremasinghe he was stressed due to a lack of finances, but had no suicidal ideations. Dr. Wickremasinghe noted the plaintiff was suffering from worsening back pain and was discouraged and worried by the impact his condition would have on his occupational pursuits. She noted that his mood should be followed closely. The plaintiff told the doctor he would be starting a job as a day camp leader in a few weeks and that the job would not involve physical work.

**91**  On June 18, 2003, Dr. Wickremasinghe confirmed with the plaintiff by telephone that he had an appointment with Dr. Spencer Lui, an orthopaedic specialist, on August 8 to further investigate his back difficulties.

**92**  On June 19, 2003, Dr. Wickremasinghe sent a letter to the plaintiff's counsel in support of funding for ongoing rehabilitation sessions. She wrote:

I am Jonathan's family physician and have been seeing him with back pain related to his accident. Jonathan admits that he was trying to downplay his symptoms, as he did not wish to jeopardize his chances of becoming a fire fighter. However, he has had difficulty maintaining jobs that require physical activity.

I strongly suggest that Jonathan engage in a rehab program that includes activation physiotherapy and occupational therapy assessment. He may benefit from a personal trainer as well as an orthopedic assessment.

1. **Physiotherapy Treatments**

**93**  During the plaintiff's physiotherapy treatments between January 9, 2002 and March 25, 2002, several notes were made relating to the plaintiff's activities. On February 4, the plaintiff indicated he was seeing Dr. Mackie to confirm about engaging in break dancing. On February 7, the plaintiff reported he had been told he could do all sports and jobs. On February 20, he reported having break danced three days previously, with the only injury being a groin pull as he did a spin. On March 7 and 15, his physiotherapy records again indicated that the plaintiff break danced. On March 25, the plaintiff stated he was undertaking a one week swimming course in relation to his pursuit of his lifeguard certificate. He described the course to his physiotherapist as a "crash course", and that he felt no pain from it. The plaintiff was not successful in pursuing the swimming course as he reported to Dr. Wickremasinghe on April 11, 2002.

**94**  The plaintiff stopped his physiotherapy treatments at the end of March of 2002 and did not resume them until May 1, 2003. The resumption of his physiotherapy treatments coincided with the plaintiff's complaints to Dr. Wickremasinghe and the locum on April 17, May 8 and 14 and June 10, 2003, of ongoing back pain related to his snowboard grinding and landscaping jobs. On May 1, the plaintiff reported he was experiencing sharp intermittent pain and some pain while breathing. He stated that work was the trigger. He also reported he had not break danced for the past six months. On May 5, 2003, the plaintiff complained his back was hurting quite a bit; two days later on May 7, he reported a sore back. On May 12, the plaintiff stated he had taken the previous Friday off and his back had been okay while he was at work. It had apparently been a slow day at work. On May 21, the plaintiff reported pain from bending over to pick up a shoe; two days later on May 23, he felt pain when he was bending over to dry his legs. On May 26, the plaintiff reported pain by the midday while at his landscaping job. On June 3, he told Dr. Wickremasinghe he had quit his landscaping job the previous Thursday and experienced a decrease in pain since quitting.

**95**  The plaintiff had no further physiotherapy appointments beyond June 3, 2003, as they were not covered by ICBC.

1. **The Plaintiff's Treatment by Dr. Lui**

**96**  On August 8, 2003, the plaintiff saw Dr. Spencer Lui in connection with his back pain. The appointment had been scheduled prior to the Assault as a result of the plaintiff's complaints of back pain to Dr. Wickremasinghe in the spring of 2003. According to Dr. Lui, the plaintiff told him at their initial meeting that he had ongoing lower back pain that was "quite disabling" and that he was having difficulty coping with heavier and more physical activities due to his pain, weakness and stiffness.

**97**  Dr. Lui reported:

Examination at the time of his low back showed hyper lordosis of the lumbar spine. There was decreased in range of motion in all planes as well as extension pain. There was no sign of any particular local segmental instability.

**98**  Dr. Lui referred the plaintiff to the Canadian Back Institute (the "CBI") for a back care program and strengthening exercises after noting:

This patient no doubt has significant mechanical type of low back pain as the result of the motor vehicle accident. He suffered soft tissue injury and likely strain of the facet joint and ligamentous structures. There remained to be the possibility of discogenic injury and weakening of his back. There was however no neurological finding as the cause of concern to indicate immediate surgical treatment.

1. **The CBI Assessment and Treatment**

**99**  The plaintiff went to the CBI for a physiotherapy assessment on September 10, 2003, where he reported central lower back pain over his tailbone (the sacrum and coccyx) that was intermittent in nature with pain free periods of up to one day in duration. The plaintiff said the symptoms radiated up to the back of his neck and he experienced headaches with increased low back pain. He reported his sleep was not significantly disturbed despite having to change positions frequently.

**100**  The clinical findings made on September 10th, 2003, as reported in a letter dated December 4, 2003 and prepared by Katherine Shearman, included flexed lumbar position when sitting, and normal lumbar lordosis when standing. The plaintiff was noted as having "reduced muscle bulk over the left paraspinals and tenderness with pressure over the fourth and fifth lumbar vertebrae." He also had "reduced recruitment and control of the core stability muscles." and "elevated muscle tension through the mid-thoracic spine ... at the seventh thoracic vertebrae." In addition, the plaintiff was "tender over the right sternoclavicular joint, the second costocartilage joint and the right long head of the biceps tendon."

**101**  The plaintiff was diagnosed with the following:

Mechanical back pain due to poor core recruitment and stability. Abnormal right scapulothoracic joint positioning with altered soft tissue tension in the upper back and long head of biceps. There was a joint hypermobility at the level of the seventh thoracic vertebrae.

**102**  The plaintiff undertook "functional restoration therapy" three hours per day from Monday to Friday from September 10, 2003 to October 22, 2003, and thereafter was set up to follow an independent gym routine.

**103**  At the end of the therapy, the plaintiff reported no significant improvement in his low back symptoms (which he characterized as 7 out of 10 on a scale for pain, with 0 as no pain and 10 as most pain), and he continued to experience pain free symptoms of up to a day. The plaintiff did report an improvement in his neck symptoms, although on the same scale he rated it as an 8 out of 10.

**104**  The plaintiff expressed doubt to the physiotherapist at the CBI about his ability to perform in a labour intensive job and he indicated he did not plan to return to such a job. While reporting pain with normal activities, he said he was not limiting his activities.

**105**  According to the CBI report, the plaintiff improved "in recruitment and endurance of the upper and lower trunk stability muscles." His lumbar flexion range increased from 83 degrees to 100 degrees (ideal being 120 degrees) and he had lumbar extension and cervical movements in the ideal range.

**106**  On a test of his perceived tolerances, the report indicated the plaintiff did not demonstrate an improvement in perceived neck and back disability. The perceived disability was in the medium category, whereas functionally, according to the report, the plaintiff's activities exceeded the medium qualification.

**107**  The report offered the following prognosis:

During the six weeks that Mr. Hutchings spent in physical rehabilitation, he made objective improvements with respect to core stability and functional strength. It is anticipated that if Mr. Hutchings continues with the prescribed exercise routine of stability and general strength exercises, he will continue to make improvements. Mr. Hutchings is expected to continue to improve over at least the next six months. This estimate is based on the progress he has made while in therapy, the length of time since his injury, and that Mr. Hutchings attends the gym facility three to four times per week, as recommended.

**108**  The report suggested the plaintiff could progress into a heavy lifting capacity with his strengthening routine at the gym and "anticipated that with consistent exercise, Mr. Hutchings will be able to progressively develop his activity tolerance to meet the physical demands of his pre-injury occupation."

**109**  The plaintiff returned to see Dr. Lui on May 17, 2004. At that time, he reported little improvement or changes from his earlier visit and he continued to experience off and on lower back pain that was aggravated by activities. Dr. Lui characterized the injury as likely to last for a long time. He expressed doubt as to the probability of the plaintiff becoming a firefighter because of probable restrictions in his ability to handle heavier physical type of work. He suggested a CT scan in case of discogenic problems.

**110**  A CT scan was duly performed on May 26, 2004, revealing no bone or soft tissue abnormality and thus ruling out the need for surgical intervention.

1. **The Assault and its Aftermath**

**111**  On July 26, 2003, the plaintiff suffered the second blow to his aspirations of becoming a fireman when he was assaulted by being struck with a beer bottle on the right side of his head. The specific injury which the plaintiff suffered from the Assault was a closed head injury involving an intraparmenchyl haemorrhage. It was a bruise about three centimetres in diameter on the junction of the frontal and right parietal lobes of his brain. The plaintiff was originally admitted to St. Paul's Hospital where he was given a CT scan on July 26, 2003, before being transferred to VGH for monitoring. The CT scan report indicated the plaintiff had been struck on the head with a beer bottle and was able to move his left arm slowly but with little power, and he was also experiencing facial numbness. The report disclosed a three centimetre bruise to the plaintiff's right rear frontal lobe with the remainder of the brain unremarkable. The plaintiff reported no loss of consciousness, and he remained standing after being hit with no nausea or vomiting. During the initial examination, the plaintiff was oriented as to time, place and person, but it was noted that his speech was "slurred somewhat".

**112**  Upon his transfer to VGH where he came under the care of Dr. Brian Toyota, a neurosurgeon, the plaintiff was noted to have left arm and face numbness, slurred speech, a larger right pupil than left and sluggish behaviour. His GCS was quantified as 15.

**113**  On July 28, 2003, the plaintiff was administered a second CT scan. The reported findings included a "focal intraparenchymal hematoma ... in the ... right fronto-parietal region..." and "shear injury evident in the subcortical white matter in the right frontal lobe."

1. **The Seizure Post-Assault**

**114**  The plaintiff was discharged from VGH on July 28, 2003. On August 3, 2003, he was re-admitted to St. Paul's Hospital after developing left facial and arm twitching which was subsequently diagnosed as a focal seizure. A third CT scan was taken on August 3, 2003, and reviewed by Dr. John Barberie, a radiologist, who reported the intracranial haemorrhage involving the surface of the posterior aspect of the frontal lobe was evolving appropriately with decreasing density. He did not note any other injuries or abnormalities. He recommended a follow up scan after resolution of the trauma to exclude any underlying abnormalities.

**115**  Dr. Barberie compared the August 3 CT scan to the earlier one taken on July 26, 2003 at VGH, which identified only the intracranial injury. He then reviewed the CT scan administered on July 28, 2003 at VGH. Dr. Barberie testified that after reviewing the three CT scans, he could see no sign of the frontal shear injury referred to in the July 28 report. He also testified that there would be no existing evidence of the original shear injury of November 9, 2001 by July of 2003. He attributed the characterization of the July 28, 2003 scan as revealing a frontal shear injury to "artifacts" of the x-ray process, with "no clinical significance."

**116**  Dr. Barberie also reviewed the November 10, 2001 scan from VGH and testified that it showed at least two shear injuries in the frontal lobe. He stated that shear injuries show up as a white spot on the scan and are the product of a rotational force involving bleeding around, and disruption of, the nerves in the front of the brain on both sides. He testified that what he saw in the November 10, 2001 CT scan was a sign of a "serious significant injury", but that the haemorrhage caused by the second injury visualized by the later CT scans was "easier to heal".

**117**  The plaintiff was referred to see Dr. Toyota on August 11, 2003, who reported the plaintiff suffered partial simple motor seizures involving the left face and arm, which he related to the previous head injury and right posterior frontal haemorrhage. The plaintiff was prescribed Dilantin to prevent seizures and Dr. Toyota ordered a follow up MRI to assess the presence of an underlying pathology for the haematoma he suffered.

1. **The Plaintiff's Post-Assault Contact with Dr. Wickremasinghe to January 20, 2004**

**118**  Following the Assault, the plaintiff continued to see his general practitioner or her locums. On September 8, 2003, he reported worsening back pain since the Assault, identifying it as 6 out of 10 on a pain scale and describing it as constant.

**119**  On September 22, the plaintiff reported he was attending CBI and doing exercises. He told Dr. Wickremasinghe that he experienced minimal pain while doing exercises, but the pain increased later in the day and was at its worst just before bed time. He reported sleeping at night but with some neck pain. Dr. Wickremasinghe's September 22 clinical notes indicated the plaintiff was experiencing worsening depression that started prior to his most recent injury. The notes also indicated the plaintiff was financially strapped and had relationship problems. His girlfriend was anticipating leaving to work on a cruise ship for six months and he was planning to move in with a friend. Dr. Wickremasinghe noted the plaintiff was tearful in the office, but he told her that he never was while at home and he did not believe he was depressed. The plaintiff was working 3 to 10 hours a week at this time. Dr. Wickremasinghe listed the plaintiff's "stresses" as having his identification and wallet stolen while at the hospital after the Assault, relationship problems, financial problems, daily back pain, no longer being able to play sports and break dance and headaches every one to two days since the Assault. Dr. Wickremasinghe noted the plaintiff would benefit from counselling.

**120**  The plaintiff saw Dr. Wickremasinghe again on October 20, 2003, and at that time, he reported working about 12 hours a week. He was also still experiencing ongoing back pain. As recommended by the CBI, the plaintiff was referred to a massage therapist.

**121**  On October 27, the plaintiff reported experiencing for the first time since the Assault, migraines once a week and stress or neck pain headaches a few times a week. He stated that loud music triggered his headaches. On November 12, the plaintiff complained of unrelated health issues that were causing him concern. He also reported smoking marijuana and trying cocaine approximately 50 times, with his most recent incident being about a month prior. At the time, he had not had any suicidal ideations for the past six months, but before then, he had planned to jump off a bridge. He reported his mood as being okay, though Dr. Wickremasinghe noted a "flat effect". The plaintiff told her he would be seeing a psychologist.

**122**  On November 27, 2003, the plaintiff told Dr. Wickremasinghe he was moving from living with his girlfriend to living with his two friends. He said he had stopped taking Dilantin in mid November and had not had a seizure since then. He discussed the use of medications to help with his back pain and headaches. He reported seeing a psychologist, Dr. Chuck Jung, on November 21, 2003, for an assessment after getting a referral by Dr. Kaushansky, and was considering seeing Dr. Jung for ongoing care.

**123**  On December 11, 2003, the plaintiff saw Dr. Toyota again, at which time Dr. Toyota noted the plaintiff had stopped the Dilantin on his own in November, but encouraged the plaintiff to resume the medication to combat future potential seizures. To that end, Dr. Toyota gave the plaintiff a new prescription for Dilantin.

**124**  By January 20, 2004, it appeared the plaintiff's difficulties reached a critical point. He initially saw Dr. Wickremasinghe in the morning and according to her notes, he told her he was undergoing stress and that his mood had deteriorated in the past few weeks. He attributed the deterioration of his mood to financial problems. He indicated he was working for the Vancouver School Board, but was finding some planning and organizational parts of the job difficult. He told Dr. Wickremasinghe he was uncertain whether his difficulties began post-injury or were pre-existing. He was finding work stressful in that he had to get to and from three different job sites. He said he was concerned with his poor decision making, his time management and his memory. He claimed not to have filled his Dilantin prescription because of a lack of money. He reported smoking marijuana three to four times a week and had had some cocaine the previous weekend. He told Dr. Wickremasinghe of his previous thoughts of suicide and his plan to jump off a bridge, although he said his last ideations were about a year ago. Dr. Wickremasinghe noted the plaintiff as being fragile, forgetful and saying "I'm not sure a lot". She concluded he had no active suicidal ideations, but was depressed with multiple stressors including financial, work and head injury impairments. At that time, she prescribed antidepressants and counselled him against the use of non-prescription drugs or alcohol.

1. **The Plaintiff's Dealings with Dr. Kaushansky on January 20, 2004**

**125**  Following his appointment with Dr. Wickremasinghe on the morning of January 20, 2004, the plaintiff saw Dr. Kaushansky that afternoon. Dr. Kaushansky concluded the plaintiff was at risk of suicide and he arranged for him to see Dr. Jung for treatment beginning January 23 (although it appeared the appointment was changed to January 27). Dr. Kaushansky noted in a letter dated January 21, 2004, that the plaintiff told him "he has heard voices which have been encouraging him to end his life - such voices become more prominent when his is intoxicated with either alcohol or recreational drugs." Dr. Kaushansky recommended ongoing treatment and maintaining the antidepressant medication prescribed to the plaintiff. He also recommended a vocational assessment as he reasoned that the plaintiff's "depression must be considered as reaction to a life that he thinks has been significantly derailed and is now going "nowhere"." In particular, Dr. Kaushansky noted the plaintiff was working three jobs doing mostly childcare at three different locations rather than becoming a fireman. It was this recommendation that led to the plaintiff undergoing an assessment two days later on January 22, 2004, with Ms. Alison McLean, an occupational therapist with OT Consulting/Treatment Services Ltd.

1. **Feasibility for Employment Evaluation with Alison McLean**

**126**  The plaintiff was referred to Ms. McLean for a physical capacity evaluation to determine his feasibility for employment with reference to the physical activity factor titles as listed in the National Occupational Classification (the "NOC"). The evaluation consisted of a series of tests conducted over a six hour period and was based in part on existing medical reports and a history given by the plaintiff. Ms. McLean did not have access to Dr. Wickremasinghe's clinical notes reflecting her dealings with the plaintiff from the time of the Accident onwards. The results of Ms. McLean's assessment of the plaintiff was detailed in a letter dated February 5, 2004.

**127**  The employability categories considered in the evaluation consisted of the following: competitive, in which an individual would have no "physical activity factor limitations ... within their strength category"; employable, in which an individual while meeting most of their requirements has limitations that "may require a sympathetic employer, modified work hours or environmental/ergonomic intervention"; and non-employable, in which the individual has "significant limitations and does not meet the basic requirements for feasibility for employment."

**128**  In her evaluation of the plaintiff, Ms. McLean found restrictions in his physical ability to bend, lift and handle which, in her opinion, made him employable, with the potential to work in limited and light strength occupations, and with some restrictions, to some degree for medium and heavy strength occupations. In her opinion, the plaintiff did not have the physical capacity because of his identified limitations, to access in an open labour market the jobs he would otherwise be qualified for by education, aptitudes and interests. Ms. McLean viewed the plaintiff as competitively employable for some occupations within the limited and light strength occupations, but not for all given his restrictions in bending and handling.

**129**  With respect to the plaintiff's aspirations of becoming a firefighter, it was Ms. McLean's opinion that the plaintiff's condition precluded him from that profession because of its classification in the NOC and the predecessor publication, the Canadian Classification and Dictionary of Occupations, as involving very heavy lifting. Ms. McLean reported the plaintiff did not meet the strength requirements or the demand for "other body positions" due to his limited tolerance for bending.

**130**  In her assessment, Ms. McLean noted that despite the optimistic prognosis of the CBI report authored by Katherine Shearman anticipating an eventual ability to meet the physical demands of his pre-injury occupation, the plaintiff was not at the time of his evaluation at CBI able to meet the physical demands of a firefighter. Ms. McLean further noted the CBI evaluation did not consider the plaintiff's tolerance for bending, only lifting, and that bending was "a critical physical demand" for his potential occupations, such as carpentry, landscaping or firefighting.

1. **The Plaintiff's Treatment by Dr. Jung**

**131**  The plaintiff initially met with Dr. Jung, a psychologist, on November 21, 2003. He saw Dr. Jung again on January 27, 2004, and continued to see him weekly for five weeks to specifically address suicidal issues. Thereafter, the plaintiff continued to see Dr. Jung on a monthly basis to deal with ongoing related problems. Dr. Jung provided five letters relating to his treatment and assessment of the plaintiff dated as follows: December 19, 2003, relating to the November 21 assessment; November 4, 2004, to provide a brief overview of the plaintiff's requirement for psychological intervention in the future; November 29th, 2004, dealing briefly with the effect of trauma induced depression on the likelihood of subsequent depression; August 8, 2005, being a full psychological report providing Dr. Jung's opinion as to the cause, nature and extent of the plaintiff's psychological problems; and August 26, 2005, detailing Dr. Jung's concerns with the potential effect of an adjournment of the trial set in this matter.

**132**  Prior to the Assault, the evidence of the plaintiff's post-Accident cognitive and psychological condition consisted of the evidence of his initial examination and treatment by the ambulance attendants, the hospital records from VGH from November 9 to 12, 2001, the examination by Dr. Theissen reflected in his May 21, 2002 report, the examination by Dr. Kaushansky on January 29 and February 5, 2002 and the subsequent personality assessment inventory on June 19, 2002 and the plaintiff's ongoing disclosures to Dr. Wickremasinghe as reflected in her clinical notes.

**133**  In the aftermath of the Assault, the plaintiff's cognitive and physiological functioning underwent further examination and assessment in light of developments and problems which became manifest during the period following the Assault.

**134**  After the plaintiff's initial assessment with Dr. Jung on November 21, 2003 (the plaintiff's mother was also present to provide "collateral information"), Dr. Jung ventured the initial opinion that the plaintiff was "experiencing psychological problems referable to his motor vehicle accident." Dr. Jung referred to depression, general stress, suicidal ideation, deteriorated confidence and self-esteem and memory and concentration problems. He identified the plaintiff's reported physical problems as headaches, back pain and numbness in his left hand. Dr. Jung strongly recommended psychological interaction.

**135**  Further details from the plaintiff's meetings with Dr. Jung on November 21, 2003, and January 27, 2004, can be found in Dr. Jung's report dated August 8, 2005.

**136**  Following the November 21, 2003 meeting, Dr. Jung described the plaintiff as visibly depressed. The plaintiff acknowledged he was suicidal and had thought about jumping off a bridge or off of his balcony or hanging himself. Dr. Jung reported the plaintiff told him after the Accident that he kept trying to get better in order to be a firefighter, but has since been told that it was no longer possible for him to become one. The plaintiff reported he worried about financial problems and some pre-existing sexual dysfunction. He said about a year ago he was very angry and depressed and cut himself. He reported that his back pain came and went and that he suffered from daily headaches.

**137**  The plaintiff told Dr. Jung his memory was not the best and that he often lost belongings and would forget to do simple things. He noted he was easily distracted sometimes, but felt he could stay focussed. The plaintiff told Dr. Jung that "he doesn't have a plan for the future. He doesn't know what to do. He used to have steps but now everything has collapsed."

**138**  The plaintiff acknowledged that in high school he smoked and sold marijuana for a few years, but stated he stopped smoking marijuana after graduation to maintain his health.

**139**  Dr. Jung described the plaintiff as overwhelmed during the initial sessions following their January 27, 2004 meeting. He described the plaintiff's decision making and problem solving abilities as extremely poor and noted that his "depressive symptoms and suicidal risk was related to his inability to problem-solve a number of ongoing issues."

**140**  Dr. Jung noted as an example of the plaintiff's poor problem solving his work schedule at the time of working five jobs over six days a week and his role as a Big Brother, all of which led to an excess of travel and disorganization. The plaintiff also had financial stresses which he was not coming to grips with.

**141**  Dr. Jung noted the plaintiff had been put on antidepressants and began, through the counselling sessions, to address some of the disorganization and work issues causing him stress such that his thoughts of suicide declined and his depressive symptoms became less intense. By the summer of 2004, Dr. Jung reported the plaintiff had streamlined his work to two jobs - one at the Sutton Place Hotel and the other at the WECC - and that his mood was stable without suicidal ideations.

**142**  Dr. Jung noted that by November of 2004, the plaintiff was moving out of the apartment he shared with his two friends and moving back in with his mother, which he regarded as a more stable environment. He said he had been smoking marijuana and doing cocaine while in the apartment because others around him were also doing it. Dr. Jung reported that in December of 2004, the plaintiff's mother co-signed a loan to allow the plaintiff to get a car to facilitate his work and his social life. Dr. Jung described the plaintiff's living arrangement with his mother as "a very protective environment" in which he received financial, emotional and organizational support.

**143**  By April of 2005, the plaintiff told Dr. Jung he was working 35 hours per week at the WECC over a six day period and that he planned to work as a lifeguard in the summer of 2005, having concluded a qualifying course in May. As of their last session on July 19, 2005, and before Dr. Jung's August 8, 2005 full psychological report was produced, Dr. Jung described the plaintiff as doing well, socializing with people at the WECC and feeling better about himself, but with worries about the future and becoming overwhelmed again. The plaintiff acknowledged to Dr. Jung he was smoking marijuana again about once a day, but planned to stop. He remained at that time on antidepressants.

1. **The Plaintiff's Treatment by Dr. Wickremasinghe** **January 20, 2004 - April 27, 2004**

**144**  The plaintiff continued to see Dr. Wickremasinghe with appointments on February 18, March 30 and April 27, 2004. On February 18, the plaintiff reported his mood was slightly improved, and that he was taking his Dilantin regularly. He had not used marijuana in the past month and had no further cocaine use at that time. He reported finding his visits to the psychologist very helpful. Dr. Wickremasinghe found him more focussed and with improved insight.

**145**  On March 30, the plaintiff reported playing roller hockey for about two weeks, which caused some back pain. While he reported attending the gym four times a week and lifting weights without back pain, he also indicated he had not done any break dancing in the past few months due to his back. He reported no suicidal thoughts, and though Dr. Wickremasinghe noted his mood to be labile, the plaintiff thought it was well maintained. He also reported increased headaches, but no migraines. He admitted to some marijuana use, but said he was not doing cocaine.

**146**  On April 27, 2004, the plaintiff said he had even moods, an okay sleeping pattern and no suicidal thoughts. He reported taking a two week break from roller hockey due to increased back pain. He returned to lifting weights after resolution of his right clavicle injury which he told Dr. Wickremasinghe about on his previous visit of March 30, 2004. Dr. Wickremasinghe described the plaintiff as comfortable, chatty, focussed and with an appropriate effect.

**147**  On July 26, 2004, Dr. Wickremasinghe provided the plaintiff's counsel with a medical legal report setting forth her opinion as to the adjustment difficulties and mood problems the plaintiff experienced following the Accident. She noted that she would only refer to his physical injuries as they related to his mood disorder. Dr. Wickremasinghe based her opinion on the history given to her by the plaintiff and his mother and the opinions of Drs. Toyota and Lui.

**148**  Dr. Wickremasinghe noted that when she first saw the plaintiff following the Accident, he had concerns about its impact on his aspirations to be a firefighter. His concerns were focussed on his orthopaedic injuries, specifically his shoulder separation. She described him as becoming "increasingly discouraged" as he became aware of his physical limitations and he experienced "difficulties with poor memory, poor time management and poor decision making abilities ...". Dr. Wickremasinghe stated:

He developed frank symptoms of a major depressive disorder including sleep difficulties, decreased appetite, decreased energy, decreased motivation, tearfulness and low mood including frequent suicidal thoughts. These symptoms predated Jonathan's second head injury in July 2003. Prior to his first accident in 2001, Jonathan had no history of depression.

**149**  Dr. Wickremasinghe noted the plaintiff was on Celexa, an antidepressant, and expressed the opinion that "it is more probable than not that he would not be able to become a firefighter in the future when his injuries are considered as a whole."

**150**  In Dr. Wickremasinghe's opinion, the Accident caused the plaintiff "significant emotional difficulties in addition [to] his physical and neurocognitive difficulties."

1. **The Plaintiff's Assessment by Dr. Kaushansky in 2005**

**151**  The plaintiff was reassessed by Dr. Kaushansky on May 2 and 3, 2005, with the doctor's opinion set out in a letter dated June 16, 2005. At that time, the plaintiff reported to Dr. Kaushansky he was working about 30 hours a week at the WECC and was hoping to obtain permanent status after working 900 hours. He was also taking his lifeguard course and described his mood as being "up and down". He reported problems with recall and multi-tasking, but no problems with moods or anger. Dr. Kaushansky also interviewed the plaintiff's mother who reported the plaintiff had problems with short term memory loss, a lower frustration tolerance and lower self-esteem. She also noted the plaintiff seemed overwhelmed by too much stimuli and had difficulty understanding complex issues. The plaintiff's mother reported to Dr. Kaushansky that the plaintiff had drastically improved since returning to live with her in the fall of 2004. She expressed concern that if the plaintiff moved out on his own without community support, he would get depressed.

**152**  Dr. Kaushansky noted the plaintiff's 2002 assessment did not report concerns of diminished attentional skills, but in 2005 the plaintiff appeared more easily distracted. However, on both occasions the plaintiff was able to persevere on the tasks presented.

**153**  Dr. Kaushansky stated in his report:

His memory for details was excellent throughout our discussions and Mr. Hutchings did appear to be a good historian of facts. During the initial interview, he reported appropriate thought content, whereas during the 2004 interview he reported being quite depressed and hearing some voices (thought to be command hallucinations). In the third interview, 2005, Mr. Hutchings denied such voices.

**154**  Dr. Kaushansky noted that during testing in 2002 and again in 2005, checks and balances suggested the plaintiff's efforts on the tests were appropriate and the tests provided a reliable measure of his functioning level.

**155**  The plaintiff's functioning was tested in a number of areas in both 2002 and 2005 including the following: level of intellectual functioning; attention and speed of information processing, learning and memory; language; visuo-spatial functioning; and mood and personality functioning.

**156**  By way of summary, Dr. Kaushansky noted:

[I]n the two neuropsychological assessments, there continues to be a constellation of cognitive problems. The assessments indicated a man whose intellectual functioning falls within the "average" range, with lower than expected skills on measures of simple attention, speed of information processing, reading comprehension and some memory tasks (list learning). Intact skills included visual spatial functioning (as long as the task has no time component), novel problem solving skills, and most tasks of memory.

**157**  Dr. Kaushansky also noted that there was a difference in perception between the plaintiff and his mother as to his pre- and post-Accident problems in the areas of apathy, disinhibition or executive skills (planning, reasoning and judgment). The plaintiff saw little or no change between his pre- and post-Accident functioning, whereas his mother saw significant differences which led Dr. Kaushansky to suggest the plaintiff may have an organic inability to recognize his own shortcomings as a result of the trauma itself.

1. **Independent Medical Examination of Dr. Michael Jones**

**158**  Dr. Michael Jones, a neurologist with a specialty in epilepsy, examined the plaintiff at the request of his counsel on May 16, 2005. His objective in that examination and in conducting a review of the medical and psychological records and reports complied since the Accident was an attempt to determine which of the plaintiff's symptoms were causally related to the Accident and which symptoms could be causally related to the Assault.

**159**  Dr. Jones' report consisted of a letter dated May 16, 2003 and three appendixes. Appendix A was a table of contents of all the records and reports compiled with respect to the plaintiff that Dr. Jones reviewed. Appendix B was a record review, consisting of Dr. Jones' comments on the reports relevant to his specialty. Appendix C was a summary of the plaintiff's various histories including past health, personal, family, and present illnesses and examinations.

**160**  In his letter, Dr. Jones based his opinion of the respective effects of the Accident and the Assault on a number of facts and assumptions. He characterized the closed head injury caused by the Accident as a moderate traumatic brain injury based on the length of the plaintiff's post-traumatic amnesia and "the presence of white matter lesions seen in his CAT scan and subsequent MRI scan." He relied on the records, primarily Dr. Wickremasinghe's, as evidencing significant neurocognitive and behavioral problems post-Accident but pre-Assault. Dr. Jones related the left arm weakness and numbness and continuing sensory impairment and clumsiness in the plaintiff's left hand to the new lesion over the right parietal area resulting from the Assault. Finally, Dr. Jones attributed the focal seizure a week following the Assault and the continuing minor focal seizures to the same cause.

**161**  Dr. Jones drew the following conclusions from his examination and review:

Jonathan, in many ways, is like the walking wounded. In other words, he looks normal, he talks normal and he carries on very well in terms of "cocktail chatter". It seems however that he is floundering in his life and is not having the successes that most would have predicted he likely would have had prior to the MVA. He has had significant depressive symptoms and problems today with memory that he admits to. From just talking to him, I got the impression that he largely minimizes the depth and breadth of his neurological or neuro-cognitive shortcomings primarily because I think he lacks the insight to be aware of them. He can't articulate them clearly but they are described in other people's descriptions of him. The lesions in his frontal lobe, in terms of the shear hemorrhages, are the type of lesions that characteristically would explain this type of behaviour or negative behavior that he has been displaying.

The focal motor seizure that he had one week after the beer bottle incident affecting his left face and arm and the continuing very minor focal motor seizures he has in his left eye, I believe, are intrinsically related to the beer bottle incident. They fit well in terms of a chronological evolution. They fit well in terms of where the hemorrhagic contusion was and his current deficit now. Specifically the focal seizure and "to call a spade a spade", i.e. his "epilepsy" which he has now, is causally related to the beer bottle incident. This is an example of post-traumatic epilepsy. I don't believe it is intrinsically related to the MVA. As long as his seizures that cause the twitching around his eye, are minimum, and are unobtrusive, as they appear to be from his account, then I would agree they don't necessarily warrant therapeutic intervention with medication. I did suggest to him "where there is smoke there is fire", meaning if they in any way got larger, stronger, or more involved, then one would have to consider going back on some form of anti-seizure medication.

**162**  In cross-examination, Dr. Jones agreed that a GCS of 3 to 8 is considered severe; 9 to 12 is considered moderate and 13 to 15 is considered mild. He agreed there is a variation on how these scores correlate to future functioning, although there is "a loose linear relationship" between the GCS and the outcome. Dr. Jones also said a factor in determining whether a head injury is judged mild, moderate or severe is the duration of confusion or impaired consciousness following the trauma. He agreed the use of morphine could cloud an interpretation of a person's state of consciousness or confusion.

**163**  Dr. Jones agreed he relied heavily on Dr. Wickremasinghe's report of July 26, 2004, and in particular, on her diagnosis of a major depressive disorder based on the symptoms of "sleep difficulties, decreased appetite, decreased energy, decreased motivation, tearfulness and low mood including frequent suicidal thoughts ... [predating] ... Jonathan's second head injury in July 2003."

**164**  Dr. Jones agreed with the suggestion that substance abuse can result in neurological deficits and that the use of marijuana over an extended period of time can possibly affect memory and concentration. He agreed the plaintiff did not volunteer information about his disabilities, but would respond when asked. He testified he saw the plaintiff as glossing over problems and not realizing how handicapped he really was. Dr. Jones agreed with the suggestion that a seizure disorder or left hand neurological impairment could become problems in the plaintiff's desire to be a fireman.

1. **Dr. Toyota's Reports and Evidence**

**165**  In a report dated October 28, 2004, and directed to counsel for the plaintiff, Dr. Toyota made the following assertions:

The current neurologic and musculoskeletal symptomatology that Mr. Hutchings continues to suffer are all attributable to the initial motor vehicle accident and thus head injury of November 9th, 2001, except for the numbness and clumsiness involving the left hand. The neurologic symptoms, which are attributable to the motor vehicle accident in November 2001 include, but are not limited to, the neurocognitive defects and the epilepsy.

**166**  In an earlier letter dated June 2, 2004, Dr. Toyota stated the following:

As a general assessment, the initial and presumably continued, neurocognitive deficits that Jonathan has suffered have been secondary to the initial motor vehicle accident in November of 2001. The deficit involving his left hand and the subject seizure disorder are secondary to the head injury suffered in July of 2003.

**167**  He went on to say in that same report:

The clinical presentation of the injuries, the location of the abnormalities on the imaging studies and the pathophysiologies of the head injuries are such that, I believe, [the] two incidents and their clinical outcomes are distinct.

**168**  Although Dr. Toyota referred to his October 28, 2004 opinion as a clarification, it is apparent from reading his separate reports that there was indeed a change in his opinion rather than a clarification. I am not satisfied that the epilepsy was secondary to the Accident. There were no reports of epilepsy until after the Assault and Dr. Toyota's explanation of why he linked the epilepsy to the Accident after initially declaring it a consequence of the Assault was, at best, opaque. I prefer the evidence of Dr. Jones and accept his opinion that the epilepsy was caused by the Assault rather than by the Accident.

**169**  In his report of June 2, 2004, Dr. Toyota reported that a CT scan taken of the plaintiff after the Assault, presumably referring to the CT scan taken on July 28, 2003, "specifically revealed a 29 x 19 mm intracerebellar hematoma on the right side in the pre-central gyrus as well as a right frontal shear hemorrhage." This was the same CT scan later reviewed by Dr. Barberie and described by him as revealing "artifacts" of the x-ray process with "no clinical significance." Dr. Jones also reviewed this same scan and found no evidence of a shear injury depicted in it. Dr. Toyota was not asked specifically about his reference to the shear injury in the post-Assault x-rays. It was unclear whether he was reporting what he read in the radiology report or whether he was reporting what he himself saw and interpreted. In any event, I accept the evidence of Drs. Barberie and Jones on this point. There appears to be no reason why the plaintiff would have sustained a shear injury from the Assault; no such injury was revealed on the July 26 or August 3, 2003 CT scans and the shear injuries from the Accident would not be evident 20 months later. Thus I am satisfied the Assault did not cause any shear injuries and the reference to any such injuries in the July 28, 2003 radiologist report and Dr. Toyota's June 2, 2004 report were inaccurate.

1. **Evidence of the Plaintiff's Ability to Function in the Community**

**170**  The plaintiff, in addition to his own evidence, called the evidence of his mother, Anita Hutchings, his mother's friend, Kate Pilgrim, his girlfriend, Kristy Seymour, his girlfriend's mother, Monica English, his friend and co-worker at the WECC, Natalie Vermis, his co-worker from Options, Herb Sallens, and his co-workers from the WECC, Don Conway and John Palinisky. The plaintiff also called evidence from Derek Nordin, a vocational counsellor, and Dean Powers, a vocational rehabilitation consultant, who observed him on a number of different occasions at his work site at the WECC.

1. **The Plaintiff's Evidence**

**171**  The plaintiff in chief testified that his social life changed following the Accident. He testified he tended to keep more to himself and did not go out as much. He indicated that when he resumed his relationship with Ms. Seymour, she would want to go out and he would not. He said as of the date of the trial, he was attempting to get out more and be more sociable. He also testified to his diminished involvement in sports and other physical activities.

**172**  As far as his post-Accident employment was concerned, he recounted difficulties that confronted him at his various jobs. He acknowledged he was the First Aid attendant while at Options, but said that the most serious injury he dealt with in that capacity was a cut finger. He described feeling pain in his back while working at Options, with the pain being especially excruciating when he was working the grinding machines. The pain eventually caused him to leave that job in the spring of 2003. He similarly described back problems when he was landscaping following his departure from Options, and said he often had to lie on the floor after work to relieve his symptoms.

**173**  He described working as a valet at the Sutton Place Hotel, saying that he made mistakes and caused damage to three different vehicles, but managed to avoid losing his job because he was well liked by the supervisor. The plaintiff said he had difficulty with paperwork and required his co-workers to help him with that aspect of the job. He described himself as being only "so-so" at making quick decisions.

**174**  The plaintiff stated that in the period leading up to December of 2003, he was working at various childcare jobs and was also a Big Brother. He said he was much too busy during that period and had no time for himself. The plaintiff indicated he could not handle the competing pressures on his time and felt that he was running around and needed more structure in his life. He stated he was in no condition to be a Big Brother at that time and things deteriorated for him.

**175**  The plaintiff admitted to becoming initially suicidal after the Accident, but before the Assault, when he "cut his chest". He said he did not tell Dr. Wickremasinghe about this incident. He added he had thought about jumping from the Burrard Street Bridge or from his apartment balcony, and continued to have these thoughts during the time between the Accident and the Assault.

**176**  The plaintiff testified when he started seeing Dr. Jung for his suicidal ideations, he eventually began to get better. He said he left the Sutton Place Hotel valet job when he got a job opportunity at the WECC. He said his relationship with Kristy Seymour deteriorated in mid 2003 and he moved into an apartment with the defendant Vischon and Chris MacDonald in late November of 2003, becoming quite involved with drug use while he was there. He said things were getting out of hand and he eventually moved back in with his mother in September of 2004. The plaintiff stated that things were better with his mother and he was now better able to cope in that atmosphere. He said it "definitely helps" to be with his mother as there was structure for him in that environment. The plaintiff noted Ms. Seymour assisted him when he lived with her, and his association with Dr. Jung also helped, particularly when it came to making decisions and exercising judgment. The plaintiff indicated when he lived with Ms. Seymour, she took care of paying the bills and would buy the groceries and look after the apartment.

**177**  He testified the Accident had an affect on his activities, essentially preventing him from doing any break dancing because of his back problems and limiting his workouts at the gym lifting weights, although he did follow the CBI exercise regime. He stated he was limited in basketball, high-jumping and rollerblade hockey because of the back pain those activities caused him.

**178**  The plaintiff testified he had not recovered from his back problems as of the trial and he still noticed he had memory problems daily. He agreed he told Dr. Wickremasinghe that he was okay when he saw her, but explained he knew to become a fireman he would need the "okay" from his doctor, so he felt he had to convince himself and his doctor that he was in fact alright. He said he would talk to his mother about his back problems and she would tell him to tell his doctor, but he stated he did not believe he told Dr. Wickremasinghe, although he indicated there might have been some instances when he did.

**179**  He testified that he passed his lifeguard course and received his National Lifeguard Service certificate in May of 2005, but barely passed the physical portion by "only by a few seconds". He stated he enjoyed the lifeguard job he held in the summer of 2005, but had no real emergencies that he had to deal with.

**180**  The plaintiff testified he applied for the permanent job at the WECC in September of 2005 and was successful in securing the position. He indicated there had been an earlier competition which he had not been eligible to apply for because he did not have the necessary hours as an auxiliary employee to convert to permanent status, but the job was not filled at that time. He testified that he received no raise in pay but was able to work an additional shift on Sundays as a cashier, though he did not always do so if he needed time for himself. He said he continued to see Dr. Jung during this time, and Dr. Jung helped him with his decision making issues.

**181**  The plaintiff testified that it definitely helped to be with his mother because she provided him with the necessary structure for all of his activities and his job. He said it would be difficult for him to cope without the help of his mother and Dr. Jung.

1. **Anita Hutchings**

**182**  Anita Hutchings, the plaintiff's mother, confirmed in her evidence that before the Accident, the plaintiff was very physically active with basketball, soccer, snowboarding, break dancing, swimming, camping and workouts at the gym. She testified that following the Accident, the plaintiff only tried snowboarding one time and found it very painful for his back. Similarly, as far as she knew, he only tried break dancing once after the Accident. She did not think he played basketball, soccer or roller hockey at all after the Accident.

**183**  Ms. Hutchings testified that before the Accident, the plaintiff was very popular and always had friends over at least three times per week. Following the Accident, many of the plaintiff's friends dropped away. She described the plaintiff as being very focussed before the Accident and able to accomplish whatever he set his mind to. She indicated that he had the initiative to set and accomplish objectives. She testified that up to the Accident, the plaintiff worked pretty steadily and did volunteer work including teaching break dancing.

**184**  Ms. Hutchings described seeing the plaintiff while he was in the hospital and that his eyes were closed but he was awake. She said he did not initially recognize her and when he spoke to her, he spoke in French, which was something he would not normally do. She testified that before the Accident, the plaintiff did not suffer from headaches, but following the Accident, he had regular ones for months. She testified during his first month home after the Accident, the plaintiff could not sit up by himself or even get dressed on his own.

**185**  Ms. Hutchings was asked about the plaintiff's visit to a nightclub on December 12, 2001. She stated the plaintiff had gone out only an hour and came home "shaken and tired". She recalled he was in pain and remained that way over the next few weeks. She testified she called the Reach Clinic to get a renewal of an anti-pain medication because the Ibuprofen he was taking was not sufficient to quall his pain. Specifically, she sought a prescription for Percocet. She said as a result, the Reach Clinic sent a prescription for Oxycet to a drugstore and she went picked it up. She identified in Exhibit 4 a list of prescriptions including those for Ibuprofen on December 13 and Oxycet on December 17, 2001. Ms. Hutchings testified the plaintiff used the prescription until it was gone. She said he had daily pain for months and was still on medication as of January 7, 2002, which was the date when he reported to Dr. Wickremasinghe that he had been off all medications since around December 17, 2001. Ms. Hutchings testified that during this initial period, the plaintiff slept badly, had daily headaches and a horrible memory. She described him as being in a lot of pain, walking with one shoulder up.

**186**  With respect to the plaintiff's mood, Ms. Hutchings testified the plaintiff had not had problems with depression prior to the Accident. However after the Accident, the plaintiff was not depressed for the first few weeks or months, but then gradually became unhappy when he did not get better. She noticed the plaintiff was less sociable and he could become quite agitated. She described him as being "pretty blunted, with a deadpan look most of the time" and that "he was just not as happy". Ms. Hutchings testified the plaintiff's mood worsened after the first few months, and that he never got back to who he was and that he no longer wished to socialize with people.

**187**  She testified the plaintiff moved in with Ms. Seymour for 11 months, but then moved to an apartment with the defendant Vischon and Chris MacDonald, where he had no one to take care of him. She said around November or December of 2003, his depression began to get worse again. Ms Hutchings stated that after the plaintiff moved in with Ms. Seymour in December of 2002, she would see him from time to time when he would come over after working at Options and be on her sofa. She described him as being unhappy and recalled that he continued to have problems with his memory. She testified that immediately following the Assault, she believed the plaintiff was feeling slightly better because he was relieved of being able to go back to work and was relieved that the Assault was not as bad as he thought it might have been. Ms. Hutchings testified she did not see a big difference in his mood in the time before and after the Assault. She attributed the trigger for the plaintiff's depression to the fact that he did not have her or Ms. Seymour to look after him once he moved into the Beach Avenue apartment with his friends.

**188**  Ms. Hutchings stated that in the fall of 2003, the plaintiff told her about his suicidal ideations; she made him promise not to do anything and got him an appointment with Dr. Wickremasinghe for the following day. She said the day after seeing Dr. Wickremasinghe, the plaintiff started taking antidepressant medication and then saw Dr. Kaushansky and Dr. Jung.

**189**  Ms. Hutchings testified the plaintiff had told her he felt as if his future had been taken away from him and that he felt that no matter how hard he tried, he could not get better. She believed the plaintiff's depression did not significantly improve, despite the antidepressants, until he moved back in with her in September of 2004. She indicated both she and Ms. Seymour ensured the plaintiff took his daily antidepressant medication. Ms. Hutchings testified that the plaintiff continued to have problems with his memory and gave as an example his tendency to lose items, such as cell phones (he has apparently gone through four), his keys in the front of his car, agendas, tickets and watches. In addition, the plaintiff would forget to stay on top of his appointments and take his medication.

**190**  Ms. Hutchings described the plaintiff's room as "a disaster zone" and said he would get overwhelmed unless she helped him to get organized, whereas before, he could initiate and organize his belongings himself. She continually had to remind the plaintiff of appointments and meetings that he had to attend.

**191**  Ms. Hutchings stated the plaintiff had difficulty following conversations if more than one person was talking, but was good if he was talking to someone one on one. She noted the plaintiff had difficulty in sorting things out and needed to be spoken to slowly and calmly. She stated that when the plaintiff became very depressed, he would become paralyzed and unable to act. She described an instance of getting a call from the plaintiff while on his way to see Dr. Jung when he could not figure out which bus to get on. She testified his reading had slowed down as well, although she also stated that she did not believe the Assault appeared to have any apparent cognitive effect on him.

**192**  Ms. Hutchings described an occasion where the plaintiff was unable to remember what ingredient went into a salad and him phoning her to get specific instructions on not only ingredients, but also help in how to make the salad. She described the plaintiff as having poor financial skills and referred to an example when he paid a bill that was not owed, resulting in a prolonged delay in getting the matter sorted out. She noted the plaintiff ability to budget his money was poor, and that he grocery shopped with her. Ms. Hutchings further testified that the plaintiff did not pay rent but had "maxed out his credit cards" to supplement his income.

**193**  Ms. Hutchings stated that in the period leading up to the Assault, the plaintiff complained to her of back problems, though he would not tell Dr. Wickremasinghe. She said the plaintiff had told her he did not want to tell Dr. Wickremasinghe because he was afraid of jeopardizing his chance at becoming a fireman. Ms. Hutchings said she encountered Dr. Wickremasinghe in the spring of 2003 and told the doctor about the plaintiff's back problems.

**194**  Ms. Hutchings also said the plaintiff would talk to her about things that she considered inappropriate, such as sexual problems that he was experiencing. She indicated the plaintiff had also put revealing photographs of himself on the internet in pursuit of a modelling career. She commented that the plaintiff did not seem to have the same boundaries that he had prior to the Accident. Ms. Hutchings did not believe that his cognitive problems had evaporated, but that they were neither better nor worse; she felt that they were just carrying on.

**195**  Ms. Hutchings described her role vis-à-vis the plaintiff as being a caregiver; she reminded him, organized him, and helped him with his financial management. She testified that she was unable to apply for a possible job as an alcohol and drug counsellor and administrator in the Northwest Territories. The job would have paid her nearly 50% more than her present salary. Ms. Hutchings stated she felt she could not take the job in the Northwest Territories because of the ongoing need to provide care for the plaintiff. She described him as being "not her son" in the sense of not the person he was before the Accident.

1. **Kristy Seymour**

**196**  Ms. Seymour testified she had known the plaintiff since 1997 and they had dated on and off again since that time. At the time of her testimony, Ms. Seymour was 24 years old. Although the plaintiff currently lived at home with his mother, he and Ms. Seymour spent a significant amount of time together. When asked to describe the plaintiff before and after the Accident, Ms. Seymour stated that in high school, the plaintiff was fun, outgoing, popular, active and always doing something. After the Accident, Ms. Seymour believed the plaintiff was not as outgoing; he was initially in bed for months and on medication. She said he was not himself following the Accident and he lost many friendships. At the time, Ms. Seymour was working and going to school and liked going out, but the plaintiff had become very different in his personality and level of confidence.

**197**  Ms. Seymour stated that before the Accident, the plaintiff would play football and the two of them would go for walks, hikes, out to movies and out with friends. She said after the Accident, all that changed; they lost lots of friends and the plaintiff did not get out much at all.

**198**  Ms. Seymour was asked about the couple's break up following their period of cohabitation after the Accident (but before the Assault) and why the break up occurred. She indicated that she felt as if she had to constantly take care of the plaintiff; the plaintiff had become very much like a child and she felt a lot of pressure.

**199**  Ms. Seymour was asked what it was like when she lived with the plaintiff, and she stated it had been fine, but there had been lots of extra work for her. The plaintiff would forget things and this left her feeling like a mother because she had to stay on top of everything. Ms. Seymour noticed a huge loss in confidence in the plaintiff following the Accident.

**200**  When asked to describe the plaintiff's mood after the Accident, but before the Assault, Ms. Seymour replied that it was never steady; one day his mood would be good, but then the next day it would be not so good. Other times, the plaintiff would have daily shifts of moods. Ms. Seymour said when the plaintiff was high, they would go for walks, but then if he became depressed, he would become judgmental, hard on himself and hard on her.

**201**  Ms. Seymour stated she was with the plaintiff when the Assault took place. Their relationship endured for a period following the Assault until Ms. Seymour secured a job on a cruise ship. This led to Ms. Seymour and the plaintiff terminating their cohabitation, though Ms. Seymour ended up staying and not going on the cruise ship.

**202**  Ms. Seymour stated that they remained together until June of 2004, although they were no longer living together. By June of 2004, she perceived that their relationship had changed. She wanted to go out and socialize and he did not, thus resulting in the two of them constantly battling one another.

**203**  Ms. Seymour expressed frustration at having to take care of the plaintiff all the time. In her words, she was "fed up" and "didn't want him as a child".

**204**  Ms. Seymour described the plaintiff in high school as being very actively involved in the gym and with playing a variety of sports. He also performed and taught break dancing in addition to his involvement in rollerblading, basketball, baseball, soccer and snowboarding. She said after the Accident, the plaintiff got rid of his snowboard. He no longer rollerbladed, although he did try playing roller hockey only to give it up a short time later. Ms. Seymour did not believe the plaintiff played basketball anymore, and observed that the plaintiff would not go out dancing after the Accident.

**205**  Ms. Seymour recalled visiting the plaintiff two days after the Accident when he was still in the hospital. She recalled that his eyes were not open and it took some time for him to realize that she was there.

**206**  She recalled that the plaintiff spoke to her in French and she could not understand what he was saying because she did not understand French. She said the plaintiff had no idea that she was there for a period of time.

**207**  When asked if she had been aware of what the plaintiff was saying about his injuries following the Accident, Ms. Seymour stated that the plaintiff was sugar-coating his injuries because he was very determined to have a career as a firefighter.

1. **Monica English**

**208**  Monica English is Kristy Seymour's mother and testified that when the plaintiff and Ms. Seymour were in high school together, the plaintiff would stay at her house from time to time during the school year.

**209**  She said when the plaintiff was in high school he was full of energy and had lots going on. If he was not at school, he would be at the community centre. Ms. English testified she was aware the plaintiff had been going to the gym for exercise before school. She recalled the plaintiff was a break dancer who would put on shows and who had a very energetic and outgoing personality. She said that the plaintiff and her daughter would plan things out as to what they were doing and where they were going and both were very focussed individuals.

**210**  Ms. English was asked about her impressions of the plaintiff following the Accident, and she said that before the Accident, the plaintiff had lots of focus, would teaching break dancing, would go camping and would do everything with her daughter together. After the Accident, the plaintiff was different; talking to him was like "drawing a blank" and Ms. English often wondered if he even understood what she would be saying.

**211**  Ms. English did not think the plaintiff went to the gym after the Accident, and nor could she recall seeing him break dancing. She indicated after the Accident, the group of friends that had hung out together appeared to break up, with the rest of the group continuing to do social activities that the plaintiff could not physically or mentally do. Ms. English stated that if the plaintiff forgot something, he would act with embarrassment and frustration, like one instance where she recalled him forgetting to pick up the mail when she asked him to.

**212**  In cross-examination, Ms. English indicated she did not know very much about the effects of the Assault on the plaintiff, or whether he was on medication for a seizure or whether he had feeling problems in his left hand as a result of the Assault.

**213**  Ms. English testified in cross-examination that she understood the reason behind the end of her daughter's relationship with the plaintiff at the end of November of 2003 to be due to her daughter's frustration at her role of being a babysitter to the plaintiff more than a companion.

1. **Kate Pilgrim**

**214**  Kate Pilgrim was a friend of Anita Hutchings, the plaintiff's mother, who spent a significant amount of time at the Hutchings' house over the past six years. Ms. Pilgrim would visit the Hutchings home up to four or five times a week. Ms. Pilgrim described the plaintiff as being fit and active before the Accident, with an outgoing personality, a quick wit and considerable focus on his interaction with others. She was aware that he often went to the gym to work out and was aware of his intention and desire to become a fireman.

**215**  Ms. Pilgrim saw the plaintiff in the hospital immediately following the Accident and described him as being "very out of it" and not really focussing. She said in the period after the Accident, she noticed his memory was bad; he would forget his keys or his wallet, or he would go to the gym without his gym kit. She described him as being noticeably depressed and recalled the plaintiff often going to his room, appearing to not want to interact. Ms. Pilgrim also recalled the plaintiff's frustrations with his memory problems and she believed he was much the same after the Assault as he was before it. She observed that the plaintiff seemed very dependent on his girlfriend, both before and after the Assault.

**216**  Ms. Pilgrim described the plaintiff as being an average student in school. She did not think he was 95% recovered from his physical injuries by the end of January of 2002, and although by January of 2003 she thought there had been some improvement, she did not think he was back to normal. She was asked in cross-examination whether she was aware he did the Grouse Grind in 2003 and said she was not. She agreed that if he had been able to complete the trail in 45 minutes that that would reflect improvement in his physical condition.

**217**  Ms. Pilgrim expressed no awareness of any involvement the plaintiff had with drugs and said that he had expressed anti-drug use both before and after the Accident.

1. **Herb Sallens**

**218**  Herb Sallens worked with the plaintiff in the Options warehouse in a supervisory capacity. He attested to the difficulties he witnessed the plaintiff experiencing in his functioning in the warehouse. He explained that it was the warehouse worker's job to fill orders by picking out the equipment or clothing contained in an order and then putting it into a package. He said the plaintiff made quite a few mistakes, including forgetting to take off stickers, referencing wrong serial numbers and sometimes putting the wrong clothing in the wrong package. Mr. Sallens said because he liked the plaintiff, he covered for the plaintiff's mistakes and did not tell upper management, thus helping the plaintiff to avoid being fired. He said the plaintiff worked in the warehouse for about three months before going into the grinding department, and he also testified that the plaintiff complained about back pain while he worked at Options.

**219**  Mr. Sallens acknowledged in cross-examination that he was a close friend of the plaintiff's brother, but he said he was not aware of the plaintiff's Accident or injuries. He said that Dennis Regan was the supervisor in the manufacturing part of the warehouse and Stephen Gay was the operations manager. Mr. Sallens testified he had no concerns about the plaintiff filling the role of the first aid officer at the operation. He agreed that the plaintiff had a good attitude and a good attendance record.

1. **Don Conway-Brown**

**220**  Mr. Conway-Brown had worked as a maintenance man at the WECC for the past five years and had known the plaintiff from that association. He was asked about the plaintiff's memory and said that the plaintiff did forget things at times. As an example, Mr. Conway-Brown recounted that despite the plaintiff's responsibility to ensure the doors were locked in the centre at the end of the day, the plaintiff would often forget. Mr. Conway-Brown testified that he performed a secondary check and would find some doors open "the odd time". He said on Thursday nights, the plaintiff would take over for another co-worker who had to leave early and as a result, the plaintiff would have more responsibilities. Mr. Conway-Brown stated the plaintiff would sometimes forget to shut off the elevator or would leave the doors open or would forget to lock the pottery studio in the community centre.

**221**  In cross-examination, Mr. Conway-Brown described the plaintiff as having good people skills. He said he was aware there was a competition for the permanent position that the plaintiff was successful in obtaining. He agreed the plaintiff had a short time to close up the building and secure the doors while Mr. Conway-Brown had a longer time to check on them as he made his maintenance and garbage pick-up rounds at the end of the day.

1. **John Palinsky**

**222**  Mr. Palinsky testified in a similar vein to Mr. Conway-Brown. He had worked at the WECC for the past three years and had known the plaintiff since about last year. Mr. Palinsky was responsible for the ice operations in the community centre. When asked about the plaintiff's memory, Mr. Palinsky stated the plaintiff had forgotten many times to lock the doors, windows and elevators. Mr. Palinsky said he would close doors after the plaintiff and would discover things unlocked that should have been locked. He stated that on some occasions, he would ask the plaintiff questions that the plaintiff would seem to have a hard time understanding.

1. **Natalie Vermis**

**223**  Natalie Vermis was a friend of the plaintiff's. She first met him in Grade 9 at King George High School. Ms. Vermis was studying at UBC but previously worked part-time and during the summer at the WECC. She testified the plaintiff was very outgoing and popular throughout high school and was very active athletically and socially. She confirmed his commitment to becoming a firefighter which she said was evidenced in his increased commitment to school in his final year. She described the plaintiff as being able to do "tons of things at once" before the Accident, but "not as good at it" after the Accident. She said if the plaintiff had several tasks to do at work, he would be unable to do them simultaneously and would stop one to do the other. Ms. Vermis stated that before the Accident, the plaintiff had no trouble with reading, but afterwards, he seemed to lack confidence and would get friends to check emails or read memos. She also noticed the plaintiff appeared to be more moody and down on himself. Ms. Vermis testified the plaintiff also seemed less willing to go out. She said although his moods appeared to be presently improving, she had not noticed a big difference in the time after the Accident to the present. However, Ms. Vermis stated the plaintiff's organizational abilities seemed to have diminished since the Accident. Before the Accident, Ms. Vermis recalled the plaintiff being able to organize various events and activities whereas after the Accident, the plaintiff required help in the form of getting people to do lists for him. She said it helped the plaintiff to perform his duties at the WECC if he was able to check off things to do on a list. She noted that if he was called on his walkie talkie and given instructions, he would sometimes forget what he had been doing or what he had been told to do prior to the interruption. Ms. Vermis stated the plaintiff's pre-Accident memory was normal, while his post-Accident memory was "not as great". As an example, Ms. Vermis noted the plaintiff's tendency to forget to lock doors. She said the plaintiff would frequently forget his keys to the point that he would use a keychain. Ms. Vermis stated it was not uncommon for the plaintiff to leave or lock his keys in rooms or take his keys home with him. She noted the plaintiff was not confident in his memory and would often reassure himself by repeating things. Ms. Vermis testified the plaintiff sometimes appeared dazed when she talked to him and it seemed to take him a while to assimilate instructions or information. She also noticed the plaintiff's involvement in sports had diminished since the Accident, but affirmed that the plaintiff still wished to be a firefighter.

**224**  On cross-examination, Ms. Vermis said she thought the plaintiff had been hospitalized for up to a month following the Accident. She did not realize that it was in fact only two to three days. She said she only saw him once or twice in the hospital and a few times before June of 2002. She said between Christmas of 2002 and July of 2003, she only saw the plaintiff a couple of times. Ms. Vermis was not aware of the Assault for a period of time after it occurred, but had understood it to be not "a big deal". She stated she did not see the plaintiff regularly until the summer of 2004 when he started working at the WECC. She indicated the supervisors at the job were Jessie Gammie and Nelson McLachlan.

1. **Dean Powers**

**225**  Dean Powers was qualified to give opinion evidence as an expert in vocational rehabilitation. He produced a report dated June 15, 2005, setting forth his assessment of the plaintiff's vocational limitations and needs based on his review of some of the medical, psychological and physiotherapy reports (not including Dr. Wickremasinghe's clinical records) detailing the plaintiff's condition. Mr. Powers also reviewed a vocational assessment authored by Mr. Derek Nordin. He interviewed the plaintiff and the plaintiff's mother, observed the plaintiff at his workplace at the WECC and interviewed one of the plaintiff's supervisors, Jessie Gammie.

**226**  Ms. Gammie did not testify and accordingly, to the extent that Mr. Powers' report and evidence relied on his interview with her, it must be discounted.

**227**  The focus of Mr. Powers' report was on the affect of what he described as the plaintiff's disabling condition on his potential for employment. He defined competitive employability as "a worker's ability to find and keep employment on a full-time basis, usually forty hours per week, all of which depends upon the industry and the climate of competition affecting a company within that industry." Mr. Powers noted:

An individual's ability to be "competitive" within their workplace environment depends upon how their disability impacts his or her performance on the job and whether modifications or accommodations are required in order to maintain their employment position.

**228**  He adopted the World Health Organization's definition of disability as "... any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being."

**229**  In summarizing the plaintiff's disability, Mr. Powers focussed his attention on the Accident, stating as follows:

Of significance, Mr. Hutchings was unconscious prior to being admitted to hospital after the MVA and was diagnosed with brain haemorrhaging. Upon returning home, his mother cared for him and fed him for this first ten days. He reported depression and disorientation to his mother in the early stages of recovery. His mother stated in an interview that he displayed severe short-term memory problems, which she stated continue to challenge her son to this day. She also stated that pain and headaches interrupted his ability to sleep until nightly medication was prescribed. In addition, he suffered multiple physical injuries accompanied by pain.

**230**  Mr. Powers went on to observe:

[T]he physical, cognitive and psychological challenges experienced by Mr. Hutchings are due to the motor vehicle accident of November 9, 2001. These residuals existed in advance of the second injury, the assault of July 2[6], 2003, which resulted in seizure activity early onset.

**231**  Mr. Powers' report noted that in his sessions with the plaintiff, he tried to hide his physical and cognitive challenges. Mr. Powers opined the plaintiff had an inability to acknowledge his condition. As an example, Mr. Powers noted the plaintiff's pursuit of a lifeguard certificate which Mr. Powers expressed doubt he would be able to successfully obtain as it required a strong back and full manual dexterity and required the plaintiff to take notes. In fact, despite Mr. Powers' doubts, the plaintiff did obtain his lifeguard certificate and worked as a lifeguard in the summer of 2005.

**232**  Mr. Powers reported that in his current job, the plaintiff had a history with his employer, having volunteered at the WECC since 1997 and having been hired to work part-time during the summer of 2002. At the time of Mr. Powers' report, the plaintiff had only part-time status at the WECC as a Building Supervisor - Program Assistant II. Mr. Powers noted in his observations of the plaintiff that he got along well with his co-workers and the users of the community centre and enjoyed an informal rapport with his supervisors. Mr. Powers' observations of the plaintiff's job led him to describe it as "mostly a maintenance job" except when he manned the cash register. Mr. Powers described the plaintiff's job as arranging equipment for rooms in the WECC when the rooms are rented out for various functions. According to Mr. Powers, the plaintiff did not perform any actual program planning despite his title. He described the plaintiff's job as "structured, routine, relatively easy to do and easy to follow." Mr. Powers noted that he saw Mr. Hutchings constantly returning to his work duty sheet to see what he was expected to do next, noting that the plaintiff's memory for even regular duties did not appear to be strong.

**233**  In his evidence, Mr. Powers testified he saw a fair amount of Mr. Hutchings being supported by his co-workers. He testified it appeared to him that the plaintiff demonstrated problems keeping track of what he needed to do and would get instructions from supervisors and co-workers.

**234**  In his report, Mr. Powers noted:

Mr. Hutchings is certainly motivated and has demonstrated the attributes acceptable to his supervision team at the Community Centre. He is also trying to increase his skill level so that he can be a Lifeguard. Unfortunately ... [that] may lead to failure due to his physical and cognitive disabilities. In fact, he may not be able to demonstrate the judgement required for the responsibilities, which come under with the Lifeguard occupation. It is concerning that he is now trying to conceal his disabilities from his instructors in the Lifeguard program.

**235**  Mr. Powers concluded the WECC was a "supportive employment worksite" and the plaintiff benefited from that given his past history with the organization. It was Mr. Powers' opinion that it would be difficult for the plaintiff to find other employment to match the current generous wage of $17 per hour he received from the WECC and he would likely be relegated to an entry level wage in the $8 to $10 per hour bracket if he was forced to find other employment.

**236**  Mr. Powers opined a need for vocational rehabilitation services and funding for those services for every job change undertaken by the plaintiff for the balance of his working life. He estimated the cost of that service at $39,000 plus GST.

**237**  Mr. Powers testified that he based his opinion as to the plaintiff's employment at the WECC and the plaintiff's future prospects on his observations at the WECC, his interview with Ms. Gammie and his experiences in the field.

**238**  In his evidence, Mr. Powers testified that although the plaintiff had successfully competed for permanent status for his current position, that fact did not alter his opinion. He also testified that absent the information from Ms. Gammie that he received from his interview with her, his opinion would remain unaltered.

**239**  The defendants' cross-examination of Mr. Powers established that he did not arrive at any independent opinion as to the medical cause or nature of the plaintiff's condition since that was beyond his expertise. He acknowledged he accepted information from the plaintiff and his mother as factual.

**240**  Mr. Powers' assessment of the plaintiff took place between March 18 and June 15 of 2005. He interviewed the plaintiff's mother in May for about two hours. He saw the plaintiff three times in March and four times at the work site primarily to observe (once in April, twice in May and once in early June). He said he was aware from the medical reports that the plaintiff had used both marijuana and cocaine, but he was told by the plaintiff's mother in May that the uses that were "more than experimental" were over with. Mr. Powers said when he questioned the plaintiff he was told the plaintiff's drug use was not current. Mr. Powers stated the plaintiff's mother told him that the plaintiff's prior use had been a real problem, that there were behavioral problems and that he had used cocaine to off-set his pain. Mr. Powers indicated he knew that the plaintiff had used marijuana and that one of the issues that came up was whether depression had to do with general marijuana use. He agreed that prior drug use could impede attempts to get a firefighting job if there was a need to disclose it.

**241**  Mr. Powers was shown the materials for the occupational first aid course which the plaintiff successfully completed in 2002 and Mr. Powers noted the level of reading required would depend on the exams and how they were done. He also agreed the plaintiff's acquisition of a first aid certificate would assist him in obtaining employment. Mr. Powers was challenged on his evidence about his concern that the plaintiff was hiding his disability in order to secure a lifeguard job given that Mr. Powers had done nothing about his concerns.

1. **Derek Nordin**

**242**  Derek Nordin was called as an expert in the field of vocational evaluation and rehabilitation counselling. He conducted a vocational assessment of the plaintiff consisting of an interview and vocational test battery on February 9, 2004. He also reviewed the neuropsychological reports of Dr. Kaushansky dated April 12, 2002 and January 21, 2004, the medical report of Dr. Theissen dated May 21, 2002, the psychological report of Dr. Jung dated December 19, 2003 and part of Dr. Toyota's clinical records.

**243**  Mr. Nordin relied on the content of the medical reports as being factual and received information from the plaintiff which he also relied on as being factual. He produced a report dated July 29, 2004, in which he set forth the results of the plaintiff's vocational test battery, which included tests for academic achievement, aptitude and vocational interest.

**244**  In academic achievement, the plaintiff demonstrated average to low average academic skills in spelling and arithmetic. He scored in the below average range in reading ability. Mr. Nordin commented that the plaintiff's scores were much lower than anticipated given his past educational achievement. In his evidence, Mr. Nordin agreed he had not seen the plaintiff's transcripts from high school in order to establish a baseline for the plaintiff's academic achievement.

**245**  On the aptitude portion of the testing Mr. Nordin reported as follows:

This test battery provides information on an individual's cognitive, perceptual and motoric aptitudes. Overall, the majority of Mr. Hutchings' results were in the low average to below average range. His strongest performance was on spatial aptitude where he scored in the average range. His performance for verbal aptitude, clerical perception and motor coordination were in the low average range. Numerical aptitude, form perception, finger dexterity and manual dexterity were all in the below average range.

**246**  Mr. Nordin noted that the plaintiff's complaint of his left hand feeling awkward from the loss of feeling resulting from the Assault may have had an impact on his performance on the manual dexterity subtests. Overall, Mr. Nordin asserted that the plaintiff's performance on the tests should be used with caution. He noted:

With respect to Mr. Hutchings' poor performance on testing administered by our office I do note that only a few weeks prior to our appointment, Dr. Kaushansky had diagnosed Mr. Hutchings as depressed and at significant suicidal risk. As such, Mr. Hutchings' performance at our office may have been negatively influenced by his mood disorder. I would therefore caution that obtained results should be viewed with this in mind. More specifically, for example, Mr. Hutchings' post-injury vocational history suggests he is more likely functioning at the average level in terms of his cognitive abilities in the absence of depression.

**247**  Mr. Nordin testified he was not asked to and did not undertake a second test battery to test the plaintiff after his mood disorder had been stabilized. He agreed the occupational first aid course the plaintiff took in 2002 was quite intensive and involved significant material, both medical and technical, and would have required a day long exam. He agreed the plaintiff was on Dilantin and on an antidepressant at the time that he took the test battery. Mr. Nordin testified he did not ask the plaintiff about his non-prescription drug use and was not aware of it at the time that the tests were performed on February 9, 2004. Mr. Nordin agreed it was a possible factor in the outcome.

**248**  As far as the vocational interests testing was concerned, Mr. Nordin reported as follows:

A further analysis of Mr. Hutchings' results indicate "*High*" interest in Mechanical/Fixing, Electronics, Manual/Skill Trades, Protective Service, Athletics/Sports, Animal Service, and Medical Service Occupations. Results also suggest "*Very Similar*" interests to individuals reporting themselves as satisfied working in the occupations of Firefighter and Emergency Medical Technician. He shares "*Similar*" interests to individuals reporting themselves as satisfied working as Conservation Officers, Janitor, Military (Enlisted), Pipefitter/Plumber, Telephone Repairer, Respiratory Therapy Technician, Athletic Trainer, Occupational Therapist and Registered Nurse. It should be noted that an individual can have an interest in a particular occupation without necessarily having the aptitude for the work.

Mr. Hutchings' results also indicate a preference for mechanical activities and skill trades and technical occupations as well as a strong indifference/dislike for school coursework.

[Emphasis in original]

**249**  Mr. Nordin noted that in 2003 the average full-time full year income for a firefighter was $58,750. Mr. Nordin also included a table of earnings by education and gender, which indicated that the plaintiff, with his high school diploma and BCIT carpentry training, would fall into the category of trades certificate or a diploma, with average earnings of $47,900 per annum. He did not think the first aid certificate would justify a change in category, but he agreed it could make an applicant more competitive for a job. Mr. Nordin testified that some of the plaintiff's dexterity problems could be related to the permanent deficit to his left hand stemming from the Assault. He also agreed that the plaintiff's history of seizures could prevent him from becoming a firefighter.

**250**  Mr. Nordin opined that if the plaintiff's mood disorder was controlled (and resulted in at least average level cognitive functioning) the plaintiff could consider training as a technician in various fields, but would still need to assess the impact of the deficit in his left hand. He noted the plaintiff's back complaints could limit him to "in shop" bench work as opposed to on site work and that could further reduce his competitiveness for jobs.

**251**  Mr. Nordin concluded in his report:

At the time of our interview, Mr. Hutchings was being treated for depression and had been considered a suicide risk. Should Mr. Hutchings' pattern of mood disorder, physical complaints and cognitive complaints continue, in my opinion, he will be considerably challenged to establish himself in the workforce much beyond what he has already done. Even accepting that the mood disorder stays under control long term, any continued cognitive and/or physical complaints would still negatively impact Mr. Hutchings' job options and marketability and most probably, his long-term earning potential as well.

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| **III.** | **LOOKING INTO THE FUTURE** |  |

**252**  A significant portion of the plaintiff's claim depended on an assessment of the future economic effects, if any, of the Accident on his earning capacity and his need for care.

**253**  As far as assessing his need for care was concerned, the plaintiff relied on the evidence and report of Paul Pakulak, an occupational therapist with training in work capacity evaluation and cost of future care analysis. Mr. Pakulak met with the plaintiff in the company of his mother on August 5, 2005, for about 2 hours. Mr. Pakulak's file consisted of four pages of notes, taken during and after the session with the plaintiff and his mother, and his report dated August 9, 2005. About three quarters of Mr. Pakulak's time and notes related to his interview of the plaintiff.

**254**  The focus of Mr. Pakulak's report was stated as follows:

This report is an assessment of current and prospective services or assistive devices that Mr. Hutchings requires or will require to compensate for hi[s] physical deficiencies and/or medical condition, and any future requirements for therapeutic treatment in order to promote and maintain a quality of life as close as possible to that possessed prior to his injuries.

**255**  In addition to his interview with the plaintiff and his mother, Mr. Pakulak relied on the various medical legal reports as well as the vocational and psychological evaluations produced in relation to the plaintiff, all of which Mr. Pakulak summarized in his report and relied on in his conclusions.

**256**  Mr. Pakulak noted that at the time of his assessment, the plaintiff reported memory and concentration deficits including frequently misplacing or losing items, his need to check and re-check his "task lists" at work, getting lost when going to familiar locations and requiring reminders for his medications. Mr. Pakulak also noted the plaintiff's reported low self-esteem and poor money management. The plaintiff's mother itemized a variety of issues the plaintiff struggled with including a tendency to minimize his difficulties, difficulty in organizing and planning (including his own meals), impulsive behaviour and poor judgment, insecurity and a low frustration threshold. Mr. Pakulak noted no problems with the plaintiff's management of his personal care or in his capacity for homemaking tasks except for his reliance on reminders. The plaintiff also had no difficulty transporting himself from place to place except for a tendency to get lost and need directions.

**257**  Mr. Pakulak concluded, based on his assessment and review of the medical legal, vocational, functional and psychological evaluations, that the plaintiff would benefit from "further formal rehabilitation efforts". He recommended ongoing psychological counselling with a frequency of one time a week for a nine month period with bi-weekly follow ups for a further six weeks and 8 to 12 sessions per year thereafter. He estimated the cost of the first 15 months as $7,800 with $1,200 to $1,800 yearly thereafter. He recommended a total sum of $39,000 for a vocational consultant for the plaintiff's lifetime based on the needs identified in Mr. Powers' report and the indications made "throughout the medical documentation". Mr. Pakulak also recommended an occupational therapist for the plaintiff based on the reported ongoing cognitive deficits, the medical documentation he reviewed and Mr. Pakulak's professional experience working with individuals with similar difficulties as the plaintiff's. He suggested two 2 hour sessions per week for one month, one 2 hour session per week for three months and monthly follow ups thereafter. He computed $7,560 for the initial six months based on 36 sessions, but agreed in cross-examination that the initial amount should be for four months, not six, and should involve 22 two-hour sessions at $85 per hour, together with $40 per session in travel expenses, totalling $2,530. He calculated the ongoing 12 yearly sessions at $2,520. Mr. Pakulak also recommended the use of a rehabilitation assistant to "facilitate the implementation of strategies prescribed by the occupational therapist and to assist with time management, planning, organization and problem solving ...". Mr. Pakulak estimated eight hours per week over the first three months, reduced to four hours per week for a further three months and four hours per month thereafter. He calculated the cost at $36 per hour and $18 per hour for travel time, amounting to $5,184 for the first six months and ongoing yearly costs of $1,728 plus travel expenses.

**258**  Based on Ms. McLean's recommendation that the plaintiff participate in a supervised exercise therapy program, Mr. Pakulak recommended a kinesiologist for three sessions a week for six weeks, weekly follow-ups for a further six weeks and monthly follow-ups thereafter. The first 12 weeks would be $1,620 and the ongoing yearly costs would be $810. He also recommended a yearly gym pass at a cost of $350. To assist the plaintiff with memory, time management and organizational compensation, Mr. Pakulak recommended an electronic organizer at a cost of $175. He also recommended a portable back rest at a cost of $64.95 in keeping with Ms. McLean's recommendation, as well as an ergonomic chair which he priced at $525 - $700.

**259**  Mr. Pakulak estimated the plaintiff's yearly cost of Celexa at $177.

**260**  The most significant opinion and recommendation expressed by Mr. Pakulak was that the plaintiff required an assisted living environment to facilitate his move away from his mother's home. In Mr. Pakulak's opinion, the plaintiff was best suited for the satellite apartment program offered through an organization known as the Cheshire Homes Society which offers three levels of care ("Cheshire Homes"). Mr. Pakulak suggested the plaintiff would require six months of care at the highest level, six months at the middle level, and thereafter at the lowest level. According to his calculations, the cost associated with assisted living would be $35,310 for the first year and $21,900 per year thereafter. Mr. Pakulak noted that as the cost of assisted care included a cost for rehabilitation, that discrete ongoing cost would no longer be required, although Mr. Pakulak recommended that the plaintiff undergo the initial six month rehabilitation program prior to embarking on the Cheshire Homes program.

**261**  In cross-examination, Mr. Pakulak acknowledged that he was in no position to state whether the problems he identified as limiting the plaintiff's occupational and living circumstances were caused by the Accident or by the Assault. Although he noted in his report the plaintiff no longer took medication and did not experience seizures, he acknowledged Dr. Jones' evidence was that the plaintiff's eye twitchings were seizures of a minimal nature. Mr. Pakulak also testified he was aware that the plaintiff experimented with drugs following the break up with his girlfriend when he moved into the apartment with his friends, but Mr. Pakulak did not canvas the nature or extent of the drug use and nor was he certain of the plaintiff's pre-Accident drug use. Mr. Pakulak agreed that any diagnosis or prognosis of the plaintiff's condition was outside his area of expertise and recognized that the only neurosurgeon who saw the plaintiff before the Assault, but after the Accident, was Dr. Theissen who did not recommend vocational counselling or any need for therapy through the G.F. Strong Traumatic Brain Injury Program.

**262**  As far as his recommendation for assisted living through Cheshire Homes was concerned, Mr. Pakulak acknowledged that both of the plaintiff's injuries met the Cheshire Homes definition of brain injury, though he was not certain whether he had all the relevant medical information prior to making that recommendation. He also acknowledged he had not observed the Cheshire Homes assessment process. He knew that none of the medical professionals assessing or treating the plaintiff had recommended Cheshire Homes and he acknowledged that his assessment was less intensive than what would be performed by Cheshire Homes itself in determining the appropriateness of the plaintiff for its program. Mr. Pakulak testified that he was familiar with other programs offered, such as those through G.F. Strong, but he could not recall why he did not recommend those other programs. He said his recommendation of Cheshire Homes was based on his past experience and on his conversations with the Director of Cheshire Homes.

**263**  It appeared that in his report, Mr. Pakulak included a paragraph in his recommendations for the plaintiff that was re-worded from an earlier unrelated report that he used as a template for this report. In this other report, Mr. Pakulak included the cost of a case manager at $3,060 for the first month and $3,315 annually on an ongoing basis based on a recommendation from a Dr. Vondette and his experience in working as a case manager for individuals with "severe brain injuries". Mr. Pakulak acknowledged in cross-examination that that recommendation had no relevance to the present case, even though he included it in his summary of recommendations and included those figures in his estimate of the cost of future care. He agreed that portion of his report should be excised and not relied upon.

**264**  The plaintiff tendered a report dated August 24, 2005 to address the net present values of future cost of care based on Mr. Pakulak's report. In addition a report dated August 26, 2005 was tendered that provided "statistical perspectives of future employment incomes and benefits..." the plaintiff may have earned, but for the effects of the Accident. Both reports were completed by John Struthers, a consulting economist. In the former report, Mr. Struthers included two tables, one of which included net present value estimate calculations based on the lower end of the ranges of costs identified by Mr. Pakulak and/or the least frequent replacement of the plaintiff's jobs (Table 1A). The other table referenced net present value estimate calculations based on the upper ends of the ranges of costs and/or the most frequent replacements (Table 1B). Within each table, Mr. Struthers provided for the following separate possibilities:

1. the plaintiff will not live independently in the future, that is, as he presently is, relying on his mother; and
2. that he will live independently, that is, through the Cheshire Homes Society.

In Table 1A, Mr. Struthers calculated the present value of future cost of care at either $281,197 (not living independently) or $761,569 (living independently through Cheshire Homes). In Table 1B he estimated $296,717 (not living independently) or $777,089 (living independently through Cheshire Homes).

**265**  Mr. Struthers testified that he relied on Mr. Pakulak's cost of care assessment report including the erroneous inclusion of the case manager costs of $3,060 for six months and $3,315 annually thereafter in calculating the present value of the future cost of care for the plaintiff. In his report, he calculated the present value of the first year cost of care as $4,634 and of the second year onward, of $75,175 totalling $79,809. Clearly those figures are based on Mr. Pakulak's error in his report and must be excluded from any consideration. In keeping with Mr. Pakulak's recommendations, Mr. Struthers included his calculation of the present value of the cost of occupational therapy for the first year at $5,992 and the second year onwards as $57,146.

**266**  In summary, Mr. Struthers' present value assessment of the plaintiff's future cost of care would be as follows:

Table 1A - $281,197 - $79,809 = $201,388

$761,569 - $79,809 = $681,760

Table 1B - $296,717 - 79,809 = $216,908

$777,089 - $79,809 = $697,280

**267**  For his second report, Mr. Struthers relied on the report of Dean Powers of June 15, 2005, the report of Dr. Kaushansky dated June 16, 2005, the June 8, 2005 report of Dr. Jung and Mr. Pakulak's August 9, 2005 report. He also relied on information in entry requirements and salaries for firefighters from the Vancouver Fire and Rescue Services. It was Mr. Struthers' assumption that the plaintiff's physical and psychological difficulties precluded him from working as a firefighter or a carpenter. He also assumed that at his present job the plaintiff was significantly supported and would have difficulty otherwise in matching his wage of $17 per hour, more likely earning in the $8 - $10 per hour range.

**268**  In calculating the plaintiff's earnings as a firefighter, Mr. Struthers assumed his entry into the market in January of 2004 when the plaintiff was 22 years old to when he would reach the mandatory retirement age of 60, relative to firefighters. He assumed the plaintiff would have been a firefighter for 20 years before being promoted to lieutenant, and after three years as a lieutenant would have been promoted to a captain until the end of his career. Mr. Struthers then calculated a past value of $85,000 from January 1, 2004 to October 1, 2005 discounted by average contingencies to $59,000, or alternatively risks only contingencies to $78,000. He calculated future net present values of $1,624,000 to age 60, discounted to $1,390,000 for average contingencies and to $1,540,000 for risk only contingencies. He explained that average contingencies included risks of employment as well as choice for unemployment whereas risk only contingencies referred to only the risks imposed on individuals leading to unemployment. After summarizing what the net present value of the plaintiff's earnings would have been had he not had the Accident and become a firefighter, Mr. Struthers then turned to a model based on the fact of the Accident and the plaintiff's consequent inability to become a fireman. In that model, Mr. Struthers assumed the plaintiff to have earnings similar to his current position as a rogram assistant to building supervisor, or, in the alternative, to have earnings similar to B.C. males with Grades 11 to 13 working in unskilled occupations. He also built in additional contingencies and lower wages to account for the plaintiff's residual disabilities.

**269**  Mr. Struthers' calculations for lifetime earnings for the plaintiff similar to his current employment yielded net present values of $635,936 assuming average contingencies and $758,505 assuming contingencies for risks only. He also included calculations showing a deduction of 25% for average labour market contingencies as well as a deduction of 20% for the impact of residual disabilities which would reduce the plaintiff's future employment incomes to reflect a net present value of $392,000. Adding 20% for non-wage benefits would yield $470,400 for the with-Accident model, and $1,668,000 for the without-Accident model, rendering a net present value of future losses of income of $1,197,600.

**270**  In a second example using a grid showing a decrease in hourly wage and increasing negative labour market contingencies to account for his residual disabilities, Mr. Struthers demonstrated that at a salary of $10 per hour with a labour market contingency of 39%, a present net value of future income of $307,485 would result.

**271**  Mr. Struthers estimated that if the plaintiff were to earn or lose $1,000 each year to his 65th birthday, the net present value of his earnings or losses would be $24,672. He created a table showing the present value of $1,000 per year to each year from the date of trial and the cumulative value of $1,000 per year remaining to age 65. Thus, any increase in loss could be calculated by combining the multipliers from the date of trial to the date of increased loss with the multipliers from the date of increased loss to retirement.

**272**  In cross-examination, Mr. Struthers acknowledged that when he conducted assessments of future loss of income, he would be frequently asked to provide projections of income based on several alternative career options versus just one, in keeping with the individual's experiences, academic ability and interest. He was also asked to consider the plaintiff's loss in light of Mr. Nordin's opinion that the plaintiff's post-Accident earning abilities were consistent with individuals with a trade certificate or diploma, rendering full time annual income of $47,900 annually.

**273**  In his evidence on re-examination, Mr. Struthers testified that he looked at a range of fall-back occupations for the plaintiff if he were unsuccessful in becoming a fireman. Mr. Struthers identified a police officer would make approximately $69,500 annually, a corrections officer would make $45,500, a sheriff would make $46,200 and arms services personnel make approximately $48,000. Mr. Struthers testified that using the multiplier in his report, the present values for a future income based on those salaries could be established.

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| **IV.** | **THE CASE FOR THE DEFENDANTS** |  |

**274**  For the most part, the defendants' case was built on the cross-examination of the plaintiff's witnesses, primarily the plaintiff himself, his mother, Ms. Seymour and Dr. Wickremasinghe. These individuals were the most intimately acquainted with his condition and ability to function after the Accident both before and after the Assault. The defendants, through cross-examination, sought to reveal discord between the theory postulated in the plaintiff's presentation of his case, specifically that the Accident substantially compromised his condition and ability to function, and to contrast that with the plaintiff's contemporaneous activities, achievements and assertions. In essence, the defendants' response to the plaintiff's case was to demonstrate through cross-examination that the evidence relied on by the plaintiff was actually formed in hindsight with the influence of subsequent events distorting and backdating his difficulties. The defendants did not contend that the plaintiff and his witnesses were deliberately attempting to mislead the Court; but rather that they were caught up in an unconscious reshaping of past events to accord with the plaintiff's present interests and exigencies.

**275**  A significant focus of the defendants' challenge to the plaintiff's case was on Dr. Wickremasinghe, whose ultimate opinion as to the plaintiff's condition and ability to function was acknowledged to be the product of hindsight. Her explanations of her evolving views and diagnoses formed much of the subject matter of the defendants' cross-examination of her.

1. **Cross-Examination of Dr. Wickremasinghe**

**276**  In her cross-examination, Dr. Wickremasinghe acknowledged the plaintiff told her he had a "brain shear injury", a technical term she would not normally expect him to be familiar with. She was aware at that time that people with head injuries could underestimate the extent of their problems. In making decisions regarding his care, Dr. Wickremasinghe used information the plaintiff provided to her in addition to occasionally consulting his mother once she started noting inconsistencies in the plaintiff's reporting. She initially accepted the plaintiff's information at face value.

**277**  Dr. Wickremasinghe agreed a potential consequence of a head injury is depression and she knew she should have been looking for signs of mood problems or depression. She agreed one way of determining whether a person who experiences a head injury is recovering is to gauge how they are operating "in the real world". She also agreed that she thought the plaintiff had a good chance of recovering from his physical injuries given his condition and determination, but she did not agree that taken as a whole, her clinical notes supported the conclusion that he was substantially improving through December of 2001 and January of 2002 despite the specific note reflecting his reports of getting better overall.

**278**  Dr. Wickremasinghe said she initially took his reports at face value but over time realized he was contradicting himself and perhaps his inability to realize it was a product of his head injury. She acknowledged that on some occasions, for example December 13, 2001, her observations of the plaintiff appeared to match his positive accounts of his own progress. She also acknowledged that despite his inconsistency with his mother about his need for Percocet in December of 2001, Dr. Wickremasinghe did not see a problem as she reasoned that he may not in fact have realized that he needed the Percocet until he was left without it.

**279**  She agreed that she used hindsight in eventually diagnosing the plaintiff but described the process as looking at her clinical notes as a whole to find a pattern of behaviour rather than coming to an after the fact conclusion.

**280**  Dr. Wickremasinghe was uncertain when she began using hindsight to analyze the plaintiff, describing it as an ongoing process used at different times for different symptoms. She said she referred the plaintiff to a neurologist (Dr. Theissen) in April of 2002 because "some of the neurological things" were confusing to her and she later also referred him to an orthopaedic surgeon (Dr. Lui) because the plaintiff did not appear to be healing from his back injury.

**281**  Dr. Wickremasinghe acknowledged that on January 7, 2002, the plaintiff portrayed himself as being significantly improved in all areas and as not needing medication since December 17, 2001. She agreed he appeared to contradict himself by saying his memory was almost back to normal, but then admitting that he still forgot appointments and other things. She regarded that as an unclear sign of problems and decided it was premature to obtain neurological testing. Dr. Wickremasinghe agreed she was aware the plaintiff and his mother went to see Dr. Kaushansky at Mr. Rubin's request and became aware that the plaintiff reported to Dr. Kaushansky that he was 95% recovered from his physical injuries. She said she had seen an improvement in his physical symptoms but questioned the characterization as significant. She agreed the improvement she saw was in keeping with people in good shape healing from soft tissue injuries in stages, but she said it was not necessarily an indication of the final outcome.

**282**  Dr. Wickremasinghe agreed the plaintiff also showed some improvement in his non-physical injuries in that he was no longer sleepy, slurring his speech or confused in terms of identifying people. He was also able to have normal conversations and encounters. She testified however his memory problems became evident upon deeper probing, and it was not clear that his memory had improved at all. She was unsure whether the plaintiff would have had any insight into his memory improvements or problems.

**283**  Dr. Wickremasinghe agreed she sent the plaintiff to see Dr. Mackie regarding his shoulder separation, after which he told her on February 11, 2002 that he had been cleared to return to work. She agreed she thought he was ready to go back to work and she did not therefore think it was necessary to speak with Dr. Mackie or get a consultation report from him. She agreed that on April 11, 2002, the plaintiff reported being back at school and finding it easy to remember information he had previously learned. She pointed out that during that period he also failed a first aid course and she sent him to see a neurologist to help resolve concerns about his inconsistency. Dr. Wickremasinghe agreed she next saw the plaintiff relating to the effects of the Accident in September of 2002. By this time the plaintiff had completed his course at BCIT and had passed it. She agreed his marks were higher when he returned to BCIT post-Accident, but she did not agree that his performance necessarily reflected an improvement in his head injury. She said head injury patients can learn material if given time, but it did not necessarily mean that they could use it in work situations.

**284**  Dr. Wickremasinghe agreed that on September 19, 2002, the plaintiff saw a locum, Dr. Meakes, to seek a certification for an occupational first aid course. The plaintiff told Dr. Meakes that he had not had seizures, headaches, or dizziness, though he did admit he had some short term memory losses and required more effort and concentration to learn and study. The plaintiff also told Dr. Meakes he had finished his carpentry course but did not want to be a carpenter. She agreed that Dr. Meakes noted a slight decrease in fluxion of the plaintiff's speech, but that he was enjoying the company of his friends. She agreed his statements were consistent with what the plaintiff had told her and were consistent with a person recovering from his non-physical injuries.

**285**  Dr. Wickremasinghe agreed she obtained a copy of Dr. Theissen's report dated May 21, 2002. She noted no disagreement with its contents in her file and she did not seek consultation with Dr. Theissen regarding the report. She said she did not agree with Dr. Theissen that the plaintiff had recovered from his physical injuries but she said she was not looking to him for that opinion. She agreed with Dr. Theissen that the plaintiff showed signs of improving from his head injury and that there were no indications he would not improve further. She also agreed with Dr. Theissen's conclusion that aside from some concentration difficulties, the plaintiff's mental status and neurological examination were normal. She noted that mental status examinations screen for gross abnormalities, not for subtleties. She agreed the main problem identified by Dr. Theissen was a problem with concentration that could lead to problems with memory and short term distractibility. She accepted that opinion.

**286**  She agreed that Dr. Theissen opined the plaintiff's injury would not affect his ability to seek gainful employment, but raised the issue of what the compass of the term gainful employment included. She accepted Dr. Theissen's opinion that at that point, there was no need for enrolment in the G.F. Strong Traumatic Brain Injury Program, which was essentially the purpose of her referral of the plaintiff to him. She agreed she never did refer the plaintiff to the program.

**287**  Dr. Wickremasinghe agreed that after the plaintiff's September 19, 2002 visit with Dr. Meakes for the medical certificate for his occupational first aid course, he did not return to the Reach Clinic until January 7, 2003. She did not recall at that visit being aware of the plaintiff's earlier visit with Dr. Meakes to seek the certificate, and she was asked whether she would have signed the certificate indicating her confidence in the plaintiff's physical and/or psychological fitness to render emergency pre-hospital care to workers. She stated she would have had great difficulty in doing so, and she would have gone beyond mere exploration of his mood and cognitive functioning prior to signing. Dr. Wickremasinghe did not discuss with Dr. Meakes the plaintiff's medical certificate. She agreed that on January 7, 2003, the plaintiff told her his physical injuries were continuing to improve and that he had completed the Grouse Grind in 45 minutes and wanted to attend a boot camp for firefighters to be held Merritt. He told her he was working as a first aid attendant at a snowboarding company, but Dr. Wickremasinghe testified she was unaware at the time that he had received his first aid certificate and she made no enquiries about it. She said she took his opinion as to how he was functioning at face value, including the fact that he was a first aid attendant. She said it was possible he had shown some improvement and she accepted at face value that he was getting better and was back to break dancing and doing his other usual activities.

**288**  Dr. Wickremasinghe said she asked the plaintiff about his moods because his mother had reported the plaintiff had suicidal ideations in the past. She acknowledged making no notes in the plaintiff's file about what she was told by the plaintiff's mother, but she did note it in the mother's file.

**289**  At around the same time, the plaintiff asked for medication for some sexual dysfunction he was experiencing, and Dr. Wickremasinghe prescribed Paxil which she thought would "kill two birds with one stone" and help address any depression his mother had referred to. She acknowledged she made no note of that in the plaintiff's records, which referred only to the plaintiff telling her his mood was fine. Her assessment was that he was recovering well from his head injury at that time.

**290**  On April 17, 2003, the plaintiff saw Dr. Meakes again and complained of shoulder and mid back problems. By this time, Dr. Wickremasinghe did not consider the plaintiff to be a reliable historian because she could not rely on him to provide consistent information. On May 8, she saw him at the Reach Clinic and he was still having mid back pain and was going to physiotherapy. She agreed that after the Accident, the plaintiff initially went to physiotherapy on January 9, 2002 until March 25, 2002 and did not return for more sessions until May 1, 2003.

**291**  Dr. Wickremasinghe said the break in the plaintiff's physiotherapy treatments would either indicate improvement or that the plaintiff was following the program laid out for him.

**292**  Dr. Wickremasinghe stated that by May of 2003, the plaintiff was complaining of pain and being unable to afford physiotherapy. She agreed he was working during that time frame.

**293**  She agreed that at his appointment on May 8, he told her he was discouraged about his back pain and since the Accident, had not been able to return to activities such as break dancing, despite what he had told the physiotherapist in 2002. She regarded that as an example of his inconsistency; another example was his assertion that he slept well all night, while also stating in other instances that he tossed and turned all night.

**294**  By the May 14, 2003 visit, Dr. Wickremasinghe testified she thought the plaintiff was finally being more forthright about his back pain and agreed that the plaintiff had reported both he and his mother thought his cognitive skills and memory were back to normal. She noted "good recovery from head injury" in her file. She was asked whether she thought the plaintiff was reporting his non-physical injuries accurately, to which she responded that except for his mood and some concentration and judgment issues, she believed so. She agreed she made no mention of that in her clinical notes.

**295**  Dr. Wickremasinghe agreed that on June 10 the plaintiff told her he was stressed due to a lack of finances, his inability to avoid physiotherapy and his difficulties with his relationship with Ms. Seymour. She agreed he told her he had no suicidal ideations.

**296**  Dr. Wickremasinghe agreed that sometimes the word depression is used to denote unhappiness and sometimes it is used to denote a specific physiological condition meeting the criteria for a diagnosis of clinical depression under the Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition (the "DSM-IV").

**297**  She agreed she did not see the plaintiff again prior to the Assault. The plaintiff was next in the Reach Clinic on September 8, 2003 and saw one of her colleagues who reported that he had lower back pain made worse with the recent brain haemorrhage. Dr. Wickremasinghe did not agree with that assessment because she thought the plaintiff's description of his back pain prior to the Assault was worse than his description after the Assault. Dr. Wickremasinghe was directed to a note she wrote on September 22, 2003 for the plaintiff to aid in his application for employment insurance, referring to his inability to work "due to a recent head and back injury". She said she did not mean to imply that the back injury was recent or was a result of the Assault. It was her understanding that the plaintiff had begun to apply for employment insurance after quitting his Options and landscaping jobs around May of 2003 before the Assault, and she was referring to his back injury as of that time.

**298**  Dr. Wickremasinghe agreed on June 10 she did not assess the plaintiff's condition as requiring a reference to the local mental health department or a prescription for antidepressants. She also agreed that she did not extend counselling to him.

**299**  She agreed the first time the word depression was ever used in her clinical records was on September 22, 2003, following the Assault. At that time, the plaintiff reported to her experiencing worsening depression starting prior to his most recent injury. During that same visit, the plaintiff denied his depression, which Dr. Wickremasinghe characterized as his attempt to fight the diagnosis. On September 22, Dr. Wickremasinghe stated she made a clinical diagnosis of depression based in part on his self-report. She prescribed the medication Celexa on January 20, 2004, at the plaintiff's request as he reported his mood had deteriorating over the few weeks prior due to stresses from balancing three jobs and his financial problems. She confirmed her earlier diagnosis of depression made on September 22, 2003.

**300**  Dr. Wickremasinghe was referred to her report of July 26, 2004, in which she referenced the plaintiff's mood disorder and adjustment difficulties resulting from the Accident. In that report, she opined "it is more probable than not that he would not be able to become a firefighter in the future when his injuries are considered as a whole." She agreed the net result of her July 26, 2004 letter was that before the Assault, the plaintiff was clinically depressed to the extent that of and by itself, it would prevent him from becoming a firefighter. She agreed her diagnosis was made in accordance with the criteria set out in the DSM-IV, which is "the acknowledged bible of the criteria for the treatment of psychiatric disorders". Dr. Wickremasinghe agreed that to make the diagnosis she made of a "major depressive disorder", the DSM-IV required five or more of nine listed symptoms being present during the same two week period representing a change from previous functioning.

**301**  Dr. Wickremasinghe agreed in cross-examination that her clinical records between November 9, 2002 and July 26, 2003 did not reveal the presence of symptoms required by the DSM-IV criteria to diagnose a major depressive episode in the plaintiff during that time frame. She was asked whether she looked at the DSM-IV criteria when she authored her July 24, 2004 report diagnosing depression and she responded that she asked the plaintiff's mother about his symptoms over the phone and in person and documented them in the mother's chart when the plaintiff was being inconsistent in denying his symptoms to Dr. Wickremasinghe. She agreed she did not refer the plaintiff to a psychiatrist because she thought she could treat him on her own. She did not agree that her diagnosis of a major depressive disorder due to the Accident was a gross overstatement. Dr. Wickremasinghe was uncertain as to how often she saw the plaintiff for counselling sessions and she was uncertain whether he followed up and took the Paxil she prescribed to him in January of 2003, which she testified was important to treat his depression. She agreed she did not ever prescribe the 40 to 60 mg of Paxil recommended if there was no response to an initial dosage of 10 to 20 mg within two to six weeks. She did not make any extended enquiries as to the plaintiff's non-prescription drug use in late 2003 and early 2004, though Dr. Wickremasinghe acknowledged that on November 12, 2003, the plaintiff told her he had used marijuana about 50 times in the previous period. Dr. Wickremasinghe did not know how he was paying for the marijuana.

1. **Cross-Examination of the Plaintiff**

**302**  The defendants' challenge to the plaintiff's evidence was essentially premised on the apparent discord between his assertions, activities and level of functioning in the period following the Accident and his presentation at trial of his condition and limitations.

**303**  The plaintiff acknowledged that in January of 2002, he tried break dancing a few times and he had told his physiotherapist he was feeling good. The only pain he suffered from the break dancing was a groin pull. He also acknowledged he was going back to the gym by early 2002, was working at a summer camp in July and August of 2002 and was able to obtain his Occupational First Aid - Level III certificate in October of 2002. All of these activities required a relatively high level of physical functioning.

**304**  The plaintiff indicated in cross-examination that before the Assault, he considered himself to be on a good path to recovery in relation to both his physical and non-physical injuries and that the Assault definitely did not help his recovery.

**305**  The plaintiff testified he had not been accurate in telling some of his doctors about how he was feeling because he was worried about having a record of problems that would impair his chances of becoming a firefighter. He acknowledged that when he was asked about that issue on his examination for discovery on August 17, 2004, he only referenced one occasion when he told his doctor he was okay to return to work, and that was when he wanted to go forest firefighting. He testified at his discovery that he believed, apart from that occasion, he attempted to be truthful and accurate in his reporting.

**306**  The plaintiff acknowledged in cross-examination that he used drugs sporadically before the Accident, including cocaine once or twice, and that after the Accident he used cocaine "a handful of times". He agreed with his evidence given on his examination for discovery that he may have used drugs once a month before the Accident and that it could potentially negatively affect his attempts to become a firefighter. He agreed he used cocaine in 2004 while living in the Beach Avenue apartment with the defendant Vischon and Chris MacDonald. He agreed that he had said in his examination for discovery and to Dr. Wickremasinghe that it might have been as much as 50 times, but he testified that figure may have been an exaggeration.

**307**  The plaintiff acknowledged in cross-examination that the marks he received in his courses as BCIT following the Accident were the best marks he ever got. He acknowledged getting his Occupational First Aid certificate, but pointed out that he failed on his first attempt. The plaintiff was unsure how many others failed in their first attempts as well. He could not recall telling his doctor that he had decreased concentration at school or that he experienced a year when he could not concentrate prior to the Accident.

**308**  The plaintiff testified he continued to have back pain and problems up to the trial date, and while he may have told Dr. Wickremasinghe that his back was improving when it was not, he could not remember as his memory was "horrible". He was reminded that in January of 2002 when he met with Dr. Kaushansky he told the doctor his back pain was 95% better. The plaintiff was asked if that was true, to which he responded he was trying to convince himself that he was better at that time.

**309**  The plaintiff agreed that he enjoyed his job at the Sutton Place Hotel parking cars and that he got on well with people there. He also agreed during that time he went out more with people socially. He acknowledged that during his employment with the Sutton Place Hotel he parked many cars and had only two scrapes and damage to one Tule roof carrier.

**310**  The plaintiff agreed he told his physiotherapist on January 28th, 2002 he had improved a lot, but he testified he was unsure whether that was an example of him being inaccurate or actually thinking he was recovering. He agreed that when he took his lifeguard course in March of 2002, he told his physiotherapist he felt no pain when in fact he did feel pain and only said what he did because of his desire to be a fireman. The plaintiff indicated he may have believed he had improved a lot by then. When asked about his job at Options, the plaintiff agreed he got a letter of reference which stated, among other things, that he was quick and willing to learn. He testified he was happy to get that recommendation but did not accept that as being true. He said the letter of reference was a template and he was unsure if it was misleading or not.

**311**  In response to his reports of improvements to Dr. Wickremasinghe, the plaintiff testified he underplayed his symptoms and agreed there were three reasons why he might have reported positively on his condition: a) he might have been having a good day; b) he might have subconsciously told himself he was better; or c) he might have deliberately decided not to disclose something because he did not want a record of his condition to thwart his desire to be a fireman. The plaintiff was unsure when he decided to "come clean" as to the true nature of his physical and non-physical condition, but he agreed he had not done so as of January of 2003. He agreed by April of 2003 he was being more truthful with Dr. Wickremasinghe and was continuing to do so on May 8, 2003, when he felt he was no longer holding back. He agreed he told Dr. Wickremasinghe his cognitive skills were back to normal, but he was not sure how accurate that statement was. The plaintiff also agreed that on June 10, 2003, he told Dr. Wickremasinghe he had no suicidal ideations. He testified he could not recall whether or not he was hiding his depression at that time. The plaintiff was referred to his examination for discovery where he testified he told Dr. Wickremasinghe about his depression on many occasions and cried in her office about five times within a year of the Accident. The plaintiff confirmed this was true.

**312**  The plaintiff agreed that after the Assault in the fall of 2003 he broke up with his girlfriend and by November of 2003 he noticed a significant deterioration in his emotional and psychological state. He stated he was unsure whether he felt that badly before, but he did recall being suicidal before the Assault.

**313**  The plaintiff agreed his use of drugs was a factor in his feelings of depression and suicidal ideations; another factor was learning his Assault injuries could impact his goal of becoming a firefighter because of his need to take Dilantin.

**314**  He agreed he still harboured the desire to become a firefighter and was aware he could still apply in his late 20s after building up his resume and being off Dilantin for a period of time to get his Class 3 licence.

**315**  He agreed that by the spring of 2004 he was not as depressed, was better organized and was in better control of his life. He also agreed he received his National Lifeguard Service certificate in May of 2005, he worked as a lifeguard in the summer of 2005 and he won the competition for his job at the WECC in September of 2005.

1. **Cross-Examination of Anita Hutchings**

**316**  It was the general thrust of the defendants' cross-examination of the plaintiff's mother, Ms. Hutchings, that her description of her son's injuries, and in particular his cognitive deficits, was grossly exaggerated. The defendants questioned her assertions that she had to give the plaintiff step-by-step instructions as to the ingredients of a green salad and how to make it; that he had significant ongoing difficulties with organization; and that his room at home was of a disastrous nature. The defendants contrasted that evidence with the demeanour and ability that the plaintiff revealed in his direct and cross-examination on the trial; with Dr. Jung's evidence that the plaintiff was improving in his ability to organize; with Ms. Hutchings' own evidence that the plaintiff was tidier than the other two roommates he had been living with before returning home to live with her; with evidence he knew how to make a salad; and with the apparent fact that the plaintiff had no difficulty in recalling earlier portions of his testimony when asked probing questions about his past and present condition and abilities.

**317**  The defendants also challenged Ms. Hutchings' evidence as to the nature of her son's deficits by reference to the fact that he got his lifeguard certificate in May of 2005 and performed without apparent difficulties in that role in the summer of 2005. The defendants also pointed to Ms. Hutchings' acknowledgement that she co-signed a loan for the plaintiff to help him buy a car, which they submitted, was incongruent with her express concerns about his ongoing cognitive problems.

**318**  The defendants also pointed to Ms. Hutchings' tendency in her evidence to minimize the effects of the Assault, pointing to her evidence that the plaintiff seemed to get better after the Assault by explaining that he felt relieved it was not worse. The defendants highlighted some apparent inconsistencies between Ms. Hutchings' evidence and that of other witnesses. They contrasted her denial that the plaintiff was using marijuana on a daily basis in the summer of 2005 with the testimony of Dr. Jung who stated the plaintiff told him he was and that he, Dr. Jung, spoke to Ms. Hutchings about it. The defendants also contrasted Ms. Hutchings' evidence that the plaintiff was depressed by January of 2002 with the results of Dr. Kaushansky's personality assessment inventory in June of 2002 showing no depression. Ms. Hutchings gave evidence in cross-examination that in November of 2003, she told Dr. Jung her concern was her son's brain injury or depression, whereas Dr. Jung testified she told him her concern was about permanent damage to his back which was making him unhappy. The defendants also pointed to the testimony of Ms. Hutchings on cross-examination in which she indicated the plaintiff's left hand problems were no longer a source of frustration for him. Her evidence on the matter conflicted with the evidence of both the plaintiff and Ms. Seymour.

1. **Cross-Examination of Kristy Seymour**

**319**  The defendants' challenged Kristy Seymour's testimony by focussing on her acknowledgement that despite what she related at trial as to the difficulties she saw the plaintiff encountering while they lived together between November of 2002 and November of 2003, she took no contemporaneous steps to refer him to a psychologist or get him mental health care. The defendants also established through cross-examination that Ms. Seymour never contradicted the plaintiff's positive progress reports to Dr. Wickremasinghe even though Ms. Seymour was sometimes with the plaintiff when he was saying these positive things. Ms. Seymour explained in her evidence that the plaintiff was the patient, not her, and she was aware he was attempting to avoid impediments in becoming a fireman.

**320**  The defendants also emphasized the differences in Ms. Seymour's description of the plaintiff's physical limitations as compared to the evidence of the plaintiff himself and what he appeared to be capable of doing during the currency of their cohabitation. The defendants established through cross-examination that Ms. Seymour denied any awareness the plaintiff was doing the Grouse Grind by January of 2003. It was also established through Ms. Seymour that she believed the plaintiff was not able to work out at the gym to the extent that his testimony indicated.

**321**  The defendants pointed to Ms. Seymour's denial of any knowledge of the plaintiff's drug use in the course of their relationship and contrasted that with the plaintiff's assertions to Dr. Jung and Dr. Kaushansky as to his pre-Accident, post-Accident and post-Assault drug use. Ms. Seymour disagreed that the plaintiff used drugs more after the Assault than before. She agreed that after the Assault the plaintiff became increasingly depressed, but she did not agree that he increased his use of drugs.

**322**  Ms. Seymour also agreed that as of the summer of 2005, the plaintiff still had problems with his left hand and had twitches to his left eye and that both these issues were a source of trouble and frustration for him.

**323**  She also agreed that one reason she and the plaintiff stopped living together was that the plaintiff would not go out as much as she wanted to, and she felt constrained by his limitations.

1. **The Evidence of Dennis Regan**

**324**  Dennis Regan was the grinding department supervisor at Options and recalled that the plaintiff worked in the grinding department for approximately three to four months. Mr. Regan indicated there were three to eight other employees in the grinding department and all of them worked under his supervision.

**325**  He described the machines that were used in the grinding department and the functions required of the employees using the machines. Mr. Regan described the work as physically demanding because of the constant lifting and carrying of snowboards and the repetitive motion to the wrists, elbows, shoulders and back. When asked about complaints from employees, Mr. Regan said it was a natural part of the job for employees to get aches and pains. Strains and other injuries also occurred because of the nature of the work. Mr. Regan had no recollection regarding any complaints the plaintiff made, and specifically said he did not remember any.

**326**  Mr. Regan agreed in cross-examination that he did not remember any complaints from the plaintiff because the plaintiff did not stand out in his mind. When asked if the plaintiff perhaps did make some complaints but he simply did not recall them, Mr. Regan replied it had been several years since the plaintiff worked there. He noted the job would not be recommended for a person recovering from a back injury and he agreed it would not show good judgment for a person to do the job if he or she was recovering from a back injury.

1. **The Evidence of Essra Vischon**

**327**  Mr. Vischon gave evidence in chief concerning the Accident of November 9, 2001 which I earlier noted in discussing the issue of liability.

**328**  In cross-examination by Mr. Rubin, Mr. Vischon stated he had known the plaintiff since Grade 8 and that they had attended King George High School together. Mr. Vischon had previously seen the plaintiff break dancing and said it consisted of extreme feats of strength, lifting a person's own body weight at different angles. Mr. Vischon stated the plaintiff was very good at it because he was fast and strong. Following the Accident, Mr. Vischon noticed the plaintiff was barely able to do anything; as he started to recover, the two of them would go to the gym together. Mr. Vischon said the plaintiff would fool around with break dancing, but he had to slow it down because it put a strain on his injury.

**329**  Mr. Vischon recounted how the plaintiff used to play basketball, hockey and various other sports, all of which he excelled at. Mr. Vischon remembered how the two of them were always competing together. Mr. Vischon said after the Accident, the plaintiff had some down time before slowly trying to return to his activities. Mr. Vischon stated the plaintiff's muscles would tighten up, making it hard for the plaintiff to return to the activities he did before. Mr. Vischon said the plaintiff could not lift the same weights that he used to, and he described the plaintiff as limited and not as strong as he used to be, even to this day. When asked about the plaintiff's lower back, Mr. Vischon replied that it was terrible; the plaintiff could not do squats after the Accident and had a lot of trouble doing dead lifts. Mr. Vischon stated he noticed the plaintiff's difficulties with his lower back after the Accident but before Assault. Before the Accident the plaintiff had been a very social person, but after the Accident he became very closed, even toward Mr. Vischon.

**330**  Mr. Vischon indicated the plaintiff's shoulder injury was quite noticeable even by the date of the trial because one collarbone was larger than the other. The plaintiff described it to Mr. Vischon as scar tissue. Following the Accident, Mr. Vischon recalled the plaintiff doing exercises he learned from the CBI. The two of them did complete the Grouse Grind trail in the time since the Accident, but Mr. Vischon said they went at a steady pace that was not as fast as they used to do and that they were passed by others on the trial. He recalled the plaintiff being fairly tired after completing the Grind and the next day the plaintiff was quite sore.

**331**  In cross-examination by Mr. Abrioux, Mr. Vischon indicated he was in California during his Grade 12 year. He was asked about smoking marijuana with the plaintiff and while he said there was the odd time, the two of them were more focussed on working out. Mr. Vischon said he could not recall seeing the plaintiff doing cocaine, but he was aware that their other roommate was.

**332**  Mr. Vischon agreed that after the Accident both of them were shaken up and both of them had physical problems. Due to the passage of time, Mr.Vischon could not recall if the plaintiff had improved greatly by the end of January. He did recall that the plaintiff's shoulder injury improved in comparison to how it was immediately after the Accident because the plaintiff was able to do some workouts, but Mr. Vischon said the plaintiff continued to be troubled by pain right up to the trial date. He agreed that within several months of the Accident the two of them were back at the gym working out with the plaintiff doing "rehab stuff". According to Mr. Vischon, the two of them worked out together following the accident. Over time, Mr. Vischon noticed the plaintiff's strength and ability to work out improving. While Mr. Vischon characterized the plaintiff as being fairly strong, he testified the plaintiff was not as strong as he was before the Accident, and the purpose of their workouts was to try and stay in shape. Mr. Vischon agreed the plaintiff was stronger than an average person, but he said it depended on what the average person was like. He agreed that by the summer of 2004 the plaintiff could bench press 180 pounds, and Mr. Vischon believed the plaintiff's biceps were the same size as his own. He was aware the plaintiff could do significant abdominal workouts including sit ups and leg raises, but Mr. Vischon stated he was still able to do much more than the plaintiff could.

**333**  Mr. Vischon stated he was unaware the plaintiff had experienced groin pain in 2002 from break dancing. He agreed the plaintiff worked at Options but said the plaintiff did not work there for very long because the work made him feel tired. Mr. Vischon stated the plaintiff did not receive a letter of reference from Options. With respect to the Grouse Grind, it was suggested to Mr. Vischon that the two of them did the Grouse Grind trail three to four times in the first six months following the Accident. Mr. Vischon disputed this and said they did the Grind in the first month or two. While he was not able to say for sure whether they completed the trail in 45 minutes, he estimated 45 minutes as being his best evidence and stated that he and the plaintiff were evenly matched when they hiked the trail.

**334**  Mr. Vischon agreed the plaintiff was bedridden following the Assault and that when he next saw him, the plaintiff was sad and "pissed off".

1. **The Report of Douglas Hildebrandt**

**335**  The defendants also tendered the report of Douglas Hildebrandt, an economic consultant, in response to the report of Mr. Struthers. In dealing with the possibilities facing the plaintiff on the assumption that no accident occurred, Mr. Hildebrandt gave as an example of the plaintiff's earning capacity as being based on a 10% likelihood of being a fireman and a 90% likelihood of him earning at the average for a B.C. male with a community college certificate. Mr. Hildebrandt's example was based on information he acquired about the average acceptance rate for applicants for jobs as fireman. In other words, Mr. Hildebrandt approached the issue by merging the possibilities confronting the plaintiff based on an assessment of the likelihood of him becoming a fireman versus earning an average amount for a B.C. male with a community college certificate.

**336**  Mr. Hildebrandt showed a summary of lifetime incomes for B.C. males including firefighters ($1,390,057 to $1,540,069 depending on what contingencies are applied); post-secondary non-university certificate of less than one year, $920,198; post-secondary non-university certificate of more than one year, $1,075,008; unskilled - all strength, $663,787; unskilled - light or limited - $557,170; low skilled all strength, $776,571; low skilled light or limited $804,709.

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| **V.** | **ANALYSIS** |  |

1. **Overview**

**337**  In this case, I am confronted with two distinct tortious acts separated in time and circumstance. The act with which this law suit is concerned - the Accident of November 9, 2001 - caused a series of injuries involving the plaintiff's back, neck, shoulder and head. These injuries complicated the plaintiff's physical and cognitive condition for a period of time, resulting in a source of dispute as between the plaintiff and the defendants.

**338**  The act which is not the subject of this claim - the Assault of July 26, 2003 - caused an injury to the plaintiff's head involving seizure activity and a neurological deficit to his left hand. There is also a body of evidence before me that the plaintiff suffered from, and is being treated, for depression. At issue is whether the depression was caused solely by the Assault or whether the Accident either caused or materially contributed to the onset of the depression.

**339**  Also at issue are the consequential effects of the plaintiff's respective injuries on his future ability to earn income, his future requirements for care and accommodation and the extent to which, if to any extent, the consequential effects of the Assault nullified the consequential effects of the Accident through the application of the principle of *novus actus interveniens.*

**340**  On the basis of all the evidence in this case, I am satisfied that at the time of the Accident, the plaintiff was on a trajectory with a realistic possibility of him becoming a fireman. I come to that conclusion based on the preponderance of evidence that it was an enduring goal the plaintiff set for himself and that prior to the Accident, and while still at a relatively young age, the plaintiff identified and took deliberate steps conducive to achieving his goal. Those steps included working out, doing volunteer work in the community, talking to his teacher whose son was a fireman about what was required and enrolling in a post secondary course at BCIT in carpentry which, he was told, would be useful training for firefighting.

**341**  I am alive to the issues raised by the defendants as to the stiff competition for firefighting jobs and I am also alive to the evidence of the plaintiff's involvement with drugs in high school as possible bars to the fulfillment of his career choice. However, I am satisfied the plaintiff's ambition, athleticism, personality and initiative at a relatively young age in identifying and undertaking the pre-requisite training and education all combined to made his goal of becoming a fireman a realistic one, particularly if he was sufficiently committed to expanding his search beyond the Vancouver area.

**342**  I find support for this conclusion in the evidence that following the Accident and the resulting physical and cognitive obstacles the plaintiff faced on the path to reaching his goal, the plaintiff was forced to suspend his BCIT course and undergo therapy. The plaintiff nevertheless persisted by re-enrolling in his BCIT course and later completing it. He also took further steps toward achieving his objective by successfully completing an industrial first aid course, undergoing physical therapy and returning to the gym in order to build up his strength and athleticism. In other words, the plaintiff's determination to become a fireman was not thwarted or turned aside by the Accident or its consequences. In my view, this supports the realistic possibility that, if able, the plaintiff would have found a way to achieve his goal.

**343**  The real issue here is which of the plaintiff's physical and non-physical injuries were caused, or were materially contributed to, by the Accident, and to what extent those injuries detract from or repudiate his ability to work in some capacity, providing him with an income earning career equal to what he could have achieved absent the Accident.

1. **Physical Injuries**

**344**  As I see it, the most telling evidence of the enduring characteristics of the plaintiff's physical condition emerges from the following evidence: his visits and complaints to Dr. Wickremasinghe and her locum on April 17, May 8 and 14, and June 10, 2003; his resignation from his job at Options and his subsequent resignation from his landscaping job at the end of May of 2003; his abandonment of break dancing six months earlier; and his failure to obtain his National Lifeguard Service certificate in the fall of 2002.

**345**  Regardless of whatever manner the plaintiff may have presented himself to his caregivers and whatever activities he may have attempted in the aftermath of the Accident, it is apparent that by the spring of 2003 (and well before the Assault), the plaintiff was encountering significant difficulties that prevented him from carrying on at jobs that, objectively viewed, were less physically demanding than the role of a firefighter. Besides the plaintiff's physical condition, there was, on the evidence, no reason why the plaintiff had to leave the jobs he had in the spring of 2003 or why he had to seek further physiotherapy treatments and consultations through Dr. Wickremasinghe. The fact the plaintiff may not have informed his supervisor at Options, Mr. Regan, of his condition is not inconsistent with his overall evidence that he was trying to convince himself and others that he was not limited in his physical abilities.

**346**  I find further support of the plaintiff's ongoing back pain from the evidence of Dr. Lui and Ms. Alison McLean. Although in each of their examinations and assessments of the plaintiff they were reliant to a large extent on his subjective accounts of his limitations, it is significant that both of their findings, although post-Assault, coincided with the plaintiff's pre-Assault complaints of back pain. Additionally, I rely on the evidence of Ms. McLean that in performing her assessments, she opined the plaintiff "gave full effort during the assessment and that the test results can be considered reliable."

**347**  While, as counsel for the defendants pointed out, Ms. McLean's evaluation of the plaintiff was conducted on January 22, 2004 at a point when he was determined to be in crisis due to his depression, it was Ms. McLean's view, which I accept, that the validity of her assessment would not be affected because the plaintiff was able to "follow the questions and interact within a very structured and guided interview".

**348**  While Ms. McLean's assessment varies in some degree from the evaluation done by Ms. Shearman of the CBI conducted in the fall of 2003, according to Ms. McLean the CBI evaluation was less comprehensive, but still similarly determined the plaintiff would not meet the requirements to be a firefighter.

**349**  I conclude in light of all the evidence and despite the plaintiff's attempts since the Accident to replicate his pre-Accident activities and condition, the plaintiff has encountered significant limitations. Specifically, the plaintiff has encountered limitations identified by Ms. McLean and Dr. Lui with respect to his ability to lift, particularly when awkward postures are required such as bending and/or twisting, in addition to the plaintiff's mechanical back pain that is subject to aggravation by injuries.

**350**  I accept the opinions of Dr. Lui and Ms. McLean that the plaintiff's limitations render his goal of becoming a firefighter unlikely and I accept Ms. McLean's assessment that these limitations reduce his "capacity to be able to access in an open labour market all jobs within the limited, light, medium and heavy strength job categories ...".

**351**  While I accept that some of the plaintiff's physical injuries caused by the Accident including his shoulder and neck pain and his headaches have been largely resolved, and that he has regained some of his strength and level of fitness, the plaintiff's lower back pain remains an enduring obstacle in his future choice of vocation.

1. **Non-Physical Injuries**
2. **Cognitive Problems**

**352**  The evidence relating to the plaintiff's cognitive problems came from a variety of sources including the neuropsychological testing done by Dr. Kaushansky, the assessments of Drs. Theissen, Jones and Jung, the clinical notes of Dr. Wickremasinghe, the observations of Dean Powers, the testimony of the plaintiff, the evidence of his intimates and co-workers as to their ongoing observations and interactions with the plaintiff and the record of his undertakings since the Accident. In addition, I was able to observe the plaintiff as he testified in chief and in cross-examination and make my own observations of his ability to understand, assimilate and respond in that context.

**353**  I accept the contention of the defendants, which was agreed to by the expert medical witnesses, that the real measure of the affect of a brain injury is how the injured person performs and functions in "the real world". I also accept, however, that neuropsychological testing is a valid and reliable method of gauging the nature and effect of a brain injury.

**354**  In this case, Dr. Kaushansky's neuropsychological testing supported the plaintiff's contention that he was subject to ongoing cognitive problems with respect to simple attention, speed of information processing, reading comprehension and some memory tasks. At the same time, Dr. Kaushansky reported that the plaintiff's "memory for details was excellent throughout our discussions and he did appear to be a good historian of facts." Dr. Kaushansky did not appear to regard those conclusions as being incongruent, and he noted the plaintiff's insight into his post-Accident functioning differed from his mother's assessment of him.

**355**  As far as the plaintiff's ability to function in the community was concerned, the defendants relied on his success in returning to BCIT and in completing his carpentry course, in obtaining his Occupational First Aid certificate and in eventually obtaining his National Lifeguard Service certificate as all demonstrating an absence of significant cognitive problems. Dr. Kaushansky's opinion was that such tests were not necessarily a measure of whether a person has cognitive problems or not as they are all performed in sterile settings without distractions.

**356**  The defendants further relied on the evidence that the plaintiff was able to perform as a lifeguard during the summer of 2005 and that he was successful in competing for his present permanent status as a Program Assistant II - Building Supervisor at the WECC as demonstrating a strong ability to function in the real world. By contrast, the plaintiff relied on the evidence of his co-workers at the WECC and the assessment conducted by Dean Powers to establish that his memory and attention problems continued to affect his ability to function. The plaintiff argued he required various forms of help and support to perform his job, which was less demanding in practise than it may have appeared to be according to its title.

**357**  Additionally, the plaintiff relied on the evidence that although he worked as a lifeguard in the summer of 2005, he was not confronted with any real challenges to his ability to function.

**358**  Finally, the defendants pointed to the apparent ease with which the plaintiff was able to understand and respond to questions over the course of two days of testimony, recalling his previous testimony and assimilating or anticipating the meaning of particular lines of questioning.

**359**  I am satisfied that there is sufficient agreement within the evidence to support the conclusion that the plaintiff's cognitive difficulties exist and are ongoing. This evidence included the shear injuries identified, the ongoing symptoms described by the plaintiff (but more particularly by his mother, Ms. Seymour, Ms. Pilgrim, Ms. Vermis and to a lesser extent, the plaintiff's other co-workers), the neuropsychological testing by Dr. Kaushansky, the workplace observations by Mr. Powers and the characterization by Dr. Jones of the plaintiff's observed and reported behaviour since the Accident as congruent with frontal lobe damage. I accept that these injuries have an ongoing impact on the plaintiff's ability to organize himself and maintain a focus on prospective tasks. These injuries also have a concomitant effect on his confidence and his overall competence. That, it seems to me, is what the evidence supports.

**360**  I accept the plaintiff has had some success in acquiring certification for first aid and life guarding, in completing his BCIT course, in obtaining a job as a lifeguard and securing a permanent position at the WECC. Those are not inconsiderable successes and are a testament to his ongoing determination to overcome his limitations.

**361**  I do not, however, see in the totality of the evidence, including his ability to testify, a counterweight to the evidence of those who know him best and the neuropsychological tests that his cognitive problems have not resolved since the Accident. As both Dr. Kaushansky and Ms. McLean pointed out in their respective areas of assessment and expertise, functioning in a structured and guided context is different from functioning in the community at large. It is in the latter context, not in the former, that the evidence established that the plaintiff is continuing to encounter difficulties. Similarly, as both Dr. Jones and Dr. Kaushansky testified to, the plaintiff's ongoing accounts of his own progress were suspect because of his lack of insight and inability to judge. Thus his positive assertions to Dr. Wickremasinghe and others did not have the usual weight which might otherwise be attributed to them.

**362**  While it is unfortunate neither Ms. Gammie nor Mr. McLachlan of the WECC were called to provide their insights and observations of the plaintiff's ability to function under their supervision, I do not find that failure detracts sufficiently from the overall evidence of the plaintiff's limitations to offset my finding that the plaintiff has some ongoing cognitive problems which have some impact on his ability to function in the real world.

1. **Depression**

**363**  The defendants contended the evidence was insufficient to establish on a balance of probabilities that the plaintiff suffered depression prior to the Assault, suggesting that the references in Dr. Wickremasinghe's clinical notes to the plaintiff being unhappy or having a flat effect, fell short of establishing depression on a clinical scale and were referable to other causes such as financial stresses or his relationship difficulties with Ms. Seymour. The defendants challenged Dr. Wickremasinghe's diagnosis of a major depressive disorder attributable to the Accident on the basis of her concession that insufficient criteria necessary for a diagnosis were noted in her records and that she took no contemporaneous steps consistent with such a diagnosis. The defendants challenged Dr. Kaushansky's attribution of the depression to the Accident on essentially the same basis in that his PAI in June of 2002 revealed no indication of depression and he also took no contemporaneous steps consistent with such a diagnosis.

**364**  The defendants challenged Ms. Seymour's evidence that she was concerned with the plaintiff's mental health following the Accident, but before the Assault, on a similar basis. The defendants pointed to the fact that she took no positive steps to deal with her concerns despite, on some occasions, being present with the plaintiff in Dr. Wickremasinghe's office when he was discussing his condition.

**365**  As far as Dr. Jung's attribution of the depression to the Accident was concerned, the defendants argued that Dr. Jung relied on Dr. Wickremasinghe's July 26, 2004 report which they contended was fatally flawed. Dr. Jung also relied on what he was told by the plaintiff and his mother in after the fact interviews. In coming to a conclusion as to the cause of the depression, Dr Jung reached his conclusion before having access to the clinical notes of Dr. Wickremasinghe and the other medical reports, including those relative to the Assault.

**366**  The defendants submitted that any substantive evidence of depression arose only after the Assault: They noted that the word depression was only first used in Dr. Wickremasinghe's clinical records on September 22, 2003; with the plaintiff entering a state of acute emotional crisis by November of 2003. The defendants contended that on all the evidence, only one logical conclusion could be drawn. They submitted:

[T]he Plaintiff was in an acute emotional and psychological state as of November/December 2003. There was a significant deterioration in his condition. He was clinically depressed, suicidal, and was hearing voices which were telling him to kill himself. Other than the Plaintiff's self report and his mother's collateral evidence, there is nothing to suggest that this was the case prior to the Assault. Whatever the Plaintiff might have told hi[s] mother regarding suicidal ideation during this period, her evidence was that she did not take him seriously and that it was over by October 2002. This is particularly significant in light of her occupation as a counsel[l]or and her greater than the average parent's ability to ensure her son received appropriate treatment.

**367**  With respect to the evidence of Dr. Kaushansky and Dr. Jung, the defendants further submitted as follows:

Dr. Kaushansky testified that after the Assault, the Plaintiff realized that the "train had left the tracks" and he became depressed. Dr. Jung's evidence is of assistance as to why the train in fact had left the tracks. He testified that in his initial meeting with Mr. Hutchings in November 2003 it was apparent, that the Plaintiff had realized that the Assault was going to be a factor which may affect his future. It was Dr. Jung's evidence that the Plaintiff realized that the injuries sustained in the Assault did have an impact on his goal to be a firefighter. "The seizures would prevent him from firefighting and this was the final thing which tipped it over". It should be noted that the Plaintiff's functioning pre Assault was not in keeping with a condition which was just shy of being "tipped over".

**368**  The defendants submitted the depression should be found to be an effect of the Assault alone. They argued the plaintiff's pre-Assault functioning did not disclose a precarious emotional state "subject to being tipped over" and they relied on Dr. Jung's evidence to the effect that it was possible that a person who, focussed on being a fireman, received a head injury resulting in seizures and left hand impairment, could suffer a major depressive disorder absent a pre-existing accident.

**369**  On the totality of the evidence I accept that the Assault played a significant role in the development of the plaintiff's major depressive episode in November and December of 2003 and January of 2004. I do not, however, accept that it can be isolated as a cause from the larger context of the plaintiff's condition and limitations arising from the Accident. It is clear that by the fall of 2003, the plaintiff was confronted with an array of obstacles to his desired progress. Before the Assault, the plaintiff had been forced to come to terms with, and acknowledge, his inability to work at Options and as a landscaper because of his back pain, and he was required to confront those implications for his future. Throughout the fall and into the winter of 2003, the plaintiff worked and lived in circumstances which not only challenged his ability to organize and control, but also highlighted his ongoing cognitive problems. It was entirely true, as the defendants contended, that the plaintiff encountered some success in his post-Accident attempts to resume his trajectory by returning to and passing his course at BCIT, by getting his Industrial First Aid Certificate and by eventually passing his National Lifeguard Service certification. However, as was apparent from Dr. Wickremasinghe's clinical notes, the plaintiff still displayed objective signs of unhappiness from time to time before the Assault.

**370**  In addition, according to his intimates, the plaintiff had ongoing cognitive problems both pre-dating and post-dating the Assault. While his deteriorating relationship with Ms. Seymour no doubt contributed to his unhappiness and eventual depression, she, of course, attributed many of the relationship issues to his problematic moods and cognitive difficulties. This evidence must be judged in light of the fact that the plaintiff and Ms. Seymour always had an up and down relationship prior to the Accident, and also in light of the defendants' contention that Ms. Seymour's evidence seemed to vary from her contemporaneous behaviour in not doing anything about the problems she saw. Even still, regard must be had for Ms. English's evidence, given in cross-examination, that at the time the plaintiff and Ms. Seymour were living together, her daughter told her in effect it was more like looking after a child than having a partner.

**371**  In my view, the defendants' submissions underestimated the relative fragility of the plaintiff's position before the Assault and failed to appreciate that although he was achieving some successes in pursuit of his goal, he was being forced to, in effect, swim up stream to do so. When the Assault occurred, the Accident's current of effects was not simply diverted away from the plaintiff and supplanted by that of the Assault. The plaintiff was instead forced to deal with the combined effect of both incidents and, I conclude, it was that confluence of currents that swept him into his state of depression in late 2003 and early 2004.

**372**  Accordingly, while I accept that the plaintiff was not in a state of diagnosable depression prior to the Assault, there was evidence which I also accept that he had pre-Assault suicidal ideations and was in a precarious emotional state due to the effects of the Accident. I am quite satisfied that the Accident was thus a material contributing cause of his depression. In drawing that conclusion, I do not discount the evidence that the plaintiff was using drugs, apparently with some regularity, during that period. Nor do I discount the possibility that the drugs may have contributed to his depression or even some of his cognitive problems during that time frame. I am however satisfied that the drug use, if it was a factor, was not a major factor. The combined effect of the Accident and the Assault was the major contributing cause of the plaintiff's depression and while the Accident was the sole cause of the plaintiff's cognitive problems, the depression has been an exacerbating force.

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| **VI.** | **CONCLUSION** |  |

1. **Overview**

**373**  I have carefully considered the defendants' submissions that the plaintiff's case consisted of overstatements and exaggerations to offset his own assertions of positive progress since the Accident. I have also carefully considered the submissions that the plaintiff's case consisted of a tendency on the part of many of the witnesses to shape their evidence through hindsight to attribute his difficulties, which arose most noticeably after the Assault, to the Accident rather than to the Assault. I do not dismiss the assertion that hindsight has played a role in shaping some of the evidence of the plaintiff's witnesses or that some of the examples given of his post-Accident deficiencies may be extreme or at least atypical.

**374**  What emerges from the evidence in this case, however, was that at the time of the Accident, the plaintiff was a young man with goals, but with no particular establishment in a specific occupation or even normal pattern of living yet. Thus there was at the time of his injury no well established context against which to measure the effects of the injury. The plaintiff's life was in a dynamic and shifting period and it would have been difficult to assess, contemporaneously, whether and to what extent the effects of the Accident impaired his ability to function. In such circumstances, it was really only the passage of time and the plaintiff's accretion of experience in the real world that would have allowed any of the plaintiff's intimates or colleagues to gain insight into the effects of the Accident. This is not a case of a fireman who is suddenly unable to perform as a fireman. It is a case of a young man exploring his ability to function in a variety of ways while seeking to become a fireman, and finding some obstacles in his path, which for some time he was unable, or unwilling, to acknowledge. The fact that it was in the post-Assault period that the plaintiff's difficulties came to a head does not gainsay the contribution of the effects of the Accident to that crisis, nor to his ongoing impediments.

**375**  The onset of seizure activity and the left hand deficits caused by the Assault on top of his existing difficulties brought him to a point of crisis in late 2003 and early 2004. While there was no doubt other factors at play, these other factors were not, in and of themselves, such that they would have led to the crisis. In my view, while accepting that Dr. Wickremasinghe's after the fact diagnosis of clinical depression in the pre-Assault period was anachronistic, I find the characterization of the Accident as a material contributing cause of the depression both accurate and justified. The evolving or developing realization of the plaintiff's limitations was in part the product of his inability or unwillingness to accept them himself, and in part the product of a need to assess him over time and in a variety of circumstances to understand what his limitations were.

**376**  I find the Accident caused the plaintiff physical and non-physical injuries, some of which have been resolved, some of which have not. I find the Accident to have caused injury to the plaintiff's neck, shoulder, back and head. I find the injuries to the plaintiff's neck, shoulder, and mid back have largely been resolved. I am not satisfied the injury to his lower back has been resolved and accept that it has become a chronic condition.

**377**  I find the plaintiff's head injury has only been partly resolved. I conclude his headaches attributable to the Accident have largely abated and those remaining are attributable to the Assault. I accept the plaintiff has experienced some improvement in his cognitive functioning, except for his ongoing experiences to some degree with organizational, memory and concentration/focus problems. These continuing problems are evident in the performance of his tasks of daily living and working.

**378**  I find the head injury from the Accident and the ongoing back problems made a material contribution to the plaintiff's onset of depression which culminated in November of 2003 and January of 2004. I find the Assault also materially contributed to the onset of depression.

**379**  I am not satisfied, as was contended by the defendants, that as far as the plaintiff's development of depression was concerned, the Assault represented a *novus actus interveniens* in the sense described by Lambert J.A. in ***Yoshikawa v. Yu*** [*(1996), 21 B.C.L.R. (3d) 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=) at para. 21 (C.A.):

The other important principle, for the purposes of this case, as a principle applicable in dealing with questions of proximate cause, is the principle that a new intervening act, occurring after the defendant's wrongful act, may give such a pronounced new impetus or deflection to the chain of causation that the original wrongful act of the defendant is no longer regarded as a significant cause upon which to rest legal liability. The principle is sometimes referred to as involving the occurrence of a *novus actus interveniens.*

**380**  This is not a case such as ***Luchak v. Taylor***, [*[2003] B.C.J. No. 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4WV-00000-00&context=), [*2003 BCSC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4WV-00000-00&context=), which counsel for the defendants relied on, where intervening events precipitated the plaintiff's depression, effectively providing a separate cause. Rather, as I have earlier noted, this is a case where the enduring diminuation of the plaintiff's cognitive and physical capacities caused by the Accident and his ongoing discovery of the limitations which they imposed upon him was a significant factor in the development of his depression, which the Assault contributed to, but did not overshadow or offset. I would thus not give affect to the defendants' plea of *novus actus interveniens* in connection with the depression.

**381**  I would attribute the cause of the plaintiff's depression in the proportion of 60% to the Accident and 40% to the Assault. Although the actual onset of the clinical depression began post-Assault, I am satisfied the effects of the Accident were significant factors already building toward the onset of the depression when the Assault occurred. I find the Assault, while traumatic and potentially consequential to the plaintiff and his plans, did not involve the same long term need to endure difficulties and discover limitations that the Accident's effects did. Hence, I find the Assault was less of a factor, but a factor nonetheless, in the plaintiff's development of a mood disorder.

**382**  The parties differed on whether the depression should be considered a divisible or non-divisible injury. I conclude it is a non-divisible injury as that term is used in ***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) and ***E.D.G. v. Hammer***, [*[2003] 2 S.C.R. 459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0Y9-00000-00&context=) [***Hammer***].

**383**  In this case there was simply no evidence to suggest the depression was not, although contributed to by distinct causes, of a piece. In other words, there was no evidence that any aspect of the plaintiff's mood disorder was solely caused by either the Accident or the Assault, or by some other non-tortious cause. That being so, I conclude that the plaintiff's depression was a 100% non-divisible injury, and although attributing 60% causation to the Accident and 40% to the Assault, it follows the defendants in this case are jointly and severally liable for the damage or loss flowing from the depression. In reaching this conclusion, I have relied on the comments of McLachlin C.J.C. in ***Hammer*** at paras. 28 - 33 which read as follows:

Since I have concluded that the Board is not liable to E.D.G. for any of the damage caused by Mr. Hammer, it is not strictly necessary to consider the issue raised on the Board's cross-appeal. However, because the Board rests its challenge on the claim that Vickers J. misapplied a principle laid out in *Athey v. Leonati,* [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), it will be useful to consider the Board's challenge.

The Board's challenge concerns that portion of the damages that was, in the view of Vickers J., caused jointly by Mr. Hammer and the subsequent abusers. Vickers J. held Mr. Hammer liable for the sum total of these damages, stating that "[a]s long as he [Mr. Hammer] is a part of the cause of the injury, even though his acts alone did not create the entire injury, his responsibility for the [entire] damage that flows from the injury is established" (para. 57). As an authority for this proposition, Vickers J. cited Major J.'s claim in *Athey, supra,* at para. 17, that "[a]s long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury" (emphasis in original).

In the Board's submission, Vickers J. was incorrect in applying this principle to the case at bar. The principle applies, the Board claims, only where the other cause is non-tortious and is a precondition of the injury, not where it is tortious and occurs subsequently.

In my view, the Board's reading of the principle articulated in *Athey* is overly narrow. After making the claim cited above, Major J. further expanded upon his reasoning, stating at para. 19 that:

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm ... It is sufficient if the defendant's ***negligence*** was a cause of the harm ... [First emphasis added; second emphasis in original.]

This principle is not confined to cases involving non-tortious preconditions. It applies to any case in which the injuries caused by a number of factors are indivisible.

The matter is governed by the ***Negligence*** *Act,* [*R.S.B.C. 1996, c. 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=), which provides that "[i]f damage or loss has been caused by the fault of 2 or more persons", then "(a) they are jointly and severally liable to the person suffering the damage or loss". This rule implies that Mr. Hammer is liable to E.D.G. for the full cost of any injuries that are indivisible and caused both by Mr. Hammer and by the subsequent tortfeasors.

The Board's real disagreement may lie, not with the principles applied by the trial judge, but with the trial judge's factual conclusions, in particular, his conclusion that 90 percent of the damage was indivisible and was caused both by Mr. Hammer and by the subsequent tortfeasors. This is, however, a finding of fact, and cannot be overturned absent palpable and overriding error. It is not evident to me that the trial judge committed such an error in this case.

[emphasis in original]

**384**  In their submissions, the defendants sought to distinguish ***Hammer*** from the present case on the basis that in ***Hammer***, the trial judge found on the basis of a psychologist's evidence that if the damage to the plaintiff from the defendant and other causes were represented by circles having a common centre, 90% of the plaintiff's damage would fall inside the defendant's circle and 10% would fall outside. The defendants in the present case contended that finding means, in effect, any proportion of the plaintiff's depression I attribute to the Accident would not be non-divisible and would thus not engage the defendant's liability under the ***Negligence Act***, *R.S.B.C. 1996, c. 333****.***

**385**  In my view, that submission amounts to a misreading of ***Hammer.*** In ***Hammer***, the effect of the trial judge's finding was that 90% of the psychological damage was materially contributed to by the defendant and other *tortfeasors* and for that proportion of the whole, the injury was non-divisible. The other 10% was discreet and not contributed to by the defendant Hammer, and hence, was divisible from the portion for which he was liable. In the present case, as I have already noted, there is no basis on the evidence for concluding that any aspect of the plaintiff's depression was separate from the rest and caused without material contribution from the Accident.

**386**  As I previously indicated in these reasons, I am not satisfied on the evidence as a whole and on a balance of probabilities that the Accident caused or materially contributed to the seizure activity experienced by the plaintiff following the Assault. While there was some evidence advanced through Dr. Toyota that the initial shear injuries may have made the plaintiff more susceptible to the subsequent injuries arising from the Assault, the overall ambivalence of his evidence on the issue and the lack of any supporting evidence fell short of proving a causal link to the required degree.

1. **General Damages**

**387**  On the issue of general damages, the plaintiff relied on the following cases where between $125,000 and $185,000 in general damages was awarded: ***Fournier v. Stevenson Brothers Warehousing Inc.***, [*[2003] B.C.J. No. 679*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2C9-00000-00&context=), [*2003 BCSC 448*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2C9-00000-00&context=) ($185,000); ***Klingsat v. Westminster Savings Credit Union***, [*[2001] B.C.J. No. 2572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4B6-00000-00&context=), [*2001 BCSC 1701*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4B6-00000-00&context=) ($150,000); ***Reilly v. Lynn*** [*(2003), 10 B.C.L.R. (4th) 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=), [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) ($150,000); ***West v. Cotton***[*(1995), 10 B.C.L.R. (3d) 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0TG-00000-00&context=) (C.A.) ($150,000); and ***Cook v. Cahoose***, [*[2001] B.C.J. No. 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1DC-00000-00&context=), [*2001 BCSC 254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1DC-00000-00&context=) ($125,000). The plaintiff argues these cases establish an appropriate range. The plaintiff also referred to ***Traynor v. Degroot*** [*(2003), 18 B.C.L.R. (4th) 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20R7-00000-00&context=), [*2003 BCCA 483*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20R7-00000-00&context=) ($120,000); and ***H.(A.) (Guardian ad litem of) v. Roy*** [*(2000), 77 B.C.L.R. (3d) 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-228T-00000-00&context=), [*2000 BCCA 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-228T-00000-00&context=) ($125,000) as a case similar to the case at bar with damages lower than what is being sought by the plaintiff.

**388**  The defendants on the other hand relied on ***Luchak v. Taylor***, *supra,* ($55,000); ***O'Ruairc (Guardian ad litem of) v. Pelletier***, [*[2004] B.C.J. No. 2592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0RN-00000-00&context=), [*2004 BCSC 1633*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0RN-00000-00&context=) ($60,000); and ***Gorosh v. Bowen***, [*[2005] B.C.J. No. 1369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0Y2-00000-00&context=), [*2005 BCSC 917*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0Y2-00000-00&context=) ($40,000) as establishing the appropriate range of non-pecuniary damages which they submitted as being between $50,000 and $65,000.

**389**  The underlying premise of the plaintiff's submission on the range of non-pecuniary damages was that the plaintiff's cognitive, physical and emotional deficits were a result of the Accident, were continuous and would likely continue into the future and thus represented a significant impairment of his enjoyment and quality of life, both past and future.

**390**  The underlying position of the defendant with regard to non-pecuniary damages was that the evidence fell far short of establishing ongoing cognitive and physical deficits resulting from the Accident and that the depression was a product of the Assault. The defendants also submitted that the extent of the plaintiff's loss of quality and enjoyment of life was exaggerated in the evidence and accordingly did not engage the level of damages sought by the plaintiff.

**391**  As I have found that some of the plaintiff's physical and cognitive functions resulting from the Accident continue to exist and will likely exist into the future and that his depression was materially contributed to by the Accident, I find the range of awards relied on by the plaintiff to be more compelling than those of the defendants. As I have indicated, I have found some of the examples of the plaintiff's difficulties, such as his inability to make a salad and the evidence from his mother as to the state of disorganization with respect to his daily living, not to be wholly representative of the true state or extent of his cognitive defects given the overall evidence of his success at school and his ability to acquire and maintain jobs. I am nonetheless satisfied the plaintiff continues to suffer from them to some degree with no clear prospect of improvement. Similarly, while his neck, shoulder and mid back are largely resolved and any headaches he presently suffers from appear attributable to the Assault, I accept that the plaintiff still experiences stiffness in his back and shoulder and that his lower back is vulnerable to certain activities such as lifting or twisting. The depression remains an ongoing issue and, while significantly improved, nonetheless is something the plaintiff must continue to deal with on an ongoing basis to avoid exacerbation of his cognitive problems. Additionally, there was evidence, which I accept, that the plaintiff is quieter, more withdrawn and less sociable than he was prior to the Accident, and as well is less involved in the various sports and activities that previously brought him pleasure.

**392**  On balance I am satisfied an award of $135,000 for non-pecuniary damages is appropriate given the overall effect of the Accident on the plaintiff's quality and enjoyment of life.

1. **Special Damages**

**393**  The plaintiff's claim for special damages amounted to $5,668.74 consisting of the costs of medications, chiropractic, physiotherapy and massage therapy, cab fare, a mattress, a comforter, psychologist's fees and an MRI scan. The defendants challenged the MRI scan, psychologist's fees, and certain of the medications as costs attributable to the Assault. They also challenged the physiotherapy between May 1, 2003 and June 3, 2003 as not being attributable to the Accident.

**394**  I am satisfied the special damages claimed by the plaintiff, except for the MRI scan of $975 (and $97.50 interest) and certain of the medications (Paxil - $67.50 and Dilantin (x 4) totalling $73), are appropriate, resulting in an award of special damages of $4,455.74.

1. **Past Loss of Income**

**395**  The plaintiff's claim for past income loss was predicated on a finding that he would have become a firefighter by January of 2004 when he was 22 years of age. Based on that approach, Mr. Struthers estimated his income to the date of trial would have been between $59,000 and $78,000, depending on whether his income was discounted by average contingencies or by risk only contingencies respectively.

**396**  The position of the defendants was that at most, the plaintiff's past income loss was $5,000 based on the fact he was unable to finish his BCIT course by January of 2002 and commence working. Accordingly, the defendants acknowledged responsibility for an income loss between January of 2002 and April of 2002 when he ultimately completed his course at BCIT. The defendants relied on the evidence that the plaintiff was essentially employed continuously after finishing at BCIT until the time of trial and hence was not entitled to any significant award for past loss of income beyond the initial period between January and April of 2002.

**397**  I conclude the plaintiff's claim for past loss of income based on the likelihood of him becoming a fireman by January of 2004 was not made out on the evidence to the necessary degree of possibility. Before becoming a fireman, the plaintiff would have had to have selected his course, applied for it and completed it, obtained his Class 3 driver's licence and gone through a fire department's application and selection process. Whether he would have completed these processes and actually been hired by January of 2004 would have depended on a variety of factors including how widely he initially made his application. In my view, the evidence was simply too uncertain that the plaintiff would have been able, without more extensive work and community experience, to have reached the point where he would have been likely hired as a fireman by January of 2004.

**398**  In my view, the better measure of his past income loss is the loss of his opportunity to work between January and April of 2002 because of his need to return to BCIT to complete his carpentry course, and the diminuation of his earning capacity between the Accident and trial date, due to his physical and non-physical injuries. While it was true the plaintiff has essentially been employed since completing his BCIT course, he was unable to maintain his job at Options or fully pursue his landscaping job because of his back pain, and he has been limited in his pursuit and choice of jobs since the Accident as a result of all of its effects.

**399**  At the same time, as I have previously noted, the plaintiff at the time of the Accident was in a transitional and exploratory part of his life without certain or immediate prospects. Overall, given his loss of marketability as an employee and his actual loss while he was compelled to re-attend BCIT, I find the difference between what he has actually earned between the Accident and the trial date to be in the realm of $25,000. In coming to that conclusion, I bear in mind the evidence of Mr. Nordin that once the plaintiff completed his BCIT course, he fell into the category of those with an average wage of $47,900 and that his current income is between $26,500 and $31,000. Thus, adding together a reasonable income loss for the period of January 2002 to April 2002 of $5,000 with the overall diminuation in the plaintiff's ability to move incrementally toward the average wage for his level of training and education during that period, I conclude the sum of $25,000 is an appropriate award under this head of damages.

1. **Loss of Earning Capacity**

**400**  As far as the plaintiff's future earning capacity is concerned, I find a real and substantial possibility that he will be impaired in his pursuit of a livelihood and particularly in pursuit of a career as a fireman, given the disabling effects of his chronic back condition and ongoing cognitive difficulties and the lurking presence of his depression (even though it has improved through medications and his contact with Dr. Jung throughout 2004 and 2005). At the same time, I find the Assault and its subsequent consequences have diminished the plaintiff's prospects of becoming a fireman both because of the neurological deficit to his left hand and his history of seizure activity. This is not a case of non-divisible injury. Rather, it is a case where the plaintiff's future prospects have been affected by two separate but concurrent events, each of which has compromised his potential earning capacity. I conclude that of the two causes, on the evidence before me, the more far reaching effects flowed from the Accident, which combined identified cognitive, physical and psychological limitations, the implications of which were explored through the evidence of the plaintiff's lay and expert witnesses. In contrast, it was not clear on the evidence what implications the effects of the Assault had (apart from the depression which it contributed to along with the Accident), except that the combination of left hand deficit and history of seizure activity may impede the plaintiff from meeting the rigorous physical standards required of a fireman, as would the effects of the Accident.

**401**  With respect to the Accident's effects, I conclude there is a high degree of likelihood the plaintiff will have to readjust his career trajectory. I am not satisfied that he is necessarily limited to a minimum wage job level in the absence of a supportive workplace, but I am satisfied he is, and will remain, more vulnerable to job loss, longer unemployment, lower wages, and a diminished career pinnacle than he would have otherwise achieved because of the disabilities that his physical, cognitive and emotional condition present him with.

**402**  The plaintiff relies on ***Reilly v. Lynn,*** *supra,* in which the plaintiff's loss of earning capacity was based on the fact that at the time of the accident, he was a qualified lawyer, who, after the accident was able to secure professional employment until his cognitive problems "caught up with him" and caused him to leave the practice of law. In that case, in reviewing the award made by the trial judge for loss of earning capacity, Smith and Low J.J.A., writing the majority judgment, summarized the relevant principles at para. 101 as follows:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati,* [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) (S.C.C.) at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra,* at para. 27, *Steenblok v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (B.C.C.A.) at 135. The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (B.C.S.C.) at 93. However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) (B.C. C.A.) at para. 11; *Ryder (Guardian ad litem of) v. Jubbal,*  [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (B.C.C.A.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (B.C.C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra,* at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.,* [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=)*,* at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in a modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ...

[emphasis added]

**403**  It is clear that a range of possibilities can be envisaged for the plaintiff on the assumption that the accident did not take place and, as well, on the basis of the reality that it did.

**404**  In the case at bar, unlike as in ***Reilly v. Lynn,*** I am not satisfied the best measure of the plaintiff's loss was achieved by quantifying his chances of being a fireman and effecting a comparison of what he could have earned in that capacity with what he either earns now or may earn in the future, as was addressed by the report of Mr. Struthers and the responding report of Mr. Hildebrandt. The loss the plaintiff has suffered is not best assessed as the loss of a chance to become a fireman; it is the likelihood of loss of a broader range of possibilities falling roughly between the income potential of a person with a trade certificate or a diploma at $47,900 in 2003 dollars, (identified by Mr. Nordin as apposite to the plaintiff's level of education and training) and the income potential of a fireman starting at $58,740 according to the 2001 Census.

**405**  Against that must be compared the range of possibilities faced by the plaintiff as a consequence of the Accident which include working at or around minimum wage, working at or close to his present income, or charting a course that finds a way of realizing or approaching his pre-Accident earning potential.

**406**  In this case, having considered all the evidence, including the evidence both of the plaintiff's successes (the successful completion of his BCIT course, the successful completion of the Industrial First Aid course, the successful completion of the National Lifeguard Service course, his apparent ability to secure and perform a job as a lifeguard and his successful competition for the building supervisor job at the WECC) and his difficulties (his apparent difficulties in performing his past jobs at Options, as a landscaper and as a valet, his described difficulties at the WECC, his described difficulties with organizational focus and memory issues, his physical limitations and his need to grapple with depression), I conclude that the cognitive difficulties faced by the plaintiff were worsened by his depression which crystallized in November of 2003 and to some extent, his future prospects are contingent on his ongoing management of that condition. In the event the plaintiff is able to manage that mood disorder, I consider it a realistic possibility that he could retrain and enhance his potential earning capacity. The fact remains, however, that whatever level of potential earning capacity he attains he is still conditioned by the physical and non-physical effects of the accident and by the loss of impetus and specific direction occasioned by them.

**407**  In my view, there are too many variables at large in the evidence before me to fix the plaintiff with specific with-Accident or without-Accident potential streams of income. The uncertainties are best dealt with by considering the range of possibilities open to him before and after the Accident and finding an amount that reflects his likely annual loss of income and benefits given the loss of advantage he has suffered from the Accident.

**408**  I conclude, in keeping with the principles set forth in ***Brown v. Golaiy*** [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.) and ***Kwei v. Boisclair*** [*(1991), 60 B.C.L.R. (2d) 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30K-00000-00&context=) (C.A.), that the measure of the plaintiff's loss is in his diminished ability to attract, maintain or progress with various income earning opportunities due to his loss of function, competence and competitiveness resulting from the effects of the Accident and I would assess his loss of earning capacity at $625,000 based on the present value of income loss in the range of $25,000 annually to age 65.

1. **Cost of Future Care**

**409**  The cost of future care calculated by Mr. Struthers relied on the report dated August 9, 2005 produced by Mr. Pakulak. After excising the cost associated with a case manager ($79,809), Mr. Struthers concluded the plaintiff's cost of future care amounted to $201,388 in circumstances where the plaintiff was not living independently, that is with his mother, and $681,760 where the plaintiff was living independently, that is, within the care of Cheshire Homes, under Table 1A, or $216,908 (not living independently but with his mother) or $697,280 (living independently but within Cheshire Homes) under Table 1B.

**410**  I do not find a significant likelihood that the plaintiff will find it necessary to live under the umbrella of Cheshire Homes or a similar environment in order to live independently. I accept some degree of probability of that event if the plaintiff is unable to maintain control of his depression. Overall, I conclude the need for such a cost of future care should be reduced by 80% to reflect the degree of likelihood the plaintiff will require it at some future point. Mr. Struthers calculated $520,407 as the total future cost of the plaintiff living independently through Cheshire Homes. I would reduce that figure to $104,081.

**411**  Given my finding that the plaintiff's ability to function on his own is to some extent contingent on maintaining control over his depression, I would allow the future care costs associated with the need for ongoing psychological counselling as identified by Mr. Struthers in Table 1A representing a cost of $34,559. I would also allow the future cost of Celexa at $4,188. I do not consider it necessary to provide for the comprehensive ongoing occupational and vocational counselling or therapy on the basis suggested by Mr. Pakulak and Mr. Powers, but would award the sum of $20,000 to assist the plaintiff in his future occupational endeavours and planning. I find some significant duplication in Mr. Pakulak's recommendation of a rehabilitation assistant with the ongoing psychological counselling and the vocational counselling and occupational therapy that I have provided for and I would make no award for that. I would allow the amount identified by Mr. Struthers as the first year cost of a kinesiologist recommended by Mr. Pakulak at $2,188, but do not consider it to be a necessity on an ongoing basis as I am satisfied that the plaintiff is capable of pursuing a course of exercise on his own after receiving appropriate assistance and guidance.

**412**  I conclude the plaintiff would in any event have purchased a fitness pass for a gym and would not allow that expense as one attributable to the Accident.

**413**  I would allow the expenses for an electronic organizer, a portable low back support and an ergonomic desk chair, totalling $2,796 together with GST and PST of $391.44.

**414**  Thus, for cost of future care, I award the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care | $104,081.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Counselling | $ 34,559.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Celexa | $ | 4,188.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future Occupational Endeavours and |  |  |
|  | Planning | $ 20,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Organizer, back support and chair | $ | 3,187.44 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Kinesthiologist | $ | 2,188.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | **$168,203.44** |  |

1. **In-Trust Award**

**415**  The plaintiff advanced an in-trust award based on his mother's care for him following the Accident and since his return to live with her in September of 2004.

**416**  It was the defendant's position that this case was similar to ***O'Ruairc (Guardian ad litem of) v. Pelletier,*** *supra,* in which an in-trust claim was made for the services provided by the family's mother in the years following the accidents in that case. In that case, Justice Wedge concluded where the only evidence on the issue was to the effect that the plaintiff's mother assisted the plaintiff by bringing him to appointments with his various doctors and health care professionals and provided assistance to him that "one would expect from a family member", this was not sufficient to establish the kind of loss that would give rise to an in-trust award.

**417**  The defendants submitted this reasoning applied to the present case and that Ms. Hutchings had not done anything beyond what any other caring mother would do in terms of cooking and cleaning since the plaintiff returned home to live with her. Counsel for the defendants submitted that Ms. Hutchings was in effect being overly protective of the plaintiff and an in-trust award was not, in all of the circumstances, justified.

**418**  Counsel for the plaintiff relied on the evidence of Ms. Hutchings as to the degree of care required by the plaintiff, and in particular, her evidence that she had to go on some medication herself because of the stress related to looking after him, that she refused to apply for a job with substantially more income attached to it in the Northwest Territories in order to stay with her son and on her expressed view that he needed her to "look over his shoulder". In my view, this is not such a case that attracts an in-trust award. While I accept Ms. Hutchings has had to perform duties on behalf of the plaintiff, it is my conclusion that they do not ascend to the level of being above and beyond what would be expected from the familial relationship so as to engage the right to damages. It must be remembered that since living with his mother, the plaintiff has been working and socializing, and, with his mother's assistance, has purchased a car and is able to drive himself to and from any destinations.

**419**  I would not give effect to the plaintiff's claim for an in-trust award.

|  |  |  |
| --- | --- | --- |
| **VII.** | **SUMMARY OF CONCLUSION** |  |

**420**  In summary, the plaintiff is entitled to recover the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary Loss | $135,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Income Loss | $ 25,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of earning capacity | $625,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care | $168,203.44 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Special Damages | $ | 4,455.74 |  |

**421**  The parties have liberty to speak to the issue of a management fee and any income tax issues that arise from these reasons as well as the issue of costs.

CULLEN J.

**End of Document**

[***Insurance Corp. of British Columbia v. Awla, [2012] B.C.J. No. 1416***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24RF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.F. Cullen A.C.J.S.C.

Heard: November 14-18, 21-25, December 5-9, 12-16 and 19,

2011.

Judgment: July 9, 2012.

Dockets: S076183, S076186, S034964

Registry: Vancouver

**[2012] B.C.J. No. 1416** | 2012 BCSC 998 | 11 C.C.L.I. (5th) 177 | 2012 CarswellBC 2008

Between Insurance Corporation of British Columbia, Plaintiff, and Harpreet Awla, Daniel Ascencao, Agostinha Ascencao, Bobby Atwal, Vikram Singh Atwal, Avenue Auto Glass Ltd., Gurpreet Awla, Ujjal Awla, Updash Awla, Bansal & Sons Diesel Automotive Ltd., Kulvinder Singh Bansal, Navdeep Singh Brar, Kulbir Singh Chohan, Rodney Daniel Dick, Carolyn Rachel Duquesne, Robert Jules Duquesne, Allen Ferrier, Tariq Hezbawi, Cynthia Ann Hill, Ross Hinchberger, Lynn Holt, International Autohaus LLC, Cheri Kostynick, Ajmer Litt, Sara Larae Elizabeth McDonald, Mohamed Nachar, Sandeep Singh Rai, Satwant Ranauta, Jasbir Singh Randhawa, Shinderpal Randhawa, Kulbir Romana, Mohammad Salim, Jagjeet Singh Sidhu, Jason Garry Smith, Riad Iskandar Youssef, John Zarelli, Mahmed Zkeer, Arthur Moran, Davinder Singh Deol, Breeze Produce Inc., 0640147 B.C. Ltd., and John Doe, Defendants And between Insurance Corporation of British Columbia, Plaintiff, and Jean Claude Auger, Vikram Singh Atwal, Bobby Atwal, Avenue Auto Glass Ltd., Kulwant Singh Bal, John Richard Bracken, Mohamed Nachar, Jasbir Singh Randhawa, Shinderpal Randhawa, Varinder Singh Sahota, Bhupinder Singh Sangha, Jagjeet Singh Sidhu, Samuel Edward West, Jasraj Singh Bains, and John Doe, Defendants And between Insurance Corporation of British Columbia, Plaintiff, and Jason Garry Smith, Defendant

(419 paras.)

**Case Summary**

**Tort law — Trespass — To goods — Conversion — What constituting — Availability — Actions by plaintiff for damages for conspiracy and conversion allowed --Plaintiff insurance company alleged conspiracy defendants stole vehicles and resold them to conversion defendants — Liability respecting special damages was $182,496 for Harpreet, $102,815 for Vikram, $13,100 for Gurpreet, $12,604 for Bansal defendants, $58,227 for Smith and $26,614 for Dick — Punitive damages were awarded $60,000 against Harpreet, $20,000 against Vikram, $20,000 against Gurpreet, $5000 against one Bansal defendants and $3000 against Smith.**

**Tort law — Conspiracy — Nature and elements of tort of conspiracy — Actions by plaintiff for damages for conspiracy and conversion allowed --Plaintiff insurance company alleged conspiracy defendants stole vehicles and resold them to conversion defendants — Liability respecting special damages was $182,496 for Harpreet, $102,815 for Vikram, $13,100 for Gurpreet, $12,604 for Bansal defendants, $58,227 for Smith and $26,614 for Dick — Punitive damages were awarded $60,000 against Harpreet, $20,000 against Vikram, $20,000 against Gurpreet, $5000 against one Bansal defendants and $3000 against Smith.**

**Damages — For torts — Affecting property — Personal property — Trespass or conversion — Conspiracy — Actions by plaintiff for damages for conspiracy and conversion allowed --Plaintiff insurance company alleged conspiracy defendants stole vehicles and resold them to conversion defendants — Liability respecting special damages was $182,496 for Harpreet, $102,815 for Vikram, $13,100 for Gurpreet, $12,604 for Bansal defendants, $58,227 for Smith and $26,614 for Dick — Punitive damages were awarded $60,000 against Harpreet, $20,000 against Vikram, $20,000 against Gurpreet, $5000 against one Bansal defendants and $3000 against Smith.**

**Damages — Types of damages — Special damages — Exemplary or punitive damages — Actions by plaintiff for damages for conspiracy and conversion allowed --Plaintiff insurance company alleged conspiracy defendants stole vehicles and resold them to conversion defendants — Liability respecting special damages was $182,496 for Harpreet, $102,815 for Vikram, $13,100 for Gurpreet, $12,604 for Bansal defendants, $58,227 for Smith and $26,614 for Dick — Punitive damages were awarded $60,000 against Harpreet, $20,000 against Vikram, $20,000 against Gurpreet, $5000 against one Bansal defendants and $3000 against Smith.**

**Damages — Assessment of damages — Actions by plaintiff for damages for conspiracy and conversion allowed --Plaintiff insurance company alleged conspiracy defendants stole vehicles and resold them to conversion defendants — Liability respecting special damages was $182,496 for Harpreet, $102,815 for Vikram, $13,100 for Gurpreet, $12,604 for Bansal defendants, $58,227 for Smith and $26,614 for Dick — Punitive damages were awarded $60,000 against Harpreet, $20,000 against Vikram, $20,000 against Gurpreet, $5000 against one Bansal defendants and $3000 against Smith.**

|  |
| --- |
| Actions by the plaintiff for damages for conspiracy and conversion. The plaintiff insurance company sued some defendants for conspiracy to convert 12 vehicles insured by it and to defraud it and sued other defendants for conversion of some of the vehicles. The plaintiff alleged that the conspiracy defendants stole the vehicles, created a false identification and ownership history for them and resold them to the conversion defendants, some of whom were aware of the scheme. The plaintiff sought special damages for its payments to insureds. It sought punitive damages against the conspiracy defendants and against the conversion defendants who acted knowingly or recklessly.  HELD: Actions allowed.  Harpreet, Vikram and Gurpreet were liable for conspiracy with respect to several vehicles. Harpreet arranged to supply purchasers with false identification and referred them to a credit union employee who approved their loans after receiving threatening telephone calls. Vikram was connected to an insurance agency that processed fraudulent registrations. Gurpreet assisted purchasers in false registration. The Bansal defendants, Smith and Dick were each liable for conversion with respect to one vehicle. The Bansal defendants facilitated the completion of a private vehicle inspection report for a vehicle that was not present, resulting in a false vehicle inspection number enabling the conspirators to register and sell the vehicle. The vehicles purchased by Smith and Dick were stolen vehicles for which the plaintiff had paid a claim. Liability for special damages was $182,496 for Harpreet for six transactions, $102,815 for Vikram for four transactions, $13,100 for Gurpreet for two transactions, $12,604 for the Bansal defendants, $58,227 for Smith and $26,614 for Dick. Punitive damages were awarded $60,000 against Harpreet, $20,000 against Vikram, $20,000 against Gurpreet, $5000 against one of the Bansal defendants and $3000 against Smith. The plaintiff did not act unreasonably by choosing to mitigate its losses by selling the vehicles at wholesale prices instead of on the retail market. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=),

Insurance (Motor Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 14*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B02T-00000-00&context=)

Revised Regulation (1984) under the Insurance (Motor Vehicle) Act, [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=), Regulation 143(1)

Rules of Court, Rule 18A (old)

Sale of Goods Act, [*RSBC 1996, CHAPTER 410, s. 26*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JG59-2150-00000-00&context=)

**Counsel**

Counsel for the Plaintiff in both actions: M. Hewitt, J. Frahm.

Counsel for the Defendant, Jason Smith: D.H. Murray.

Counsel for the Defendants, Satwant Ranauta, Kulvinder Bansal and Bansal & Sons Diesel Automotive Ltd.: S. Grey.

The Defendant, Ross Hinchberger: Appeared on his own behalf.

**Reasons for Judgment**

|  |
| --- |
| **A.F. CULLEN A.C.J.S.C.** |

**INTRODUCTION AND BACKGROUND**

**1**  There have been several trials of actions brought by the plaintiff, Insurance Corporation of British Columbia ("ICBC"), against various defendants for conspiracy to convert vehicles insured by ICBC and conspiracy to defraud ICBC and against other defendants for conversion of those vehicles. In *ICBC v. Atwal*, [*2010 BCSC 338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X16J-00000-00&context=) (*Atwal*, BCSC), aff'd *ICBC v. Atwal*, [*2012 BCCA 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1DT-00000-00&context=) (*Atwal*, BCCA), and in *ICBC v. Gill et al*, and *ICBC v. Ben-Jaafar*, [*2011 BCSC 1106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22WV-00000-00&context=) (consisting of two trials ordered to be tried together), I gave Reasons for rendering Judgment, in part, against the defendants based both on the allegations of conspiracy and on the allegations of conversion.

**2**  In the present trial, I ordered two actions to be tried together, *ICBC v. Awla et al*, S076183 Vancouver Registry, and *ICBC v. Auger et al*, S076186 Vancouver Registry. By the time of trial, the plaintiff had settled with and/or discontinued its claims against all the defendants in the *ICBC v. Auger* action, leaving only the *ICBC v. Awla et al* action to be heard, subject to settlement and/or discontinuances against individual defendants in the latter action. A third action *ICBC v. Smith* S034964 Vancouver Registry was ordered tried at the same time.

**3**  In the case of *ICBC v. Ben-Jaafar*, *supra*, I offered a description and explanation of the nature of that action and the transactions underlying it, in part relying on the judgment in *Atwal*, BCSC. Those descriptions are apt in the present case and appear at paras. 1 - 10 inclusive of the decision in *ICBC v. Ben-Jaafar* as follows:

[1] These two actions were ordered tried together. In *Insurance Corp. of British Columbia v. Atwal*, [*2010 BCSC 338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X16J-00000-00&context=) [*Atwal*], I described the nature of the cause of action in a related trial that is applicable to these two cases as follows at paras. 1, 2 and 3:

[1] This action arises out of a scheme entailing the theft, or ostensible theft, of motor vehicles insured by the plaintiff, the Insurance Corporation of British Columbia ("ICBC"), the creation of a false identification and ownership history of the vehicles, and the resale of the vehicles to purchasers with or without knowledge of the wrongful nature of the sale transactions. The plaintiff, ICBC, claims against the various defendants both as the insurer which paid claims under the theft coverage of comprehensive policies sold to the owners of the wrongfully obtained and sold vehicles, and as the owner of the vehicles and the pre-existing rights of ownership of the vehicles acquired as a result of the payment of the theft claims under the comprehensive coverage policy.

[2] Although this action involves seven vehicles wrongfully acquired between February 17, 2002 and June 7, 2002, it is alleged that the seven vehicles at issue in this law suit were wrongfully acquired, given a new identity, and sold in a manner consistent with a significant number of other vehicles and hence are part-in-parcel of a larger scheme operated throughout 2002 and 2003 in the lower mainland area of British Columbia.

[3] In particular, the scheme at issue involved each stolen or fraudulently acquired vehicle being given a new vehicle identification number ("VIN"), with false registration documents from Alberta naming fictitious Alberta residents as owners, being transferred to an unwitting or, in some cases, complicit British Columbia residents and sold to third parties who by dint of their ownership are said to be liable in conversion to the plaintiff.

[2] As I noted in *Atwal*, it is alleged that the claims in the present actions are part of a larger scheme operated throughout 2002 and 2003 in the lower mainland area of British Columbia. It is alleged that in total, the scheme was used "to disguise dozens of vehicles resulting in a total of approximately $2,000,000 in insurance claims that were honoured by ICBC" (Plaintiff's closing, para. 8).

THE NATURE OF THE SCHEME ALLEGED

[3] The means by which the scheme operated started with the creation of false Alberta Vehicle Registration Certificates ("AVRC"), which were used to register the various stolen or fraudulently obtained vehicles in B.C. using a false vehicle identification number ("VIN").

[4] The reason for the fabrication of AVRCs in each case was that any attempt to register a vehicle that had been reported stolen in British Columbia would be caught by ICBC, who has the statutory obligation as Registrar of Motor Vehicles to register the ownership and transfer of motor vehicles, issue vehicle licences and sell compulsory basic insurance coverage. To be registered in B.C., a vehicle previously reported stolen in B.C. would need a new (false) VIN. The advantage of manufacturing a VIN on a forged AVRC was that the ICBC computers would not be able to reveal whether the falsely identified vehicle had ever in fact been registered in Alberta. In relation to each vehicle at issue in this case and in relation to each other vehicle revealed by the evidence in this case, the initiating document leading to the re-registration of a vehicle reported stolen in B.C. was a forged AVRC. Each of the AVRCs had several similar indicia of fraud described by the plaintiff in its closing submissions at para. 32 as follows:

To the trained eye of Alberta Service's employee Karla Fedorak, there are several *indicia* of fraud apparent from the information found on the face of the Alberta vehicle registration certificates used to import the vehicles that are the subject of this action:

1. Often the month of expiry is incorrect (i.e. does not correspond to the correct month according to letters of last name noted on the AVRC).
2. Often the day of expiry is incorrect (i.e. not last day of month).
3. In many cases, there are two licence plate numbers noted on one AVRC.
4. In many cases, the licence plate is recorded as Class "5", which is a non-existent class.
5. The vehicles described on the registration documents did not exist within Alberta's motor vehicle electronic system (MOVES database).
6. The licence plate numbers noted on the documents either did not exist in Alberta's MOVES, or did exist but were not registered to the person named as the owner of the AVRC.
7. The motor vehicle identity numbers (MVIDs) of people named as owners were either invalid, or, if valid, were not associated to the person named on the AVRC.
8. The Registry Agent identity numbers were either invalid, or were associated to one of two valid Registry Agents.
9. The addresses on the documents frequently did not exist.

[5] In addition to the AVRCs, other falsified documents were used to complete the process of disguising the identity of and reregistering the stolen vehicles. The vehicles being imported into B.C. required an inspection by a vehicle inspector who would complete a Private Vehicle Inspection Report ("PVIR").

[6] The vehicles would then be transferred from the fictitious or unwitting Alberta resident into the name of an unwitting British Columbia resident using a Transfer/Tax form generally on the pre-text that the transfer was a "gift" to the unwitting recipient to avoid the payment of taxes. There would then be a transfer of the vehicle to a real person - the ultimate owner who would pay the person or persons involved in the scheme.

[7] Various of the identities of the unwitting B.C. recipients of the initial transfer from the fictitious/unwitting Alberta owners were based on stolen pieces of identification which were used on a number of different occasions. The plaintiff asserts that in some cases, the repeated use of a particular stolen identity can be linked to one or another of the conspirators.

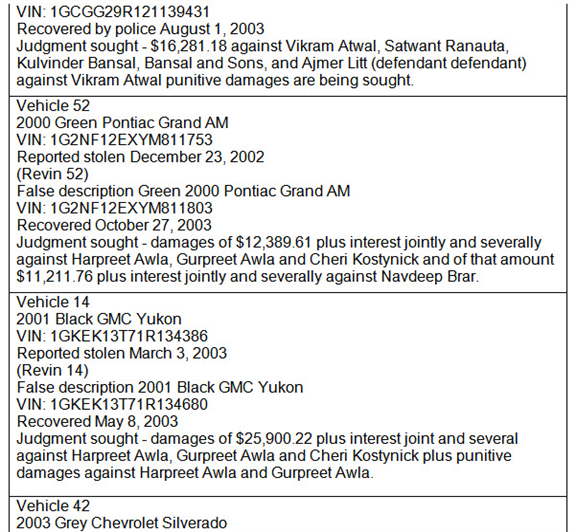
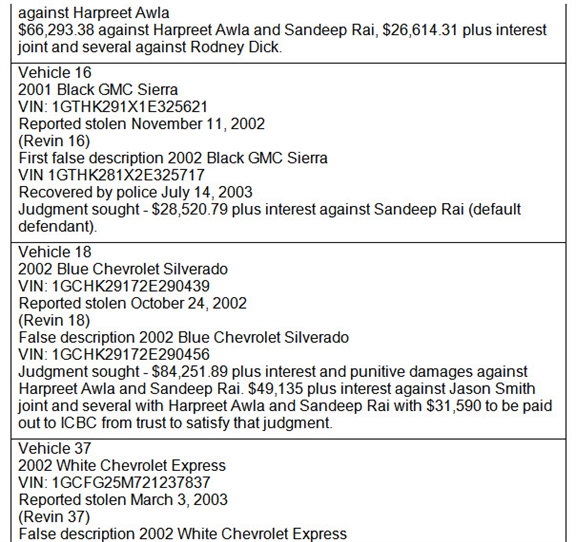
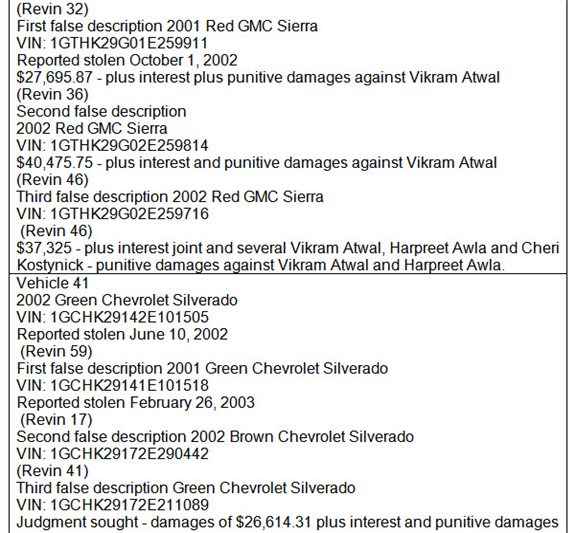
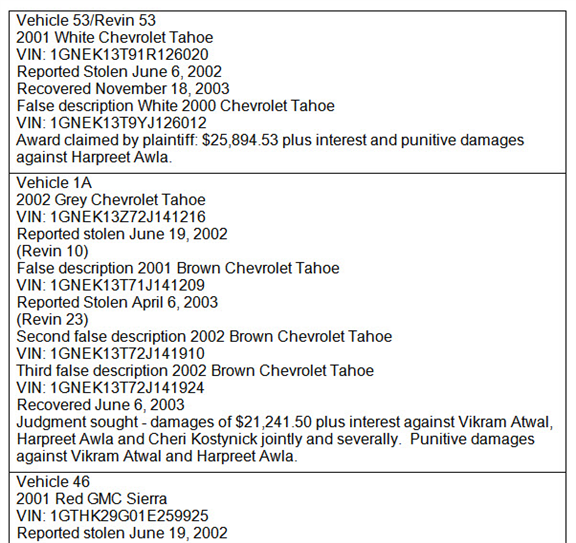
[8] In Action S076185, *Insurance Corp. of British Columbia v. Ben-Jaafar* ("the *Ben-Jaafar* action"), there are eight vehicles alleged to have been stolen in the object of the scheme. In Action S076184, *Insurance Corp. of British Columbia v. Gill* ("the *Gill* action"), there are six vehicles said to be stolen in the object of the scheme.

[9] As with *Atwal*, *supra*, the defendants in the *Ben-Jaafar* action and the *Gill* action fall into one of two categories. It is either alleged that they are "conspiracy" defendants involved in some aspect of the scheme by which the vehicles at issue were stolen, disguised and re-sold; or it is alleged that they are "conversion" defendants, the ultimate purchasers of the vehicles whose possession of the stolen vehicles is said to render them liable to the plaintiff in conversion, whether or not they had knowledge of the actual status of the vehicles.

[10] The various vehicles at issue in these lawsuits, and the other lawsuits generated by the scheme at issue, are identified by number. During the investigation, the plaintiff assigned a number to each vehicle from one to fifty-eight. Each vehicle was referred to as "stolen" at the time of the theft with its assigned number, and after its fraudulent re-identification as "Revin" with the same number.

**4**  In the context of this action, the plaintiff is seeking judgment against a number of defendants for conspiracy and a number of other defendants for conversion in connection with a total of 12 vehicles, some of which were subjected to more than one theft or extensible theft and "Revining". In the result, there are 17 transactions in relation to which the plaintiff is seeking judgment against one or more of the defendants.

**5**  The specific vehicles and transactions at issue in this action are as follows:



**6**  There were three other vehicles referred to in the plaintiff's claim (Stolen/Revin 58, Stolen/Revin 54 and Stolen/Revin 50) in relation to which the plaintiff is not seeking judgment.

**THE CONSPIRACY DEFENDANTS**

**7**  The primary conspiracy defendants in the *Awla* action are Harpreet Awla, Gurpreet Awla and Vikram Atwal.

**8**  Vikram Atwal was found liable in conspiracy in *Atwal*, BCSC, *supra*, and *Ben-Jaafar*, *supra*, in relation to 12 vehicles stolen and revined in 2002 and 2003. The transactions for which he was found liable are part of the same overall scheme that is alleged in the present case. Vikram Atwal did not defend himself at this trial.

**9**  Harpreet Awla was born in 1981. He admitted knowing Vikram Atwal, testifying in his examination for discovery that he had met him a couple of times. He also acknowledged knowing a person by the name of Daljit Toor who rented a basement suite in his family home on 128th Street in Surrey.

**10**  Although he denied knowing Cheri Kostynick, she testified that she knew him through her then boyfriend, Daljit Toor. Ms. Kostynick testified as to her involvement with the theft and revining scheme in relation to various of the vehicles involved in this and earlier trials.

**11**  Harpreet Awla also acknowledged knowing Lynn Holt, who is now deceased, but who was involved with some of the vehicles in the revining scheme. Awla was present with Ms. Holt on November 27, 2003 when both of them were arrested after a failed attempt to sell one of the revined vehicles. He has refused to provide his cellular telephone number or records for the times connected to the conspiracy alleged. He also failed to attend an examination for discovery continuation scheduled for him on October 26, 2011. He did not attend the trial or defend himself in relation to these claims.

**12**  Gurpreet Awla is a younger brother of Harpreet Awla. He also knew Cheri Kostynick who, as earlier noted, testified at *Atwal*, BCSC, *supra*, that she was involved in a number of the Revin vehicles in this action. She also testified at the trial of this action that Harpreet Awla was involved in planning and organizing several different transactions involving the Revin vehicles. She testified Harpreet Awla was involved to a greater degree than Gurpreet Awla and it was Harpreet who collected the money from the stolen vehicles, as well as arranging for her to obtain and use false identification in the scheme. She testified she did not disclose as much of Harpreet Awla's involvement in the *Atwal*, BCSC because she was told by him "to keep her mouth shut". She testified at the present trial that she no longer has contact with the Awla family.

**THE TRANSACTIONS**

**Vehicle 53**

**13**  Vehicle 53 is as noted a White 2001 Chevrolet Tahoe, bearing VIN 1GNEK13T91R126020. It was registered to GMAC Leaseco Ltd. as lessor and Country Roots Furniture Inc. as lessee. The lessee insured the vehicle on April 30, 2002 for a year, expiring on April 29, 2003.

**14**  Vehicle 53 was reported stolen on June 6, 2002 by its insured driver, Daniel Carrier. ICBC paid out $50,879.50 consisting of three payments of $300, $187.25, and $692.25 as loss of use payments, and $49,700 as the total loss value less deductible and without GST.

**15**  Subsequently, when the vehicle was recovered and sold, ICBC received $26,666.66.

**16**  In the meantime, on June 16, 2002, an Alberta Vehicle Registration Certificate (AVRC) was provided to ICBC for Revin 53, which was described as a 2000 Chevrolet Tahoe, VIN 1GNEK13T9YJ126012, showing an owner as Gary Gorman at 162 Shawnings Avenue SE, Calgary. That address was fictitious and there were other indicia of fraud on the AVRC, including the wrong month and date of expiry and a non-existent licence class.

**17**  There was no official record of the VIN in the Alberta motor vehicle database and the licence plate identified on the AVRC related to another vehicle.

**18**  The AVRC showed that the vehicle was sold to Sharon Kumiko Seki of 8707 Crest Drive, Burnaby, B.C. on May 27, 2002. Ms. Seki testified that she had no involvement with the purported sale or transfer of the vehicle to her. She testified that she had dealings with Sussex Insurance located in Crest Plaza in Burnaby, a location where a number of the Revin vehicles were registered and insured.

**19**  On June 16, 2002, Mohamed Nachar, a vehicle inspector at Salem Auto Sales Ltd. in Surrey conducted a private vehicle inspection resulting in the creation of a Private Vehicle Inspection Report (PVIR). That report showed that Gary Gorman was the owner of the vehicle at the time of the inspection. On the same date, a B.C. Transfer/Tax form purporting to evidence the transfer of Revin 53 from Gary Gorman to Ms. Seki was provided to the plaintiff, ICBC. The vehicle was registered to Ms. Seki as a non-licensed vehicle. About three days later on June 19, 2002, the vehicle was transferred to Sara McDonald, allegedly for a price of $30,000. Ms. Seki testified she had no involvement with any of the transactions relating to Revin 53.

**20**  On June 30, 2002, a temporary operating permit was issued in Ms. McDonald's name for Revin 53. On June 21st, an Owner's Certificate of Insurance and vehicle licence was issued to her, valid until September 30, 2002. On July 2, 2003, a storage policy was issued to Ms. McDonald for Revin 53 until October 1, 2003.

**21**  On July 31, 2003, ICBC issued a temporary operating permit to Ms. McDonald until August 6, 2003. On August 27, 2003, another temporary operating permit was issued to Ms. McDonald until September 2, 2003. Another temporary operating permit was issued on October 18th until the 19th, 2003, and another one between October 19 and 20, 2003. Finally, on November 4, 2003, another temporary operating permit was issued for that date only.

**22**  Ms. McDonald financed her purchase of Revin 53 through the Greater Vancouver Community Credit Union (GVCCU). She obtained a secured personal loan of $15,000 through the manager of the GVCCU, Allen Ferrier. Mr. Ferrier testified that earlier he had met a person by the name of "Harp" in 2002. He identified that person, by photograph, as Harpreet Awla. According to Mr. Ferrier, Harpreet Awla told him that he was a broker who brought cars in from Alberta to sell to BC residents and he would send his prospective customers to Ferrier to get financing.

**23**  Within a few weeks of meeting Awla, Ferrier began to get phone calls, which he construed as threatening, to coerce him into approving loans for Awla's prospective customers. Ferrier testified he received four or five such calls preceding individuals coming in for loans to purchase vehicles from Awla. He testified he did not recognize the voice on the phone calls to him as being Harp Awla's, but it was always the same voice and he associated the calls to Harpreet Awla's scheme. He denied receiving any financial benefit from Awla or otherwise in the scheme and testified that he approved all the loans referred to him by Harpreet Awla as a result of the phone calls which he considered to be threatening in nature.

**24**  Mr. Ferrier testified that Ms. McDonald would not have qualified for a loan from GVCCU.

**25**  At the time, Ms. McDonald was in a relationship with Daniel Ascencao. She testified that although the vehicle was in her name, it was purchased for his use and benefit and he actually arranged for the loan in her name and paid for the vehicle using the $15,000 in cash which he withdrew from the GVCCU following her receipt of the loan. Ms. McDonald testified she knew Harpreet Awla through her boyfriend, Daniel Ascencao, who was a friend of his.

**26**  Revin 53 was eventually recovered on November 18, 2003, from a car dealership called Savoy Pacific Auto located in Burnaby. At the time of its recovery, it had the false VIN on it and when inspected, it was discovered to be vehicle 53.

**Vehicle 1A**

**27**  Vehicle 1A is a grey 2002 Chevrolet Tahoe bearing VIN 1GMEK1327ZJ141216. It was owned by Geordy Rentals Inc., doing business as Budget Rent-A-Car, and it was leased to Natalie Weber. It was insured with ICBC for a one year period from November 19, 2001 to November 18, 2002. Ms. Weber reported the vehicle stolen on June 19, 2002. ICBC paid out $43,200 in total, consisting of $42,400 to Geordy Rental Inc. as a total loss value, and an additional $800 to Ms. Weber for her loss of use of the vehicle.

**28**  The vehicle was fraudulently re-registered in British Columbia as a 2001 Chevrolet Tahoe bearing VIN 1GNEK13T71J141209, with an AVRC indicating it was owned by John McGill of 374 Jersey Road NE, Edmonton, Alberta. There were various indicia of fraud in the AVRC including the fact that the address of the purported owner did not exist and the licence plate related to a separate vehicle. According to the AVRC on July 4, 2002, the vehicle was transferred to Russell Herding with a Surrey address. Mr. Herding lived at that address at that time but on June 7, 2002, his black 2002 GMC Sierra was stolen from his property along with his driver's licence, photo identification and other documents.

**29**  Mr. Herding's vehicle was the subject of a claim in *ICBC v. Atwal*, BCSC, *supra*. Vikram Atwal was found liable in relation to that claim for conspiracy to convert that vehicle.

**30**  Mr. Herding's identification was used in three Revins in July 2002, including in relation to vehicle 1A. Mr. Herding testified that he had nothing to do with the transfer of Revin 1A to his name from that of John McGill.

**31**  On July 9, 2002, Mahmed Zkeer of MT Auto Repairs completed and filed a PVIR in relation to Revin 1A, naming John McGill as the owner. He completed a PVIR for Revin 32 on the same day.

**32**  On that same date, ICBC processed a B.C. Transfer/Tax form transferring Revin 1A from John McGill to Russell Herding. It was processed by Don Wotherspoon Agency (broker #56539). That broker number related to an insurance agent named Jasdeep Sandhu, who was used by Vikram Atwal on other occasions, in relation to Revin 35 (*ICBC v. Atwal*) on July 16, 2002 and Revin 40 (*ICBC v. Ben-Jaafar*). Vikram Atwal's cell phone records reveal contact between his telephone and Jasdeep Sandhu's on many occasions between January and July 2002, including two calls on July 8 and two calls on July 10, 2002, the day before and the day after the transfer from McGill to Herding on his home number. Vikram Atwal's cell phone records also reveal five calls the day before the transfer and 14 calls the day of the transfer of Revin 1A to Herding on Sandhu's work telephone number.

**33**  In the result, on July 9, 2002, Revin 1A was transferred to Russell John Herding as a non-licensed vehicle with no purchase price asserted. The vehicle retained that registration until September 23, 2002 when it was transferred to Kulbir Singh Chohan for $26,000. Mr. Herding testified that he had no involvement with any of the transfers in relation to Revin 1A. Mr. Chohan insured the vehicle for a year until September 22, 2003.

**34**  Mr. Chohan was a principal of the Hontel Construction and Development Ltd. company, which at the time was involved in building homes in the Chimney Heights area of Surrey. Various builders involved in Chimney Heights Development in 2002 and 2003, including Manraj Khela, Rupinder Chahil and Jarinder Ghuman, were also involved in the purchase of Revin vehicles through the scheme at issue in the present case.

**35**  Mr. Chohan's cell phone records show him to have been in contact with Jagjeet (Bob) Gill in the period around his acquisition of Revin 1A on September 23, 2002. In particular, his phone was in touch with Gill's phone on October 14, 2002. He was again in touch with Jagjeet (Bob) Gill on April 6, 2003, a little less than a month before he reported Revin 1A stolen on May 3, 2003. In *ICBC v. Ben-Jaafar, supra,* Jagjeet Gill was found to be liable in conspiracy to convert five other Revin vehicles.

**36**  The defendant Vikram Atwal's cell phone was in touch with Jagjeet Gill's cell phone on September 22, 2002 and on September 24, 2002, the days before and after the fraudulent transfer of Revin 1A to Mr. Chohan.

**37**  Mr. Chohan testified that Revin 1A was stolen from his residence on April 6, 2003. As a result of its investigation, the plaintiff declined to pay Mr. Chohan for his claim, as it concluded that Revin 1A was not legitimately stolen. Mr. Chohan did not contest that conclusion.

**Revin 10**

**38**  On April 14, 2003, Mohammad Salim of IP Auto completed a PVIR in relation to Revin 10, which according to an AVRC provided to ICBC on that date, was a 2002 Chevrolet Tahoe bearing VIN 1GNEK13T72J141910. The AVRC revealed that Johnathon Kostynick of 739 East 72 Avenue, Calgary, was the owner. Various of the information on the AVRC was demonstrably false: the name was fictitious as was the address; the month and date of expiry was incorrect; and, the Alberta Motor Vehicle System database had no corresponding record for the VIN reported on the AVRC.

**39**  According to the back of the AVRC, Revin 10 was sold to Cheri Kostynick on April 9, 2003. A B.C. Transfer/Tax form was processed by broker 63380 at Allied Insurance on April 14, 2003, evidencing the transfer from "Johnathon Kostynick" to Cheri Larisa Kostynick. There is no purchase price paid and a gift letter and a non-market value and tax exemption form was submitted in support of the transfer. The letter indicated "Johnathon" and Cheri Kostynick were brother and sister and the vehicle was a gift.

**40**  In the *Atwal* trial, Ms. Kostynick admitted her involvement in registering Revin 10 at the request of Gurpreet Awla. She also testified she was involved in registration of Revins 23, 45, 46 and 52. Her evidence from *ICBC v. Atwal*, BCSC, was admitted as evidence in the present trial.

**41**  Ms. Kostynick also testified that in relation to Revin 10, she went with her then boyfriend, Daljit Toor, to a house in Richmond to pick the vehicle up. The false AVRC was given to her by Gurpreet Awla and she took the vehicle to IP Auto for inspection and the creation of the false PVIR. She identified the house in Richmond as the location from which she obtained several vehicles in similar circumstances and testified at the present trial that Harpreet Awla was generally the one who took her there.

**42**  Mohammad Salim testified that he performed the inspection with respect to Revin 10 and identified Cheri Kostynick (by photo) as a person who brought him a number of vehicles for inspection. He also identified Harpreet Awla (by photograph) as the person who attended with Ms. Kostynick, although his identification was very tentative.

**43**  According to IP Auto's records, Johnathon Kostynick was the customer seeking the PVIR and his address was the same as that of Cheri Kostynick on her photo identification.

**44**  On the same day the PVIR was issued, Ms. Kostynick took Revin 10 to Preston Chev-Olds dealership in Langley to attempt to sell it. A sales associate at that dealership named Delmar Jaldbert testified that Ms. Kostynick approached him to sell the vehicle. He obtained a photocopy of the Owner's Certificate and a phone number for her and he told her he would call her once he had made the appropriate inquiries about the car. His inquiries of the VIN through the General Motors database revealed no record of Revin 10. He called Ms. Kostynick a number of times but she initially made excuses not to return to the dealership and eventually stopped answering her telephone. Mr. Jaldbert reported the incident to the police in Langley on or about April 14, 2003. Revin 10 never "resurfaced" after it was first registered on that day.

**45**  According to Cheri Kostynick, Harpreet Awla retrieved Revin 10 from her as a result of the difficulty she was having with the sales representative at Preston Chev-Olds dealership. Subsequently, on May 23, 2003, the vehicle was returned to Ms. Kostynick as Revin 23, a 2002 brown Chevrolet Tahoe with VIN 1GMEK13T72J141924.

**Revin 23**

**46**  Revin 23 came into existence on May 23rd, 2003 when an AVRC in relation that vehicle was presented to ICBC showing Johnathon Edward Klassen of 762 North 72 Street, Calgary, Alberta, as the registered owner. There were a number of indicia of fraud on the AVRC: the address did not exist; the month and date of the expiry were incorrect, and there was no corresponding record for the VIN in the Alberta Motor Vehicle System database. As well, the licence plate shown on the AVRC related to another vehicle.

**47**  The AVRC indicated that the vehicle was sold to Tammy Klassen, a name which Ms. Kostynick used as an alias.

**48**  Tammy Klassen testified that her identification had been stolen in 2000 and she had had nothing to do with Revin 23 or its transfer into her name.

**49**  On May 23rd, ICBC was also presented with a PVIR dated May 16, 2003 indicating that Mohammad Salim of IP Auto inspected it on that date for the owner "Tammy Klassen".

**50**  Also on the same date, ICBC processed a B.C. Transfer/Tax form and related documents through broker 60999 at Prospera Insurance, purporting to transfer Revin 23 to Tammy Klassen from Johnathon Klassen and showing they were brother and sister and the vehicle was given as a gift.

**51**  Following the transfer, the vehicle was subject to a series of temporary operating permits: on May 23, 2003, May 26, 2003 and May 28, 2003. On June 5, 2003, an Owner's Certificate of Insurance and vehicle licence was issued to Tammy Klassen for Revin 23.

**52**  In his testimony, Mohammad Salim confirmed that he issued the PVIR for "Tammy Klassen" on May 16, 2003. He identified Tammy Klassen as Cheri Kostynick by photo and tentatively identified Harpreet Awla as being present with her at the time of the inspection. The IP Auto file contained a photocopy of identification related to Tammy Klassen which Mr. Salim identified as depicting Tammy Klassen or Cheri Kostynick as the person who brought Revin 23 for his inspection.

**53**  Revin 23 was recovered on June 6, 2003 in Surrey. It was inspected and determined to be in reality vehicle 1A.

**54**  There were similarities in the way that Revin 10 and Revin 23 were disguised and brought into existence and they corresponded in make, year and description.

**Vehicle 46**

**55**  Vehicle 46 is a red 2001 GMC Sierra with VIN 1GTHK29GO1E259925. It was owned and insured by Reynolds Concrete Ltd. on October 1, 2001 for a one year period ending September 30, 2002. As with Vehicle 1A, Vehicle 46 went through several transformations of identity. It was reported stolen on June 19, 2002 by the insured driver, as a result of which ICBC paid a total of $46,197.49, consisting of the total loss value of $45,705.75 and $491.74 in loss of use of payments. Eventually, ICBC received $18,009.88 from the sale of the recovered vehicle.

**56**  Following the theft of Vehicle 46, Revin 32 surfaced on July 19, 2002 when an AVRC showing a red 2001 GMC Sierra with VIN 1GTHK29901E259911 owned by Joseph Stansburg of 3427 - 32nd Street NE, Calgary, Alberta was presented to ICBC. Indicia of fraud similar to other of the Revin vehicles were evident on the AVRC, including a non-existent address, the wrong expiry month and date, and the lack of any corresponding records for the vehicle in the Alberta Motor Vehicle System database. The licence plate referred to in the AVRC related to another vehicle. The AVRC indicated that the owner Stansburg had sold the vehicle to Russell Herding who, as earlier noted, had his identification stolen previously and who denied any involvement with the transaction in relation to this vehicle.

**57**  Mahmed Zkeer completed a private vehicle inspection report in relation to Revin 32 on July 19, 2002. This was the same day he "inspected" Revin 1A and less than a week before he inspected Revin 35. All three of those vehicles were purportedly sold to Russell Herding. Vikram Atwal was found liable for conspiracy to convert Revin 35 in *ICBC v. Atwal*, *supra*.

**58**  On the same date, July 19, 2002, ICBC through All Time Insurance (Agent 33332) processed a B.C. Transfer/Tax form purporting to transfer Revin 32 from Stansburg to Herding. As to Herding's vehicle which was stolen at the same time as his identification, Vikram Atwal was found liable in conspiracy to convert that vehicle (stolen 31) in *ICBC v. Atwal*, *supra*.

**59**  All Time Insurance processed a number of transactions of other Revin vehicles, including Revin 25 (February 9, 2003); Revin 38 (February 17, 2003); Revin 20 and 21 (April 16, 2003); and Revin 29 (April 30, 2003).

**60**  Of those vehicles, Vikram Atwal was found liable for conspiracy to convert Revins 38, 20 and 29 in *ICBC v. Ben-Jaafar*, *supra*. In relation to Revin 21, Atwal's cellular telephone number was used in the inspection report issued by vehicle inspector Mohamed Nachar in relation to that.

**61**  On September 4, according to a B.C. Transfer/Tax form filed with ICBC, Revin 32 was sold to Jagjeet Singh Sidhu for $35,350. Mr. Herding had no part in that transaction. The vehicle was duly registered to Sidhu with an Owner's Certificate of Insurance and vehicle licence. It was insured from September 4, 2002 to December 3, 2002.

**62**  Subsequently, on October 1, 2002, Revin 32 was reported stolen by Sidhu. ICBC paid him a total of $41,781.12 ($40,475.75 total loss; $1,144.88 for loss of use; and $160.49 for the loss of a car seat). Mr. Sidhu settled the plaintiff's claim against him for conversion. Revin 32 never resurfaced in that identity, although the plaintiff alleges that it resurfaced with the new identity of Revin 36.

**Revin 36**

**63**  Before Revin 32 was reported stolen, Revin 36 was created with a false AVRC relating to a red 2002 GMC Sierra, VIN 1GTHK29GO2E259814. The AVRC indicated Jagbir Sangera to be the owner. The address given form was non-existent. A variation of the same address had been used on other Revins, including Revin 1, which Vikram Atwal was held liable for in *ICBC v. Atwal*. Other indicia of fraud were present in the AVRC, including false dates and months of expiry, no corresponding records for the vehicle in the Alberta Motor Vehicle database and the use of a licence plate related to another vehicle.

**64**  Mohamed Nachar completed a private vehicle inspection report on September 10, 2002 naming Jagbir Sangera as the owner. According to a B.C. Transfer/Tax form processed by Don Wotherspoon Agency through Agent 56539 (Jasdeep Sandhu) in Port Coquitlam, Revin 36 was transferred from Jagbir Sangera to Deana Marie Breem and it was registered as a non-licensed vehicle. Ms. Breem testified at the *ICBC v. Atwal* trial. Her evidence from that trial was admitted in the present trial. She testified her wallet, including her driver's licence and other identification was stolen in 2000 or 2001 while she was working at the Surrey Place Mall. Her identification was used in connection with Revins 24, 36 and 37. She testified she had nothing to do with any of those vehicles or their registrations.

**65**  As earlier noted, Jasdeep Sandhu, the agent at Don Wotherspoon Agency who processed the transfer of Revin 36 from Sangera to Breem on September 10, had dealings with other Revins between July 2002 and June 2003. During that same time, there was significant telephone contacts between Vikram Atwal's cell phone and Sandhu's home and work telephone number.

**66**  Specifically, with respect to the transfer of Revin 36, there was a call from Vikram Atwal's cell phones to Sandhu's work number the day before the transfer, on September 9, 2002, and 10 calls to his work number from Atwal's cell phone on the actual date of the transfer - September 10, 2002. There was also one call from Atwal's cell phone to Sandhu's home phone on the day of the transfer.

**67**  Revin 36 remain registered in Ms. Breem's name until December 2, 2002 when a BC Transfer /Tax form indicated it was transferred to Breeze Produce Inc./Kulbir Romana for $37,500. The transfer was done through Koch D &Y Insurance. The principal operator of the vehicle was Mr. Romana. The vehicle was insured for six months, expiring June 1, 2003. Mr. Romana reported the vehicle stolen to ICBC on January 21, 2003 as a consequence of which ICBC paid out the sum of $37,325 to Breeze Produce Inc. Mr. Romana settled the ICBC claim in conversion against him.

**Revin 46**

**68**  Revin 36 never resurfaced again, however, on March 22, 2003, Revin 46 bearing VIN 1GTHK29G02E259716 was "imported" into B.C. when a false AVRC and a PVIR completed by Mohammad Salim of IP Auto Services was provided to ICBC showing its transfer from Susan Kostynick of 487 East 36th Avenue, Calgary, Alberta to Cheri Lorisa Kostynick of 12977 Glengarry Crescent, Surrey, British Columbia. Indicia of fraud similar to other Revins were on the AVRC: the address did not exist, the months and dates of expiry were incorrect and the Alberta Motor Vehicle database had no vehicle corresponding to that described in the AVRC.

**69**  On the same date, March 22, 2003, a B.C. Transfer/Tax form showed the transfer of a red 2002 Jaguar with the same VIN as Revin 46 to Cheri Kostynick. On March 24, 2003, ICBC issued an Owner's Certificate of Insurance and vehicle licence by Walia Insurance Company (Agent 62210) changing the description of the vehicle to a red 2002 GMC Sierra from its previous description as a Jaguar.

**70**  According to Mohammad Salim, as earlier noted, he was brought a number of vehicles for inspection by a person he identified by photograph as Cheri Kostynick, and a young Indo-Canadian male whom he tentatively identified, by photo, as Harpreet Awla.

**71**  On March 28, 2003, ICBC processed a B.C. Transfer/Tax form for Revin 46 indicating the sale of Revin 46 from Cheri Kostynick to Carter Plymouth Chrysler. Although no purchase price was revealed in the transfer documents, the sales manager of Carter Plymouth Chrysler testified that the dealership paid Ms. Kostynick $25,000 for the vehicle by cheque. After transfer of Revin 46 to Carter Plymouth Chrysler, it was transported to DK Brokerage Ltd. in Abbotsford, B.C. on April 4, 2003 and thereafter to Klamac Motor Company Ltd., a car dealership in Richmond, B.C.

**72**  It was recovered from a car dealership in Marysville, Washington state, U.S.A. on September 2, 2003 and on inspection it was determined to be Vehicle 46.

**Vehicle 41**

**73**  Vehicle 41 is a 2001 green Chevrolet four-wheel drive Silverado, VIN 1GCHK29142E101505. It was owned and insured by Arnold Boldt on September 17, 2001 for one year, expiring September 16, 2002. It was reported stolen on June 10, 2002 as a result of which ICBC paid out $58,521.17 ($57,724.13 for total loss and $796.86 for loss of use).

**74**  When eventually recovered after several transactions, ICBC received $31,110 in sale proceeds.

**Revin 59**

**75**  An AVRC indicating that Jacob Gilberts of 347 East 48th Avenue NE, Calgary as owner was presented to ICBC on September 18, 2002. The AVCR had indicia of fraud similar to the false AVRCs used in the scheme, including a false address, an incorrect date and month of expiry, a non-existent class of licence and no corresponding Alberta records for the vehicle. As well, the listed licence plate related to another vehicle.

**76**  According to the AVRC, the vehicle was sold to Rupinderjit Kaur Choong on September 2, 2002. Ms. Choong denied any knowledge of or involvement with the vehicle but testified her passport was lost in 1997.

**77**  Mohamed Nachar completed a PVIR form on August 14, 2002 naming Jacob Gilberts as the owner. As well, Nachar had acknowledged completing a number of false PVIR forms for Jasraj Bains and Vikram Atwal in the *ICBC v. Atwal* action. He also completed PVIR forms in relation to this action including Revins 53, 36, 16, 17 and 18. He acknowledged knowing Harpreet Awla and Allen Ferrier as someone whom he had borrowed money from through GVCCU in the late 1990s. Three of the vehicles that Nachar purported to inspect in this action were purchased by financing through Allen Ferrier at GVCCU.

**78**  The PVIR along with the AVRC and the B.C. Transfer/Tax form were provided to ICBC on September 18, 2002 evidencing the transfer of the vehicle to Ms. Choong and registering the vehicle as a non-licensed vehicle.

**79**  On October 12, 2002, another B.C. Transfer/Tax form was processed for Revin 59, transferring it into the name of Rodney Daniel Dick, indicating a purchase price of $25,000. Ms. Choong had no involvement in the sale or transfer of the vehicle to Mr. Dick. The Owners Certificate of Insurance and Vehicle Licence was issued by ICBC to Mr. Dick.

**80**  Mr. Dick was called in the plaintiffs' case. He agreed that in 2002 he was in "dire financial straits". He went to see Allen Ferrier at GVCCU to see about getting a loan for a vehicle. It was a green Silverado truck he had been shown by someone named Harp who had the vehicle for sale.

**81**  He was given a photo of Vehicle 41 and testified it resembled the vehicle he purchased as Revin 59. He was shown a picture of Harp Awla and said he couldn't say for sure if it was "Harp" as he only saw him one or two times and it was a long time ago. He met Harp at the GVCCU and first saw the green Silverado at the bank. He got a loan from the GVCCU for $16,000 and the truck for $25,000. It was Allen Ferrier who completed the application forms for a loan for Mr. Dick and he approved the financing for Revin 59. The loan was secured against Revin 59. He paid cash for the vehicle, paying "Harp" at an unlocked van parked outside GVCCU. It was registered to Dick on October 12, 2002. He had it for a few months and then reported it stolen on February 26, 2003.

**82**  He knew Ross Hinchberger. He was the person who referred him to Allen Ferrier at GVCCU, who in turn referred him to "Harp". After he reported the green Silverado stolen he telephoned Ferrier to ask if there was another vehicle available. Around six months later, Harp phoned him and told him "they" had another vehicle that had been fixed up.

**83**  He was paid at $39,000 by ICBC for the green Silverado, so he made about $15,000 on the transaction. He acknowledged that he wrongly reported having paid $35,000 for the vehicle.

**84**  Once Revin 59 was reported stolen by Mr. Dick, it did not resurface.

**Revin 17**

**85**  Revin 17, which the plaintiff alleges to be the same vehicle as Revin 59 (Vehicle 41), was registered on October 21, 2002, not long after Revin 59 was registered to Dick and several months before he reported it stolen. The registration documents included an AVRC in relation to a brown Chevrolet Silverado VIN 1GCHK29172E290442. The AVRC had indicia of fraud including a false address, an incorrect month and date of expiry and no VIN corresponding vehicle in the Alberta Motor Vehicles database. The PVIR was prepared by Mohamed Nachar on October 18, 2002, the same date he issued PVIRs for Revin 16 and Revin 18. As noted, he had issued a PVIR for Revin 59 on August 14, 2002.

**86**  On October 21st, a B.C. Transfer/Tax form was filed with ICBC purporting to transfer Revin 17 from its Alberta owner Jonathon Greywood to Reaia Ng. It was processed by McNaughton and Ward Insurance Agency, Agent 61523. Ms. Ng who testified, had nothing to do with the vehicle or the transfer. She denied being a past customer of McNaughton and Ward but there was a previous transaction in her name involving the agency.

**87**  Mohamed Nachar admitted performing "blind inspections" for Jasraj Bains and Vikram Atwal when he testified at the *ICBC v. Atwal* trial, during this time frame. Nachar acknowledged some previous contact with Harpreet Awla but gave no clear evidence that Awla had brought him vehicles for inspection. He did acknowledge knowing Allen Ferrier and he inspected three other revined vehicles in this action financed by Ferrier at GVCCU.

**88**  Revin 17 remained registered to Reaia Ng as a non-licensed vehicle until March 21, 2003 when Cynthia Hill, who at that time was married to Ross Hinchberger, both took out a three day temporary operating permit ("TOP") with a letter purportedly signed by Ms. Ng authorizing it. Ms. Hill testified that Mr. Hinchberger asked whether she was interested in buying the vehicle. According to Ms. Hill, she drove the vehicle for the duration of the TOP but when it expired, someone took the vehicle away. She saw the same vehicle again about two to three months later in Mr. Hinchberger's possession. She identified a photograph of Vehicle 41 as Revin 17 and the vehicle she later saw in Mr. Hinchberger's possession (Revin 41). It was a green 2002 Chevrolet Silverado.

**89**  She had heard of and met Harpreet Awla through Ross Hinchberger. Ross Hinchberger knew Harpreet Awla and Allen Ferrier. He got Revin 41 from Harpreet Awla and he testified it was the same vehicle that he and Ms. Hill previously had with the TOP.

**Revin 41**

**90**  Revin 41 first surfaced on June 27, 2003, through a false AVRC in relation to a green 2002 Chevrolet Silverado VIN 1GCHK29172E2110089 purportedly owned by Jason McDonald of 283 - 34 Avenue Calgary, Alberta. The address was non-existent, the month and date of expiry was incorrect and Alberta's Motor Vehicle database has no record of Revin 41. As well, the licence plate identified on the AVRC related to another Alberta vehicle. There was no PVIR issued for Revin 41 and on June 27, Cynthia Hill purchased a three day TOP on the basis of the AVRC. She testified she did so at the request of Mr. Hinchberger who testified he got the vehicle from Harpreet Awla. Both of them testified Revin 41 and Revin 17 were the same vehicle.

**91**  On July 2, 2003, the vehicle was seized from the Hinchberger/Hill residence. Upon subsequent inspection it was determined to be Vehicle 41 originally reported stolen by owner Arnold Boldt on June 10, 2002.

**92**  The key which was seized from Revin 41 was examined by a locksmith as were keys turned over by Mr. Boldt in relation to Stolen 41 and Dick (Revin 59). The locksmith concluded that the keys from the Dick claim and the Boldt claim were cut to the same combination and the Boldt keys were original, while the Dick keys were cut by code as were the keys seized with Revin 41.

**Vehicle 16**

**93**  The sole remaining defendant in connection with Vehicle 16 is Sandeep Rai against whom the plaintiff has default judgment as a result of his failure to file an appearance and statement of defence.

**94**  Vehicle 16 is a black 2001 GMC Sierra VIN 1GTHK291X1E325621 registered to Red of the Red Chicken and Seafood Co. Ltd. (RRCS) and owned for a year as of September 1, 2002.

**95**  The named driver was Edwin Piendl. He reported the vehicle stolen on March 11, 2002. ICBC paid out $60,202.17 consisting of $57,500 to GMAC for total loss, $1,128 to Piendl for reimbursement of a car seat and tires, and $1,334.77 to Piendl representing a loss of use payment. In a salvage sale after recovery of the vehicle, ICBC received $33,881.

**96**  A PVIR in relation to Revin 18 completed by Mohamed Nachar on October 18, 2002 was provided to ICBC on October 21, 2002. The PVIRs for Revin 18 and 17 were completed at the same time. As with Revin 17, the PVIR was created before the original vehicle was reported stolen. No PVIR accompanied a false AVRC relating to a black 2002 GMC Sierra VIN 1GTHK291X2E325717. The AVRC related to a vehicle which did not exist in the Alberta database and referred to a licence plate connected to another vehicle. The Alberta owner was said to be James Gurin and on the B.C. Transfer/Tax form filed on October 21, 2002 it was ostensibly transferred to Edith Wilson as a gift from her "cousin" James Gurin. Ms. Wilson testified she had nothing to do with the vehicle or the transfer. Vehicle 16 remained in Ms. Wilson's name until January 3, 2003 when it was transferred by B.C. Transfer/Tax form to Harold Roger Moran for $12,500.

**97**  Ms. Wilson had nothing to do with that transfer. Mr. Moran insured the vehicle until July 2, 2003 and on July 3, 2003, insured it until July 2, 2004.

**98**  Mr. Moran and the defendant Rodney Dick knew one other, as Mr. Moran worked for Mr. Dick from time to time and Mr. Dick's cell phone records reflected various calls to Mr. Moran between September 9, 2002 and February 26, 2003. The latter date was the day on which Mr. Dick reported Revin 59 stolen.

**99**  According to Ross Hinchberger, he had introduced Moran to Harpreet Awla as Moran was interested in buying a truck.

**100**  Revin 16 was seized on July 13, 2003. A subsequent inspection revealed it to be Vehicle 16. The bar code used on the false VIN related to a vehicle stolen five days before Vehicle 16 was reported stolen.

**101**  The transfer of the vehicle from Ms. Wilson to Mr. Moran was done through McNaughton and Ward Insurance Agency, where Ms. Wilson had been a customer. Sundeep Rai was the agent who processed the transfers.

**Vehicle 18**

**102**  Vehicle 18 is a blue 2002 Chevrolet Silverado VIN 1GCHK29172F290439. It was owned by GMAC as Lessor and Canvey Equipment Erectors Ltd. as Lessee and insured on June 21, 2002 for a year expiring June 20, 2003.

**103**  The insured driver was Keith Fortier. He reported the vehicle stolen on October 23, 2002. He testified that until it was stolen, the vehicle had been in his possession and control exclusively. No one had permission to use it, or take it for an inspection prior to the theft. He denied ever taking the vehicle to Guildford Mall or putting a for sale sign on it.

**104**  As a result of the theft claim, ICBC paid out a total of $59,141.32, consisting of $55,200 to GMAC as total loss value without GST, $2,759.05 to Canvey Equipment Erectors as total loss value; $268.74 to Canvey as total loss value and $854 to Keith Fortier as loss of use payment.

**105**  When eventually Vehicle 18 was recovered, ICBC received $31,590 by way of salvage sale. These funds are being held in trust pursuant to an order of Allan J. in *ICBC v. Smith*, which was ordered to be tried at the same time as this action.

**106**  Revin 18 first surfaced in British Columbia on October 21, 2002, two days prior to the reported theft of Vehicle 18. Revin 18 was a blue 2002 Chevrolet Silverado VIN 1GCHK29172E290456. It was identified in a false AVRC provided to ICBC on October 21, 2002 as being owned by Gabriel Stevens of 483 East Veneals Way, Calgary Alberta. There was no corresponding vehicle in the Alberta Motor Vehicle database, and other indicia of fraud were on the AVRC. The PVIR was completed by Mohamed Nachar on October 18, 2002 as noted on the same day as Revins 16 and 17, both apparently "blind" inspections. The PVIR reflected the same owner and address as the false AVRC. Those documents along with a B.C. Transfer/Tax form were provided to and processed by ICBC on October 21, 2003, evidencing a transfer from Gabriel Stevens to Tarsem Phagura. Mr. Phagura testified he had nothing to do with the vehicle or its transfer and the signature on the forms related to him were not his.

**107**  The vehicle was registered to Tarsem Phagura as a non-licensed vehicle on October 21, 2002 until it was transferred to the defendant Jason Smith on October 29, 2002. The purchase price shown on the B.C. Transfer/Tax form was $38,500. The transfer/tax form showed the sellers' signature as "P. Tarsem". Mr. Phagura testified he had nothing to do with the sale and the signature was not his.

**108**  On October 29, 2002, ICBC issued Mr. Smith with an Owners Certificate of Insurance and Vehicle Licence to Jason Guy Smith. It was insured until October 28, 2003.

**109**  Revin 18 was one of the several revined vehicles that was purchased through loans from GVCCU arranged by Allen Ferrier.

**110**  There was evidence that Mr. Smith began his dealings with GVCCU on October 10, 2002 by depositing the sum of $5,100 into a newly opened account from "Royal Bank Mission - savings acc." Despite being asked on discovery, Mr. Smith was unable or unwilling to produce records relating to the source of these funds.

**111**  On October 10, 2002, GVCCU generated a Member Information Profile document and an Equifax Summary relating to Mr. Smith's credit worthiness in connection with his application for a loan of $18,900 said to be for the purchase of a "2002 Chev 2500 Diesel". Mr. Ferrier testified that his information on the application form came from "the client".

**112**  Subsequently, on October 29, 2002, a second Member Information Profile was generated by GVCCU in relation to a second application for a loan, this time for $6,100.00 for a "car purchase".

**113**  On a net worth statement in his second Member Information Profile, the 2002 Chevrolet Silverado was valued as $48,000.

**114**  On October 29, 2002, a total of $30,000, including loans one and two and $5,000 from the initial deposit were withdrawn from Mr. Smith's account. According to a withdrawal slip which he signed, Mr. Smith obtained the $30,000 in cash.

**115**  There was no evidence whether or from where the balance of the asserted purchase price of $38,500 was paid.

**116**  Mr. Ferrier was replaced as the General Manager of the GVCCU Surrey Branch by Robert Hattrick in January 2003. Mr. Hattrick testified he was contacted by Jason Smith in July or August 2003, who told him that the police informed him that Revin 18 was a stolen vehicle. He was at the branch for copies of documents relating to the financing. Mr. Smith told Mr. Hattrick that he was in the Guildford Mall area and noticed Revin 18 in the parking lot, which was about one and one-half blocks away and on the opposite side of the street from the GVCCU branch. Mr. Smith told Mr. Hattrick that his keys and registration to the vehicle had been dropped off for him at the branch.

**117**  Revin 18 was involved in an accident in April 2003, and Mr. Smith took it to Erv's Autobody Ltd. in Abbotsford.

**118**  According to Troy Hanley, who worked at Erv's, when he entered the vehicle's VIN on to the database, it appeared to relate to another vehicle, a smaller gasoline engine pick-up truck.

**119**  Mr. Hanley testified he told Mr. Smith of the discrepancy. He also testified he noticed that the federal standards decal located on the inside of the driver's door appeared to be tampered with and he also told Mr. Smith about that and recommended that Mr. Smith contact ICBC and the police. He testified Mr. Smith did not seem concerned.

**120**  The manager at Erv's at this time was Joseph Kovack. He testified he had no recollection of speaking with Mr. Smith about the vehicle and had no recollection of there being a problem with a VIN related to a 2002 Silverado.

**The Evidence of Jason Smith**

**121**  Mr. Smith testified on his own behalf. In 2003, he lived in Mission, B.C., and was working as an apprentice lineman for Galbraith Power Lines. That job entailed travelling around the Lower Mainland.

**122**  He was in the market for a pick-up in the $40,000 range, for which he would have needed a loan.

**123**  He bought Revin 18. He just noticed it for sale in the Guildford Mall parking lot and contacted the person selling it by the phone numbers on the for sale sign.

**124**  He subsequently met the seller whose name was Tarsem. He told Smith he was going through a divorce and needed the money. He had a look at the vehicle and drove it around the mall parking lot. He could not recall the mileage or any discussion about how new it was. There was a discussion about price. He remembered talking about $40,000, which he thought was a little cheaper than a dealership price. They settled on a price of $38,500. He believed there was more than one discussion. There was nothing about the transaction that made him suspicious.

**125**  Mr. Smith had to finance the vehicle and did so through a credit union, the GVCCU, which was right across the street from where the truck was located in the mall parking lot.

**126**  He had done no previous business there. He was asked why he went there and answered that he was not sure exactly, it was in the area, and he frequented the area. He had to borrow $25,000 to $30,000.

**127**  He dealt with a guy named Al at the credit union. He was asked if someone referred him to Al and responded "I just set up an appointment and went to the appointment after that."

**128**  He filled in all the forms that were required. He thought there were about two to three weeks between attending at the credit union and purchasing the truck.

**129**  It was "Al" who had him fill out the forms for his loan application. At some point he specifically discussed the vehicle with Al. He said the bank wanted to check out the truck so he had to get hold of the seller to let him know he needed the vehicle and he dropped off the registration at the credit union. He was not present but Al informed him of that and said his loan was ready to go and the truck had "cleared lien charges". He went to the credit union for the transfer documents, for his plates and insurance, then met the seller and got the truck. He got the plates and insurance at Meridian Insurance in Port Coquitlam and registered the transfer. He then went to Richmond to pick up the truck. He couldn't recall why he went to Richmond. He paid the seller some cash when he picked up the vehicle but couldn't recall how much. He didn't think he gave him $38,500. He got a set of keys and drove away. He never saw the seller "Tarsem" again.

**130**  He testified that the truck was in a collision and required repair. He took it to Erv's where he dealt with a person called Joe. He thought Troy was just a helper. There was some difficulty with the parts not fitting. He didn't recall if there was an issue about the "serial number".

**131**  He recalled Troy saying something about the vehicle being stolen. He was surprised and didn't know what to think but no one made further inquiries and ICBC paid his claim. He said Joe told him the parts weren't matching so the truck could be stolen or there could be a mix-up in the factory. Joe told him ICBC insured it and was paying for the damages. He was never contacted by ICBC.

**132**  In July 2003, two RCMP officers came to his front door. He let them in to have a look at his truck. After looking at it, they took the vehicle away to inspect it even though Mr. Smith protested.

**133**  Once the vehicle was towed by the police, he never saw it again. He was not contacted again by the police or ICBC. He did not attempt to contact the police. ICBC commenced an earlier action against him in September 2004 and another one in 2007.

**134**  He repaid the loan to the credit union. He did not recall going there to make any inquiries as Mr. Hattrick testified.

**135**  He retained counsel two to three weeks after the truck was seized, and had no further direct dealing with the police or ICBC.

**Cross-Examination**

**136**  Mr. Smith had two other licensed trucks at the time he purchased Revin 18.

**137**  He didn't recall if he was referred to GVCCU by the seller. He agreed on his examination for discovery that he testified he went to GVCCU on his own and was not referred there. He got one loan and one overdraft in the total amount of $25,000, on October 29, 2002. He couldn't recall if he received $30,000 in cash from the credit union and couldn't recall if he got his truck the same day he got the cash.

**138**  He agreed that, although he was told the vehicle was stolen at Erv's, he did not report it to the police or ICBC.

**139**  He denied knowing more about the source of his vehicle than he told the Court. He had no knowledge of Harp Awla, Rodney Dick, Roger Moran or Ross Hinchberger.

**140**  He could not recall if anyone else was present when he saw the vehicle presented for sale in Guildford Mall. He wasn't sure if the credit union was one and one-half blocks away from the parking lot. He had never before been to the credit union. At the time, he did his banking at the Royal Bank. He agreed when he picked up the vehicle it was a long way from Meridian Insurance and a long way from the Guildford Mall. He agreed to go to Richmond to pick up the truck. Someone else had to drive with him to bring the vehicle back but couldn't recall who. He agreed Meridian Insurance was close to where he worked.

**141**  He was asked if he paid $38,500 and replied "I think that's what I paid". He agreed the transfer tax box that said below market value was checked but was not sure if he put it there, but he signed the form. He thought the price was cheaper than at a dealership.

**142**  He agreed at his examination for discovery that the vehicle "was worth more than he was asking".

**143**  He agreed on the loan application to GVCCU the vehicle was valued at $48,000.

**144**  He agreed he had produced no cell phone records of calling the number of the seller.

**145**  He also agreed the seller "could have" referred him to Ferrier at the GVCCU.

**146**  In his discovery evidence on November 9, 2010, he testified as follows:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 301 |  | Q |  | What do you remember in terms of how you dealt with the bank -- like your first dealing with the bank? - did you walk over there, did you call over there -- what did you do? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I think I just walked in. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 302 Q | You think so? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 303 Q | Was the seller involved in that in any way? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | How do you mean? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 304 Q |  | Was the seller involved in introducing you to the credit union or anything like that? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I don't recall. |  |

...

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 307 |  | Q |  | Yeah, those questions were about the credit union, and you said "I think I found it on my own." |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 308 Q | And is that right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah, it was across the street. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 309 |  | Q |  | And then later questions I was just making sure that nobody had introduced it to you or referred you to it? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I don't recall that, no. I believe it was just convenient across the road, and that's where I went. |  |

**147**  He expressed uncertainty about whether he was introduced by the seller to GVCCU.

**148**  He agreed he met the seller two times; once at the Mall and once in Richmond when he picked up the truck, and that there was about two or three weeks between deciding to buy the truck and actually buying it.

**149**  He said he didn't know the truck could have been in the possession of the real owner if he saw it two to three weeks before he bought it on October 29, 2002, speculating that maybe he saw another truck.

**150**  He did not recall October 10, 2002 as the date he probably went to the credit union. He agreed the vehicle's registration documents were dropped off at the credit union but did not know if Ferrier knew the person who dropped them off or referred to him as Harp.

**151**  He did not recall meeting with Mr. Hattrick after the truck was seized, or expressing surprise that he had signed for $30,000 cash. He said he did not think he carried that much cash.

**152**  He did not recall depositing $5,000 of his own funds with the credit union. He produced no documents showing that he opened an account or deposited funds on October 10, 2002. The documents he produced did not reflect any transactions before October 29, 2002.

**153**  He agreed that he would have had to pay an additional $8,500 in addition to his $30,000 withdrawal on October 29 to make full purchase price but produced no records relating to the withdrawal or payment of $8,500.

**154**  He agreed he could not substantiate that he paid the seller more than $30,000, except the insurance papers which show a price of $38,500.

**155**  He agreed he was unable to show the source of the original $5,000 deposited in the GVCCU on October 10, 2002.

**156**  He agreed he could have got a loan from other facilities such as the Royal Bank, but not did check there or shop for interest rates. He could not recall what the interest rate at the credit union was or what he could have got elsewhere.

**157**  He agreed that on October 10, 2002 that he just went to the credit union. He applied for a loan of $18,900 for the purpose of purchasing a "2002 Chevrolet 2500 Diesel". He agreed it would cost more than $18,900, but did not agree that he had not yet seen it. He agreed that according to the statement of his account at the credit union, he deposited $5,000 on October 10, 2002 and that was the only amount until October 29 was the $18,900 loan and the $6,100 overdraft were deposited to his account.

**158**  He couldn't recall having $5,000 ready to deposit when he went to the credit union on October 10, 2002. He agreed it appeared that he brought $5,100 in cash from which $5,000 was deposited according to the credit union source of funds declaration on October 10, 2002, which he agreed he asserted came from his Royal Bank savings account. He produced no documents to reflect the source of the $5,100. He could not recall why he deposited $5,000 if it was just to open an account.

**159**  He agreed that the October 29, 2002 withdrawal slip for $30,000 looked like it had his signature on it. He agreed when he met the seller he gave him money but did not recall what he gave him. It is possible he paid him something other than $38,500.

**160**  Mr. Smith agreed that after the vehicle was seized by the RCMP in July 2003, he did not sue RCMP or any insurance agent or agency and has not brought a counterclaim against ICBC in any existing actions.

**Vehicle 37**

**161**  Vehicle 37 is a 2002 white Chevrolet Express van, with VIN 1GCFG28M721237837. It was leased and insured by Mohammed Hanif in January 2003. The lessor was GMAC Leaseco Ltd. Mr. Hanif used the van in his courier business and drove the vehicle to and from Seattle daily from Monday to Friday. He reported the vehicle stolen on March 3, 2003. He testified that he used the van up until that date and it was never out of his possession or control.

**162**  As a result of the theft claim, ICBC paid out a total of $27,003.38, comprised of $799.28 for loss of use payment to Mohammed Hanif and $26,204.13 to GMAC for a total loss value.

**163**  Before Vehicle 37 was reported stolen, Revin 37 surfaced on February 27, 2003 when ICBC was presented with an AVRC, a PVIR and a B.C. Transfer/Tax form in relation to a white 2002 Chevrolet Express bearing VIN 1GCG929R121139431. The AVRC had indicia of fraud similar to others used in the scheme. It showed as owner, Gill Sandeep of 43 Northwoods Village, Edmonton, Alberta T6H 4L1. That was the same address as on the AVRC for Revin 24 which identified Wayne Grant as the owner. The name Gill Singh Sandeep was on the AVRC for Revin 55. The postal code was used for Revin 28, 29, 30, 2, 25 and 57.

**164**  Both Jasraj Bains and Vikram Atwal had connections to Sandeep Gill and Vikram Atwal was found liable for Revins 28, 29 and 30 which used the same postal codes.

**165**  The address on the AVRC for Revin 37 does not exist, the month and date of expiry is incorrect and there is no corresponding vehicle in the Alberta motor vehicle data base.

**166**  According to the AVRC, Revin 37 was transferred to Dianna Breen of Surrey on February 17, 2003. The B.C. Transfer/Tax form dated February 27 showed a different address for Ms. Breen. As earlier noted, Ms. Breen testified her identification had been stolen in 2000/01 and she had nothing to do with Revin 37 or its transfer to her and from her at any time. Her identify had been used for Revin 24 and 36 as well as 37 and she had no knowledge of any of these transactions.

**167**  The PVIR form presented to ICBC was dated February 27, 2003. It indicated that at noon Satwant Ranauta of Bansal & Sons Diesel Automotive inspected Revin 37 and indicated Sandeep Gill of 7128 - 123 Street in Surrey as the owner.

**168**  The address for Sandeep Gill is in fact the address of Bhupinder Gill who leased Stolen 48 which was the subject of the action in *ICBC v. Ben-Jaafar*.

**169**  On February 27, 2003 at 6:53 p.m., ICBC processed a B.C. Transfer/Tax form to transfer the vehicle to Dianna Marie Breen. It was processed by Broker 33332 at All Time Insurance.

**170**  Revin 37 was processed as a gift to avoid the need for payment of taxes.

**171**  There was a connection established between Vikram Atwal and All Time Insurance which processed Revin 32 in this action, as well as Revins 28 (February 9, 2003), 38 (February 17, 2003), 20 (April 16, 2003), and 21 and 29 (April 30, 2003). Vikram Atwal was held liable for Revins 38, 20 and 29. With respect to Revin 21, Vikram Atwal's cellular number was used on the PVIR by Mohamed Nachar who conducted its inspection.

**172**  The defendant Satwant Ranauta was, and is, a licensed vehicle inspector employed by Bansal & Sons. He did not testify at the trial. At his examination for discovery he testified he got the "job card" for the inspection. He was unclear whether in 2003 he would regularly get a "job card" to do inspections. He had no specific recollection of the inspection in question, but based his discovery evidence on what was in the remaining document.

**173**  Jasvinder Gill, also known as Jerry Gill, previously testified as to his involvement with Stolen/Revin 24 for which his cousin Raminder Bhandher was found liable in *ICBC v. Atwal*.

**174**  He was named as the lessee for Vehicle 24, but in reality it was leased for Mr. Bhandher.

**175**  With respect to Vehicle 24, I made the following findings based on the evidence before me then, which is similarly before me at this trial, at para. 282 as follows:

[282] On the other hand, I have no difficulty in accepting that the plaintiff has proved its case against the defendant Bhandher with respect to vehicle 24. With respect to that vehicle, there is reliable evidence which I accept that he was the user and lessee of the vehicle through his cousin Jasvinder Gill and that over a month before he reported it stolen, it had been given a false VIN registered through Jasdeep Sandhu of Don Wotherspoon Agency. Bhander received calls from Vikram Atwal's cell phone, and vehicle 24 was transferred a second time about three weeks before the defendant Bhandher reported it stolen. In those circumstances, and in light of the locksmith's evidence that the vehicle was likely stolen with a working key, and that the false registration of the vehicle was accomplished by an insurance agent whom Raminder Bhandher's friend Vikram Atwal was in contemporaneous contact with all combines in my view to establish to the requisite degree that Raminder Bhandher was integrally involved in the conspiracy to convert vehicle 24 and I accordingly find him liable.

**176**  In the present case, Jerry Gill testified that the defendant Kulvinder Bansal is a good friend of his and he was aware of his business Bansal & Sons. He was sure he was at the business in 2003 and was familiar with Satwant Ranauta, one of Bansal's employees. He identified a call from Mr. Bansal's cell records as being to his home number on February 11, 2003, but had no recollection of the reason for the call. He had no knowledge of the transfer of Vehicle 37 to Dianna Breen on February 27, 2003 and knew nothing of the vehicle involved.

**177**  He said he recalled Vikram Atwal and Raminder Bhandher asked about vehicle inspections and he gave them his friend's business number. He recalled Mr. Bhandher asking him whether his friend did vehicle inspections.

**178**  He was asked about two calls from Vikram Atwal's cell phone to his, one on July 3, 2002 and one on January 23, 2003. He did not know what they were about and speculated they could be from Mr. Bhandher.

**The Evidence of Kulvinder Bansal**

**179**  Kulvinder Bansal testified on his and his company's behalf. He took over the business started by his father in 1983 or 1984. The defendant Mr. Ranauta has been employed for about 20 years. Both of them are licensed to inspect vehicles. There is a Commercial Vehicle Manual which was available in 2003. He identified a page (Exhibit 134) which dealt with verifying the VIN.

**180**  He identified a later 2010 version of the Manual relating to the inspection of the VIN.

**181**  He identified a PVIR filled out by Mr. Ranauta and testified that was the form which would be filled out for a PVIR. He identified Mr. Ranauta's handwriting and signature on the form. He noted the odometer showed 56,362 according to what was written on the form.

**182**  In cross-examination, he said he knew nothing about the transfer of the vehicle or its insurance certificate and had no copies of those documents in his business records. He had not seen or had a copy of the AVRC.

**183**  He did say that his company produced a copy of the PVIR which it had in its records. There were three copies, white, green and blue - one for owners, one for the facility and one for ICBC. He gave his lawyer the green copy, which was the facility copy.

**184**  That was the only document on file. There was no registration certificate, no insurance documents, no identification documents and no internal documents other than the PVIR.

**185**  It was the practice to write down the start time of the inspection.

**186**  He himself had no involvement in the inspection. He found no invoice for the inspection. When the case started he called his lawyer and produced the records for the lawyer.

**187**  The job card was what was used to give to the mechanics to do the required work. They were created manually but if no one was in the office none would be created. There was no job card created in this case.

**188**  He knows Mohammad Salim and knew he inspected vehicles. He got in touch with him to find out what this was all about.

**189**  He knew Paramjit Awla. Jerry Gill is a friend of his. He didn't see him regularly in 2003 and didn't think he came to his property.

**190**  He denied Jerry Gill referred the Express van to him. He was familiar with Raminder Bhandher as "Sandy" and dealt with him one or two times with Jerry Gill.

**191**  He may have called Jerry Gill in February 2003 but they never did any business.

**192**  He agreed no PVIR should be issued if there was no vehicle present.

**193**  He agreed that Exhibit 20E which contained the false VIN seized from Revin 37 after it was recovered was not a proper bar code for a dashboard VIN, it was a piece of paper - most are metal and attached with rivets. He agreed it was clearly not a dashboard VIN.

**194**  In cross-examination by Mr. Murray, he said ICBC would regularly audit inspectors once every one or two years to check the paper work.

**195**  Revin 37 was maintained in Ms. Breen's name until March 9, 2003 when it was transferred to Ajmer Litt for a purchase price reported to be $6,000. On March 9, an Owners Certificate of Insurance and Vehicle Licence was issued until April 23, 2003 as a delivery vehicle.

**196**  The plaintiff has a default judgment against Ajmer Litt on the basis that he is liable for purchasing Revin 37 from Vikram Atwal.

**197**  On March 9, 2003, Vikram Atwal received a cheque from Ajmer Litt for $3,600. Mr. Atwal has refused or neglected to produce the bank records for the account to which he deposited the cheque. Mr. Atwal's telephone records show contact between his cell phone and telephone numbers associated to Ajmer Litt in the period leading up to, including and following March 9, 2003, the date of the transfer of Revin 37 to Litt.

**198**  According to Litt's telephone records, he called Atwal three times on March 9, the day of his purchase of Revin 37, and several more times after that, on March 10, 12, and 13, 2003.

**199**  On August 1, 2003, Litt brought Revin 37 to the North Delta Public Safety Building where it was inspected and determined to be Vehicle 37. The false VIN on the dashboard was seized and it was what was shown to Mr. Bansal, who testified it was not a proper VIN plate.

**Vehicle 52**

**200**  Vehicle 52 is a green 2000 Pontiac Grand Am with a VIN of 1G2NF12EXYM811753. It was reported stolen by its insured owner, Shelley Ali, on December 23, 2002. As a result of the theft, ICBC paid out a total of $17,115.08, consisting of $15,157.50 as the total loss value to the insured, $1,390 as a loss of use payment, $40.58 for reimbursement for a booster seat, and $525 to Golf 2000 Auto Sales as part of the total loss value.

**201**  The keys for the vehicle turned over by the owner showed signs of tracing indicative of copying. Eventually the vehicle was recovered on October 27, 2003 and it sold in a salvage sale for $6,200 leaving a net claim of $10,913.35.

**202**  The insured, Shelley Ali, was married to Mohammed Ali, who testified. He knew and was a former business partner of Tariq Hezbawi. He took the vehicle to Hezbawi's auto mechanic shop for repairs. He knows some of the other defendants in this action, including Mohamed Nachar, Mahmed Zkeer and Sandeep Rai.

**203**  Revin 52 surfaced on May 12, 2003 when an AVRC was provided to ICBC in relation to a 2000 Pontiac Grand Am with VIN 1G2NF12EXYM811803.

**204**  According to the AVRC, Justin Klassen of 378 - 47th Avenue in Red Deer, Alberta was the registered owner. No such address existed and the AVRC had other indicia of fraud similar to other "revined" vehicles. The Klassen name had been used on other occasions as well. The Alberta Motor Vehicle database had no records for a vehicle corresponding to the VIN and the licence plate referred to in the AVRC related to a different vehicle.

**205**  According to the AVRC, Revin 52 was sold to Tammy Klassen in May 2003. Ms. Klassen's identification had been stolen and her name had been used in several other fraudulent "revining" transactions.

**206**  Cheri Kostynick testified that she used Ms. Klassen's name as an alias in a scheme to "revin" the stolen vehicles.

**207**  The bar code on Revin 52 was inspected when the vehicle was eventually recovered on October 27, 2003, and it decoded to a 1992 Chevrolet G20 Van associated to Paramjit Awla, who was Harpreet and Gurpreet's uncle.

**208**  On May 12, 2003, ICBC registered the vehicle to Tammy Klassen after presentation of a B.C. Transfer/Tax form, an AVRC, a PVIR, and a Non-Market Value and Tax Exemption form showing that the vehicle was a gift from Justin Klassen to Tammy Klassen.

**209**  Cheri Kostynick, using the identity of Tammy Klassen, purchased three temporary operating permits for the vehicle; one on May 12, one on May 14 and one on May 21 of 2003.

**210**  The PVIR which had been submitted in relation to the registration of the vehicle was dated May 8, 2003 and was completed by Mohammad Salim of IP Auto. He completed three other PVIRs for Tammy Klassen around the same time.

**211**  Ms. Kostynick testified that she registered Revin 52 (as well as Revins 23, 10 45 and 46) at the request of Gurpreet Awla. She used the Tammy Klassen ID and after the vehicle was registered, it was advertised for sale and she sold it to Harjit Brar for $6,200, consisting of $2,500 in cash and a cheque for $3,700. She got a commission for her part in the sale and gave the balance of the money to others involved in the scheme.

**212**  Harjit Brar's husband is Navdeep Brar. He testified that it was he who owned and possessed the truck. When he attended an insurance office to attempt to insure the vehicle in October of 2003, he was told by the agent he was dealing with that it was stolen. He waited for the police to arrive after they were called and then took them to his home where the vehicle was located.

**213**  When recovered, it was determined that Revin 52 was in reality Vehicle 52.

**214**  The plaintiff seeks damages in the amount of the loss, plus interest jointly and severally against Harpreet Awla, Gurpreet Awla and Cheri Kostynick. The plaintiff also seeks damages for the loss, plus interest jointly and severally against Navdeep Brar, but no costs are sought against Navdeep Brar.

**Vehicle 14**

**215**  Vehicle 14 is a black 2001 GMC Yukon. It was insured by Cheryl Kuhn on November 20, 2002. It bore VIN 1GKEK13T71R134386 and the insurance was set to expire on November 19, 2003.

**216**  On March 3, 2003, Ms. Kuhn reported Vehicle 14 stolen as a result which ICBC paid out a total of $50,656.05 consisting of $47,473 as total loss value, $121 to pay Cheryl Kuhn for reimbursement of a new licence plate, registration fee and car seat, $392.25 to Cheryl Kuhn representing a loss of value payment and $2,669.80 to Carter Pontiac Buick, representing the total loss value with GST of Vehicle 14.

**217**  After eventually recovering and selling the vehicle, ICBC recovered the sum of $27,901.

**218**  A forged AVRC with respect to Revin 14 was recovered on May 8, 2003. The AVRC related to a black 2001 GMC Yukon bearing VIN 1GKEK13T71R134680 and indicated that Johnathon Klassen of 342 East 31st Avenue in Edmonton, Alberta, T7R 4Y9 was the registered owner. That address was non-existent. On the back of the AVRC, it indicated that Revin 14 was sold to Tammy Klassen on May 1, 2003. The purported transaction was similar to the transaction between Johnathon Klassen and Tammy Klassen with respect to Revin 23 and similar to the transaction involving Revin 52 between Justin Klassen and Tammy Klassen.

**219**  The bar code on the public VIN of Revin 14 (as with Revin 23 and Revin 52) decoded to the Awla Van.

**220**  Revin 14 was never registered in British Columbia, but in May 2003, Cheri Kostynick went to Five Star Auto, an inspection facility, located on 76 Avenue in Surrey, to obtain an inspection of Revin 14. Mr. Parmjit Dhaliwal testified that a person whom he identified as Cheri Kostynick from her photograph brought him a black 2001 GMC Yukon to be inspected.

**221**  He obtained a copy of the Alberta registration document purportedly showing the transfer of Revin 14 from Johnathon Klassen to Tammy Klassen and he completed the inspection of Revin 14.

**222**  After the inspection, Revin 14 would not start and when Ms. Kostynick returned to Five Star Auto he advised her that the repairs should be covered under warranty and suggested the vehicle be taken to a dealership for repair.

**223**  According to Mr. Dhaliwal, Ms. Kostynick told him she didn't want the repairs done under warranty and told him that money was not a problem and just go ahead and fix the vehicle.

**224**  At that point, Mr. Dhaliwal became suspicious. He contacted the RCMP and provided the serial number (VIN) for Revin 14.

**225**  The police attended and recovered the vehicle and determined it to be Vehicle 14. The vehicle was towed to the North Delta Public Safety Building in Delta.

**Vehicle 42**

**226**  Vehicle 42 is a grey 2003 Chevrolet Silverado with VIN 1GCHK29143E117365. It was insured by Clayton Gagnon on February 27, 2003 for a one year period.

**227**  Mr. Gagnon reported the vehicle stolen on June 13, 2003.

**228**  ICBC paid out $491.73 to Enterprise Rent A Car, representing a loss of use payment and another $400 to Clayton Gagnon, representing a loss of use payment for a total of $891.73. The vehicle was, when recovered, returned to Mr. Gagnon, although ICBC paid an additional $8,747.47 to Musalem Chevrolet for repair charges.

**229**  Revin 42 surfaced on June 19, 2003, bearing VIN 1GCHK29143E117379 on an AVRC provided to ICBC on that date. The AVRC indicated that Jessica Bowens of 389 East 34 Avenue in Calgary, was the registered owner. Variations of that address were used on Revin 1 (which was also a vehicle related to Rodney Dick), Revin 36 and Revin 47.

**230**  The address at issue did not exist and the AVRC contained other indicia of fraud, including the fact that the Alberta Motor Vehicle database has no record corresponding to the VIN indicated.

**231**  The back of the AVRC indicated that Revin 42 was sold to John Zarelli, of Surrey on June 19, 2003.

**232**  Mr. Zarelli testified that he became involved in Revin 42 through a person named Lynn Holt. He was told by Ms. Holt that her friend fixed up and sold vehicles that could only sell a certain number of vehicles each year without a dealer's licence. Mr. Zarelli testified that he understood he was doing a favour in registering Revin 42 in his name and that the owner would avoid the cost of obtaining a dealer's licence.

**233**  He said that in return, Ms. Holt would forgive money which he owed to her.

**234**  Mr. Zarelli testified he never used Revin 42. He was introduced to Lynn Holt by two East Indian males. He identified his signature on the insurance documents for Revin 42, but testified that the remaining handwriting was not his and was already filled out when he received the documents from one of the Indo-Canadian males. The PVIR provided to ICBC in respect of Revin 42 was completed by Mohammad Salim and Mr. Zarelli agreed that he attended IP Auto and provided a copy of his driver's licence for the inspection.

**235**  On June 19, 2003, ICBC processed a B.C. Transfer/Tax form evidencing the transfer of Revin 42 from Jessica Bowens to John Zarelli showing it as a gift, as a result of which no tax was payable.

**236**  After Revin 42 was registered in his name, Mr. Zarelli testified he did not see it again and had no further involvement with it or the two Indo-Canadian men.

**237**  Mohammad Salim confirmed that he performed the inspection of Revin 42 and identified a photograph of Cheri Kostynick as a person who had brought him several vehicles for inspection.

**238**  He gave a tentative identification of a photograph of Harpreet Awla as a person who attended with Ms. Kostynick.

**239**  On June 27, 2003, ICBC processed a B.C. Transfer/Tax form evidencing the transfer of Revin 42 from John Zarelli to Rodney Dick which showed a purchase price of $36,000.

**240**  Mr. Zarelli testified that the signature on the tax form was his but he said he was not involved in the transfer of Revin 42 from his name to Rodney Dick and he does not know Rodney Dick.

**241**  Rodney Dick testified that he purchased Revin 42 from Harpreet Awla. He said he paid $30,000 cash to Harpreet Awla for the vehicle. He was unable to pay in full the agreed upon price of $35,000 and testified that he received telephone calls from Harpreet Awla asking him to pay the outstanding amount.

**242**  He testified that he had originally been told by the manager at GVCCU that he could obtain a loan for the vehicle but was later told he could not and as a result, he was unable to pay in full for Revin 42.

**243**  The vehicle was recovered on July 10, 2003, seized by the RCMP and eventually determined to be Vehicle 42. The bar code on the false VIN on the dashboard decoded to the bar code on the public VIN of the van associated to Paramjit Singh Awla.

**244**  Paramjit Singh Awla was deceased and was Harpreet Awla's uncle, that is, his father's brother.

**245**  That van was reported stolen on October 7, 1998. It was owned by a company called Three-R Contracting Services which was a business owned by Paramjit Awla. Harpreet Awla was noted to be the insured driver and the last driver of the van prior to its reported theft. It was Harpreet Awla who reported the theft of the van to ICBC on October 7, 1998. The Awla van was recovered but there was extensive damage to the interior and exterior of the vehicle. The claim for insurance was denied by ICBC and the van was towed to the Awla residence. Although Paramjit Awla sought to contest ICBC's denial of coverage, his case was dismissed when he failed to attend a settlement conference in the Provincial Court.

**246**  As ICBC did not pay for the theft claim in respect of Vehicle 42, it did not assume ownership of the vehicle and, accordingly, the only claim is against the defendant Harpreet Awla for damages in the amount of $9,927.03, plus interest and punitive damages.

**Vehicle 45**

**247**  Vehicle 45 is a white 2002 GMC Yukon bearing VIN 1GKEK63U52J285149. It was insured by Transportation Lease Systems Inc. as lessor and 573789 BC Limited as lessee on May 16, 2003.

**248**  On August 5, 2003, the insured driver of the vehicle, Jan R. Huettle reported the vehicle stolen.

**249**  ICBC paid out a total of $2,187.48 as a result of the Huettle claim, consisting of $421.49 paid to Budget Rent-a-Car representing a loss of use payment and $1,765.99 paid for mechanical repairs to the vehicle, towing costs and reports.

**250**  Revin 45 surfaced on August 11, 2003, when an AVRC was provided to ICBC in relation to a white 2002 GMC Yukon bearing VIN 1GKEK63U22J337434 indicating that Tanya Gortons of 329 Scarce Road NW, Edmonton, Alberta was the registered owner of Revin 45. There were similar indicia of fraud with respect to the AVRC for Revin 45 as with regard to the other AVRCs, including the fact that the address did not exist, the month of expiry was incorrect and the date of expiry was incorrect. In addition, there was no record for the VIN in the Alberta's Motor Vehicle database.

**251**  According to the AVRC, Revin 45 was sold to Bonnie Keats of 382 Carlsway NE, Calgary, Alberta. On August 9, 2003, Mohammad Salim completed a PVIR which was supplied to ICBC on August 11, 2003. That PVIR, together with the AVRC and a B.C. Transfer/Tax form, Non-Market Value and Tax Exemption form and a gift letter, evidenced that Bonnie Keats purchased Revin 45 from Tanya Gortons without any purchase price as the vehicle was a "gift to cousin".

**252**  There were several temporary operating permits issued for Revin 45, one on August 11, one on August 14, and one on August 15, 2003.

**253**  Cheri Kostynick admitted that she registered this vehicle at the request of Gurpreet Awla and that Bonnie Keats was the name she used.

**254**  Mr. Salim, who conducted the vehicle inspection, identified a photograph of Cheri Kostynick appearing as Tanya Gortons as the person who had brought him several vehicles for inspection. The photograph he identified was on an Alberta driver's licence in the name of Tanya Gortons but appeared, in fact, to be a photograph of Cheri Kostynick whom he had dealt with as Tammy Klassen.

**255**  The information on the driver's licence is similar to information on the Alberta driver's licence relating to Bonnie Keats and to another person by the name of Samantha Albert who was involved with Revin 49. As well, the photographs appeared to be identical.

**256**  The first transfer of Revin 45 to Bonnie Keats from Tanya Gortons was effected by Peggy Bird, an agent at Co-Operator's Insurance. She testified that a female identifying herself as Bonnie Keats came in by herself to register the vehicle in her name and told her that she had received the vehicle as a wedding gift from a relative.

**257**  Ms. Kostynick admitted that Bonnie Keats was the alias which she used.

**258**  On August 14, 2003, Ms. Kostynick testified that she posed as Bonnie Keats and attended Applewood Kia at 16299 Fraser Highway in Surrey and attempted to sell Revin 45.

**259**  Lindsay Scott, who was a sales associate at Applewood Kia in August 2003, dealt with Cheri Kostynick posing as Bonnie Keats. She identified the photograph on an Alberta driver's licence photocopy in the Applewood Kia file as the person she dealt with.

**260**  When the management at Applewood Kia conducted a background check for the vehicle and when that check indicated that the public VIN of Revin 45 came back to a black GMC Yukon Denali registered in Texas, they called the police who attended the dealership and recovered the vehicle.

**261**  Ms. Kostynick, in the guise of Bonnie Keats, left the dealership before the police arrived. After seizure of the vehicle, the police determined that Revin 45 was indeed Vehicle 45. The sum of $2,187.48, plus costs and interest, are sought against Harpreet Awla, Gurpreet Awla and Cheri Kostynick, and punitive damages are sought against Harpreet Awla and Gurpreet Awla.

**Vehicle 49**

**262**  Vehicle 49 is a black 2003 GMC Yukon Denali bearing VIN 1GKEK63U83J233600. That vehicle was owned by Westminster Auto Leasing as lessor and Alternative Cartage Inc. as lessee, both of which insured the vehicle on March 19, 2003, for a year. On August 14, 2003, the insured driver for the vehicle, Racalda Overdick, reported it stolen. The vehicle was recovered by the police before it was registered in British Columbia but after its recovery, ICBC found an AVRC and a PVIR in the vehicle. It was recovered on August 25, 2003.

**263**  The AVRC indicated that Samantha Alberts of 221 Konkav Road SW, Calgary, Alberta was the registered owner. The information on the driver's licence as it appears on the AVRC related to Samantha Albert, appeared very similar to the information on the Alberta driver's licences of Bonnie Keats and Tanya Gortons in relation to Revin 45. As well, the photographs appear identical.

**264**  The PVIR which was recovered from the vehicle after recovery of the vehicle was dated August 18, 2003 and was completed by Mohammad Salim of IP Auto, naming Samantha Alberts of 34921 52nd Street in Surrey as the owner.

**265**  Previously, Mr. Salim had completed the inspection of Revin 45 with Tanya Gortons as the owner, showing identification with a photograph identical to that provided by Samantha Alberts.

**266**  Mr. Salim again identified a photograph of Cheri Kostynick as a person who brought him several vehicles for inspection.

**267**  He testified that Ms. Kostynick attended IP Auto with another person, a young Indo-Canadian male, and he tentatively identified a photograph of Harpreet Awla as that Indo-Canadian male.

**268**  Richard Howell was a witness who owned a security company called H & G Contracting. In 2003, he employed Lynn Holt as a security guard at a construction site in the South Surrey area. He was aware that Ms. Holt had a friend named Parm. He was aware that Lynn Holt also had a friend named Ujjal, who he thought was a brother of Parm.

**269**  He testified that he fired Ms. Holt from her position as a security guard after about six weeks and he hauled her trailer from the construction site where she was working to a trailer park called Timberland Trailer Park. He noticed that in her trailer she had a "bunch of identification" on the coffee table but he did not know whose identification it was.

**270**  Revin 49 was recovered by the police on August 25, 2003 at Timberland Motel and Campground, the same trailer park where Lynn Holt's trailer was hauled to by Mr. Howell. After inspection, it was determined that Revin 49 was, indeed, Vehicle 49.

**271**  Keith Thomas was the manager at Timberland in 2003, and he identified Lynn Holt as a resident there in that same year. He was aware that a vehicle was seized from Timberland in August of 2003 and he believed it was parked beside her trailer when it was seized.

**272**  ICBC paid out a total of $1,325.00 in insurance monies as a result of the theft claim by Ricalda Overdick, consisting of $1,300 to Alternative Cartage Inc. as a loss of use payment and $25 paid to ICBC. ICBC has also claimed further payments of $517.08 to Precision Locksmith for a report; $363.09 to Unitow Services; $1,584.77 for repair; $461.97 for repair; and $123.00 to Alternative Cartage amounting to $3,049.87. The total is $4,347.87. ICBC's claim in relation to Vehicle/Revin 49 is $4,226.66 plus interest.

**The Law - Conspiracy**

**273**  In *ICBC v. Atwal*, I set out the law founded on claims of civil conspiracy at paragraphs 236-248 as follows:

[236] In G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 765-772, the elements of liability for an actionable conspiracy under the second branch of the *Cement LaFarge* test, [*[1983] 1 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M27Y-00000-00&context=), are discussed. The requirements can be reduced to the following:

1. An agreement between two or more persons to act unlawfully, which constitutes a common design. Participation is the essence of conspiracy, and mere knowledge that a conspiracy exists or acquiescence in the agreement will not suffice.
2. Conspiracy is an intentional tort, which applies where the parties have agreed to act in a certain way, for a certain purpose, and with a certain intent. The parties accused of a civil conspiracy must know what they are doing; they must be willing participants acting as a consequence of their agreement to do so, desiring the end that is to be achieved (committing unlawful acts).
3. The agreement must consist of a plan to engage in "unlawful conduct", which in the context of civil conspiracy includes crime, tort, breach of contract, or breach of statute.
4. Damage is an essential element of tortious conspiracy, and the plaintiff must establish the defendants committed acts which furthered the conspiracy and caused it damage.

[237] The Court of Appeal in *Golden Capital Securities Ltd. v. Holmes*, [*2004 BCCA 565*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0C0-00000-00&context=), [*33 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0C0-00000-00&context=), discussed the requirement of a constructive intent to injure, stemming from Justice Estey's statement in Cement LaFarge that the defendants "should know in the circumstances that injury to the plaintiff is likely to result". Lowry J.A. (for the Court) at para. 46 commenced his analysis with the comment that "Liability in conspiracy requires proof by compelling evidence". Mr. Justice Lowry then stated the following regarding the elements of the tort:

47 Thus, to prove a case in conspiracy, it is first necessary to plainly establish, directly or by inference, that there was an agreement between the defendant and one or more others. That does not mean an agreement in the contractual sense. A defendant must be shown to have agreed in the sense of having combined or conspired with one or more others to carry out a common design or a means of achieving a common objective, which is then implemented with resulting injury to the plaintiff.

48 Where the means are unlawful, there must also be proof that the unlawful conduct was directed toward the plaintiff and that the likelihood of injury to the plaintiff was or should have been known to the defendant.

49 What becomes important for the purposes of this appeal is the meaning to be given to the "likelihood of injury". What knowledge must the defendants have had, or should they have had, about the potential for injury to the plaintiff?

[238] Building on *Cement LaFarge*, Lowry J.A. stated the following test, which requires the conduct to be "directed" at a third person in circumstances where consequential loss to that third person was "clearly expected":

56 Civil conspiracy, as it has long been understood, has been the conspiring of two or more to injure a third. Having particular regard for the fact that conspiring to act unlawfully is an extension of that tort, I consider that a constructive intent must constitute more than a greater than 50% chance that injury to the plaintiff will occur; it must amount to a clear expectation.

57 The tort exists not to provide a remedy for unlawful conduct per se but to provide a remedy where conduct of that kind is directed at a particular person (or persons) who suffers injury.

58 I would then say that liability in conspiracy will arise where two or more have agreed to carry out a common design by unlawful means, directed at a third person, if those who have agreed knew, or in the circumstances should have known, that injury to that person was likely in the sense that it was clearly expected, and the injury was sustained as a result of the agreed upon means being implemented.

THE CO-CONSPIRATORS EXCEPTION TO THE HEARSAY RULE

[239] In the course of considering the plaintiff's case against the various conspiracy defendants, it is necessary in relation to some of the transactions at issue to determine the admissibility of the acts or declarations of alleged co-conspirators against other alleged co-conspirators.

[240] As I see it, there is no evidence potentially admissible against the defendant Bains under the co-conspirators exception to the hearsay rule as to his membership in the conspiracy. The only evidence capable of proving that the defendant Bains was a member of the conspiracy in relation to Revins 27, 19 and 31, comes from the direct evidence of Mohamed Nachar, who did not testify as to any acts or declarations of the other alleged co-conspirators in furtherence of the conspiracy capable of implicating the defendant Bains.

[241] Similarly, as against the defendant Bhandher in relation to Revins 27, 19 and 31 (the Tung vehicles) the only evidence capable of proving his membership in those conspiracies is the direct evidence of Tiffany Work. There is no other evidence of acts or declarations of other alleged co-conspirators in furtherance of the conspiracy implicating the defendant Bhandher as a member as opposed to establishing the nature and existence of the conspiracy.

[242] The same is true, I conclude, of his involvement with Revin 24.

[243] In my view, however, the evidence relevant to Jaspal Atwal and Vikram Atwal is on a somewhat different footing in that there is a body of evidence of the acts and/or declarations of each of them from which it could be inferred that they were acting in concert with respect to Revin 27 and accordingly, there is evidence of the actions of each of them potentially admissible against the other probative of the issue of their membership in the conspiracy with respect to Revin 27.

[244] In determining that issue, it is helpful to consider *I.C.B.C. v. Sun*, [*2003 BCSC 1059*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22HJ-00000-00&context=), [*18 B.C.L.R. (4th) 338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22HJ-00000-00&context=), in which Groberman J. (as he then was) dealt with the application of the co-conspirator's exception to the hearsay rule in the context of a civil trial. In that decision, Groberman J. cited *R. v. Carter*, [*[1982] 1 S.C.R. 938*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M24K-00000-00&context=), [*67 C.C.C. (2d) 568*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M24K-00000-00&context=), and *R. v. Barrow*, [*[1987] 2 S.C.R. 694*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23GH-00000-00&context=), quoting from the dissenting judgment of MacIntyre J. in the latter case, setting forth the three stages of the rule as follows:

1. It is convenient to begin an analysis of the co-conspirators' exception to the hearsay rule in Canada with *Regina v. Carter*, [*[1982] 1 S.C.R. 938*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M24K-00000-00&context=). In that case, the Supreme Court of Canada established the approach for applying the co-conspirators' exception to the hearsay rule in a criminal case. The court held that the rule is to be applied in three stages. A convenient summary of the three stages appears in the dissenting judgment of McIntyre J. in *Barrow v. The Queen*, [*[1987] 2 S.C.R. 694*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23GH-00000-00&context=), [*38 C.C.C. (3d) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23GH-00000-00&context=) at 228-9:
2. The trier of fact must first be satisfied beyond reasonable doubt that the alleged conspiracy in fact existed.
3. If the alleged conspiracy is found to exist then the trier of fact must review all the evidence that is directly admissible against the accused and decide on a balance of probabilities whether or not he is a member of the conspiracy.
4. If the trier of fact concludes on a balance of probabilities that the accused is a member of the conspiracy then he or they must go on and decide whether the Crown has established such membership beyond reasonable doubt. In this last step, only the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the conspiracy as evidence against the accused on the issue of his guilt.

[245] Groberman J. went on to note in relation to *R. v. Carter* that:

1. The analysis in *Carter* is consistent with an agency theory of the co-conspirators; exception. The acts and statements of a member of a conspiracy in furtherance of the conspiracy are treated as acts and statements of the collective. They can be used against individuals who are alleged to be members of the conspiracy once it is established, to the requisite degree of proof that they are, indeed, members. The "requisite degree of proof" will be lower than the proof required for a conviction.

[246] Groberman J. went on to address the difficulty of applying the *Carter* test in a civil case and concluded that not only must the ultimate standard of proof of membership in the conspiracy at the third stage of the test be changed from beyond a reasonable doubt to on a balance of probabilities, but also that the penultimate standard of proof determinative of the use of evidence of acts and declarations of co-conspirators must be changed from the balance of probabilities to a *prima facie* case which equates to "a reasonable likelihood".

[247] Groberman J. also addressed the issue of multiple conspiracies. In criminal cases, a count in an indictment can only relate to a single conspiracy. Groberman J. noted that in the context of civil cases involving multiple conspiracies, as in the present case "the co-conspirator's exception to the hearsay rule can only apply to a statement made in furtherance of the varied conspiracy to which a defendant is found to belong."

[248] In the result, Groberman J. articulated the test for admissibility of evidence under the co-conspirator's exception to the hearsay rule in a civil case thus at para. 35 of his reasons:

1. The trier of fact must first be satisfied on the balance of probabilities that a conspiracy alleged in the Statement of Claim in fact existed.
2. If an alleged conspiracy is found to exist, then the trier of fact must review all the evidence that is directly admissible against the defendant and decide whether it shows a reasonable likelihood that the defendant is a member of that conspiracy.
3. If the trier of fact concludes that there is a reasonable likelihood that the defendant is a member of that conspiracy, then the trier of fact must go on to decide whether the plaintiff has established such membership on the balance of probabilities. In this last step, the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the specific conspiracy under consideration as evidence against the defendant on the issue of his or her liability.
4. The trier of fact must conduct this analysis separately not only for each defendant, but also for each conspiracy that may include a given defendant.

**274**  In this case, as in the case of *Atwal,* BCSC, the plaintiff relies to some extent on evidence of similar facts in relation to the conspiracy defendants. In *Atwal*, I found the similar fact evidence to be of limited utility as I do in this case. In *Atwal*, BCSC, I held as follows with respect to similar facts at paras. 216-226:

[216] The plaintiff sought to lead evidence of several transactions involving other vehicles as similar fact evidence. As the various defendants were unrepresented, I deferred ruling on the admissibility of the similar fact evidence until I had heard all of the evidence and the arguments advanced so I could consider the issue in its full context.

[217] The plaintiff argues that evidence in relation to "other Revins" is admissible to prove participation in relation to the seven vehicles at issue in the current law suit and provides the following examples of how it is relevant:

\* The similarity in documentation and vehicle disguise of all vehicles.

\* The overwhelming connection between Revin 24 (in the action) and Revin 37 (other Revin).

\* Identities, addresses and participants in the seven subject Revins that reappeared later on other Revins.

\* The corroboration of Mohamed Nachar's testimony against both Vikram Atwal and Jasraj Bains through cellphone records and invoices on other Revins.

\* The involvement of Jasraj Bains with the Sussex insurance agent on 8 Nachar-inspected vehicles, and three vehicles registered in the name of "Adam Chan".

\* The involvement of Vikram Atwal with Bob Gill, the supplier of six other Revins to Gurcheran Kondolay.

\* Jaspal Atwal's close connection to several of the other Revins, involving his customers and co-workers.

\* The close connections of each of the conspirators to various participants in other Revins - insurance agents, identities, theft victims and Revin owners.

[218] The plaintiff relies on the tendency of the similar fact evidence to establish the existence of a scheme, citing the judgment Bull J.A. in *McDonald v. Canada Kelp Co. Ltd.*, [*[1973] 5 W.W.R. 689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-627T-00000-00&context=), [*39 D.L.R. (3d) 617*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-627T-00000-00&context=) at 626 (B.C.C.A.) as follows:

Where there is a real and substantial nexus or connection between the act or allegation made, whether it be a crime or a fraud (but not, of course, limited to those), and facts relating to previous or subsequent transactions are sought to be given in evidence, then those facts have relevancy and are admissible not only to rebut a defence, such as lack of intent, accident, mens rea or the like, but to prove the fact of the act or allegation made.

[219] The plaintiff also relies on the observations of Bull J.A. in *Conti v. Canarim Investment Corp.*, [*[1974] 5 W.W.R. 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-6280-00000-00&context=) at 711, [*49 D.L.R. (3d) 262*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-6280-00000-00&context=) (B.C.C.A.), in interpreting his judgment in McDonald where he stated as follows:

With one Justice dissenting as being unable to accept such a material bearing, the majority of the Court (of which, as indicated, I was one) held that under the circumstances of that case the rejected evidence was material to the issue. There a plan or scheme was asserted that for the purpose and in the course of privately selling shares in a venture to members of the public the same alleged fraudulent misrepresentations sued upon were, during the same general period, allegedly made to other potential purchasers in the like position as the plaintiffs. On that basis the evidence of the other statements was held relevant and material to the issue of whether or not the like statements were in fact made to the plaintiffs. I think the case at bar is quite distinguishable from that in MacDonald. No like selling plan or scheme of conduct on the part of the respondents was alleged.

[220] The plaintiff relies on the following passage from Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada* 2nd ed. (Toronto: Butterworths, 1999) at 596:

[s]imilar occurrences and recurrent instances of the same conduct may be sufficient to render the evidence admissible if the past similar acts are part of a system.

[221] The plaintiff also relies on Sopinka, *The Law of Evidence in Canada*, for the proposition that in civil cases, lesser emphasis is placed on the potential prejudicial effect of similar fact evidence than in criminal cases, as explained in the following passage at p. 602:

It is apparent from the foregoing that while the rules relating to the admissibility of similar fact evidence in civil cases reflect very strongly the influence of the "category" approach of the earlier criminal cases, they in fact focus on whether the evidence is relevant to a material issue. The categories of relevance are not closed and the inquiry should concentrate on determining the probative value of the evidence without the constraint of fitting the evidence into a particular pigeonhole. Moreover, prejudice, which dominates the determination of admissibility of similar fact evidence in criminal cases, plays a significantly lesser role in civil cases, and evidence of similar facts should be admitted if it is logically probative to an issue in the case as long as, to borrow the formula of Lord Denning, it is not unduly oppressive or unfair to the other side, does not consume a disproportionate amount of court time, and does not bear the whole burden of proving the case.

[222] The plaintiff submits that in the present case, the evidence is relevant to the identity of persons involved in the conspiracy alleged and as to the intent of the conspirators with respect to the seven subject vehicles.

[223] In the case at bar, the evidence taken as a whole, establishes that the Revinning scheme was wide-spread and involved other participants who engaged in transactions not necessarily involving the four conspiracy defendants here. It is accordingly the theory of the plaintiff that the present conspiracy defendants were involved in some but not all the transactions comprising the larger scheme. In that context, evidence of other transactions they may have been involved with, without a full canvass of the circumstances of transactions they are not alleged to be involved with produces the potential danger of unfairness and prejudice.

[224] In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* 3rd edition (Markham: LexisNexis, 2009) the editors note as follows at para. 11.220:

The general principles that govern the admission of similar fact evidence in criminal cases apply equally to civil cases. Thus, evidence of discreditable conduct on other occasions is presumptively inadmissible and evidence tendered solely to show a general disposition or a mere propensity to act or think or feel in a particular way is inadmissible. The party who proffers evidence of discreditable conduct on other occasions must satisfy the trial judge on the balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudicial effect.

[225] What is at issue in the present case is not whether the conspiracy defendants were involved in a larger scheme to wrongfully acquire, falsely identify, register and sell vehicles for profit, it is whether they were involved in one or more of the seven transactions at issue in this law suit. In general, evidence that they were involved in other like transactions does not particularly address whether they were involved in a conspiracy relating to the instant transactions, so long as there is evidence that those involved were not part of a closed set limited to the present defendants. On balance, and in general therefore, I am not satisfied that the evidence of other transactions involving one or more of the conspiracy defendants is admissible as circumstantial evidence in connection with the transactions at issue in the case at bar. Except for Jaspal Atwal, none of the conspiracy defendants has testified or otherwise called evidence raising a defence to be rebutted by the impugned similar fact evidence. Thus, to the extent the similar fact evidence is proffered to prove "the fact of the allegation made" through proof of the existence of a scheme, it is of very limited utility and of considerable prejudicial effect, and I would not admit it on that basis.

[226] Having made that ruling however, it does not follow that all of the evidence called by the plaintiff which touches on transactions outside the scope of this lawsuit is necessarily inadmissible. There is evidence, for example, which touches on one or more of the defendants' participation with others involved in other transactions which is probative of a fact in issue in connection with the transactions at bar and hence relevant and admissible. In particular, the evidence of cell phone calls between the defendant Jasraj Bains' cell phone and Saleem Auto's telephone number in early 2003 offers some corroboration of Mohamed Nachar's evidence that Bains was a customer who brought him vehicles or vehicle registrations for inspection. In other words, it is evidence of an association that offers some indirect support for Nachar's testimony that he and the defendant Bains had contact through Saleem Auto, and it bears on the reliability and credibility of Nachar's evidence.

**LIABILITY OF THE CONSPIRACY DEFENDANTS**

**275**  The remaining conspiracy defendants in this action are:

1. Harpreet Awla:

Vehicle 53; Vehicle 59; Vehicle 17 (41); Vehicle 18; Vehicle 46; Vehicle 10 (1A); Vehicle 52; Vehicle 14; Vehicle 23 (1A); Vehicle 42; Vehicle 45; and Vehicle 49.

1. Vikram Atwal:

Vehicle 14; Vehicle 32; Vehicle 36 (46); Vehicle 37; Vehicle 10 (1A); and Vehicle 23 (1A).

1. Gurpreet Awla:

Vehicle 52; Vehicle 14; and Vehicle 45.

Those conspiracy defendants against whom the plaintiff has taken default judgment are:

1. Sandeep Rai

Vehicle 17 (41); Vehicle 16; and Vehicle 18.

1. Cheri Kostynick

Vehicle 46; Vehicle 10 (1A); Vehicle 52; Vehicle 14; Vehicle 23; Vehicle 45 and Vehicle 49.

**1. Harpreet Awla**

**276**  Harpreet Awla did not participate in the trial. In assessing his liability, it is necessary to consider whether the evidence proves on the balance of probabilities that there was a conspiracy as alleged in the plaintiff's pleadings, whether Harpreet Awla was a member of the conspiracy and whether the conspiracy he was a member of related to the specific vehicles that the plaintiff claims him to be liable for.

**277**  Having considered the evidence and the submissions of the plaintiff, which were not resisted in any way by the defendant, Harpreet Awla, I conclude he was liable in respect of a number of vehicles but not all contended for by the plaintiff.

1. Vehicle 53/Revin 53

**278**  The thrust of the plaintiff's case against Harpreet Awla in connection with this vehicle comes from the confluence of the evidence of Sarah McDonald and Allen Ferrier. Ms. McDonald financed the purchase of Revin 53 through a loan from the Greater Vancouver Community Credit Union (GVCCU) which had been approved by Allen Ferrier but for which she would not otherwise have qualified. The $15,000 loan was used by her boyfriend, Daniel Ascencao, to purchase Stolen/Revin 53. Ascencao was a friend of Harpreet Awla.

**279**  Mr. Ferrier testified that he approved loans for customers referred to him by Harpreet Awla to purchase vehicles Awla claimed to be importing from Alberta. He said before all the loans he processed for customers referred by Awla to finance vehicle purchases he got a threatening telephone call which caused him to approve the loan whether the customer was qualified or not. That evidence, taken with the evidence of Cheri Kostynick that she was aware of Harpreet Awla's involvement with the scheme and that he collected money for the stolen vehicles and arranged, in those transactions in which she was involved, to supply her with false identification, persuades me on the balance of probabilities that Harpreet Awla is liable in conspiracy in relation to Stolen/Revin 53.

1. Vehicle 41/Revin 59

**280**  I am similarly persuaded of Harpreet Awla's liability for Revin 59. It too was financed through a loan from GVCCU approved by Allen Ferrier for Rodney Dick. Mr. Dick testified in the plaintiff's case that he purchased the vehicle from someone named "Harp" who had it for sale. Although Mr. Dick did not positively identify a photograph of the defendant, Harpreet Awla, as the person who he purchased the vehicle from, I am satisfied on the basis of Mr. Ferrier's evidence and that of Cheri Kostynick that it was the defendant, Harpreet Awla, who was behind the theft and sale of Vehicle 41 as Revin 52 to Mr. Dick, and I accordingly find him liable in conspiracy in respect of that vehicle.

1. Vehicle 41/Revin 17

**281**  I am similarly satisfied that Harpreet Awla was behind the conversion of Vehicle 41 as Revin 17, before it was reported stolen by Rodney Dick in its guise as Revin 59. The evidence of Mr. Ferrier, Mr. Dick, Ms. Kostynick, Cynthia Hill and Ross Hinchberger established Harpreet Awla's involvement with that vehicle in its various guises beginning as Vehicle 41, becoming Revin 59, then Revin 17 and finally Revin 41 and I accordingly find him liable in conspiracy in respect of Revin 17.

1. Vehicle 18/Revin 18

**282**  Vehicle 18 is another vehicle that was financed through the approval of a loan by Allen Ferrier at GVCCU, and I conclude based on the evidence of Mr. Ferrier as to the nature of Harpreet Awla's specific involvement with him and Cheri Kostynick's evidence of his general involvement with the revining scheme that Harpreet Awla was involved in and liable for the conspiracy in relation to Vehicle 18.

1. Vehicle 46/Revin 46

**283**  Vehicle 46 went through several guises after it was initially reported stolen on June 19, 2002. It was first revined and registered as Revin 32 on July 19, 2002, transferred to Jagjeet Singh Sidhu on September 4, 2002, reported stolen by him on October 1, 2002 after it was re-registered as Revin 36 on September 10, 2002. It was then sold as Revin 36 to Breeze Produce Inc. on December 2, 2002 before it was reported stolen as Revin 36 on January 31, 2003 and registered as Revin 46 to Cheri Lorisa Kostynick from Susan Kostynick on March 26, 2003.

**284**  The evidence said to implicate Harpreet Awla in connection with Revin 46 is the general evidence of Cheri Kostynick of Harpreet Awla's involvement in the scheme, including collecting the money from the sales of revin vehicles and the supply to her of false identifications to complete the fraudulent transactions, as well as the evidence of Mohammad Salim tentatively identifying a picture of Harpreet Awla as the person present with Cheri Kostynick when he performed an inspection of the vehicle.

**285**  It appears however that there were occasions when Cheri Kostynick was involved in revining transactions with Gurpreet Awla when there is no evidence of Harpreet Awla's involvement (for example, with respect to Vehicle/Revin 52). While it is not implausible that Harpreet and Gurpreet, being brothers involved in the conspiracy generally, might be involved in the same transactions, it is not a necessary inference and in the absence of some clear or direct evidence of Harpreet's involvement in the particular transaction, I am not satisfied the standard of proof is met. Mr. Salim's identification of a photograph of Harpreet Awla is simply too tentative to amount to a positive identification and Ms. Kostynick's general evidence of the nature of Harpreet Awla's involvement in light of her earlier inconsistent evidence without more falls short of amounting to adequate proof. I thus decline to find Harpreet Awla liable with respect to Vehicle 46.

1. Vehicle 1A/Revin 10 and 23

**286**  Revin 10 was originally Vehicle 1A which was reported stolen on June 19, 2002. It went through three identity changes: Revin 1A on July 9, 2002; Revin 10 on April 14, 2003, and Revin 23 on May 23, 2003.

**287**  In the case of Revin 10 and Revin 23, Harpreet Awla's liability is established by the direct evidence of Cheri Kostynick who testified she registered Revin 10 at the request of Gurpreet Awla on April 14, 2003 and attempted to sell it the same day at a car dealership in Langley. When she encountered difficulties in completing the sale because the vehicle VIN did not match the vehicle itself, it was taken from her by Harpreet Awla and was subsequently returned to her on May 23 when she registered it using the false identity of Tammy Klassen at the request of Gurpreet Awla. In view of Ms. Kostynick's direct evidence of Harpreet Awla's involvement with Revin 10, her evidence as his overall involvement with the revin vehicles and her evidence that he supplied her with the false identification to use to register the revin vehicles, I am satisfied that the plaintiff has established Harpreet Awla's liability for conspiracy in relation to Revin 10 and Revin 23.

1. Revin 52

**288**  I am not similarly satisfied that Harpreet Awla's liability has been established with respect to Revin 52. Although Ms. Kostynick similarly used the identity of Tammy Klassen in relation to that vehicle, she testified she did so at the request of Gurpreet Awla and in his presence. She gave no evidence as to the involvement of Harpreet Awla with respect to Revin 52 and when she sold it to Navdeep Brar she put the money in her account, kept a fee and paid the rest to "one of the guys who was involved" who she did not identify. While it is not implausible that Harpreet Awla was involved with the theft and conversion of Revin 52, the evidence taken as a whole does not establish it on the balance of probabilities.

1. Revin 14

**289**  The asserted connection between Revin 14 and Harpreet Awla was the general evidence provided by Cheri Kostynick of his involvement with her in providing her with false identification including that of Tammy Klassen to register the revin vehicles, and the fact that the bar code on the false dashboard VIN on Vehicle 14 (as well as Vehicles 23, 41, 42, 45, 50 and 52) related to a vehicle formerly owned by his and Gurpreet's uncle which some years before had been reported stolen but recovered and returned to the Awlas. The use of the bar code does not distinguish between Gurpreet and Harpreet however, and there is no evidence as to which of the two or whether both of them were involved in seeking to have Ms. Kostynick obtain a PVIR and register Revin 14. In those circumstances, I am not satisfied the liability of Harpreet Awla is established by the evidence, in view of Ms. Kostynick's earlier contradictions as to who she was most involved with.

1. Revin 42

**290**  I am satisfied that the plaintiff has established Harpreet Awla's liability in connection with Revin 42 based on the evidence of John Zarelli that he permitted his name to be used in the registration of Revin 42 at the request of Lynn Holt, a proven associate of Harpreet Awla, and given Rodney Dick's evidence that he purchased Revin 42 from Harpreet Awla and received subsequent calls from him requesting him to pay the unpaid balance. I note that as well Revin 42 was one of the revin vehicles that used the Awla bar code.

1. Revin 45

**291**  While there is as with Revins 46, 14 and 52 some plausibility with respect to Harpreet Awla's involvement with Revin 45, given Cheri Kostynick's general evidence of the nature and scope of his involvement in the scheme at large, and the use of the Awlas' bar code in the revining process, the only direct evidence of who dealt with Revin 45 from Cheri Kostynick was that it was Gurpreet Awla who involved her in registering the vehicle in attempting to sell it. Given the contradictory nature of Ms. Kostynick's general evidence, I am not satisfied that the plaintiff has established Harpreet Awla's liability on a balance of probabilities.

1. Vehicle 49

**292**  I am similarly not satisfied that the plaintiff has proved Harpreet Awla's liability with respect to Vehicle 49. Although his involvement is plausible again, there is no reliable or direct evidence to determine whether he or Gurpreet Awla or both of them were involved in engaging Ms. Kostynick to falsely register the vehicle. Mohammad Salim's tentative and hesitant identification of the photograph of Harpreet Awla as the person with Cheri Kostynick is not in context sufficient to establish that it was he and not Gurpreet who attended with her at the time of the vehicle inspection.

**2. Vikram Atwal**

**293**  Vikram Atwal did not participate in the trial. The plaintiff relies in part on the evidence as to the nature and scope of Vikram Atwal's involvement in the revining scheme revealed by the evidence tendered at this trial from *ICBC v. Atwal*, *supra*, and *ICBC v. Ben-Jaafar*, *supra* and *ICBC v. Gill*, *supra*, and in part on the evidence said to directly implicate Vikram Atwal in the vehicles at issue in the actions at bar.

**294**  As I noted previously, although there is evidence which establishes the existence of the conspiracy alleged in the plaintiff's pleadings and there is evidence that establishes the defendant Atwal's involvement in that conspiracy, because of the widespread participation of other individuals and groups in relation to various other revin vehicles, I consider it necessary to find some evidence of the involvement of individual conspiracy defendants with individual vehicles before determining liability. In other words, in the circumstances of this case, the existence of similar facts such as the use of similar false identities, similar false addresses, similar or the same bar codes or VINs does not of itself necessarily establish a case of liability given the involvement and access of others to the scheme and to a means by which the scheme was perpetrated.

1. Vehicle/Revin 1A

**295**  Thus, in the case of Revin 1A, the defendant Atwal's liability was established not simply by virtue of the fact that he was found liable in *ICBC v. Atwal* in relation to a claim in respect of a vehicle which was stolen with identification which was subsequently used to falsely register Revin 1A (Russell Herding's identification) but also that the false registration was done by Jasdeep Sandhu who Vikram Atwal was previously found to have used on two other occasions. Further, the evidence that Atwal's cell phone was in contact with phones associated to Jasdeep Sandhu the day immediately before and the day immediately after the false registration of Revin 1A establishes the basis for a finding of his liability.

**296**  In addition, when Revin 1A was ultimately transferred to the purchaser Kulbir Chohan, both he and Vikram Atwal were in touch with Jagjit Gill, who it was established, was involved in the sale and distribution of various of the revin vehicles, immediately before and after the transfer to Mr. Chohan. Thus, in those circumstances, I am satisfied that the plaintiff has made out its claim in conspiracy against Vikram Atwal in relation to Revin 1A.

1. Vehicle 1A/Revin 10/Revin 23

**297**  I am not satisfied that the evidence establishes that Vikram Atwal's participation in the subsequent "theft" or revining and false registration of Revin 10 or Revin 23 is made out. The evidence in connection with those transactions appears to involve Cheri Kostynick, and Gurpreet and Harpreet Awla. While it is not implausible that Vikram Atwal had a hand in the ensuing transactions, there is no specific evidence of it and thus in context I am unable to make a finding of his participation in these transactions. The sole ICBC loss however was in relation to the payment on Vehicle 1A, which I have found the defendant Atwal liable for.

1. Vehicle 46/Revin 32

**298**  As far as Revin 32 is concerned, the evidence of Vikram Atwal's liability is founded on evidence akin to that in relation to Vehicle/Revin 1A: the use of Russell Herding's identification, together with evidence that the PVIR processed by Mohamed Nachar referred to Vikram Atwal's cell phone number and that the false registration of Vehicle 32 was processed at an insurance agency used by Vikram Atwal in connection with three other fraudulent registrations of revin vehicles. I accordingly find him liable in respect of Revin 32.

1. Vehicle 46/Revin 36

**299**  Similarly, insofar as Revin 36 (Vehicle 46) is concerned, Vikram Atwal's liability is established by his prior involvement with Vehicle 46 in the guise of Revin 32, and the use of Jasdeep Sandhu again to process the false registration for Revin 36 while there was contemporaneous contact between Atwal and Sandhu's respective telephones. I am satisfied that he is liable in respect of Revin 36.

1. Vehicle 46/Revin 46

**300**  I am not satisfied that the plaintiff has established the defendant Vikram Atwal's involvement in the transaction with respect to Revin 46 despite his involvement with two earlier incarnations of that vehicle (Revins 32 and 36). The involvement of Cheri Kostynick does not imply the involvement of the defendant Atwal, as her involvement appears to be at the behest of one or other or both of the Awlas. There is no other evidence of Atwal's involvement in the particular transaction involving Revin 46 and accordingly I decline to find him liable in relation to that vehicle.

1. Vehicle 37/Revin 37

**301**  In relation to Revin 37, Vikram Atwal's liability is established by his connection to the insurance agency which processed a fraudulent registration - All Time Insurance - which he was found to have used to process Revins 38, 20 and 29 and which I am satisfied he used to process to Revin 21. As well, the ultimate sale of Revin 37 to Ajmer Litt and the evidence that Atwal was in contact with Ajmer Litt around the time of that sale on March 9, 2003 and that he received a cheque from Ajmer Litt on the same date for $3,600 combines to satisfy me that he was involved in and is liable for conspiracy in relation Revin 37.

**3. Gurpreet Awla**

**302**  As with Harpreet Awla and Vikram Atwal, Gurpreet Awla did not participate in the trial or contest his liability.

1. Vehicle 52/Revin 52

**303**  The liability of Gurpreet Awla with respect to Revin 52 rests primarily on the evidence of Cheri Kostynick given at the *Atwal* trial on June 9, 2009 to the effect that she was involved in the false registration of Revin 52 using the identification of Tammy Klassen at the request of Gurpreet Awla and that he took her to an agent to have it registered. I am satisfied on the basis of the evidence taken as a whole and Cheri Kostynick's evidence in relation to Gurpreet Awla that he was involved in the conspiracy to steal or otherwise fraudulently acquire vehicles provide them with new false identities and sell them to complicit or unsuspecting purchasers. I am also satisfied on the strength of Cheri Kostynick's evidence that he was involved in the conspiracy with respect to Vehicle 52 specifically. I thus find him liable in connection with that vehicle.

1. Vehicle 14/Revin 14

**304**  I am not similarly satisfied with respect to Gurpreet Awla's liability for Vehicle 14. The involvement of Cheri Kostynick posing as Tammy Klassen in attempting to get a PVIR to re-register the vehicle and in the "decoding" of the bar code on the dashboard VIN to the Awla van implicates either Harpreet or Gurpreet Awla or both, but there is no specific evidence to establish which of those three possibilities is more probable than the other.

1. Vehicle 45/Revin 45

**305**  The evidence in relation to Vehicle 45 also involved Cheri Kostynick using a false identity to obtain a PVIR and to register Revin 45. The evidence also established that she attempted to sell Revin 45 at Applewood KIA on August 14, 2003. The bar code on the dashboard of Revin 45 similarly came from the Awla vehicle. In her evidence at the *Atwal* trial, Ms. Kostynick identified Gurpreet Awla as having involved her in the fraudulent registration and attempted to sell Revin 45. In the circumstances, I am satisfied that the plaintiff has established Gurpreet Awla's liability in relation to Vehicle 45.

**306**  As I earlier noted, the plaintiff has taken default judgment against Sandeep Rai with respect to Vehicle 17 (Stolen 41): Vehicle 16; and Vehicle 18; against Cheri Kostynick with respect to Revin 46 (Stolen 46); Revin 10 (Stolen 1A); Vehicle 52; Vehicle 14; Vehicle 23; Vehicle 45; and Vehicle 49.

**THE LAW - CONVERSION**

**307**  In *Atwal,* BCSC, I summarized the law relating to the tort of conversion as follows at paras. 283-287:

[283] In G.H.L. Fridman, *The Law of Torts in Canada*, 2nd Ed. (Toronto: Carswell 2002) at p. 136, the elements of the tort of conversion are set out as follows:

1. a wrongful act by the defendant involving the goods of the plaintiff;
2. the act must consist of handling, disposing of or destroying the goods;
3. the defendant's action must have either the intention or the effect of interfering with (or denying) the plaintiff's title or right to the goods.

[284] In *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce* [*[1996] 3 S.C.R. 727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SJ-00000-00&context=), [*140 D.L.R. (4th) 463*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SJ-00000-00&context=) at para. 31, the court defined and explained the tort of conversion as follows:

The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability and accordingly it is no defence that the wrongful act was committed in all innocence. Diplock L.J. asserted this principle in *Marfani & Company v. Midland Bank Ltd.*, [1968] 2 All E.R. 573 at pp. 577-578:

... the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.

...

If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received.

[285] In *MacKenzie v. Blind Man Valley Cooperative Association Ltd.* [*[1947] 2 W.W.R. 443*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93B1-JN14-G0DP-00000-00&context=) at 451, [*[1947] 4 D.L.R. 687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93B1-JN14-G0DP-00000-00&context=) (Alta. S.C.) cited with approval in *General Securities Ltd. v. Parsons* (1955), 14 W.W.R. 424 (B.C.C.A.), Chief Justice Howson stated as follows:

The principle under which the liability for conversion is determined is stated in the head note of the report of the House of Lords decision in the *Hollins v. Fowler, L.R. 7 H.L. 757, supra*, at p. 169:

Any person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person is guilty of a conversion ...

[286] In the present case it is not necessary that the plaintiff prove that the conversion defendants knew or ought to have known that the vehicle they dealt with was stolen. See *Mutungih v. Bokun* [*[2006] O.J. No. 3041*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-FC6N-X01B-00000-00&context=) at paras. 15 - 18 (S.C.J.) cited with approval by Fisher J. in *Four Star Auto Lease Ltd. v. 565204 B.C. Ltd.* [*2008 BCSC 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20F1-00000-00&context=) at para. 21, [*55 CCLT (3d) 134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20F1-00000-00&context=).

[287] The plaintiff in the present case must prove either ownership of the vehicles in question or the right to immediate possession. Under the terms of the relevant insurance policies, it becomes the owner of the vehicles once the theft claim is settled, and it has the right to immediate possession and the rights of the theft victim through subrogation.

**308**  In *Atwal*, BCCA, affirming *Atwal,* BCSC, the Court offered a succinct summary/statement of the law of conversion at paras. 24-26 as follows:

[24] Conversion of property occurs when a person wrongfully interferes with the ownership or title to another person's chattel: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [*[1996] 3 S.C.R. 727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SJ-00000-00&context=) at para. 31. The wrongful interference with a chattel does not require its actual possession. Conversion may occur by written or spoken words that demonstrate an intention to interfere with the chattel in a manner that is inconsistent with the owner's right of possession or title to the property: *Oakley v. Lyster*, [1931] 1 K.B. 148 (C.A.) at 153-155.

[25] Conversion is a strict liability tort and as such, it is not a defence to a claim for conversion that the wrongful act (the interference with the owner's right of possession and/or title) was committed innocently: *Boma Manufacturing Ltd.* at para. 31. Liability for conversion does not require proof that the tortfeasor knew, for example, that the property was stolen. Both a purchaser and a vendor of stolen goods may be liable in conversion regardless of the state of their knowledge: *Nilsson Bros. Inc. v. Mcnamara Estate,* [*[1992] 3 W.W.R. 761*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9321-JJK6-S1TC-00000-00&context=) (Alta. C.A.). The plaintiff need only establish that the act, which was wrongful in its effect of interfering with the rights of the legitimate owner, was done deliberately or intentionally: *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [*2002 SCC 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4F1-00000-00&context=), [2002] S.C.R. 312 at para. 8.

[26] It is clear that the appellant participated in the chain of events that ultimately resulted in the sale of the stolen Vehicle #27 by providing Mr. Cheema's cell phone number for the purpose of facilitating the sale of Vehicle #27. In this manner, his actions wrongfully interfered with the interests of the vehicle's true owner, ICBC, which acquired ownership of the vehicle upon its payment of Mr. Harjinder Cheema's claim.

**309**  The Court of Appeal similarly provided guidance as to the nature and effect of the tort of conversion in *ICBC v. Palma*, [*2011 BCCA 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2YV-00000-00&context=) at para. 9 as follows:

[9] As conversion is a strict liability tort, it is no defence that the wrongful act of conversion was committed in all innocence as to the true ownership of the vehicles: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [*[1996] 3 S.C.R. 727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SJ-00000-00&context=) at para. 31, [*140 D.L.R. (4th) 463*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SJ-00000-00&context=). Mr. Palma's liability for conversion *simpliciter* did not depend on a finding that he knew the vehicles were stolen or that he was a participant in fraud. The appellant was required to prove only that he was linked to the exercise of control over the vehicles in a manner inconsistent with the rights of the true owner. If he accommodated Mr. Suska's activities by allowing his facilities to be used for the purposes of the conversions, I think that his liability for conversion would follow, even if he was unaware that the vehicles were stolen. As Fleming observes, this strict rule in conversion "constitutes the most effective safeguard against rogues profiting from their dishonesty, as it encourages utmost circumspection by the business community" (John G. Fleming, *The Law of Torts*, 9th ed. (LBC Information Services: Sydney, N.S.W.) at 62). Here, Mr. Palma apparently had the right to control the use of his facilities and properties. The issue in conversion *simpliciter* then involves a determination of whether he allowed Mr. Suska and others to use his facilities and properties for the exercise of a control over vehicles inconsistent with the rights of their true owners.

**310**  In *Boma Manufacturing, supra,* the Court held at para. 32 as follows:

32 The fact that liability for the tort of conversion is strict suggests that the respondent's submission that the appellants were contributorily negligent must fail. The matter was raised before the Court of Appeal, and was dismissed without reasons. While this argument would be available in an action for ***negligence***, the notion of strict liability involved in an action for conversion is prima facie antithetical to the concept of contributory ***negligence***.

**311**  In the present case, each of the defendants Bansal & Sons Automotive Ltd., Kulvinder Singh Bansal, Satwant Ranauta, Rodney Dick and Jason Smith actively defended the claims of the plaintiff against each of them for conversion, and in the case of the Bansal defendants, ***negligence***.

**312**  As to the plaintiff's claim in ***negligence*** (in the alternative) against the Bansal defendants, because I consider the evidence relied on by the plaintiff as establishing ***negligence*** is subsumed in the broader claim of conversion, I do not consider it necessary to discuss or apply the law of ***negligence***.

**The Bansal Defendants - Analysis and Conclusion**

**313**  The essence of the plaintiff's claim in conversion against the Bansal defendants rests on the evidence that Satwant Ranauta, a vehicle inspector employed by Bansal & Sons, completed a PVIR in relation to Mohammad Hanif's 2002 white Chev Express van, using a false VIN number, even though the van was still in the possession of Mr. Hanif with its original correct VIN number, or alternatively, in the presence of the van while its original correct dashboard VIN was disguised by a false paper VIN which Mr. Ranauta ought to have concluded was false. In that latter assertion, the plaintiff relies upon the evidence of Mr. Bansal that the paper VIN was clearly not a proper dashboard VIN. In the result, following the PVIR performed by Mr. Ranauta, the van underwent its transformation from Vehicle 37 to Revin 37 and was successfully converted from its true owner's possession and control. The plaintiff submits that at the material times, it was the legitimate owner of Vehicle 37 by virtue of paying the owner GMAC $26,204.13 as total loss value and acquiring ownership by virtue of s. 14 of the *Insurance (Motor Vehicle) Act*, *R.S.B.C. 1996, c. 231* and Regulation 143(1) of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=). Those sections read as follows:

14 The corporation may acquire and hold for the benefit of the plan the salvage to which it becomes entitled

(a) on settlement of a claim under the plan, and

1. as provided by the regulations.

**Salvage**

1. (1) Where the corporation replaces a vehicle or pays to an insured the declared value or actual cash value of a vehicle or its equipment or both, less any applicable deductible amount in accordance with section 117,
2. the corporation is entitled, at its option, to the salvage in the vehicle or its equipment or both, and
3. the insured shall, on request of the corporation, execute any documents necessary to transfer to the corporation title to the vehicle or its equipment or both.

**314**  The plaintiff submits in effect the actions of the inspector in issuing the PVIR under circumstances where he ought not to and thereby facilitating the fraudulent scheme renders the Bansal defendants liable for conversion of that vehicle.

**315**  Counsel for the defendants submits there is no basis for a finding of liability against Kulvinder Bansal. There is no evidence he conducted the inspection or was otherwise "personally responsible for the PVIR".

**316**  The Bansal defendants further submit that the plaintiff's position that the Hanif vehicle was not inspected advances the defendants' position, not the plaintiff's. Mr. Grey, for the Bansal defendants submits that the examination for discovery read in by the plaintiff of Mr. Ranauta's evidence goes to establish that Mr. Ranauta inspected a 2002 Chev van on February 27, 2003, commencing about noon. His evidence was that the VIN he examined on the vehicle matched the VIN on the AVRC, had no irregularities, and was what he put on the PVIR.

**317**  According to the PVIR completed by the defendant Mr. Ranauta, the mileage on the van was 56,362. Mr. Grey relies on evidence that on February 27, 2003, the same day as the PVIR was completed, the vehicle, Revin 37, was transferred to Dianna Breen by an ICBC agent who noted VIN "cited and confirmed" and the mileage recorded was 56,362. Mr. Grey contrasts that with the evidence of Mr. Hanif that he had the vehicle in his possession throughout the time of the inspection and did not have it inspected and when it was last in his possession at 11:30 p.m. on March 3, 2003, in front of his house in Surrey, it had about 15,000 km on the odometer.

**318**  It is Mr. Grey's contention that Mr. Ranauta did inspect the van on February 27, 2003, according to his discovery evidence read in on the plaintiff's case, that the plaintiff concedes by calling Mr. Hanif that it was not his van, that it was never put to Mr. Ranauta on discovery, that he inspected no vehicle in relation to which the PVIR was created and thus, the plaintiff is estopped from asserting that Mr. Ranauta did not inspect the van bearing the false VIN.

**319**  The defendant says given the evidence that the vehicle recovered by ICBC bearing the false VIN mirrored the VIN recorded by Mr. Ranauta and the Autoplan agent, the most likely possibility is that "the rogues involved in perpetrating the fraud used a different white 2002 van when it was inspected by Mr. Ranauta and later the Autoplan agent".

**320**  Mr. Grey notes there is evidence that other stolen vehicles were revined more than once.

**321**  The defendants submit in all the circumstances that the plaintiff has failed to meet the burden of proof on the balance of probabilities that Mr. Ranauta failed to inspect a van on February 27, 2002. The defendants note that when a vehicle is being registered for the first time in British Columbia, Autoplan agents/brokers are required to examine the VINs on vehicles which are being registered. He points out there were many such revined vehicles that passed muster in this scheme which weighs against a finding of ***negligence***. The defendants also contend that the tort of conversion is not made out since if the plaintiff's theory is correct and there was no vehicle inspected, then the defendants ask rhetorically "how can Ranauta be liable in conversion when the vehicle described in the PVIR did not exist?"

**322**  The defendants further submit that the duty on the Autoplan agent to inspect the VIN after the PVIR is issued vitiates any effect of the acts of the vehicle inspector in such circumstances. If there was an act that facilitated the conversion of the vehicle, it was the plaintiff's agent, not the defendant Mr. Ranauta.

**323**  As far as damages are concerned, the defendants submit that the plaintiff should only be able to recover the difference between what the plaintiff paid the insured party and the fair market value at the time of recovery. The defendants submit there is no evidence of fair market value but the vehicle was recovered a few months later and the defendants submit the market value at the time of the recovery would be relatively close to what it was when the insurance payment was made.

**324**  I conclude that there was no second van involved in the circumstances of this case. In the first place, there is no evidence of the theft of any other white 2002 Chevrolet Express which could have been used as the vehicle which brought Revin 37 to the surface. Secondly, there is no logical reason to transfer the false VIN on one stolen vehicle to another similar stolen vehicle. That would simply lead to the need to create a second false VIN for the first stolen vehicle as there could not be two registered vehicles with the same VIN. Thirdly, if the false VIN used for the first vehicle was adequate to fool an experienced vehicle inspector and/or an ICBC agent, then why would the false VIN tag for the recovered Vehicle 37 not be the same or equally as foolproof, which clearly it was not? In the fourth place there is no evidence of another white 2002 Chevrolet Express being "revined" after the Hanif vehicle was reported stolen. Finally, the coincidence of two white 2002 Chevrolet Express vans being stolen and "revined" in sequence to allow one to be substituted for the other, is neither logical nor credible, particularly in the absence of any objective evidence that more than one such vehicle was stolen.

**325**  In my view, the Bansal defendants' submissions are based on speculation rather than evidence. I conclude it is much more likely that Revin 37 and Vehicle 37 were always one and the same. There is evidence through Mohamed Nachar that he conducted "blind inspections", that is, where no vehicle was present, at the behest of conspirators involved in this scheme, including Vikram Atwal. Thus, it is quite plausible that in this case Mr. Ranauta was confronted with the same request in anticipation of Vehicle 37 being stolen or otherwise brought into the scheme. The evidence that an insurance agent at All Time Insurance purported to inspect the VIN before transferring the vehicle is conditioned by the evidence that on four other occasions that agency processed falsely vinned vehicles associated to Vikram Atwal, and that Ms. Breen's name - the ostensible owner of Revin 37 - was used by Vikram Atwal on two other occasions in revining vehicles. Whoever it was who presented the registration and transfer documents to All Time Insurance, it assuredly was not Ms. Breen, who had nothing to do with the transfer. Nor was she the person who would have presented the AVRC to Mr. Ranauta. It is far more likely in my view that it was Mr. Atwal who sought the PVIR from Bansal & Sons and presented the transfer documents to All Time Insurance, in light of the evidence of his payment from the eventual purchaser of Revin 37, Ajmer Litt, who has not contested his liability for conversion.

**326**  In those circumstances, Mr. Ranauta's failure to recall details of the inspection is less plausible and his evidence, based on the surviving documents, has little weight in the context of the evidence as a whole.

**327**  As to how Revin 37 notionally came to be inspected by Bansal & Sons, it is at least plausible that it occurred through Jerry Gill, who knew both Mr. Atwal and Mr. Bhandher, both of whom were involved in the scheme, and Mr. Bansal, the proprietor of Bansal & Sons and who apparently gave information to Mr. Bhandher that Bansal & Sons conducted such inspections.

**328**  Given Mr. Bhandher's involvement in the scheme, and Mr. Gill's at least peripheral involvement, it seems likely to me that Mr. Bhandher's request for information was in furtherance of the scheme. Mr. Bhandher's association to Mr. Atwal and the context of the scheme supports the conclusion that it was Mr. Atwal who arranged for the PVIR completed by Mr. Ranauta.

**329**  I do not think the evidence goes far enough to establish on a balance of probabilities that Mr. Bansal was implicated in the blind inspection performed by Mr. Ranauta. While it is not improbable, I do not think the evidence establishes it was more probable than not. As to the defendant Mr. Ranauta's liability and Bansal & Sons vicarious liability, I am satisfied the plaintiff has made out its case. The fact that Mr. Ranauta did not know precisely what vehicle his actions in completing a blind inspection were contributing to the conversion of, is of no avail to him. As noted in *Atwal,* BCCA, *supra*, "the plaintiff need only establish that the act which was wrongful in its effect of interfering with the rights of the legitimate owner was done deliberately or intentionally."

**330**  In the present case, Mr. Ranauta's deliberate act of completing the PVIR in a blind inspection in relation to a white 2002 Chevrolet Express van clearly amounts to participation "in the chain of events that ultimately resulted in the sale of" stolen 37 by providing a false VIN that enabled the conspirators to register the stolen vehicle in BC and sell it for profit. That there may have been others involved in the facilitation does not preclude his liability in conversion. As I understand it, the Bansal defendants do not contest the appropriateness of a finding of vicarious liability of Bansal & Sons in those circumstances.

**331**  As far as Mr. Bansal is concerned, as earlier noted, I am not satisfied the evidence goes far enough to establish on a balance of probabilities that he was implicated in the blind inspection of Revin 37. While the evidence of his contact with Jerry Gill and Mr. Gill's evidence of referring Raminder Bhandher to Bansal & Sons as doing vehicle inspections, raises the possibility of Mr. Bansal's knowledge of the proposed inspections for the scheme, there is no other evidence to tie down his knowledge and no evidence of any other inspections in furtherance of the scheme at Bansal's establishment, as there was with Mohamed Nachar or Mr. Salim, that might provide the basis to infer his knowledge and acquiescence in the scheme. In my view, the evidence against Mr. Bansal does not go beyond raising a reason to suspect his knowledge or involvement to reach proof of it on a balance of probabilities.

**The Defendant, Jason Smith - Analysis and Conclusion**

**332**  In respect of the defendant, Jason Smith, there are two actions outstanding. He is a defendant in *ICBC v. Awla et al*, and as well, there is an earlier action commenced by the plaintiff on September 15, 2003 in which the plaintiff, ICBC, sought a declaration of ownership with respect to Vehicle 18. That action (*ICBC v. Smith*) was ordered to be tried at the same time as the two principal actions; *ICBC v. Awla* and *ICBC v. Auger*.

**333**  In neither the *ICBC v. Awla* action nor the *ICBC v. Smith* action does the defendant Smith make a counterclaim against the defendant founded on ***negligence*** or otherwise.

**334**  In the *Awla* action, the defendant Smith pleaded that:

At all material times the plaintiff was also Registrar of Motor Vehicles for British Columbia and as such issued Certificates of Ownership to members of the public on which the public relied.

**335**  The defendant further pleaded that he purchased for valuable considerable a 2002 Chevrolet Silverado from a person "who possessed a valid Certificate of Ownership issued by the plaintiff" and that he registered it with and purchased the insurance from the plaintiff and was issued with "an ostensibly valid Certificate of Ownership".

**336**  He pleaded that he relied on the validity of this Certificate of Ownership and asserted he was a valid owner of Vehicle 18.

**337**  Mr. Smith asserts that the damages, if any, suffered by the plaintiff are the result of the plaintiff's "own ***negligence*** and deliberate conduct". He further asserted that the plaintiff had no foundation for alleging that he participated in the unlawful conduct alleged and asserted it was "an abuse of process for the plaintiff to make such allegations and name him in an enormously expensive lawsuit."

**338**  In *ICBC v. Smith*, in which the plaintiff sought a declaration that it is the legal and beneficial owner of Revin 18 and lawfully entitled to dispose of it, the defendant Mr. Smith pleaded that he purchased Revin 18 in good faith, that he agreed to pay and paid $38,500 for the vehicle and that he relied on the Certificate of Ownership issued by the plaintiff in relation to Revin 18. He further asserted that he paid $2,887.50 in social services tax for the vehicle. He asserted that ICBC never informed him that Revin 18 bore a false serial number or that it might seized from him. He asserted the plaintiff had a statutory and regulatory duty to determine the true identity of the vehicle for which it issued a Certificate of Ownership. He alleged the seizure of the vehicle on July 24, 2003 was done by peace officers acting as agents for the plaintiff who unlawfully placed the vehicle in the hands of the plaintiff and failed to notify him of their intention to do so without regard to the relevant provisions of the *Criminal Code*.

**339**  The defendant Smith further pleaded that because the plaintiff issued a Certificate of Ownership for Revin 18, it is estopped from claiming ownership. The defendant asserted that the plaintiff "has acted in an arrogant, reckless and unlawful fashion with regard to the defendant's vehicle and toward the defendant" and sought an order dismissing the plaintiff's claim with special costs.

**340**  On December 6, 2004, the plaintiff brought an application under the summary trial provisions of the *Rules of Court* (then Rule 18A) seeking a declaration that it was the legal and beneficial owner of Vehicle 18 and was lawfully entitled to dispose of it.

**341**  Madam Justice Allan who heard the application described the defendant's principal defence thus at paras. 11 and 12 of her Judgment:

[11] Mr. Smith opposes the relief sought by ICBC on the basis that he is the lawful owner of the Truck by virtue of the Certificate of Ownership issued by ICBC under the *Motor Vehicle Act*. Mr. Murray submits that Mr. Smith, as an insured, was entitled to rely upon the statutory scheme of registration and licensing of vehicles. In this case, the vendor of the Truck, Tarsem Pharga, held a valid Owner's Certificate and Mr. Smith, the purchaser, was issued a valid Owner's Certificate by ICBC.

[12] The statement of defence pleads reliance on the representations made by ICBC that the Truck was properly transferred to Mr. Smith, who then became its legal owner. The defendant suggests that ICBC is now estopped from claiming ownership of the Truck. The statement of defence does not claim any relief other than a dismissal of the plaintiff's claim with special costs.

**342**  In the result, Justice Allan found that the case was not suitable for resolution under Rule 18A. She noted "several unexplained factual issues that are of concern" which "potentially point to ICBC's own ***negligence***". She cited evidence of the make-shift nature of the false VIN stickers that should have alerted a trained inspector to this irregularity, she also pointed to the fact that Revin 18 was apparently inspected five days before Vehicle 18 was reported stolen and that the inspection of the vehicle ostensibly before it was stolen showed 12,000 more kilometres on the odometer than the theft report which occurred later than the inspection.

**343**  Justice Allan considered it necessary to explore those and other evidentiary issues to enable a just determination of the issues.

**344**  She also considered the issue whether ICBC's dual role as insurer and Registrar of Motor Vehicles could lead to an estoppel of its claim "by reason of its conduct". She regarded that as a significant issue which ought to be decided in the context of a full evidentiary hearing.

**345**  In my view, based on the evidence taken as a whole, neither the plaintiff's alleged ***negligence*** nor its dual role as insurer and Registrar of Motor Vehicles vitiates its claim against the defendant Smith.

**346**  Although the B.C. Transfer/Tax Form reflects that the defendant Smith paid $38,500 for the vehicle, apart from the assertion in that document which is in all other critical aspects a manifestly false document designed to camouflage a fraudulent transaction, and his own ambiguous testimony, there is no evidence that Mr. Smith paid more than $30,000 for Revin 18. While there is no direct evidence of its value at the time, I note that the total loss payments made by ICBC to GMAC and Canvey totalled in excess of $58,000 and in Mr. Smith's own net worth statement filled out for GVCCU the vehicle had an asserted value of $48,000.

**347**  Mr. Smith's inability or unwillingness to explain where he got the additional $8,500 to pay the asserted purchase price persuades me in context of all the evidence that he paid no more than $30,000 for the vehicle which I conclude was an amount conspicuously less than its market value at the time. That Mr. Smith was similarly unable to remember details about why or with whom he went to Richmond to pick up the vehicle when according to him it has been displayed for sale in a shopping mall parking lot in Surrey is in my view unconvincing and buttresses the conclusion that he was aware that the transaction involving Revin 18 was not legitimate at the time he was involved in it. Although there has been a lapse in time since these events took place, the seizure of his vehicle as stolen in July 2003 would fix details of his acquisition of it at that time.

**348**  His resort to GVCCU for a loan when he had a good credit rating at his own bank and could have got a loan at a lower rate adds to the evidence that his involvement in the scheme was consistent with knowledge of what was afoot. As with other purchasers of the revin vehicles, Mr. Smith obtained his loan from Allen Ferrier at GVCCU to avoid careful scrutiny of the suitability for a loan and of the legitimacy of the vehicles for which the loans were obtained. I do not accept Mr. Smith's evidence that he resorted to Ferrier at GVCCU simply by coincidence because it was convenient to where he saw the truck displayed. The fact that he found his way to the very person whom Harpreet Awla had earmarked to assist in arranging financing in furtherance of the scheme purely by coincidence defies common sense. The speculation that he may have been directed there by the seller does not answer why he would go, unless it was to obtain financing without scrutiny of the legitimacy of the transaction.

**349**  In addition, as the evidence unfolded, it is not at all clear that Mr. Smith actually relied on the Certificate of Ownership in the name of Tarsem Phagura for his purchase of the vehicle. It appears from the loan application documents at GVCCU that he took steps in anticipation of buying the vehicle before it had been "revined" or registered in the name of Tarsem Phagura and indeed before it had even been reported stolen.

**350**  Mr. Smith's claim to have seen the vehicle on display in the Guildford Mall parking lot in the context of all the evidence seems to me improbable given that it would have been before October 10, 2002 when he took steps to obtain financing at GVCCU which was several weeks before Revin 18 was reported stolen, was inspected, or was registered.

**351**  Further, when Mr. Smith took Revin 18 to Erv's Autobody as a result of the accident involving it, he was clearly alerted to the prospect that there was something amiss with the vehicle and that it may have been stolen and he took no steps to inquire about or resolve the issue. In my view, that circumstance adds considerable weight to the contention that at all material times he was aware of the true status of the vehicle.

**352**  On balance, and in light of all the evidence and the lack of evidence, I conclude that the defendant Smith bought Revin 18 in circumstances which made it clear that it was a stolen vehicle. He agreed to buy it and took steps to take out a loan to buy it before it existed as Revin 18; he purported to see it for sale by someone claiming to be Tarsem Phagura, before it was registered to Tarsem Phagura (or anyone but the true owner) and before it was stolen or reported as stolen. He paid conspicuously less than the market value for it and "coincidentally" financed it through a person complicit in the theft and conversion scheme who also helped others to finance "revin" vehicles without the need to scrutinize their legitimacy.

**353**  Finally, he failed to do anything when he was confronted with some objective evidence that the vehicle was not what it appeared to be. In those circumstances, I conclude Mr. Smith knew or was wilfully blind to the fact that Revin 18 was stolen and did not at any time rely on the Certificate of Ownership issued by the plaintiff as being valid or accurate.

**354**  In those circumstances, I would not give effect to the defendant Mr. Smith's pleadings either that the plaintiff is estopped from asserting its claim because of its own conduct or that it caused its own damages through its own ***negligence***.

**355**  In coming to that conclusion, I do not wish to be taken as holding that on a different factual foundation a defendant could not successfully resist the plaintiff's claim on the basis of estoppel or causation. However, where, as here, the evidence establishes that in purchasing the vehicle conspicuously below market value, the defendant relied on the very conduct which he now complains would be illegal, to give effect to his defence or to allow him to rely on the equitable defence of estoppel, would be illegal and unreasonable.

**356**  In the case of the claim of estoppel, it is clear that a party seeking to rely on an equitable remedy must "come with clean hands". See: *Pro Swing Inc. v. Elta Golf Inc.*, [*2006 SCC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X226-00000-00&context=) at para. 22. In the case at bar, the defendant Smith did not come with clean hands. He did not rely on the Certificate of Ownership as representing a true state of affairs, or act on it as though it were. On the contrary, it was the duplicitous quality of the Certificate of Ownership that enabled him to acquire the vehicle it purported to refer to, for a price conspicuously less than it was worth.

**357**  The same reasoning applies in relation to the defendant's causation argument. The plaintiff's conduct whether negligent or not did not cause its damages. The damages were caused when Vehicle 18 was stolen reportedly on October 23, 2002 and the plaintiff paid on the subsequent claim in November 2002. The issuance of the Certificate of Ownership for Revin 18 in the name of Tarsem Phagura on October 21st and the subsequent sale of Revin 18 to the defendant Smith did not cause the theft or engage the plaintiff's obligation to pay the claim advanced.

**358**  At most, those actions may have postponed the recovery of the vehicle by enabling it to be disguised as Revin 18, but in circumstances, as here, where the defendant Smith participated in the deception by purporting in the transfer document to pay more for the vehicle than he did, and by financing the vehicle through GVCCU to avoid scrutiny of the legitimacy of the transaction, allowing him to rely on the asserted ***negligence*** of the plaintiff in failing to uncover the deception which he participated in would offend public policy.

**359**  Apart from estoppel or causation, the only other basis for the defendant Mr. Smith to resist the plaintiff's title is through s. 26 of the *Sale of Goods Act*, which reads as follows:

**26** (1) Subject to this Act, if goods are sold by a person who is not the owner of them, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner's conduct precludes the owner from denying the seller's authority to sell.

**360**  At the time of the sale of Vehicle 18 as Revin 18 to the defendant Smith, the owner was GMAC. There is simply no evidence that GMAC did anything to preclude denying the seller's authority to sell. The issue of ICBC's conduct does not stand to be determined under the *Sale of Goods Act* as it did not become the owner of Vehicle 18 until November of 2002 after the sale which is at issue. Moreover, at most, ICBC's vicarious conduct gave Tarsem Phagura ostensible authority to sell Vehicle 18 disguised as Revin 18. It is clear that Tarsem Phagura had nothing to do with the sale of Revin 18 and hence even if ICBC could be said to have been the owner at the time of the sale, its vicarious liability for Sandeep Rai's conduct would not preclude it from denying Harpreet Awla's authority to sell.

**361**  The authority to sell created by the Certificate of Ownership is only to the purported owner, not to anyone posing as the purported owner. Thus in those circumstances, I would not give effect to Mr. Smith's defence against the claim of the plaintiff and find him liable in conversion with respect to Vehicle 18. I would also give effect to the plaintiff's application for a declaration of ownership in *ICBC v. Smith*.

**The Defendant, Rodney Dick - Analysis and Conclusion**

**362**  The plaintiff's claim against Rodney Dick is in respect of Vehicle 41, a 2002 green Chevrolet Silverado disguised as Revin 59, Revin 12 and Revin 41. The plaintiff's claimed loss in respect of Vehicle 41 against Mr. Dick in conversion is $26,614.31 which represents the amount paid out to the owner of Vehicle 41 of $57,724.13 as total loss value on July 15, 2002, less the amount realized from the sale of the salvage when Vehicle 41 was recovered as Revin 41, amounting to $31,110.

**363**  Although the evidence shows an additional total loss payment to the owner of Vehicle 41 of $796.84, that amount is not calculated into the plaintiff's submissions and accordingly I would not give effect to that.

**364**  I am satisfied that the plaintiff has made out its claim against the defendant Rodney Dick in conversion. Although he has launched a counterclaim against the plaintiff, that counterclaim has been severed off from the trial and does not fall to be determined at this juncture.

**365**  Mr. Dick was a purchaser who paid conspicuously less than the apparent and insured value of the vehicle. He like Mr. Smith and Ms. McDonald financed the vehicle through Allen Ferrier at GVCCU purporting to pay $25,000 for it, but receiving only $16,000 by way of loan from GVCCU and being unable to account for the payment of the remaining $9,000.

**366**  When Mr. Dick reported Revin 59 stolen, he falsely reported that he paid $35,000 for it and he received $39,679.25 (with GVCCU) from ICBC as a result of his theft claim. He purchased the vehicle from Harpreet Awla, not from Ms. Choong, the purported registered owner. In my view, the plaintiff has established that Revin 59 was Vehicle 41 given its similarities and the fact that no other vehicle resembling Revin 59 was reported stolen or recovered, except for Vehicle 41. Accordingly, I am satisfied that the plaintiff has made out its claim in conversion against Mr. Dick entitling them to damages in the amount of $26,614.31 plus interest. As Mr. Dick's counterclaim is not being litigated in the context of this action, I make no express findings with respect to his knowledge or wilful blindness as to the status of Revin 59 when he acquired it and possessed it as it is not necessary to a finding of liability for conversion.

**DAMAGES**

**367**  In its pleadings and submissions, the plaintiff has sought both special damages and punitive damages. In connection with all the conspiracy defendants, except Cheri Kostynick, the plaintiff has sought punitive damages. In connection with those conversion defendants who are found to have purchased and used the revin vehicles with knowledge of or being reckless as to their status, the plaintiff also seeks punitive damages.

**368**  As far as special damages are concerned, the plaintiff seeks damages for its payment to the each insured for the value of the vehicle against all defendants found liable in respect of each vehicle jointly and severally. As against the conspiracy defendants, the plaintiff seeks additional special damages for expenditures relating to the theft of the vehicle and/or their recovery, such as payments of loss of use to the insured, towing charges, repair charges, and payment to the locksmith for a locksmith's report for example.

**1. Mitigation**

**369**  The defendants submit that the plaintiff failed to adequately mitigate its losses through the sale of the recovered vehicles. Although the plaintiffs did sell the vehicles at wholesale prices, the defendants say that they should have been sold on the retail market where they might have realized more as a result of the sales.

**370**  In *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=), the Supreme Court of Canada discussed the law of mitigation. Failure to mitigate is a question of fact and must be proven on a balance of probabilities by the defendant. The question to be determined is whether the plaintiff acted unreasonably in the circumstances in minimizing its loss. See: pp. 163 to 166.

**371**  In the circumstances of the present case, I am not satisfied that the plaintiff acted unreasonably in the means by which it chose to mitigate its losses. The plaintiff was confronted with significant numbers of stolen vehicles which had been stolen and used for varying periods of time and as a result, the increase in age and mileage of the vehicles would decrease their resale value. Given the need to deal with significant numbers of vehicles and the lack of any evidence of what could be expected to be achieved through individual retail sales in terms of timing and cost, I am not satisfied that the defendants' submissions concerning the plaintiff's failure to mitigate amount to more than an invitation to speculate that the plaintiff may have realized greater net sums through an attempt to sell the vehicles on a retail basis. In my view, that is insufficient to discharge the defendants' burden of proof with respect to its assertion of a failure to mitigate. I am not satisfied that the evidence permits a conclusion that the plaintiffs acted other than reasonably in all the circumstances and therefore I reject the defence of a failure to mitigate.

**2. Special Damages**

**372**  In summary, I have made the following findings of liability and special damages. For clarity, I have first set out the findings of liability based on each vehicle and the amount of damages and then below that I have set out the total liability for each defendant. It is important to note that the two ways of expressing the information representing the same total amount and should not be read as ordering double recovery. The amounts of money in the second grouping are subject to the joint and several liability described in the first grouping.

(a) Summary of Special Damages by Vehicle

1. Vehicle 53/Revin 53

**373**  With respect to this transaction, I find Harpreet Awla liable in conspiracy in the amount of $25,894.53.

1. Vehicle 49/Revin 49

**374**  With respect to this transaction, I find Cheri Kostynick liable in the amount of $4,226.66 as a conspiracy defendant. Although the evidence showed payments of $4,347.87 by the plaintiff, in submissions it sought the lesser amount of $4,226.66.

1. Vehicle 52/Revin 52

**375**  In connection with this vehicle, I find Gurpreet Awla and Cheri Kostynick liable as conspiracy defendants in the amount of $10,913.08 jointly and severally and Navdeep Brar liable as a conversion defendant in the amount of $9,482.50 jointly and severally with Gurpreet Awla and Cheri Kostynick.

1. Vehicle 14/Revin 14

**376**  I find Cheri Kostynick liable in conspiracy for special damages of $22,755.05.

1. Vehicle 45/Revin 45

**377**  I find Cheri Kostynick and Gurpreet Awla jointly and severally liable in relation to this vehicle as conspiracy defendants in the amount of $2,187.38.

1. Vehicle 41/Revin 59

**378**  I find Harpreet Awla liable as a conspiracy defendant in relation to Vehicle 41 in its incarnation as Revin 59 in the amount of $26,614.31 jointly and severally with Rodney Dick, who I find liable in conversion in relation to the same transaction in the same amount, that is $26,614.31.

1. Vehicle 41/Revin 17

**379**  I find Harpreet Awla and Sandeep Rai jointly and severally liable in the amount of $39,679.25 as conspiracy defendants. Their liability is joint and several with Ross Hinchberger as a conversion defendant in the same amount, that is, $39,679.25.

1. Vehicle 16/Revin 16

**380**  I find Sandeep Rai liable as a conspiracy defendant in connection with this vehicle and transaction in the amount of $28,520.79.

1. Vehicle 18/Revin 18

**381**  I find Harpreet Awla and Sandeep Rai liable as conspiracy defendants jointly and severally for the amount of $59,141.52 less the amount to be paid by Singleton Urquhart to the benefit of the plaintiff. Their liability is joint and several with Jason Smith whom I find liable as a conversion defendant for the sum of $58,227.79 less the same amount to be paid by Singleton Urquhart to the benefit of the plaintiff.

1. Vehicle 37/Revin 37

**382**  I find Vikram Atwal liable as a conspiracy defendant for the sum of $13,403.38. His liability is joint and several with the liability of Satwant Ranauta and Bansal & Sons Diesel Automotive Ltd., whose liability is in the amount of $12,604.13 and is joint and several with one another and with Vikram Atwal. I also find Ajmer Litt liable as a conspiracy defendant in the amount of $12,604.13. His liability is joint and several with the other two conversion defendants and with Vikram Atwal as a conspiracy defendant.

1. Vehicle 1A/Revin 1A

**383**  In connection with this vehicle and transaction, I find Vikram Atwal liable as a conspiracy defendant in the amount of $21,241.50.

1. Vehicle 1A/Revin 10/Revin 23

**384**  I find Harpreet Awla and Cheri Kostynick to be jointly and severally liable with one another and with Vikram Atwal for the sum of $21,241.50 for their involvement with Vehicle 1A in its incarnations as Revin 10 and Revin 23.

1. Vehicle 46/Revin 32

**385**  I find Vikram Atwal liable as a conspiracy defendant in the sum of $27,695.87.

1. Vehicle 46/Revin 36

**386**  I find Vikram Atwal liable as a conspiracy defendant in connection with this vehicle in its incarnation as Revin 36 in the amount of $40,475.75.

1. Vehicle 46/Revin 46

**387**  I find Cheri Kostynick liable as a conspiracy defendant in the amount of $37,325.00 in connection with this transaction in its incarnation as Revin 46.

1. Vehicle 42/Revin 42

**388**  I find Harpreet Awla liable in the amount of $9,926.03 in connection with Revin 42 as a conspiracy defendant.

**4. Summary of Special Damages by Defendants**

**389**  Harpreet Awla's total liability is $182,496.96 for his involvement with six transactions, less the amount to be paid to the plaintiff from Singleton Urquhart LLP's trust account in respect of Vehicle 18.

**390**  Cheri Kostynick's liability is $127,341.56 for her involvement with six transactions, less the amount to be paid to the plaintiff from Singleton Urquhart LLP's trust account in respect of Vehicle 18.

**391**  Sandeep Rai's total liability is $95,751.56 for his involvement with three transactions.

**392**  Vikram Atwal's total liability is $102,815.75 for his involvement with four transactions.

**393**  Gurpreet Awla's total liability is $13,100.46 for his involvement in two transactions.

**394**  Navdeep Brar's total liability is $9,482.50.

**395**  Ross Hinchberger's total liability is $39,679.25.

**396**  Rodney Dick's total liability is $26,614.31.

**397**  Jason Smith's total liability is $58,227.79, less the amount held in plaintiff's counsel's trust account to be paid to the benefit of the plaintiff, in respect of Vehicle 18.

**398**  Satwant Ranauta's total liability is $12,604.13.

**399**  Bansal & Sons Diesel Automotive Ltd.'s total liability is $12,604.13.

**400**  Ajmer Litt's total liability is $12,604.13.

**5. Punitive Damages**

**401**  In this case, the plaintiff has sought punitive damages against all of the conspiracy defendants except Cheri Kostynick and against those "conversion defendants who are found to have knowingly or recklessly obtained and used the stolen vehicles or taken steps to conceal the true facts from the plaintiff or the court".

**402**  The plaintiff seeks punitive damage awards similar to those in *ICBC v. Atwal*, *ICBC v. Gill* and *ICBC v. Ben-Jaafar*.

**403**  In *ICBC v. Atwal*, I set for the basis for punitive damages at paragraphs 305 to 308 as follows:

[305] The plaintiff seeks punitive damages against the conspiracy defendants and "against any conversion defendants who are found to have knowingly or recklessly obtained and used the stolen vehicles or who took steps to conceal the true facts from the court".

[306] In *Insurance Corporation of British Columbia v. Husseinian*, [*2008 BCSC 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1RG-00000-00&context=), [*59 C.C.L.I. (4th) 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1RG-00000-00&context=), Gerow J. set forth the basis for considering the imposition of punitive damages at paras. 161 - 163 as follows:

[161] In *Whiten v. Pilot Insurance Co.*, [*[2002] 1 S.C.R. 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=), the Supreme Court of Canada stated at para. 94 that the following points are important in determining whether an award of punitive damages is appropriate:

1. Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[162] The court went on to note at para. 95 that what is essential in determining whether an award of punitive damages should be made and the amount of the award are the particular circumstances of the case, the fact that the remedy is exceptional, and fairness to both sides.

[163] Other factors to consider in determining whether an award of punitive damages should be made and the amount of the award include:

The financial means of the defendant;

Whether the defendant required the plaintiff to prove its claim;

Whether the defendant has perpetrated a fraud on the public;

Whether the conduct includes criminal conduct;

If the defendant has been charged criminally, that fact should be taken into account;

Whether the defendant has abused the court process by conduct such as commencing actions in pursuit of his or her fraudulent claims;

If the act was fraudulent, whether it was planned and deliberate; and

Whether there was one act or multiple acts.

*Insurance Corporation of British Columbia v. Akers*, [*2003 BCSC 1407*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20V0-00000-00&context=); *Insurance Corp. of British Columbia v. Hoang*, [*2002 BCSC 1162*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-2553-00000-00&context=); *Insurance Corp. of British Columbia v. Hoang*, [*2003 BCSC 1139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-208G-00000-00&context=).

[307] In the present case, the conspiracy defendants whom I have found liable, were involved to some degree or another in a well organized and executed criminal enterprise to defraud the plaintiff of a significant amount of money. The cost to the plaintiff is, of course, the cost to the motoring public. In determining whether punitive damages are appropriate, and if so in what amount, it is important to consider the factors set out in para. 306 above in relation to each of the defendants and to consider whether the global amount of special damages ordered is insufficient to address the issues set out above.

[308] In that regard, it is important to note that the plaintiff has expended considerable time, effort and money in investigating the scheme at issue, recovering the vehicles in question, and mitigating its losses through salvage sales. The plaintiff has not sought as damages the costs expended in the investigations or recoveries of the vehicles at issue and hence, I am satisfied that the special damages ordered while reflective of the direct costs consequent on the actions of the defendants relative to the individual vehicles does not fully address the need to accomplish the objectives of retribution, deterrence and denunciation for which punitive damages are awarded, given that the defendants face no criminal sanction for their conduct.

**404**  In *ICBC v. Ben-Jaafar*; *ICBC v. Gill*, *supra*, I held as follows with respect to Vikram Atwal at paragraph 292:

Insofar as Vikram Atwal is concerned, it appears that he was integrally involved in the scheme at issue in these actions, and he now faces total liabilities in three cases in the order of approximately $335,000. Bearing in mind that he effectively took no part in defending either of the present actions, and that the quantum of damages thus far awarded against him reflects a substantial amount, I decline to order a further $10,000 per vehicle, but would instead order punitive damages against Vikram Atwal in the total amount of $40,000 arising from these two actions. That will bring the total punitive damage award against Vikram Atwal to $100,000.

**405**  Insofar as Harpreet Awla is concerned, it appears on the evidence that he played a significant role in the revinning scheme, not only in terms of acquiring, disguising and selling the various vehicles, but also in enlisting others such as Lynn Holt and Cheri Kostynick to become involved in the process based on their particular vulnerabilities. In my view, it is appropriate in all the circumstances to award punitive damages of $10,000 per vehicle against Harpreet Awla for a total of $60,000.

**406**  Harpreet Awla did not defend this case but there is evidence that on an earlier occasion he dissuaded or attempted to dissuade Cheri Kostynick from testifying against him and in my view that increases the need to impose a sanction by way of a damage award that emphasizes the need to deter and denounce his conduct.

**407**  Insofar as Gurpreet Awla is concerned, it does not appear that he was as involved as Harpreet but he nonetheless played a significant role insofar as he was concerned and I would similarly award punitive damages against him of $10,000 for each car he was involved in for a total of $20,000 in punitive damages.

**408**  Insofar as Vikram Atwal is concerned, again I must take account of the significant damage award that has been made against him, not only in connection with this case but in connection with the case of *ICBC v. Awla*, and *ICBC v. Ben-Jaafar* and *ICBC v. Gill*, *supra*. In my view, in light of those awards, it is appropriate to scale down the punitive damages awarded against Vikram Atwal and I would award the sum of $5,000 per vehicle for a total of $20,000.

**409**  Finally in respect of Sandeep Rai who is a default defendant in conspiracy, it is my view that he was not as involved as the other principal members of the conspiracy but nonetheless played a critical role in connection with those vehicles upon which his liability is based and clearly breached a position of trust vis-a-vis his principal, the Insurance Corporation of British Columbia for whom he worked as an agent.

**410**  In those circumstances, I conclude that punitive damages of $7,000 per vehicle is merited for a total of $21,000.

**411**  Insofar as Mr. Ranauta and Bansal and Sons are concerned, as Bansal and Sons are liable vicariously, I would not order punitive damages against that entity. Insofar as Mr. Ranauta is concerned, his one involvement in contributing to the disguise of a stolen vehicle marked a breach of his duties as a motor vehicle inspector in a way that contributed to a serious scheme of theft and conversion. In those circumstances, I would award punitive damages in the amount of $5,000.

**412**  Insofar as the defendant Smith is concerned, there is evidence that he has lost the $30,000 which he paid for the vehicle in the first place and will be liable for the difference between the sale proceeds of the vehicle and the amount paid to the insured, amounting to approximately $28,000.

**413**  I have found that he knew or was wilfully blind to the fact that the vehicle he was buying, given the circumstances in which he bought it and the price which he paid for it, that the vehicle was stolen and thus renders him liable to some measure of punitive damages. In all the circumstances, I conclude that punitive damages in the amount of $3,000 is an appropriate sum to award against Mr. Smith for his participation in this scheme.

**414**  Insofar as Mr. Dick is concerned, as his claim has not yet been finally determined, given the severance of his counterclaim against ICBC, I consider it inappropriate to award punitive damages at this time.

**415**  In the event that and when Mr. Dick's counterclaim is determined, the plaintiff will have liberty to re-apply for an award of punitive damages against Mr. Dick.

**416**  Costs will be awarded against those defendants whom I have found liable. Counsel have liberty to address me on each party's proportionate share of costs if they are unable to agree.

**417**  Mr. Bansal is entitled to his proportionate costs of defending the action.

**418**  Insofar as interest is concerned, I order that it be awarded as calculated on the same formula as set forth in the *Insurance Corporation of British Columbia v. Ben-Jaafar*, [*2012 BCSC 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62JX-00000-00&context=).

**419**  All the awards of special damages in relation to each vehicle are reduced by any amount that is credited to that vehicle as a consequence of settlements reached with other defendants in relation to that vehicle.

A.F. CULLEN A.C.J.S.C.

**End of Document**

[***Khudabux v. McClary, [2016] B.C.J. No. 2149***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M13-K1S1-JKHB-644X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

A. Saunders J.

Heard: January 18-22 and March 24, 2016.

Judgment: October 14, 2016.

Dockets: M146936, M161604

Registry: New Westminster

**[2016] B.C.J. No. 2149** | 2016 BCSC 1886

Between Yasmin Khudabux, Plaintiff, and Mark Daniel McClary, Defendant And between Yasmin Khudabux, Plaintiff, and Brian Scott MacDonald, Defendant

(233 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Psychological injuries — Considerations impacting on award — Pre-existing injury — Action by Khudabux for damages for personal injuries sustained in two motor vehicle accidents allowed in part — The accidents occurred in 2011 and 2014 — Khudabux had also been involved in several other accidents — The 2011 accident involved two collisions — Khudabux was entirely at fault for the first and was 20 per cent at fault for the second — Liability was admitted by the defendant McDonald for the 2014 accident — Khudabux's claims for income loss and future care costs were denied — She was awarded $43,334 in damages, which included $32,000 in non-pecuniary damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Employment status — Pre-existing medical conditions — Loss of housekeeping ability — Special damages — Non-pecuniary loss — Action by Khudabux for damages for personal injuries sustained in two motor vehicle accidents allowed in part — The accidents occurred in 2011 and 2014 — Khudabux had also been involved in several other accidents — The 2011 accident involved two collisions — Khudabux was entirely at fault for the first and was 20 per cent at fault for the second — Liability was admitted by the defendant McDonald for the 2014 accident — Khudabux's claims for income loss and future care costs were denied — She was awarded $43,334 in damages, which included $32,000 in non-pecuniary damages.**

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| Action by Khudabux for damages for personal injuries sustained in two motor vehicle accidents. The first accident occurred on April 6, 2011. The second accident occurred on March 24, 2014. Liability was admitted by the defendant McDonald for the 2014 accident but liability for the 2011 accident was denied by the defendant McClary. Khudabux had previously suffered significant injuries when, as a pedestrian, she was struck by a vehicle in 2006. She was also involved in several other motor vehicle accidents and there was evidence of cognitive issues and psychiatric complications. Khudabux was now 63 years old. She was seeking an award for non-pecuniary damages in the range of $90,000 to $110,000. The defendants sought to have non-pecuniary damages assessed globally in the range of $35,000 to $50,000, reflecting mild soft tissue injuries imposed upon pre-existing chronic pain and depression. The defendants sought a reduction of 20 to 30 per cent of that amount to account for the pre-existing conditions and Khudabux's failure to mitigate her losses.  HELD: Action allowed in part.  The 2011 accident involved two separate collisions. Khudabux was entirely at fault for the first of the two collisions and was 20 per cent contributorily negligent with respect to the second collision. The 2014 accident likely only caused a temporary aggravation of Khudabux's physical symptoms. Khudabux had a spotty employment record before 2011 and was awarded no damages for past or future income loss. Her claim for the cost of future care was also denied. There was no failure to mitigate. Khudabux was awarded $43,334 in damages, which included $32,000 in non-pecuniary damages, $2000 for loss of housekeeping capacity, and $9334 in special damages. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1), s. 1(2)

**Counsel**

Counsel for the Plaintiff: K. Deane-Cloutier, D. Darychuk.

Counsel for the Defendants: S. Markovich, K.L. Naish .

[Editor's note: A correction was released by the Court October 19, 2016; the change has been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

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| **A. SAUNDERS J.** |

**I. INTRODUCTION**

**1**  The plaintiff sues for damages in respect of injuries alleged to have been suffered in two motor vehicle accidents. The first of these accidents was on April 6, 2011 (the "2011 MVA"), in respect of which liability is denied by the defendant McClary. The second accident was on March 24, 2014 (the "2014 MVA"), and liability for that accident is admitted by the defendant MacDonald.

**2**  I should observe at the outset that this action has three unusual features.

**3**  First, the plaintiff has an unusually complex medical history. She had previously suffered significant injuries in an accident in 2006 when she, as a pedestrian, was struck by a motor vehicle (the "2006 MVA"). Those injuries were exacerbated by another motor vehicle accident in 2010 (the "2010 MVA"). In addition to the physical injuries suffered in those earlier accidents, there is evidence of cognitive issues, and psychiatric complications.

**4**  Her injuries were still significantly symptomatic at the time of the 2011 MVA, and she was still undergoing treatment. At that point in time the plaintiff, coincidentally, had been unemployed since January 2011; she was depressed and was suffering what she described as anxiety attacks, and had been assessed by her family physician as being unfit to work at least until June 30.

**5**  Her medical history was further complicated in the intervening period of approximately three years between the two subject accidents, the 2011 MVA and the 2014 MVA. There was yet another motor vehicle accident, in July 2012 (the "2012 MVA"), and there were three other accidents due to non-tortious causes. The last of these three non-tortious accidents -- on October 25, 2013, five months before the second of the subject accidents -- resulted in significant injuries and left the plaintiff being entirely disabled for employment.

**6**  The second unusual feature is that the plaintiff was an extremely poor historian. She had difficulty giving a coherent account of events; in both her direct examination and cross-examination she frequently went off on long, discursive tangents in response to simple questions, and as a result her evidence was extremely fragmented. There were many points at which her testimony seemed histrionic. At other points her responses were so inconsistent that it appeared she was possibly conflating injuries suffered in one incident with those suffered in another. I did not have any concerns as to the plaintiff's honesty, by which I mean there did not seem to be any conscious exaggeration or untruthfulness. But both the manner in which she expressed herself and the difficulties she had in doing so certainly had an adverse impact on the reliability, and therefore the persuasiveness, of her evidence. These difficulties were particularly salient because the plaintiff called no evidence from any collateral sources such as family members or friends, employers or work colleagues.

**7**  The plaintiff's difficulties in giving evidence may have been due to cultural or linguistic factors, English not being her first language. They may also have stemmed from cognitive, psychological, or psychiatric issues, or a combination; as will be seen, there is definite medical evidence of mental health issues, and no doubt these played a role in her presentation at trial. Allowances must be made in personal injury actions for persons who, through no fault of their own, exhibit such difficulties in giving evidence, but nevertheless the burden of proof still rests on a plaintiff.

**8**  The third factor I highlight is that the first of the two subject accidents, the 2011 MVA, in fact involved two separate collisions. The defendant McClary was only involved in the second collision. The plaintiff, on her own evidence, was injured as a result of the first collision, meaning that, in addition to the pre-existing symptoms from the 2006 and 2010 MVAs, she had already sustained additional injuries or exacerbations of her existing injuries when McClary's vehicle impacted hers.

**9**  Neither of the two physicians who gave evidence at trial on her behalf -- her family physician Dr. MacDonald, and a psychiatrist, Dr. Mok, who performed an independent psychiatric examination -- drew any distinction between the two collisions with respect to her injuries, and the question of what injuries had already been sustained from the first of the two collisions, prior to the defendant McClary colliding with her, was not pursued on cross-examination of either of those expert witnesses.

**II. BACKGROUND -- PRE-ACCIDENT MEDICAL AND WORK HISTORY**

**10**  Ms. Khudabux is now 63 years of age. She had a traumatic childhood. She completed high school in Kenya, and took some secretarial training there. After immigrating to Canada, she received some training in data entry, and worked in clerical positions. She moved to Vancouver in 1995, and after obtaining a diploma in insurance from Vancouver Career College, she qualified as a licensed Autoplan agent in 1995.

**11**  There is no direct medical evidence of Ms. Khudabux's psychiatric history prior to 2010. Her psychiatric expert witness at this trial, Dr. Hiram Mok, summarizes her history in his report. Dr. Mok states that according to Ms. Khudabux, she developed a major depressive disorder in the year 2000, following her separation from her husband. She was started on an anti-depressant by her former family physician Dr. Styffe, in 2000, and began seeing a psychiatrist, Dr. Hyrman, in 2004.

**12**  On January 8, 2006 Ms. Khudabux suffered injuries when, as a pedestrian, she was hit by a van. She sustained a concussion, and suffered injuries to her neck, shoulders, mid-and lower-back, knees, ankles, and feet. She suffered "grinding" headaches and couldn't sleep well for months afterwards. She testified to having experienced some improvement, "on and off", but has never really recovered from those injuries.

**13**  Ms. Khudabux was off work for, she recalled, 7 or 8 months as a result of the 2006 MVA. She had been working with an insurance agency for only about 6 months, a practicum position while she wrote exams. By the time she felt fit enough to return to work, her position had been filled.

**14**  She then was able to find employment with another brokerage, but was fired after a short time because, according to her, she was often late and tended to make errors.

**15**  In August 2009 (this history is also from Dr. Mok's report), she was assessed by a psychiatrist, Dr. Passey, for an independent medical examination. Dr. Passey diagnosed her as having:

1. Chronic Post-Traumatic Stress Disorder, (2) Major Depressive Disorder (partially treated), and (3) Chronic Pain Disorder associated with both psychological factors and a general medical condition.

Dr. Mok further states:

Dr. Passey also opined on the fact that she probably suffered from a possible mild traumatic head injury from that motor vehicle accident of January 8, 2008 [sic], and that Yasmin Khudabux had a fairly complicated history and history of depression prior to the motor vehicle accident dating back to the year 2000.

**16**  The plaintiff then worked for a series of other brokerages, six in total, up to 2010. She could not recall the details of why she left some of these positions. One position, she said, did not work for her because she was having headaches, making it hard to study for her licensing exams. At another brokerage, she testified, she was refused a month off to have surgery to address her headaches, and was then terminated after a confrontation with a customer.

**17**  In June 2010 she was injured when rear-ended by another driver (the 2010 MVA). Asked how that accident affected her, she replied that with anything that happens, her pain is aggravated. She experienced worsening of all of the physical symptoms she had suffered since the 2006 MVA. She began seeing her current family physician, Dr. MacDonald, shortly after the 2010 MVA. Dr. MacDonald referred her to physiotherapy. On examination, Dr. MacDonald noted tight musculature around her cervical and lumbar spine and her trapezius muscles.

**18**  In August 2010 the plaintiff found another position with a brokerage, but she felt the staff didn't like the way she was doing things. In her direct examination she testified that she quit after her supervisor "made some kind of sexual remark", telling him that she did not like his attitude; in cross-examination she said that she couldn't remember if in fact she had quit or been fired.

**19**  Ms. Khudabux reported to Dr. MacDonald on August 25, 2010 that she was having ongoing daily headaches, which were getting worse. Dr. MacDonald increased her Effexor dosage, because -- as Dr. MacDonald testified -- her mood was not stable.

**20**  Ms. Khudabux found another job in the fall of 2010, but testified that she lost her position when the agency closed that location.

**21**  In October 2010, Ms. Khudabux settled her personal injury damages claim in respect of the 2006 MVA.

**22**  In January 2011, Ms. Khudabux moved to Port Coquitlam to take a job with yet another brokerage. After only about 3 weeks on the job, she testified, she either quit or was fired -- she could not recall which -- because she refused to take instructions from a supervisor who was a relative of the manager, and who had only 6 months experience.

**23**  As a result of her loss of that position, she testified, she became more depressed and anxious.

**24**  Dr. MacDonald assessed Ms. Khudabux again on February 9, 2011. Ms. Khudabux was continuing to complain of chronic back and knee pain, and was having problems with her memory. Dr. MacDonald again increased her Effexor dosage. Her assessment of Ms. Khudabux included depression and carpal tunnel syndrome.

**25**  In March 2011, Dr. MacDonald noted that Ms. Khudabux's back pain had been chronic "since MVA". Dr. MacDonald, in her testimony, was unable to say whether this was a reference to the 2006 MVA or the 2010 MVA.

**26**  Ms. Khudabux's testimony was that by the time of the 2011 MVA in April 2011, she was "somewhat better", "back to 50%" of her pre-2010 MVA condition (by which I took her to mean 50% improvement of the exacerbations she suffered from the 2010 MVA, but still not recovered from that accident and certainly not recovered from the 2006 MVA). She had found chiropractic and physiotherapy too painful to endure. She had, however, begun laser therapy treatments at a chiropractic clinic in March 2011. She testified that she had been feeling that those laser treatments were really starting to help.

**27**  (It was not clear what specific injury or injuries were being treated with this therapy. I note that the plaintiff was recorded by Dr. MacDonald, in the clinical note of April 19, 2011, as having said that her back and ankle were "much better" as a result of three of these treatments in the prior two weeks. That statement does not fully accord with the plaintiff's own evidence as to the limited degree to which she had recovered from the 2010 MVA. No records of the laser therapy treatments were tendered, and I therefore have no contemporaneous evidence as to what Ms. Khudabux was telling the therapist who was rendering those treatments.)

**28**  Ms. Khudabux testified that prior to the 2011 MVA she still found climbing stairs very difficult and painful. She limped because of knee pain. She was not able to exercise at all, due to pain.

**29**  Dr. MacDonald's last clinical record prior to the 2011 MVA was on March 11, 2011, less than four weeks beforehand. Ms. Khudabux reported:

Difficulty coping esp. since [flèche vers le haut] depression symptoms

Acupuncture = mild relief

Dr. MacDonald was considering adding amitriptyline to the plaintiff's medications, as her depression had still not stabilized. Dr. MacDonald also wrote a note in support of a "medical EI" claim; the plaintiff would be unable to work at least until June 30, 2011.

**III. LIABILITY**

**A. The 2011 MVA**

**1. Evidence as to the Collision**

1. **Evidence of the Plaintiff**

**30**  The first of the subject accidents was on April 6, 2011, a Wednesday, and occurred in the eastbound lanes of Highway 1 near the Grandview Highway on-ramp. The plaintiff estimated that the accident occurred at 4:00 or 4:30 p.m. The independent witness who testified on the plaintiff's behalf, Ms. Michaele, estimated it was about 5:00 p.m. The defendant McClary put the time at 4:00 p.m. I accept it was late afternoon, a time at which traffic congestion could reasonably be anticipated.

**31**  The plaintiff testified that she entered Highway 1 from the Grandview on-ramp, merging to her left into the "slow lane". Traffic in that lane, she testified, was not moving, so she signalled, checked her mirrors, and moved into the middle lane. That lane was not moving, either; she saw an opening in the fast lane, signalled a lane change, and moved into that lane. She did not see any cars behind her in the fast lane.

**32**  The plaintiff testified that she thought traffic in the fast lane was moving. Her own speed was 30 to 35 km/h, and she was in that lane for between 2 and 5 seconds, when she realized that the car immediately ahead of her was stopped. This was the first time she had seen that car. Fearing a collision, she quickly swerved to her left into the HOV lane, without signalling, but in doing so "clipped" or "touched" -- she used both terms -- that car ahead of her in the fast lane, making contact between the right front of her own car, and the left rear of the other vehicle. She could not describe the force of the impact, other than to say it was like a "fender bender".

**33**  She continued to move into the HOV lane, at an angle; she said that she thought she was going to hit what she called the "retaining wall" -- the median divider between eastbound and westbound traffic -- but was able to straighten her car somewhat and bring it to a stop, still at an angle, with the right rear protruding into the HOV lane and her driver's door so close to the median that she could not open it. She said in cross-examination, rather dramatically, that she had thought she would die if she hit the "retaining wall"; she said she was going fast enough to be "concerned", although she conceded that she never lost control of her car at any time.

**34**  At this point, prior to being hit by McClary's truck, she felt pain in her neck and left shoulder, and her knee, and also felt dizzy. She felt like she was in no condition to move. She felt like she was in shock.

**35**  She also testified that she thought her car was "smoking", so she turned the engine off, removed the keys from the ignition, and undid her seat belt so she could reach the glovebox and begin looking for the registration. She did not turn on her hazard lights -- because, she said, she was afraid the car might catch fire. She did not check surrounding traffic conditions.

**36**  She had been stopped for, she estimated, 3 to 5 seconds when she heard a "bang" and the sound of breaking glass -- from, she later surmised, her right passenger mirror breaking. This was the second collision, the result of being hit on the back right corner, and along the right side, by the defendant McClary's truck as it had passed her at speed.

**37**  Ms. Khudabux testified that her head, her back and her knees all struck the inside of the car due to the impact of the second collision. The additional injury she felt most acutely, initially, was chest pain. Later on, as she remained at the accident scene, all of her previous symptoms -- including headache, arm pain, and back pain -- started feeling as if they'd been aggravated.

1. **Evidence of the Independent Witness**

**38**  The plaintiff called an independent witness, Ms. Michaele. She had been driving eastbound on Highway 1, and after passing underneath the Grandview overpass she moved to the left into the HOV lane where it begins. The roadway was congested with traffic. She was doing about 60 km/h in the HOV lane. Traffic in the other eastbound lanes to her right was much slower, and up ahead of her, further to the east where the Grandview on-ramp merges with Highway 1, traffic in the other lanes was coming to a complete stop.

**39**  Ms. Michaele observed the front right of the plaintiff's vehicle, in the lane to her immediate right -- the eastbound "fast lane" -- collide with the rear left of a grey car in front of it. Ms. Michaele described this as not being a high-speed collision, but said there was a considerable impact. She then observed the plaintiff's car move further over into the HOV lane, ahead of Ms. Michaele, and then come to a complete stop, with the nose of the plaintiff's car angled toward the median divider, about one or two feet away from it.

**40**  Ms. Michaele had started to brake -- to the extent that, she estimated, she had probably halved her speed -- as a result of seeing this first collision, between the plaintiff's car and the grey car. At the point in time when the plaintiff came to a stop in the HOV lane, Ms. Michaele was about 5 or 6 car lengths behind her.

**41**  Ms. Michaele then saw McClary's vehicle -- a white Ram pickup truck -- in her peripheral vision, moving across from the right. The McClary truck had not been ahead of Ms. Michaele when the plaintiff had her first collision. Asked what speed the McClary truck was travelling, Ms. Michaele could only say, "fast". Her sense from its line of travel was that the truck was coming from the second lane -- the middle eastbound lane -- into the third land -- the "fast lane" -- and then into the HOV lane. The McClary truck cut her off, entering the HOV lane right in front of her, only about one or two metres ahead. She described its motion as more of a swerve than a lane change, and said she had to slam on her brakes, activating her ABS. It appeared to her that the truck was swerving into the HOV lane to avoid colliding with the grey car. Ms. Michaele testified that if the truck had not swerved into the HOV lane, it would have gone straight into the grey car's rear end.

**42**  She then saw McClary's truck hit Ms. Khudabux's car, and Ms. Khudabux's car hit the median. The front left of the truck hit the back right of the car, and impacted it along the side as well. Her impression was that 3 or 4 seconds elapsed after the plaintiff's car come to a stop and before the second collision.

**43**  McClary's truck then veered back into the fast lane, hitting the left side of a van that was positioned in the fast lane, ahead of the grey car Ms. Khudabux had hit in the first collision. McClary then came to a stop.

1. **Evidence of the Defendant McClary**

**44**  Mr. McClary testified he had entered the eastbound lanes of Highway 1 from 1st Avenue. He moved over into the fast lane (the left-most lane at that location, which was west of commencement of the HOV lane). He recalls that traffic was moving quite well. He first said he was travelling at about 60 km/h; under cross-examination, he revised that to between 60 and 70 km/h. He cannot say how long he remained in that lane prior to the accident, but said he remained at a pretty constant speed until moments before the accident.

**45**  As he proceeded eastbound, towards the Grandview interchange, traffic in the right lanes became more congested. The HOV lane was clear, and he observed that traffic was moving into the HOV lane to free up space in the third lane, the fast lane, which he was travelling in.

**46**  Mr. McClary recounted the events around the collisions as having occurred much more quickly than they were described by either Ms. Khudabux or Ms. Michaele. He says that when he first observed the plaintiff, she was about four car lengths ahead of him, moving from the middle lane into his lane; she then clipped the car ahead of her before moving into the HOV lane. He says this all happened "in seconds -- it was just a flash," and that the plaintiff's car was only ahead of him in his lane for "seconds, if that". When he saw the plaintiff's car enter the lane ahead of him, he immediately braked and swerved to the left to avoid a collision. The plaintiff, however, also moved left into the HOV lane and came to a stop. Mr. McClary thought there was enough room to go between the plaintiff and the grey car, but he hit the plaintiff's car as he passed by it. He agreed, in cross-examination, that this was a "fairly heavy impact."

**47**  He then came to a stop, hitting the side of a van immediately in front of the grey car. He was then more or less parallel to the end of the Grandview Highway on-ramp (roughly the same position as attested to by the plaintiff and Ms. Michaele).

**48**  Mr. McClary was cross-examined on evidence he gave during an examination for discovery, in which he had deposed to having traveled behind the plaintiff's vehicle for 30 to 60 seconds before the collision. He resiled from that time estimate, saying that he had been trying, during the discovery, to give the best answer, but that on reflecting, later on, he realized that he could not have been following the plaintiff for that length of time.

**49**  When asked in cross-examination to agree that he hit the plaintiff because he did not have enough "time and distance" to simply brake given the speed he was travelling, he at first denied this and said the situation changed because the car ahead of him stopped suddenly, not gradually, and there was also a stopped car in the HOV lane. He agreed that he didn't have the time or distance to stop for two stopped vehicles that were on the highway, one of which was in his lane.

**2. Assessment of Liability**

**50**  Ms. Khudabux is entirely at fault for the first of the two collisions.

**51**  I find both Mr. McClary and Ms. Khudabux to have been at fault for the second collision.

**52**  I do not attach much significance to the substance of the testimony given by Mr. McClary on examination for discovery as to the distance he followed the plaintiff prior to the collision; given that Ms. Khudabux entered Highway 1 from the Grandview on-ramp, and given that he finally brought his truck to a halt roughly parallel to the end of the on-ramp, I agree that his initial discovery evidence of having followed Ms. Khudabux for 30 to 60 seconds makes no sense. This change in his evidence does, however, raise a concern as to the reliability of his trial testimony.

**53**  Given that Mr. McClary was unable to bring his truck to a stop until it was past the grey car, I do not attribute any of the second collision to the manner in which Ms. Khudabux had been manoeuvering across the lanes of traffic; in other words, I do not find the collision occurred because Ms. Khudabux cut him off. Had Ms. Khudabux not manoeuvred across in front of him, he still would have had to brake for the grey car, and in all likelihood would have collided with that grey car had he remained in the fast lane. This finding is consistent with his own testimony as to how and where he came to a stop, and with the testimony of Ms. Michaele as to his vehicle's movements prior to the collision. It was likely the case that he was quite simply not paying sufficient attention to the traffic conditions around him, and was travelling too fast for those conditions.

**54**  The HOV lane, however, should have been clear and available for him to swerve into to avoid a collision. That the lane was not clear was due to Ms. Khudabux having stopped her vehicle in a position where it intruded into the HOV lane. Notwithstanding her testimony, I do not find that she had any reasonable basis for concluding that it would have been unsafe for her to continue to operate her vehicle. Rather than blocking the HOV lane, where there was no shoulder, she ought to have slowly manoeuvred her car back across the lanes of traffic to the right shoulder, where she could have safely exited the vehicle and exchanged information with the driver of the grey car. I find she was negligent for stopping her vehicle in a through lane, where it would foreseeably be an impediment to traffic.

**55**  In addition, I find that, having brought her vehicle to a stop in a position where it would substantially impede traffic in a lane of travel on a busy, major thoroughfare, Ms. Khudabux ought to have anticipated that her stopped vehicle potentially posed a hazard to other drivers. She undid her seatbelt without activating her four-way indicators and without doing any kind of check of surrounding traffic. Had she done so, I find it likely that she would have appreciated that eastbound vehicles were having to slow dramatically in reaction to the traffic congestion, and she would then reasonably have anticipated the need to keep a careful watch before taking any steps to unfasten her seatbelt and exit her vehicle.

**56**  In the circumstances, I find her contributorily negligent in respect of the injuries she sustained from the second collision, both for stopping the vehicle in the HOV lane and for undoing her seatbelt before it was safe for her to do so. I assess her contributory ***negligence*** in respect of the injuries caused by the second collision at 20%.

**B. The 2014 MVA**

**57**  The March 24, 2014 accident was a rear-end collision. As noted at the outset, the defendant MacDonald admits liability.

**IV. DAMAGES**

**A. The Plaintiff's Evidence**

**58**  I have outlined above some of the evidence of Ms. Khudabux's physical and psychiatric conditions prior to the 2011 MVA. Ms. Khudabux testified as to those injuries and conditions and her various treatments, recounting them in what frankly struck me as obsessive detail.

**59**  In her direct examination, Ms. Khudabux was asked to describe the injuries she attributes to the 2011 MVA.

**60**  I recounted above Ms. Khudabux's evidence as to the injuries she had begun to feel upon bringing her vehicle to a stop after the first collision, and the other feelings of her pre-existing pain being aggravated later, as she remained at the scene after the second collision.

**61**  She began to have a headache at the scene. She had suffered from headaches since the 2006 MVA. Prior to the 2011 MVA, in late 2010 and early 2011, she testified that she would have extreme headaches if she worked too hard, under the glare of lights or when using a computer, and if there were changes in the weather. She stated that her headaches did not change much as a result of the 2011 MVA.

**62**  Prior to the 2011 MVA, she could read for about half an hour before needing to rest for 15 minutes, and she could remember "most" of what she read. Now, she says, she can read for only about 15 minutes before getting a headache, and she finds it difficult to focus and retain what she has read.

**63**  The 2011 MVA, she testified, caused "increased" stiffness and pain in her neck and arm. She said that currently they still get very stiff, though she did not draw any more specific comparison between the current level of pain and discomfort and what she was experiencing prior to the 2011 MVA. Ms. Khudabux appeared to be wearing a splint or brace on her right arm. At least twice during her testimony, she gestured at the area of this splint, explaining that it was a great source of discomfort.

**64**  As to her mid-back, she testified that prior to the 2011 MVA it had been getting better, but it would be painful if she sat for too long.

**65**  She continued to feel pain in her lower back from the 2006 MVA prior to the 2011 MVA, having only recovered to 50% of her pre-2006 MVA condition. However, she said that her back pain had been controllable, whereas now it is more painful and "not controllable at all". She now has a lot of pain going into her buttocks and down her legs into her knees; the pain is now constant, whereas before the 2011 MVA it was "not too bad". Before the 2011 MVA, she could sit for half an hour without pain; now, she can only sit for 10 or 15 minutes.

**66**  She testified that her right knee now gets swollen very often; she has knee pain almost every day, and has to wear knee braces. She avoids climbing stairs because her knees "click" and are painful.

**67**  Her feet were very painful following the 2006 MVA. She stated that the 2011 MVA "kind of aggravated" this symptom.

**68**  She finds it difficult to do laundry and household chores because of pain in her arm and her knees. She finds it difficult to drive due to headaches, knee and hand pain, and depression. Her thumb and hand pain restrict her ability to crochet, and her ability to sew is limited by foot and knee pain. She has cut down on the volunteer work she does at her mosque.

**69**  Ms. Khudabux testified that she explained to her family physician, Dr. MacDonald, that all her pains had been aggravated by the 2011 MVA. She then spontaneously observed that when she tries to explain her injuries, her voice will go high-pitched, as if she is screaming, and people often mistakenly think she is angry or shouting. She then observed that she first noticed she was behaving in this manner in 2010.

**70**  A short time later in her testimony, she was asked what she has told her family physician about her feelings of depression. Ms. Khudabux testified that she always says that she is getting anxiety attacks, that she is not able to work with people because they say that she is shouting at them, and that her personality has changed.

**71**  Asked in direct examination how her depression is these days, she said that she has moods, she gets angry at herself, has less energy, and sleeps more than normal, sometimes through a whole day. Asked how this differed from her condition before the 2011 MVA, she said it was not much different.

**72**  Ms. Khudabux recounted her history following the 2011 MVA. She injured herself in a slip-and-fall type accident on May 15, 2011, further aggravating her MVA injuries. By August 2011 her depression and her physical injuries had abated to the point that she was able to return to work, obtaining employment with an insurance agency, Atkinson Terry. However, she soon lost that job due to conflict with her supervisor, repeating her pre-accident pattern of difficulties in the workplace. She underwent gall bladder surgery in November 2011 and was unable to work for a time; she then obtained a temporary position with another insurance agency, ST Insurance, filling in for vacationing staff, in December 2011.

**73**  She travelled to east Africa in March 2012. While on that vacation she slipped and fell in the shower, hitting her head.

**74**  On her return to Canada, there was an incident of significant conflict with her family members in May 2012, which led to her being involuntarily hospitalized for psychiatric issues.

**75**  On July 11, 2012, Ms. Khudabux was injured in another rear-end accident (the 2012 MVA). Describing this accident in cross-examination, she said that it resulted in "aggravated pains" in her neck, mid-back, back, lower back, knees, and feet -- in her words, "everywhere". (This description, I note, is consistent with what she had earlier said about the effects of the 2010 MVA: with anything that happens to her, all her pain is aggravated.)

**76**  Despite those injuries, Ms. Khudabux continued working. In early July 2012 she worked for Park Insurance for two weeks. She testified that she was let go because of inexperience with personal lines insurance; though her employer had said they would train her, she testified that the trainer did not actually provide her with any training. She obtained a temporary position with AP Insurance for a couple of weeks in late July, filling in for someone who was on vacation.

**77**  Ms. Khudabux was cross-examined on notes of her statements made to Dr. MacDonald during a visit on September 6, 2012. The notes record Ms. Khudabux as complaining that her orthotics had been stolen from her car, and she had experienced a "++ flare up" of pain in her right foot, quad, and back since then. Ms. Khudabux acknowledged that her orthotics had been stolen during her visit to Africa. She agreed that she had probably had increased back spasms after that; however, she maintained that the foot pain, knee pain, and back pain she experienced at this time were all because of the 2011 MVA.

**78**  In October 2012 -- desperate, she said, for work -- she took a position in an Amazon Canada warehouse, working on a conveyor belt line. She testified that she hurt her finger and that the job wasn't right for her.

**79**  From October 30, 2012 to January 26, 2013, Ms. Khudabux worked for Main Street Insurance. She testified that another part-time employee wasn't happy with her and started "playing dirty"; this employee, at one point, threw a stamp at her. Ms. Khudabux said that she was fired during her probationary period.

**80**  As a result of losing that job, she testified that she became extremely depressed, feeling like she was having a nervous breakdown.

**81**  I digress from this narrative, which reflects Ms. Khudabux's own trial testimony, to point out that according to her expert witness, the psychiatrist Dr. Mok, it was around this point in time -- in February 2013 -- that her treating psychiatrist, Dr. Hyrman, diagnosed her as suffering from "inadequate personality, recurrent depression, likely recurrent transient brain syndrome". Dr. Hyrman did not testify, his medical records are not in evidence, and there is no evidence from her psychiatrist as to the cause of these conditions he had diagnosed. Nor was there any evidence from Ms. Khudabux as to the nature or frequency of her psychiatric treatment at this time.

**82**  In June 2013 she obtained a position as a contractor with Combined Insurance, selling accident and health insurance by making calls on prospective clients in their homes. On October 25, 2013 she fell out of a reclining chair at a client's home, injuring her back. She continued to work for the next four days, but testified that "all of the symptoms were coming back". She was also experiencing severe knee pain, particularly while climbing stairs. She took a month off work on a doctor's advice, and at the end of November 2013 submitted a letter of resignation, citing injury to her back, and explaining that she was on "medical EI" and was continuing to have medical treatments. She has not worked since then.

**83**  The 2014 MVA -- which occurred on March 24, 2014 -- was, she testified in her direct evidence, "the worst of all". She claims that when she attended at the admitting department at the hospital following the accident, she couldn't get up out of her chair and she thought she was "paralyzed".

**84**  Since the 2014 MVA, she testified, there has been "no improvement at all" in her symptoms. However, in cross-examination she acknowledged that prior to that accident she had still been disabled, and was "in very bad shape".

**85**  Through 2014 and 2015 there was a great deal of familial conflict between Ms. Khudabux and her children. In January 2014 she wrote one of her sons asking for financial support on the grounds of hardship, citing the "bad fall in October" and depression resulting as a side-effect of medication. After she wrote that letter, her sons stopped speaking to her; she attributed this to her sons resenting her attempts to enforce spousal support from her ex-husband, whom she said was then in a mental institution.

**86**  Ms. Khudabux was cross-examined as to the effect of these relationship issues on her emotional health. At first she avoided answering the questions directly, seeming to imply that these were not significant stressors. However, she acknowledged having asked her family physician, Dr. MacDonald, in March 2015, to write a note stating that the stress of not having contact with her children and grandchildren was making her medical condition worse.

**87**  This final phase of the cross-examination of the plaintiff in particular elicited several long, rambling, and, frankly, histrionic narratives from the plaintiff.

**B. The Medical Evidence**

**88**  No medical evidence was tendered from any physicians who treated the plaintiff in respect of the 2006 or 2010 MVAs. Nor was any evidence presented of independent medical examinations undertaken in any litigation arising out of those accidents. Although the medical reports in evidence make reference to the plaintiff continually receiving medical and psychiatric treatment up to 2015, there is no evidence from any treating physician other than her family physician.

**1. Dr. Anthony Preto**

**89**  For reasons that will become apparent, I deal first with the expert evidence tendered on behalf of the defendants, that being the report of an orthopaedic surgeon, Dr. Anthony Preto. I was advised in the course of trial that the defendants did have Ms. Khudabux undergo an independent psychiatric examination, but no expert opinion report has been tendered in respect of that examination.

**90**  Before summarizing the evidence of Dr. Preto, I digress with a general observation with respect to expert medical evidence in soft tissue injury cases.

**91**  The expert medical evidence presented at this trial brought into focus a difficulty that not infrequently arises when a defendant pursues the strategy of tendering the opinion of an orthopaedic surgeon to rebut allegations of soft tissue injury. Of course, there may be situations in which such a specialist feels able to offer opinion evidence that sheds light on the nature and scope of such complaints. But it is also the case that a clash between experts pitting an orthopaedic surgeon against a physiatrist, specializing in rehabilitation medicine -- or even, as in the present case, against a family physician -- can possibly leave counsel in the position of the hoodlum in the film *The Untouchables*, at the point when he realizes too late that he has brought a knife to a gunfight.

**92**  There is a tendency common to many orthopaedic surgeons who provide expert opinion reports in soft tissue injury cases before this court to express their opinions without qualification -- specifically, without acknowledging the extent to which their opinions are shaped by or restricted to the narrow field of their own expertise. In the result, many such reports come before this court that, in substance, say "I have examined this patient, and nothing is wrong with them," when what is really meant is, "I have examined this patient, and I am unable to diagnose any orthopaedic injury". Expert witnesses who provide opinions in such stark terms without explicitly stating the limitations of their opinion may, if their opinions contrast with complaints of pain and suffering that are found to be genuine, and are at odds with contrary opinion evidence from another medical expert, risk creating confusion. They may also leave themselves vulnerable to a finding of bias if the unstated limitations of their opinions are not drawn out at trial.

**93**  These risks should be avoided through counsel having, in the first instance, selected an expert witness qualified to give opinion evidence in a field relevant to the issues at stake. Counsel should be familiar with the commonly understood scope of expertise held by specialists in that field, and should endeavour to determine whether the expert they have retained shares that understanding. Once the expert's report has been prepared, counsel should always explore with their expert witness the extent to which their opinion has been shaped, in terms of what is said and what is not said, by any limitations in the witness' expertise. Lastly, counsel should ensure that any limitations or qualifications in the expert's opinion are frankly acknowledged in the substance of the report.

**94**  Turning to the evidence of Dr. Preto, his report sets out answers to six separate questions. I infer he had been asked these questions in his letter of retainer. The questions, and his answers, can be summarized as follows:

1. What injuries did the plaintiff sustain in these accidents? Dr. Preto describes Ms. Khudabux as referring to her complaints as having been caused by the 2011 MVA, but also describes her as having related her history to him in a "monotone, mechanical, tape recorder-like fashion", and as having appeared to have an altered mental state. Ms. Khudabux did not mention the 2014 MVA. Dr. Preto does not describe what injuries she recounted as having sustained;
2. What is her current status with respect to these injuries? Dr. Preto says simply says that he was not able to detect any current physical or emotional complaints relating to either the 2011 MVA or the 2014 MVA;
3. What is the prognosis with respect to the injuries from which she currently suffers? Dr. Preto refers only to the plaintiff's bilateral knee arthritis and right carpal tunnel syndrome, neither of which, he says, are connected to the accidents;
4. What effect have the injuries had on her life? Dr. Preto does not answer this question, but offers the opinion that the injuries she relates are due to the 2006 MVA;
5. To what extent are her current complaints attributable to pre-accident injuries, arising independently of the subject accidents? Dr. Preto answers that the injuries she described to him are related in her mind to the 2006 MVA. He notes her long history of depression; and
6. Has the plaintiff taken reasonable steps to treat her injuries? He opines that the current state of her health is related to her pre-accident mental health issues; and that the 2011 and 2014 MVAs have had no impact on her pre-existing knee osteoarthritis. He notes that she is wearing a splint on her right wrist to protect her carpal tunnel.

**95**  Dr. Preto's report makes no mention of any of Ms. Khudabux's complaints, following the 2011 MVA, of suffering left shoulder, neck, back, and ankle discomfort, as documented in the records. At trial, he was cross-examined at some length as to the fact that Ms. Khudabux's medical records, disclosed to him, do clearly document numerous such complaints. He acknowledged this to be the case, but offered no explanation for why he did not reference this evidence in his report.

**96**  In an effort to understand this apparent discrepancy, I asked Dr. Preto why, in the light of this medical history, he did not feel the need to comment on anything other than the plaintiff's carpal tunnel syndrome and knee osteoarthritis; specifically, was it because he views those other injuries as outside the scope of an orthopaedic surgeon's area of practice?

**97**  He replied in the affirmative.

**98**  I then referred Dr. Preto to Dr. MacDonald's diagnosis of the plaintiff as suffering "myofascial injuries" to the neck and shoulders, and I asked him his understanding of that term. He replied:

Myofascial injuries are soft-tissue injuries, which are in the expertise field of a physiatrist, a physiotherapist, or an acupuncturist. Not an orthopaedic surgeon; certainly not in my field of expertise, and clinical experience and treatment.

**99**  Dr. Preto, in short, provided no opinion as to the plaintiff's complaints -- other than her carpal tunnel syndrome and knee pain -- as he felt they were outside the scope of his expertise.

**100**  Consequently, Dr. Preto's evidence provides no real answer to Dr. MacDonald's diagnoses of ongoing soft-tissue injuries resulting from the 2011 MVA.

**101**  Dr. Preto provided some explanation of the findings he obtained on his physical examination. Ms. Khudabux's chest expansion, measured at 6 cm, showed normal ribcage mobility. There was some measured restriction of the lumbosacral increment, at 7 cm vs. the normal 10 cm; he described this as a "minimal" restriction. Her straight leg raise was normal, at 90 degrees. There was some swelling of the knees, consistent with mild osteoarthritis. This was, in his view, a pre-existing condition relative to the subject accidents; she does not have traumatic osteoarthritis. He noted that she was wearing a splint on her right arm in respect of her carpal tunnel syndrome.

**102**  In the course of his testimony, Dr. Preto did make some pertinent observations as to Ms. Khudabux's ability to recount events. He spent 30 to 45 minutes interviewing her prior to conducting a physical examination, and he found it hard to get a coherent history from her. He described the interview as unusual, with regard to both her spontaneity and the information he obtained from her. He found her manner of responding to his questions to be "inappropriate"; she spoke in what he described as a monotone, mechanical, rambling manner. Dr. Preto asked her repeatedly about the 2011 MVA, and she kept responding with references to the 2006 MVA. She had brought colour photographs showing her 2006 injuries, primarily injuries to her face. The same held true when he asked her about the 2014 MVA.

**103**  (Ms. Khudabux was cross-examined at trial as to what history she had given Dr. Preto. She insisted that she advised him of the injuries she sustained in both the 2011 and 2014 MVAs.)

**104**  I note that Dr. Preto's list of the medical records he reviewed included the records of not only Dr. MacDonald, but also nine other doctors, none of whom testified.

**2. Dr. Hiram Mok**

**105**  Dr. Mok, a psychiatrist with particular experience in treating mood disorders in persons with cross-cultural backgrounds, assessed the plaintiff at the request of her counsel. He is not her treating psychiatrist. He saw her on one occasion only.

**106**  Dr. Mok's report, dated June 17, 2015, lists the records of seven physicians in addition to Dr. MacDonald, including two psychiatrists and a psychologist. One of the psychiatrists, the aforementioned Dr. Hyrman, had disclosed records of his treatment of Ms. Khudabux up to March 2014; in his report, Dr. Mok records Ms. Khudabux as advising that she had seen Dr. Hyrman as recently as March 2015. As noted above, Dr. Hyrman's records are not in evidence.

**107**  In his report, Dr. Mok diagnosed the plaintiff as having sustained, as a direct result of the 2011 MVA, "Major Depressive Disorder, recurrent, with anxious distress, current severity = severe, and Somatic Symptom Disorder with predominant pain, persistent, severe". He states that she may be in her third episode of recurrent depression:

...contributed to partly by her workplace termination in February of 2011 and also partly by the onset of chronic pain complaints, physical limitations and her inability to continue working following the motor vehicle accident of April 6, 2011.

He notes that patients with three episodes of recurrent major depressive disorder are at a 95-100% risk of recurrence.

**108**  Dr. Mok provided his "strong" recommendation that the plaintiff be assessed and evaluated by a specialist in physical medicine and rehabilitation.

**109**  In his trial testimony, Dr. Mok described his interview of the plaintiff as "long and tedious". He found her to be an extremely vague historian "hard to pin down".

**110**  Dr. Mok records Ms. Khudabux as having told him, in recounting her history subsequent to the 2011 MVA, about her attempts to return to work as a part-time insurance agent, in about six different positions, but that in each case she left either because she was let go, or because her pain complaints got worse. He testified in cross-examination that he did have some understanding that she did not consistently work full-time from 2006 to 2011. He conceded that he did not have a lot of information to assist him in comparing her pre- and post-2011 MVA condition, in respect of her employment difficulties. He conceded that he was unable to say that her Chronic Pain Disorder diagnosed in 2009 -- the equivalent to what is now termed Somatic Symptom Disorder -- had resolved prior to the 2011 MVA.

**111**  He conceded that he knew nothing of her May 2011 slip-and-fall accident, her March 2012 fall in the shower, or the 2010 and 2012 MVAs. He acknowledged that these incidents may have had an impact on the Somatic Symptom Disorder he subsequently diagnosed. The same goes for her conflicts with co-workers.

**112**  Dr. Mok clarified that Ms. Khudabux has had a pattern of recurrent episodes of major depression since 2000. Her third episode of major depression began in February 2011. He is not of the view that her third episode is all due to the 2011 MVA. He gave no opinion in his report as to the severity of the plaintiff's depression before the 2011 MVA. He agreed on cross-examination that his opinion was based on his understanding that Dr. MacDonald viewed Ms. Khudabux's depression as being stable, prior to the 2011 MVA; and on Ms. Khudabux having told him that her depression only got worse after the 2011 MVA. He conceded that Dr. MacDonald's clinical records demonstrate that Ms. Khudabux's mood had in fact been worsening as of February 2011.

**113**  With respect to Dr. Hyrman's 2013 diagnosis of Inadequate Personality, Dr. Mok observed that this is an outdated diagnostic term. He was unsure of the meaning Dr. Hyrman attached to what he called "this label", but he observed that Dr. Hyrman has known her for a while. He also offered that he found Dr. Hyrman's handwritten notes difficult to read.

**114**  Dr. Mok agreed with defence counsel's suggestion that Ms. Khudabux's depression prior to the 2011 MVA was probably worse than "moderate".

**115**  He agreed that her background of major depressive disorder and cognitive impairments may have made her more likely to have difficulties in the workplace. She may have been vulnerable to stress and lacking in coping skills, and with each successive stress she would have had less capacity to move forward. In persons with her level of disability, discrete stressful events such as trauma, apart from the stresses of everyday life, may lead to an inability to recover quickly, or at all.

**116**  His sense of Ms. Khudabux's condition subsequent to the 2011 MVA was that there was a steady decline, but this was based on his reading of Dr. MacDonald's first report. He also understood that her lack of success in obtaining steady employment was because of her pain.

**3. Dr. Helene MacDonald**

**117**  The plaintiff relies on the opinion of her family physician, Dr. Helene MacDonald.

**118**  Dr. MacDonald wrote two expert reports, which were filed as evidence. The first was dated March 17, 2014. It only addressed the 2011 MVA. One week after that report was written, the 2014 MVA occurred, and the consequences of that accident are addressed in the second report, written on September 9, 2015.

**119**  Dr. MacDonald did not distinguish between the two collisions that formed the 2011 MVA. I infer she was not made aware by the plaintiff or her counsel of the plaintiff having immediately experienced exacerbation of her pre-existing injuries prior to the impact of Mr. McClary's vehicle. Consequently, Dr. MacDonald offered no opinion as to whether the second collision further exacerbated Ms. Khudabux's pre-existing injuries or whether it caused entirely new injuries.

**120**  The thrust of Dr. MacDonald's first report is that the 2011 MVA is the cause of the plaintiff's ongoing cervicogenic headaches and myofascial injuries, and a substantial aggravating factor in her depression. She states that the pre-existing cervicogenic headaches were made worse by the 2011 MVA. She attributes the plaintiff's mid-back pain entirely to the 2011 MVA. Pre-existing headache, low back pain, neck and shoulder pain, and right foot pain, were all, she opines, significantly aggravated by the 2011 MVA, as was her chronic depression. Pre-existing degeneration of the right knee increased her susceptibility to increased knee pain.

**121**  Dr. MacDonald's first report summarizes the plaintiff's pre-2011 MVA condition only in reference to the plaintiff's own oral history, as given to Dr. MacDonald on the first visit following the accident on April 19, 2011. There are considerable discrepancies between the information recorded by Dr. MacDonald and the plaintiff's testimony.

**122**  The first report restates the contents of the clinical notes of each session with Ms. Khudabux in considerable detail. She records having assessed Ms. Khudabux on December 6, 2011 -- eight months post-accident -- as having ongoing neck and left shoulder pains, persistent problems with her right knee and ankle, and, most significantly, lower back pain. There is no mention of mid-back pain. On examination, her neck and upper back muscles were "tight" and her lower back "tense"; her neck range of motion was full, and her lumbar flexion "unchanged" from previous examinations. Further complaints of lower back pain were noted in a visit on December 22; there is no note of mid-back pain, though the thoracic spine was "tight".

**123**  Ms. Khudabux reported to Dr. MacDonald on February 16, 2012 that she had seen a podiatrist because of persistent right foot pain, and he had told her that she might need surgery. No expert opinion from the podiatrist is in evidence.

**124**  On March 13, 2012, Dr. MacDonald recorded the plaintiff as having been "focused on her flare-ups of neck and lower back pain", with persistent right knee and right ankle pain. These neck and low back complaints are described in the actual clinical note as "periodic". There is no mention of mid-back pain.

**125**  There is no record of Ms. Khudabux having complained of neck, shoulder, back, or knee pain when she was next assessed on May 9, 2012, following her return from Africa.

**126**  A visit on June 7, 2012 and a follow-up on June 20 were concerned solely with her involuntary admission for psychiatric reasons, following her conflict with her family. Ms. Khudabux is recorded as having said to Dr. MacDonald on June 22 that she felt her pain was the cause of her anger. No consultation reports or expert opinion reports from any psychiatric assessment at this time are in evidence.

**127**  The clinical records, as summarized in the first report, indicate Ms. Khudabux as suffering injury to her neck, shoulders, mid- and lower-back as a result of the July 2012 MVA. Ms. Khudabux was referred to chiropractic and physiotherapy, which she was reported as continuing as late as January, 2013. The injuries are demonstrated by objective findings; her range of motion is not recorded as "normal" until May 2013.

**128**  Remarkably, even though the 2012 MVA is discussed in Dr. MacDonald's narrative summary of the clinical records, no mention is made of it in the two-page "Diagnosis and Etiology of Injuries".

**129**  It will be recalled that Ms. Khudabux, in her testimony, stated that some of the distinguishing features of her current low back pain, in contrast to her pre-2011 MVA condition, are that her pain is now constant and radiating. As noted above, prior to the 2012 MVA Ms. Khudabux's low back pain had only been periodic. Even after the 2012 MVA, when Ms. Khudabux was assessed by Dr. MacDonald on July 23, 2012 the back pain, though constant, was not radiating into her legs.

**130**  Dr. MacDonald's second report provides the following analysis. She repeats that the cervicogenic headaches were made worse by the 2011 MVA, and says the frequency and intensity of the headaches were further aggravated by the 2014 MVA. She attributes the plaintiff's low back pain, which is now "severe", to both myofascial injuries and degeneration, which have left her at increased risk for chronic pain. Osteoarthritis is said to be the likely main contributing factor to the bilateral knee pain, although increased muscle tension from an antalgic gait, due to her back pain, is also a component. The knee pain would be less severe but for the 2011 and 2014 MVAs. Right foot pain, left foot pain and ankle pains are attributed to antalgic gait, although the right foot pain is also due to chronic plantar fasciitis, chronic pain from the 2006 MVA, and pain from a flat arch and ingrown diabetic toenails.

**131**  Multi-joint right hand pains are, she says, most likely due to probable arthritis. Dr. MacDonald acknowledged this in her second report. She posited some degree of contribution due to strains suffered in the 2011 and 2014 MVAs. However, she did state with respect to her notes of treatment on May 6, 2014 that it was unclear whether Ms. Khudabux's complaints of elbow and hand pain at multiple joints were new, or related to the MVA.

**132**  She states in the second report that despite the 2014 MVA, Ms. Khudabux's "symptoms remain essentially constant".

**133**  Dr. MacDonald was cross-examined on her clinical records.

**134**  She acknowledged the extent to which her opinions were based on Ms. Khudabux's reporting of her subjective symptoms.

**135**  With respect to Ms. Khudabux's complaints of arm pain, she acknowledged having diagnosed carpal tunnel syndrome in February 2011.

**136**  Although Dr. MacDonald had stated in her second report that Ms. Khudabux's Major Depression was "stable" prior to the 2011 MVA, she acknowledged that in fact, despite treatment with anti-depressants, there had been no improvement in the depression symptoms since the January 2011 workplace termination, and in fact the depression still had not stabilized.

**137**  Although her first report attributes the worsening of the plaintiff's cervicogenic headaches to the 2011 MVA, Dr. MacDonald conceded that it may be just as likely that it was the 2012 MVA that caused the headaches to worsen.

**138**  Included in Dr. MacDonald's first report is a summary of a treatment session on September 6, 2012, when Ms. Khudabux is recorded as having had her orthotics stolen when vacationing in Kenya earlier in the year. Dr. MacDonald's clinical records, however, also record Ms. Khudabux as having disclosed that she slipped in the shower on this vacation, hitting her head, having no loss of consciousness but suffering increased headaches and swelling of her left foot due to the fall. Dr. MacDonald did not explain why she omitted this incident from her report.

**139**  Dr. MacDonald acknowledged, under cross-examination, the contributing role played by the numerous non-tortious accidents Ms. Khudabux has suffered since 2011: the May 2011 slip-and-fall; the shower accident in Africa in the spring of 2012; and the October 2013 fall from the recliner chair. She stated that in a typical patient, these injuries could be expected to be mild; the recliner chair incident, for example, would typically result in injuries resolving in a span of 4 to 8 weeks. She conceded that Ms. Khudabux, given her pre-existing conditions, is not a typical patient. Each of Ms. Khudabux's complaints, she agreed, has multiple etiologies.

**140**  She agreed that she only "suspects" the 2014 MVA is playing a role in the ongoing left thumb pain.

**141**  In respect of the contribution made by the two subject accidents to Ms. Khudabux's employability, Dr. MacDonald acknowledged that she did in fact return to work after the 2011 MVA, and continued working up to the fall of 2013. In contrast, when Dr. MacDonald assessed her in January 2014, after the October 2013 recliner chair incident, there was no projected return-to-work date, and Ms. Khudabux had applied for a disability pension. Although Dr. MacDonald had written, in her second report, that she had decided in January 2014 that Ms. Khudabux was unemployable due to chronic pain, cognitive impairments, and chronic major depression, she agreed that Ms. Khudabux had struggled with all of these issues prior to the 2011 MVA.

**142**  When cross-examined on the 2014 MVA and her opinion that despite this accident the plaintiff's symptoms remained essentially constant, Dr. MacDonald said that the 2014 MVA resulted in another temporary exacerbation of symptoms. She agreed that the 2014 MVA did not substantially change the plaintiff's myofascial back pain. There was an increase in her lumbar pain, but over time the range of motion improved.

**C. Discussion**

**1. Non-Pecuniary Damages**

1. **The Legal Principles**

**143**  The purpose of non-pecuniary damage awards in personal injury cases was summarized recently by Mr. Justice Jenkins in *Bove v. Wilson*, [*2016 BCSC 1620*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KNG-YT61-JG02-S34T-00000-00&context=):

[41] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases (*Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at paras. 188-189; *Andrews v. Grand & Toy Alta. Ltd*., [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at paras. 243-44). Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts (*Trites*).

[42] ... The factors emphasized by Madam Justice Kirkpatrick in *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), have been referred to and followed by judges of this court on many occasions and are most instructive in assessing non-pecuniary damages...

**144**  In *Stapley*, Kirkpatrick J.A. stated:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage *from Lindal v. Lindal*, [ [*[1981] 2 SCR 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=)] at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton*, [*[1978] 2 S.C.R. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=) at p. 284 of S.C.R.).

[46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, [*2004 BCCA 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

[Emphasis in original.]

**145**  Personal injury damages are compensatory, or restitutionary; as with all tort damages, they are intended to restore an injured plaintiff, as much as can be done through a monetary award, to the state they would have been in had the injury never occurred. The assessment of damages entails a comparison of the plaintiff's current state with what the Supreme Court of Canada, in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), termed the plaintiff's "original position". To ensure that a defendant justly compensates a plaintiff, consideration of this "original position" entails not only an examination of the plaintiff's condition at the time the subject injury is sustained, but also consideration of what condition the plaintiff would have gone on to attain but for the defendant's conduct. As stated by the Supreme Court of Canada in *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), a judgment delivered by Chief Justice McLachlin:

78 It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. ...

See also *Burdett v. Eidse*, [*2011 BCCA 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1W5-00000-00&context=), at paras. 59-61; and, *Hussack v. Chilliwack School District No. 33*, [*2011 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=), at paras. 97-104.

**146**  With respect to the potential for a pre-existing condition that forms part of the "original position" becoming manifest, even had the tort not occurred, the rule is stated in the reasons of Mr. Justice Smith, concurred in by the entire five-justice panel, in *T.W.N.A. v Canada (Ministry of Indian Affairs)*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=):

1. ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

**147**  Finally, it must be remembered that the onus is on a plaintiff to prove that the defendant's wrongdoing has materially contributed to the injury. A defendant is only liable for injury or loss that the plaintiff would not have suffered but for the defendant's ***negligence***. The contribution must be proven to have been more than negligible, or more than *de minimus.*

1. **Position of the Plaintiff**

**148**  The plaintiff submits that the two defendants in this case, having contributed to a single, indivisible injury, are jointly liable to the plaintiff, citing *Bradley v. Groves*, [*2010 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20X0-00000-00&context=), where the court stated, at para. 37:

... It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

**149**  As to the quantum of damages, in argument the plaintiff's counsel contended for an award reflecting the 2011 MVA as being a substantial, ongoing contributing factor in the plaintiff's symptoms of pain and discomfort and loss of quality of life, over the past five years and into the future; and also, as being the cause of the Somatic Symptom Disorder diagnosed by Dr. Mok, and a substantial contributing factor in the plaintiff's ongoing Major Depressive Disorder. It is further submitted that the 2014 MVA subjectively -- that is, in Ms. Khudabux's own perception -- caused severe aggravation of her headaches, soft tissue injuries, and depression. The discontinuity between the subjective perception of this aggravation, and Dr. MacDonald's opinion as to the 2014 MVA causing a temporary aggravation only, is, it is submitted, due to her perception of pain being distorted by the ongoing depression. The plaintiff contends for a non-pecuniary damages award in the range of $90,000-$110,000.

1. **Position of the Defendants**

**150**  The defendants jointly contend for non-pecuniary damages to be assessed globally in the range of $35,000-$50,000, reflecting mild soft tissue injuries imposed upon pre-existing chronic pain and depression. The defence, conceding that other cases may provide only limited assistance, points to the assessments made by this court in *Engel v. Engel*, [*2000 BCSC 1330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B12F-00000-00&context=) and *Herman v. Constable*, [*[1996] B.C.J. No. 1218*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1MB-00000-00&context=) (June 3, 1996), Vancouver Registry B936904. The defence further contends for a reduction of 20-30% to account for both the pre-existing conditions and the plaintiff's failure to mitigate her losses by following treatment recommendations made by Dr. MacDonald.

1. **Analysis**

**151**  Before addressing the plaintiff's position as to damages, and before turning to my analysis of the evidence, I will deal first with the damages arguments raised by the defendants.

**152**  First, I address the position that the global damages award ought to be reduced to account, in part, for the pre-existing conditions. This position reflects one common approach to the assessment of general damages in such cases, in which the assessment begins with a notional damages award that reflects the entirety of the plaintiff's condition, with a deduction then being made to account for the probability of the plaintiff, but for the accident, having gone on to a substantially similar medical condition in any event. However, the defence provides no authority suggesting that their initial range of $35,000-$50,000 properly reflects the totality of Ms. Khudabux's current state, prior to accounting for pre-existing conditions. Indeed, the defence submission, as I have indicated, is that this suggested starting point would already have accounted for the pre-existing chronic pain and depression. In this respect, the defence submission appears to have double-counted Ms. Khudabux's pre-existing conditions.

**153**  Second, the defendants say that some deduction lies in their favour due to the plaintiff's failure to follow Dr. MacDonald's recommendations that she undergo further physiotherapy and active rehabilitation. The plaintiff's explanation, however, is that she has not continued with physiotherapy as she found it too painful. This is borne out by the contemporaneous notes in Dr. MacDonald's records following the 2014 MVA.

**154**  The defence contends that this is not reasonable; to the contrary, I accept that it reflects the plaintiff's subjective reality. Furthermore, the defence submissions conceded Dr. MacDonald's point that Ms. Khudabux's pre-existing cognitive impairments and depression prevented her from seeing the potential benefits of treatment. The defendants must take the plaintiff as they found her; her alleged failure to mitigate is not to be judged solely on a fictitious objective standard or reasonableness.

**155**  Further, this contention of the defence ignores the evidence of Dr. Mok that her perception of pain and disability is inextricably linked with her psychiatric condition, that she requires ongoing psychiatric treatment, and that the prognosis for full recovery from her psychiatric conditions, even with treatment, is poor. The defence also overlooks the evidence in Dr. MacDonald's notes, which clearly indicate the plaintiff having told Dr. MacDonald in the aftermath of the 2014 MVA, on July 29, 2014, that she felt physiotherapy was not helping. A finding of mitigation requires the defence to have established on a balance of probabilities that a course of action not pursued by the plaintiff likely would have had a positive impact. This has not been proven.

**156**  The defendants also note that the plaintiff has not provided an explanation as to why she has not attempted Pilates or yoga classes before now, yet she contends that she would do so in the future as part of her claim for the cost of future care. I do not see this as an aspect of mitigation; rather it goes to the future care claim, which is discussed further below.

**157**  The defendants also submit that there is no evidence to suggest the plaintiff regularly attended psychiatric treatment following the subject MVAs. However, as I have noted, there is quite definite evidence of ongoing treatment by Dr. Hyrman. The defendants have not established any failure to adhere to a treatment plan.

**158**  In the result, I do not find any failure to mitigate.

**159**  I should also address at this point the defence position that an adverse inference ought to be drawn from the plaintiff's failure to call evidence from witnesses who would have been expected to be in a position to corroborate her testimony concerning the restrictions her injuries have imposed upon her lifestyle -- friends, family members, and persons she did volunteer activities with in her mosque -- and on her ability to perform in the workplace -- employers, supervisors, and co-workers. The plaintiff was not, however, in a unique position to call upon such witnesses; what evidence they may have had to give would have been available to the defence through pre-trial interviews or, had they been uncooperative, depositions. I do not see this as a matter of adverse inference. The issue, rather, is whether I can be satisfied that the plaintiff has proven her case, on a balance of probabilities, without having called such corroborative testimony.

**160**  I turn now to the plaintiff's submission that I ought to find the defendants jointly and severally liable in respect of a damages award that reflects the entirety of the plaintiff's loss, on the basis that the injuries caused by the two defendants are indivisible. With respect, I find that approach simplistic, and not suited to the factual complexity of the present case and the legal issues that flow therefrom. I say this for several reasons.

**161**  First, I would not find this to be a true case of "indivisible" injury as between the two present defendants, at least not in respect of all of the plaintiff's symptoms. Ultimately, I approach the assessment of damages in the present case initially on the basis of whether the plaintiff has met the onus of proving "but-for" causation, and then as a question of quantifying the aggravation caused by the subject accidents.

**162**  With respect to the 2011 MVA, the evidence may be taken to indicate it caused an injury to the plaintiff's mid-back in terms of a significant aggravation of pre-existing injury that has continued to play a contributory role in the plaintiff's symptoms. The evidence with respect to the contribution this accident made to her current headaches, low back pain and her other myofascial injuries is more ambiguous.

**163**  On Dr. MacDonald's evidence, the 2014 MVA caused only a temporary aggravation of the plaintiff's baseline physical symptoms. This opinion was based, in part, on the plaintiff's own reporting of symptoms to Dr. MacDonald. I do not accept the plaintiff's submission that the inconsistency between Ms. Khudabux's testimony as to the effects of the 2014 MVA and Dr. MacDonald's opinion can be accounted for by Ms. Khudabux's subjective perceptions of pain. Rather, the inconsistency appears to lie in Ms. Khudabux's variable reporting of symptoms. Dr. MacDonald has posited the possibility of the 2014 playing some contributory role in the plaintiff's complaints of arm, knee and foot pain, but as discussed below I do not find that evidence persuasive.

**164**  Second, indivisibility is a finding made in respect of causation. Findings as to the liability of individual defendants require application of other sets of rules, those regarding the assessment of fault and the assessment of damages.

**165**  If this were a situation of indivisible injury arising out of torts for which there was joint and several liability, the plaintiff's suggested approach still ignores the continuing contributions to Ms. Khudabux's injuries made by the 2006, 2010 and 2012 MVAs. If I were to follow this analysis, I would find that the 2006 MVA is certainly the originating cause of the headaches and low back myofascial pain. The 2006 MVA also likely continues to contribute to the plaintiff's current disability because the depression it triggered rendered the plaintiff more susceptible to future episodes of depression. There are also concerns as to how the cognitive injuries suffered in that accident impact her psychiatric state, and as to how the physical injuries she sustained in that accident will have affected her physiological and psychiatric resilience -- as do, in my judgment, the other motor vehicle accidents she has suffered, as well.

**166**  The plaintiff, however, settled her claim in respect of the 2006 MVA in 2010; she may already have been compensated to some degree for pain and suffering, and pecuniary loss, arising out of that earlier accident. Whether a finding of joint and several liability would be available in light of that circumstance is to my mind questionable.

**167**  In any event, however, this present case is not one of joint and several liability. The plaintiff's analysis of the defendants' liability would have me ignore the fact that Ms. Khudabux is responsible, in part, for her current injuries. If I were to approach the assessment of damages in the present case on the basis of assessing the plaintiff's current condition globally, arriving at a notional damages valuation, and then apportioning liability amongst the responsible tortious actors, I would have to take her own ***negligence*** into account. Her negligent driving caused the first collision in the 2011 MVA, which by her own admission resulted in injury. Her negligent failure to leave the HOV lane clear and her removal of her seatbelt were further instances of contributory ***negligence*** that, as I have found, contributed to the injuries caused by the second collision. The rules of assessment of liability -- specifically, s. 1(1) of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333* -- would then require me to apportion liability severally as between each responsible tortfeasor, including the plaintiff.

**168**  Furthermore, the basis for such an apportionment of liability between the responsible actors, under the statute, is not their degrees of causation, but their respective degrees of fault. As I have only the slightest evidence -- in the form of comments made by the plaintiff in passing, in giving her evidence in chief -- as to the circumstances of the 2006, 2010 and 2012 MVAs, I would not find it possible to establish different degrees of fault, and I would therefore be obliged by s. 1(2) of the ***Negligence*** *Act* to apportion liability equally amongst those other three accidents (assuming one tortfeasor only was responsible for each), the present two defendants, and Ms. Khudabux. In the result, and ignoring the complication arising from the fact that her 2006 MVA has settled, she would receive at most only one-sixth the value of her notional global damages from each of the present defendants.

**169**  (I say "at most" because this one-sixth figure would only account for Ms. Khudabux being one of six "actors" contributing to her injuries. It may however be the case that several liability apportionment would require me to treat Ms. Khudabux as having made two separate contributions, in respect of different acts of ***negligence*** on her part having contributed to the two collisions that formed the 2011 MVA; in that case, the present defendants would each only be liable for one-seventh the plaintiff's damages. Thankfully, that is not an issue I need decide.)

**170**  Finally, regardless of whether this is a case of joint-and-several or several-only liability, the plaintiff's submission would have me effectively disregard the plaintiff's original position. To be fair, the plaintiff's counsel, in closing submissions, did quote case law in which both *Blackwater* and *T.W.N.A*. are cited. However, counsel invites me to treat Ms. Khudabux's numerous pre-accident complaints as matters of "thin skull" rather than "crumbling skull" conditions; in the words of Bernard J. in *MacAulay v. Field*, [*2014 BCSC 937*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2RM-00000-00&context=), not as conditions that have a "measurable risk of detrimental effects in the future".

**171**  As was noted in *T.W.N.A.*, at para. 30:

... there is no need to obscure the damages inquiry by metaphorical references to "thin skulls" and "crumbling skulls." Major J.'s "simple idea" [in *Athey*] is clear and direct, and both latent and active pre-existing conditions must be considered in assessing the plaintiff's original position.

In my view, the approach advocated by counsel completely underplays the significance of the plaintiff's pre-existing physical and psychiatric conditions.

**172**  This brings me to consideration of the strength of the evidence the plaintiff did adduce.

**173**  I have described above my concerns with the plaintiff's own testimony. I had the advantage of observing the plaintiff as she testified over the course of more than seven hours. She was, quite simply, an unreliable narrator. It is to be expected, given her psychiatric condition, that this litigation would become a focal point for her anxieties and that she would therefore tend, in her reporting to her physicians and in her testimony, to blame the subject accidents for her current mental, emotional, and physical state. As to whether that conforms to objective reality, I approach her uncorroborated evidence with some skepticism.

**174**  The problems inherent in assessing the weight of the plaintiff's evidence of course spill over into assessing the weight of Dr. MacDonald's evidence, because of the extent to which Dr. MacDonald's assessment depended on the plaintiff's account and reports of subjective symptoms. I do not wholly discount Dr. MacDonald's opinion on this basis, because her opinion was also, to a limited extent, based on objective findings on physical examinations she conducted from time to time, such as restricted range of motion and muscle thickness or tension indicative of spasm. Nevertheless, the degree of reliance on purely subjective symptom reporting, seen in the light of the inconsistency and general reliability concerns with respect to the plaintiff, raises real concerns.

**175**  Coupled with this concern are the facts that Dr. MacDonald is a family medicine specialist with limited expertise in the diagnosis of myofascial pain; and she is the plaintiff's treating physician, and as such, given her ethical obligations, will be inclined to take the plaintiff's complaints at face value.

**176**  Further concerns with the weight to be given Dr. MacDonald's opinion arise through a comparison of her very limited description of Ms. Khudabux's pre-2011 MVA physical condition with the plaintiff's own trial evidence. For example, Dr. MacDonald stated in her first report that since the 2011 MVA, Ms. Khudabux's headaches "have been daily and have been more intense than previous". This statement appears to have been based upon comments made by Ms. Khudabux during an assessment on January 23, 2014. This, however, is inconsistent with Ms. Khudabux's own testimony, given in her examination-in-chief, that the 2011 MVA did not change her headaches much.

**177**  Likewise, Dr. MacDonald states in her second report that Ms. Khudabux "does not endorse a pre-existing history of mid back pains prior to 2011", and on that basis she attributes the mid-back pain entirely to the 2011 MVA, with the 2014 MVA having temporarily caused some aggravation. Ms. Khudabux's evidence in chief was to the contrary.

**178**  Dr. MacDonald attributes the plaintiff's current symptoms of leg and foot pain, in part, to an antalgic gait, which she in turn attributes to low back pain caused by the 2011 and 2014 MVAs. Dr. MacDonald appears to have been unaware that the plaintiff, prior to the 2011 MVA, found climbing stairs very difficult and painful, limped because of knee pain, and was not able to exercise at all, due to pain.

**179**  There are numerous further examples.

**180**  I do not fault Dr. MacDonald for these inconsistencies. They appear to originate in the plaintiff's own variable reporting to Dr. MacDonald of her subjective symptoms. The particular factual matrix relied upon by Dr. MacDonald in her reports may or may not have been correct. The difficulty for the plaintiff is that in the face of these inconsistencies, many of the facts relied upon by Dr. MacDonald in respect of the plaintiff's medical history cannot be accepted as having been proven on a balance of probabilities. I find this particularly to be the case in respect of the degree to which Ms. Khudabux was still suffering (either as a result of physiological, psycho-emotional or psychiatric issues) the effects of the 2006 and 2010 MVAs as of April 2011.

**181**  There are further issues with Dr. MacDonald's reports, however, that arise independent of the plaintiff's unreliability as a historian. Read in isolation, the conclusions stated in Dr. MacDonald's reports would imply that Ms. Khudabux's various complaints have more or less continued unabated since April 2011, with no intervening causes. For example, in her second report she states, in reference to her diagnosis of chronic lumbar pain:

The MVA of 2011 caused a worsening of her pain, which exists to this day. The increased pain is myofascial in nature and is a direct consequence of the 2011 MVA.

However, it is clear from the clinical records that there was improvement in the lumbar pain symptoms in late 2011 and early 2012, to the point where she appears to have been fit enough to undertake a trip to Africa in the spring of 2012, with no reports of so much as back discomfort in the visits immediately following that vacation, and no further complaints of neck or back pain of any kind until after the 2012 MVA. Indeed, it is only after the 2012 MVA that the mid- and lower-back symptoms appear to assume a pattern of chronicity.

**182**  The same can be said of Dr. MacDonald's attribution to the 2011 MVA of the plaintiff's current headache pattern. There is no evidence of the plaintiff complaining of "daily" headaches, in the time period following the 2011 MVA, until January 2014 -- after the 2012 MVA, and after the October 2013 fall from the chair that resulted in Ms. Khudabux resigning from her employment.

**183**  I referred above, in summarizing Dr. MacDonald's evidence, to finding it remarkable that she, in stating her opinion as to the causes of Ms. Khudabux's various complaints, made no reference to the 2012 MVA. That accident was reported by Ms. Khudabux to have immediately resulted in increased neck, lower back, and right foot pain. I find that Dr. MacDonald's failure to acknowledge the 2012 MVA and non-tortious accidents as factors in the plaintiff's current presentation, mark her as an advocate.

**184**  The same tendency towards advocacy can be seen in Dr. MacDonald's second report, specifically in her discussion of the plaintiff's vocational disability. In her narrative she acknowledges Ms. Khudabux's history, since 2006, of losing employment "due to decreased communication skills and difficult interactions with co-workers and the public". She further acknowledges that Ms. Khudabux's chronic, pre-existing depression and cognitive impairments contributed to her post-2011 employment difficulties. Yet, in summarizing she states:

To summarize, Ms. Khudabux's chronic myofascial injuries and chronic pain following her MVA's have exacerbated her pre-existing conditions, and left her such that she is now unable to continue working,

implying that the MVA injuries are the but-for cause of her current employment situation. I find that, to put it mildly, to be a selective view of the facts.

**185**  Given Dr. MacDonald's opinion as to the nature and cause of Ms. Khudabux's physical ailments, I find it somewhat surprising that there has been no referral made to a physiatrist. It is even more remarkable that there is no evidence before the court from a qualified specialist as to the nature and degree of Ms. Khudabux's pre-existing cognitive impairments, even though Dr. MacDonald acknowledges this to be a significant factor in respect of the plaintiff's disability.

**186**  Lastly, there are concerns with respect to Dr. MacDonald's approach to the assessment of Ms. Khudabux's pre-existing psychiatric condition. Dr. MacDonald, despite being the primary caregiver for Ms. Khudabux, stated in her second report that it was unclear to her whether Ms. Khudabux was seeing her psychiatrist on a regular basis, and that she was not being provided with any documentation from her psychiatrist. Furthermore, Dr. MacDonald's second report makes no reference to Dr. Mok's diagnosis of Somatic Symptom Disorder. To the extent Dr. MacDonald does discuss the plaintiff's psychiatric symptoms, it is only by way of positing that the MVA injuries have made her depression worse, and that the increased depression in turn is exacerbating her pre-existing cognitive issues. Dr. MacDonald -- perhaps because the subject is beyond the scope of her expertise -- did not address the possibility that the plaintiff's pre-existing psychiatric issues have affected and are continuing to affect her perception of pain. Nor does she address what seems to me to be the real and substantial possibility that Ms. Khudabux's pre-existing psychiatric issues would have led to her having substantially the same condition she now exhibits, had the defendant McClary's vehicle never collided with her.

**187**  The impression I was left with following the cross-examination of Dr. MacDonald was that her assessment of many of the plaintiff's complaints as stemming from physical injuries caused by the 2011 MVA, as opposed to being manifestations of an underlying and pre-existing psychiatric condition combined with exacerbation of pre-existing injuries and the effects of subsequent injuries, was simply not credible.

**188**  For all of these reasons, I give little weight to Dr. MacDonald's opinion evidence. I conclude that she has likely understated the role of Ms. Khudabux's pre-existing conditions and the impact of her other accidents, and has overstated the significance of the 2011 accident, in respect of the plaintiff's headaches and her complaints of neck, shoulder, and mid- and lower-back pain. I find her conclusions that the 2011 MVA contributed to the plaintiff's current complaints of left and right knee pain, which she acknowledged were primarily symptoms of pre-existing osteoarthritis, and to the left ankle and foot and right foot pain, to be largely speculative. I make the same finding in respect of Dr. MacDonald's opinion that Ms. Khudabux would likely still be physically able to work but for her MVA injuries.

**189**  I also have concerns with respect to the opinion evidence of Dr. Mok, though to a lesser extent.

**190**  I hesitate to give much weight to a psychiatric opinion concerning a patient with a history as complex as Ms. Khudabux's that is based on a single one hour and fifteen minute interview.

**191**  As noted above in my discussion of his testimony, Dr. Mok did not appear to have a sound grasp of the severity of the plaintiff's depression prior to the 2011 MVA. He had a poor understanding of the nature of the plaintiff's pre-2011 employment difficulties, specifically the degree to which her cognitive and psychiatric issues may have been contributing factors. He acknowledged, in his report, the worsening of the plaintiff's mood in February 2011 following her workplace termination. It was clear from his cross-examination that he had misapprehended the severity and instability of the plaintiff's depression prior to the 2011 MVA.

**192**  In discussing the continuing decline in Ms. Khudabux's mood following the 2011 MVA, and the reported decline in her coping skills, Dr. Mok noted that she reported an association between her increased pain and worsening mood. It is not at all clear to me why that association would not also have been present prior to the 2011 MVA, particularly considering Ms. Khudabux had been diagnosed with Chronic PTSD and Chronic Pain Disorder, which was associated with psychiatric factors and her general medical condition, in 2009. As noted above, Dr. Mok was unable to say that these prior conditions had resolved.

**193**  Dr. Mok was not fully informed as to the plaintiff's pre-accident employment pattern, nor as to the numerous other accidents she has been involved in. He had an incomplete understanding of the reasons for the plaintiff's post-2011 MVA employment difficulties, being under the impression that she had simply been laid off or had been unsuccessful because of pain.

**194**  The overall impression I was left with following the cross-examination of Dr. Mok was that his opinion, while it may have been the best one could do in the circumstances, was superficial. I do not have the benefit of an opinion from her treating psychiatrist, Dr. Hyrman. Dr. Mok professed not to understand Dr. Hyrman's most recent reported diagnosis of Ms. Khudabux, and said he had difficulty reading Dr. Hyrman's notes. As I have stated, Dr. Mok saw Ms. Khudabux on only one occasion.

**195**  That there are very significant psychiatric complications underlying Ms. Khudabux's presentation is undeniable. However, I am not persuaded that Dr. Mok's diagnosis presents a complete picture.

**196**  Given these concerns, I give relatively little weight to Dr. Mok's "impression" that her Major Depressive Disorder and her Somatic Symptom Disorder are a direct result of the 2011 MVA, and I do not accept his conclusion she would have continued to be employable but for the two subject accidents.

**197**  Those are my concerns with respect to the medical evidence tendered on behalf of the plaintiff.

**198**  As I have noted, Dr. Preto, the defence expert, gave no opinion as to the plaintiff's myofascial injuries. His opinion that the 2011 and 2014 MVAs did not contribute to the plaintiff's osteoarthritis and carpal tunnel syndrome was not challenged on cross-examination, and I accept it as proven.

**199**  In summary, I found all of the medical expert opinion evidence presented to be highly unsatisfactory.

**200**  Rather than making a global assessment of the plaintiff's current condition as the product of a series of events creating indivisible injuries, and then parsing out responsibility severally amongst the actors whose tortious conduct has historically contributed to those injuries, I approach the assessment of damages by making findings as to the contribution made by the 2011 and 2014 MVAs to the plaintiff's condition since the 2011 MVA, having regard to the factors set out in *Stapley*.

**201**  I am not persuaded that there is a "but for" causative link between either of the subject accidents and the plaintiff's current headaches.

**202**  I am similarly unpersuaded with respect to her current psychiatric issues, such as they have been identified by the doctors who testified -- that is, her depression and any Chronic Pain Disorder or Somatic Symptom Disorder she may now be suffering from. If there is any continuing causative contribution, I am not persuaded that it is more than negligible. There can be little doubt, on the evidence, that Ms. Khudabux was in a psychiatrically or psychologically fragile state prior to the 2011 MVA. Her documented history of depression, her 2009 diagnosis of chronic PTSD and Chronic Pain Disorder, her continuing psychiatric treatment, and her conflicts with co-workers leading to an unstable employment record all point to a significant pre-existing level of disability.

**203**  With respect to her physiological injuries, Ms. Khudabux was experiencing ongoing physical symptoms of pain prior to the 2011 MVA. Further, as noted, her pre-2011 MVA condition had already been aggravated by the first collision in the 2011 MVA by the time she was hit by McClary. I find that the collision with the McClary vehicle in the 2011 MVA likely resulted in a significant aggravation of pre-existing mid-back pain, and continues to contribute to the plaintiff's symptoms in that regard. It resulted in moderate, temporary aggravation of the plaintiff's pre-existing headache symptoms, which have now resolved. I also find that the collision with McClary in the 2011 MVA aggravated the myofascial pain that she was already suffering as a result of the 2006 and 2010 MVAs. The first and second collision together likely aggravated, temporarily, the pre-existing neck, shoulder and knee pain. It is likely that the impact of both the first and second collisions had the additional effect of further reducing the plaintiff's resiliency, in terms of her ability to recover from the physical and mental (psychiatric and psychological) effects of future trauma, though to a relatively modest degree.

**204**  That fact of the plaintiff's pre-existing level of disability, of course, does not in itself mitigate the defendants' liability; a tortfeasor must take the victim as they are found. The issue is whether, and to what extent, the second collision in the 2011 MVA made any appreciable difference in respect of the factors enumerated in *Stapley*, in light of the independent traumas that followed. Those traumas include the 2011 slip-and-fall accident; the shower accident in Africa; the 2010 and 2012 MVAs; and, most significantly, the 2013 fall from the recliner chair. (I note that neither Ms. Khudabux's November 30, 2013 resignation letter, nor her letter to her son on January 14, 2014, made any reference to the motor vehicle accidents). The traumas she endured also include the cumulative psychological impact of the numerous incidents of interpersonal conflict she has experienced, including conflicts in the workplace and within her family.

**205**  Without taking into account the comparison between Ms. Khudabux's current with-accident and notional without-accident condition, and accounting not only for the aggravation of her pre-existing injuries from the 2011 MVA but also from the tortious and non-tortious injuries she subsequently sustained, I would assess her non-pecuniary damages globally at $75,000.

**206**  I then must account for what position I find Ms. Khudabux would likely have been in in any event, but for the 2011 MVA. I am unpersuaded that there is a great disparity, given Ms. Khudabux's "original position" and given the number of other intervening traumas she has sustained, between the pain, suffering, and loss of enjoyment of life that Ms. Khudabux now endures, and the situation she would find herself in had the collision with McClary never occurred. I find there is a high probability that Ms. Khudabux would be nearly as substantially incapacitated and affected as is now the case. Accordingly, I reduce Ms. Khudabux's award to reflect this probability and the extent to which her current condition is only marginally worse than what otherwise would have been the case. (Note that this adjustment has no bearing on the damages she is entitled to for the acute phase of her injuries; the adjustment begins at the point at which her pre-existing and subsequent injuries predominate.) On that basis I reduce the $75,000 amount to $30,000.

**207**  That figure must then be further reduced to account for Ms. Khudabux's contributory ***negligence***, which I have quantified at 20%.

**208**  I therefore award Ms. Khudabux, as against the defendant McClary, non-pecuniary damages of $24,000.

**209**  With respect to the 2014 MVA, I find that there was likely only a temporary aggravation in Ms. Khudabux's physical symptoms, with, consequentially, some small degree of reduction in her resiliency in respect of future trauma. I regard Dr. MacDonald's opinion as to the 2014 MVA having a continuing role in the plaintiff's current presentation as being largely a matter of speculation and advocacy. In respect of the 2014 MVA, I award a further $8,000 as against the defendant MacDonald.

**2. Loss of Earning Capacity**

**210**  The plaintiff contends that as a result of her injuries, her "tenuous grip on employment sustained a major blow". It is submitted that but for the 2011 MVA, she would have, to the date of trial, continued with the same pattern of earnings she enjoyed previously. It is argued that her past loss of earning capacity is best assessed by comparing her average earnings of $21,472 over the three prior calendar years, 2008-2010, to her average level to 2014, which is $5,368. The difference, to the date of trial, net of income taxes at the rate of 6.7%, is calculated at $71,970.

**211**  As to her future earning capacity, the plaintiff submits that given her financial circumstances, there was, but for the subject accidents, a strong possibility that she would have continued to work until age 70, and quite possibly to age 75. Using those same average income figures, the future loss of capacity, on an earnings basis, is calculated at between approximately $115,000 and $235,000. It is further suggested that an assessment based on the capital asset approach ought to yield a similar range.

**212**  The plaintiff contends that the negative contingencies associated with the plaintiff possibly having to be off work from time to time for medical issues and "various slips and falls" in any event, even without the subject collisions, are already accounted for in this calculation. Counsel submits:

... it is clear that Ms. Khudabux's past career has been full of events that have caused her to be a short term employee in all of her jobs. She was frequently off work before the first collision, and as such, her pre-collision average earnings take these absences into account.

**213**  Even if I were to accept the plaintiff's position that the injuries she sustained in the 2011 and 2014 MVAs continue to play a significant role in her condition, I would not accept this analysis as it does not account for the full effect of the negative contingency associated with the plaintiff's pre-existing psychiatric and physiological conditions, and therefore considerably overstates the loss. Ms. Khudabux was terminated from her employment in late January 2011. In March, she was assessed as being on "medical E.I." until June 30, meaning she would have been without employment income for, at a minimum, the first six months of the year. At that point, in March 2011, her depression still had not stabilized, meaning that the date of her return to employability was uncertain. This loss of more than five months of employment all transpired within the calendar year of 2011. Under the plaintiff's suggested methodology of comparing pre- and post-accident averages, this loss ought to go to pre-accident earning capacity, but instead the plaintiff's figures have assessed the post-accident earnings as encapsulating all of the calendar year 2011. Attributing the 'nil' earnings for the first half of 2011 to the plaintiff's pre-accident capacity, as is the proper calculation, would reduce the past income loss, to the date of trial, from the claimed $71,970, to $38,778.

**214**  Extending that analysis to the plaintiff's methodology of calculating the future capacity loss, the range would be approximately $121,000 to $201,000.

**215**  That calculation, however, would also understate the effect of the plaintiff's psychiatric condition, and the negative contingencies that attach, in that it would only reflect the probability of a six-month loss in employment every three-and-a-half years. Recall, however, that Dr. Mok's evidence was that, having suffered her third episode of major depression as of January 2011, Ms. Khudabux was at increased risk of recurrence, with future episodes likely to result in further declines in her emotional resilience.

**216**  It therefore seems to me, on Dr. Mok's evidence, that there is every reason to believe that as of February 2011 Ms. Khudabux was at risk of a major depressive episode, not merely once every three-and-a-half years, but potentially any time her employment was terminated by reason of interpersonal conflict (as so often seemed to be the case). The associated negative contingency becomes exponentially greater when one considers the number of emotional stressors, unrelated to her employment, that Ms. Khudabux has endured and would have endured in any event but for the subject MVAs. Even without the 2011 and 2014 MVAs, then, her prospects of finding stable employment, post-2011, were significantly reduced.

**217**  Putting aside the arithmetic analysis, I simply do not accept that there is a real and substantial possibility that Ms. Khudabux would have earned significantly more income, but for the accidents. She had a spotty employment record before 2011. That spotty pattern resumed from August 2011 until she injured her back in the 2013 accident when she fell out of the recliner. It may be the case that the 2011 and 2014 MVA injuries have made a marginal impact on the plaintiff's resilience, but I am not persuaded that the effect on her employability has been more than negligible.

**218**  I make no award for loss of past or future earning capacity.

**3. Loss of Housekeeping Capacity**

**219**  The plaintiff submits that an award of $10,000 under this heading would be appropriate. I find a high probability that the plaintiff would still, but for the 2011 MVA, be in need of housekeeping assistance. I allow an award under this heading in the amount of $2,500, reduced by 20% to $2,000 to reflect the plaintiff's contributory ***negligence***.

**4. Special Damages**

**220**  The plaintiff claims a series of expenditures alleged to have been caused by the two subject accidents.

**221**  The plaintiff claims $76.96 in acupuncture expenses incurred December 10-30, 2012, and a further $20.00 in acupuncture expenses incurred August 1, 2013. There is no evidence of Dr. MacDonald recommending those acupuncture treatments at those times, and I am unable to relate those treatments to the 2011 MVA. I note that ICBC has already reimbursed Ms. Khudabux for the cost of physiotherapy following the 2011 MVA and acupuncture treatments following the 2012 MVA.

**222**  Prescription costs incurred following the 2011 MVA of $23.51, and a B.C. Ambulance fee of $80.00, are allowed. The total of $103.51 is reduced by 20% to $82.81 to account for the plaintiff's contributory ***negligence*** in respect of the 2011 MVA.

**223**  The sum of $8,778.73 is claimed in relation to the net loss on the purchase and sale of a car that Ms. Khudabux used while her car was being repaired, as well as collision damage repair costs, following the 2011 MVA. The plaintiff's evidence as to the purchase and sale of the substitute vehicle was fragmented. However, I accept the plaintiff's submission that the loss on the sale of the vehicle was virtually the same as the cost of a rental car would have been. That claim is allowed, and the amount reduced by 10% to $7,900.86 to reflect the plaintiff's contributory ***negligence*** in failing to move her car only, since her failure to remove her seatbelt did not affect the damage to her vehicle.

**224**  There are further costs claimed -- physiotherapy, parking at Richmond General Hospital, taxi and car rental expenditures, the cost of a knee brace and the cost of a parking pass -- which were incurred in the acute phase of recovery of the 2014 MVA injuries. I allow those expenses as against the defendant MacDonald, in the amount of $1,329.97.

**5. Cost of Future Care**

**225**  The plaintiff claims for the present value of the future cost of a variety of medications and therapies recommended by Dr. MacDonald and/or Dr. Mok.

**226**  The claim is comprised of a series of active rehabilitation treatments, at a one-time cost of $600 to $720; massage, chiropractic, or acupuncture treatments at a cost of $900 to $1,500 per year; a six-month gym pass for Pilates or yoga, totalling $270 to $425; additional medication costs for anti-depressants at $1,440 per year; over-the-counter medication at $84 to $120 per year; and psychotherapy at a cost of $1,600 to $2,160.

**227**  The whole claim is quantified at a present value of approximately $50,000.

**228**  I am not persuaded that these expenses have been proven to be more reasonably necessary than they would have been had the subject accidents not occurred.

**229**  Moreover, I would not make an award for future psychotherapy costs in any event without testimony from the plaintiff's treating psychiatrist as to the potential efficacy of this proposed treatment, in the context of her entire psychiatric history.

**230**  Finally, there is the question of the likelihood of the plaintiff undertaking the therapies. I note that in cross-examination, Dr. MacDonald was specifically asked for her opinion as to the likelihood of the plaintiff undergoing active rehabilitation therapy or physiotherapy, given that she had only initially complied with Dr. MacDonald's recommendations in respect of same, and had then stopped going because it made her pain worse. Dr. MacDonald conceded she would be surprised if the plaintiff were to say that she would undertake such therapies in the future. I also accept the defence submission that there is no reason to believe the plaintiff would undertake yoga or Pilates, as she has not done so at any time since the 2011 MVA.

**231**  This claim is disallowed.

**V. SUMMARY**

**232**  I award the plaintiff damages as follows:

1. As against the defendant McClary:
2. Non-pecuniary damages $24,000.00
3. Loss of housekeeping capacity $ 2,000.00
4. Special damages $ 8,004.37
5. As against the defendant MacDonald:
6. Non-pecuniary damages $ 8,000.00
7. Special damages $ 1,329.97

**233**  Unless there are matters I am unaware of, the plaintiff will be entitled to her costs at Scale B. If the parties need to make submissions as to costs, arrangements can be made with Supreme Court Scheduling -- New Westminster for a hearing.

A. SAUNDERS J.

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**CORRECTION**

Released: October 19, 2016

Please be advised that the attached Reasons for Judgment of the Honourable Mr. Justice A. Saunders dated October 14, 2016, have been corrected as follows:

On the cover page, K.L. Naish was added to the Counsel for the Defendants field, as she was present at trial from January 19 to 22, 2016.

**End of Document**

[***Kumar v. Canada Post Corp., [2006] B.C.J. No. 49***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S33T-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

MacKenzie J.

Heard: November 28 - December 2, 2005.

Judgment: January 11, 2006.

New Westminster Registry No. S80643

**[2006] B.C.J. No. 49** | [*2006 BCSC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MG-00000-00&context=) | [*150 A.C.W.S. (3d) 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MG-00000-00&context=)

Between Mahadeo Vijay Kumar, plaintiff, and Canada Post Corporation and Cameron Nixon, defendants

(94 paras.)

**Case Summary**

**Damages — General damages — For personal injuries — Calculation — Considerations — Aggravation of pre-existing injury — Loss of earning capacity — Non-credible plaintiff who suffered soft tissue injuries was awarded general damages of $12,000 — Award was reduced by 20 per cent because of pre-existing condition suffered in earlier accident that could resurface — No award was made for loss of earning capacity — Plaintiff failed to prove that injuries from this accident resulted in loss of future or past earning capacity.**

**Damages — Physical injuries — Body injuries — Neck — Back — Non-credible plaintiff who suffered mild muscle strain to his left neck and shoulder was awarded general damages of $12,000 — Award was reduced by 20 per cent because of pre-existing condition suffered in earlier accident that could resurface.**

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| Action by Kumar against the defendant Canada Post Corporation for damages for soft tissue injuries sustained in a motor vehicle accident -- Accident occurred on June 18, 2001 -- Liability was admitted -- Kumar claimed his neck and upper back in the left shoulder area were injured -- He suffered headaches, poor sleep, depression and irritability -- Use of his left arm was limited -- Problem with claim was that Kumar was involved in one accident in September 1997 and in many motor vehicle accidents after this accident -- Canada Post claimed that Kumar's injuries in this accident were far less severe than he claimed -- At the time of the accident Kumar earned $11 an hour as a cook -- HELD: Action allowed -- Kumar was awarded damages of $11,986 -- He was not credible -- June 2001 accident occurred at very low speed and caused Kumar to suffer mild muscle strain in his left neck and shoulder -- These injuries were fully resolved by January 2003 -- Kumar did not become depressed as a result of the injuries and suffered only a minimal loss of enjoyment of life in the period from this accident to the next one that occurred on August 15, 2003 -- General damages were assessed at $12,000 -- Award was reduced by 20 per cent to $9,600 because Kumar suffered debilitating injuries to his neck and left shoulder in a September 1997 accident -- Pre-existing condition was asymptomatic when the accident occurred but there was a 20 per cent chance that the injuries would resurface -- Past wage loss was assessed at $1,777 -- No award was made for future loss of earning capacity -- Kumar failed to prove that the injuries in this accident caused him a loss of either future or past earning capacity. |

**Counsel**

Counsel for the Plaintiff: R.C. Gambrel

Counsel for the Defendant: J.R. Schmidt and A.P. Prior

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| **MacKENZIE J.** |

Introduction

**1**  Mr. Kumar claims damages for soft tissue injuries suffered in a motor vehicle accident that occurred on June 18, 2001. Liability is admitted. Mr. Kumar says he suffered injury to his neck, and upper back in the left shoulder area with the effects of headaches, poor sleep, depression and irritability, and limitations on the use of his left arm.

**2**  There are serious problems with Mr. Kumar's claim because he has been in so many motor vehicle accidents. They are listed chronologically as follows:

1. September 1997;
2. June 18, 2001, (the subject of this action);
3. August 15, 2003;
4. May 7, 2004;
5. September 7, 2004; and
6. May 18, 2005.

**3**  The number of accidents and Mr. Kumar's claim that the one of June 18, 2001, materially contributed to his alleged chronic pain, indeed his alleged myofascial pain syndrome, makes causation a critical issue. The defendants maintain that Mr. Kumar's injuries from the June 18, 2001, accident were far less severe than he claims. This case turns almost entirely on the credibility of Mr. Kumar which was put squarely in issue.

**4**  I have no hesitation in saying I do not believe Mr. Kumar's evidence. The reasons will become apparent, but they include the fact he made several prior inconsistent statements in circumstances that taint the whole of his evidence. Mr. Kumar was repeatedly and successfully challenged in cross-examination. I have no confidence in his testimony. I must therefore assess damages on whatever objectively sound evidence exists before me. Mr. Schmidt and Mr. Prior, both counsel for the defendants, have been of great assistance in this task. Their statement of the facts is accurate and their arguments are both persuasive and fair.

**5**  I find on the evidence that the June 18, 2001 accident occurred at very low speed and caused Mr. Kumar mild muscle strain in his left neck and shoulder. These injuries had fully resolved by January 2003 at the latest. Mr. Kumar did not become depressed as a result of these injuries and suffered only a minimal loss of enjoyment of life in the period from this accident to the next one on August 15, 2003.

The Facts

**6**  I find the following facts on the evidence.

**7**  The accident of June 18, 2001, occurred on 92nd Avenue in Surrey, British Columbia when a mini-van operated by the defendant, Cameron Nixon, and owned by the defendant, Canada Post Corporation, hit the Toyota driven by Mr. Kumar. Mr. Nixon, a Canada Post employee, was trying to turn left onto 92nd Avenue.

**8**  Mr. Nixon was only travelling at about 10 km per hour when his vehicle struck the passenger side of Mr. Kumar's car. Mr. Kumar adduced no evidence of damage to either vehicle, and I accept Mr. Nixon's description of the collision as, "slight and at slow speed."

**9**  Mr. Kumar was born in Fiji and immigrated to Canada in 1985. He was 39 years old when the accident occurred and 43 at trial.

**10**  Mr. Kumar began work in Canada as a dishwasher and cook. Between 1985 and 2001, he worked at a variety of restaurants in the Lower Mainland, including "Denny's," "ABC," and "Ricky's." He had no formal training as a cook at the time of the accident. Mr. Kumar had worked for about 15 years when he began to work as a cook with Aramark Canada Limited ("Aramark"). Aramark then had the contract to operate the cafeteria at the 37th and Heather Street RCMP headquarters in Vancouver. At the time of the accident, Mr. Kumar was working full-time for Aramark, earning $10.60 per hour.

**11**  In his previous accident of September 1997, Mr. Kumar had also suffered injury to his neck and left shoulder. He complained of pain from these injuries for over 2 1/2 years to the spring of 2000.

**12**  In cross-examination, Mr. Kumar clearly adopted his statement of June 19, 2001, to ICBC, when he described his lifestyle before the June 18, 2001 accident by saying, "I do housework and go to work. I have no time for other stuff." Mr. Kumar also adopted the statement he made at his examination for discovery to the effect that there was "no problem" with his family relationships.

**13**  Immediately following the accident on June 18, 2001, Mr. Kumar drove to the school to pick up his son and returned home. He experienced pain and went to his family doctor's office that day.

**14**  On June 19, 2001, Mr. Kumar returned to his doctor's office for reasons unrelated to the accident of the previous day.

**15**  Mr. Kumar missed work on June 19, 20 and 21 because of his injuries. He then returned full-time on August 6, 2001. In July, 2001, he did not visit a doctor for treatment but actively participated in physiotherapy. Mr. Kumar did not incur any expenses for medication in June or July 2001, but had physiotherapy surcharges.

**16**  Mr. Kumar stopped working on August 6, 2001. He continued physiotherapy and participated in a graduated return to work program. Mr. Kumar returned to full-time work on November 12, 2001, but missed several days of work in late December 2001 and late January 2002.

**17**  Mr. Kumar continued to work full-time to the end of June 2002 as a cook in the RCMP cafeteria. Then Aramark lost its contract with the RCMP and Mr. Kumar was laid off. In the summer of 2002, Aramark selected Mr. Kumar to participate in management training at three locations in Greater Vancouver. From September 2002 to March 2003, Mr. Kumar worked full-time for Aramark as a kitchen manager at a General Motors dealership in Vancouver. He described his duties there as being lighter than previously. Mr. Kumar did light lifting, although he was required to lift bags weighing up to 50 lbs. The pre-cut food was easier to prepare. Mr. Kumar's pay increased to $12.50 per hour.

**18**  Mr. Kumar did not say that he experienced pain when he worked at the General Motors dealership, but he left that position voluntarily in the spring of 2003 to enrol in a cooking course at Vancouver Community College. He dropped out after only a few weeks.

**19**  Mr. Kumar testified that right to the present, his level of pain remains very elevated. He said it is usually around 9 to 9.5 on a scale of 1-10, where 10 is the most intense pain he had ever experienced. However, I find that Mr. Kumar's injuries from the June 18, 2001, accident had fully resolved by 2003. He had no problems with neck and shoulder pain in 2003, up to his next accident on August 15, 2003. This was evident from his sworn statement to ICBC on August 19, 2003 when just four days after the August 15, 2003 accident, Mr. Kumar said, "I have no medical conditions. I injured my left shoulder and neck in a motor vehicle accident a few years ago but this had recovered and I was having no problems within this year." In cross-examination, Mr. Kumar gave detailed evidence about the procedure in making the statement so as to ensure its accuracy. He had read it over to confirm it was correct. In fact, Mr. Kumar made a correction to the last line to change the wording from, "and I was having no problems with this over the last year," to, "and I was having no problems within this year."

**20**  On June 22, 2003, Mr. Kumar began work as a driver of an Aramark coffee van which required him to be physically fit and,

1. "[to be a]ble to lift and carry weight ranging from 5-10 kilograms, minimum 20 times during an 8 hour period, utilizing proper lifting and carrying procedures"; and,
2. "to bend at waistline and reach to load and unload products minimum 20 times during an 8 hour period, utilizing proper lifting and carrying procedures."

**21**  This new position represented another increase in pay to $14.44 per hour.

**22**  The next accident, on August 15, 2003, occurred while Mr. Kumar was at work for Aramark. He suffered a significant injury to his lower back which had not been injured in the June 18, 2001 collision. The August 2003 accident appeared to be a much more serious collision than the one in June 2001 because Mr. Kumar was taken to hospital and could not drive home. Also, Mr. Kumar was away from work from mid-August to October, 2003 because of lower back pain.

**23**  As mentioned, Mr. Kumar was involved in the three accidents of May 7, 2004, September 7, 2004, and May 18, 2005. In the latter, Mr. Kumar rear-ended another vehicle.

**24**  On April 6, 2004, Aramark issued a written warning to Mr. Kumar about his unsafe driving and accident record. They told him further discipline could lead to dismissal if he did not take corrective action. On August 4, 2004, Aramark terminated Mr. Kumar's employment for cause based on his unsafe driving habits and failure to report another accident. Mr. Kumar disagreed with Aramark's reasons, but agreed Aramark had indeed terminated him.

**25**  In September 2004, Mr. Kumar started a job with a courier company. He worked briefly at a lumber mill in early 2005 and then returned to the courier company where he worked until November 2005. At the time of trial, Mr. Kumar was unemployed but planned to seek work in January 2006.

**26**  Mr. Kumar testified that his life from 2001 to now has consisted of "having a stiff neck." In January 2002, he said there was no change in his condition; he was feeling the same headaches, swollen and stiff neck and pain in the upper back and shoulders. Even now, he said that sleeping remains a problem because of pain.

**27**  From June 18, 2001 to January 1, 2002, Mr. Kumar said his mood interfered with his enjoyment of life and caused two relationships to end.

**28**  From January 1, 2002, to the end of June 2002, Mr. Kumar continued to work at the RCMP cafeteria, but said the same high level of pain persisted in his neck, shoulder blade and the left side of his upper back. He said his headaches diminished somewhat, but the work he could do was limited.

**29**  From September 2002 to March 2003, Mr. Kumar worked at Carter GM. He decided in March 2003 to attend Vancouver Community College for the first year of a three-stage chef course. He only stayed a few weeks because of the alleged limitations in his ability to cut, chop and lift. Mr. Kumar said he still had headaches and the neck and left shoulder blade pain remained severe.

**30**  In June 2003, Mr. Kumar was hired as a coffee truck driver for Aramark but said lifting and carrying heavy weight worsened his pain. He said he had no social life around then. Mr. Kumar said he only slept four-to-five hours a night; he would snap at his family and still does so. In short, Mr. Kumar testified that just before the August 2003 accident, the pain from his previous injuries was severe.

**31**  As I have mentioned, Mr. Kumar's description of the extent of his pain and the limitations on his activities before the August 2003 accident is inconsistent with his sworn statement of August 19, 2003, when he said to ICBC, "I injured my left shoulder and neck in a motor vehicle accident a few years ago but this had recovered and I was having no problems within this year." This statement is not ambiguous. I reject the argument that Mr. Kumar was either referring to his September 1997 accident, or that he was simply mistaken in saying he had recovered from the injuries sustained in the June 2001 accident.

**32**  The following are some of the more significant matters on which Mr. Kumar's evidence was shown to be false:

Mr. Kumar's Activities Outside Work before June 18, 2001

**33**  Mr. Kumar said that before the June 2001 accident, he did most of the outside work at his family's home in Surrey including landscaping, and cutting the grass. Mr. Kumar said he also did inside maintenance, painting and tiling. He testified he played soccer for a Fijian league from mid-April to mid-September and went to the games every second Sunday. He attended practices every Saturday. Mr. Kumar also said he enjoyed walking, fishing and crabbing before the accident, and liked to socialize with friends and go to movies.

**34**  This description of Mr. Kumar's pre-accident activities is inconsistent with his previously mentioned statement of June 19, 2001, to ICBC in which he said, "... My health is good. I do housework and go to work, I have no time for other stuff. I visit my dad in the hospital every day. I have read the above statement and it is correct to the best of my knowledge."

The Effect of the Injuries on Mr. Kumar's Relationships with his Family Members

**35**  Mr. Kumar testified that pain from the June 2001 accident made him irritable, so he had conflict with his family members, including his son. However, at his examination for discovery, Mr. Kumar was asked whether the accident had affected his relationships with anyone such as his son. Mr. Kumar answered, "I don't think so. I have a teenage son and you know how teenagers get with their parents, so that's a normal life which I am going through. Everybody knows that. And basically everything's O.K. with my family and other stuff is good." Mr. Kumar testified that statement was true.

The End of Mr. Kumar's Employment with Aramark in 2004

**36**  Mr. Kumar testified that he was "let go" in August 2004 from his employment with Aramark because he had been missing too much work and his injuries prevented him from doing the required lifting and driving. However, Mr. Kumar admitted to having received a letter from Aramark that disclosed his employment was terminated with cause, effective August 4, 2004. A warning letter of April 6, 2004, set out his accident record with company vehicles. Mr. Kumar admitted he had been fired on August 4, 2004, although he disagreed with Aramark's reasons for firing him.

Whether Mr. Kumar was rendered unconscious by the Accident

**37**  Nowhere in Mr. Kumar's prior statements did he say that he lost consciousness in the June 2001 accident. However, at trial, he insisted he had lost consciousness. But, the accident was slight and at slow speed, as Mr. Nixon described. The impact was minimal. I accept Mr. Nixon's testimony that only seconds after the accident occurred, he found Mr. Kumar conscious and alert.

**38**  I also agree with counsel for the defendants that Mr. Kumar's evidence about the intensity of his pain at various times after the June 18, 2001 accident and his description of the immediate aftermath of both it and the accident of August 15, 2003, were mechanical and rote. Mr. Kumar described both accidents in very similar terms that were inconsistent with the different levels of seriousness.

**39**  Mr. Kumar's evidence sounded rehearsed and he was argumentative on cross-examination. His evidence of not remembering until immediately before trial that his work with Aramark ended because its employees were laid off, and not because of a disability on his part, was unbelievable.

The Medical Evidence

**40**  Mr. Kumar relies on two reports prepared by Dr. Barron, and one report of Dr. Guy, both general practitioners at a clinic in Surrey. Dr. Guy was cross-examined by counsel for the defendants. Because the opinions of both doctors depended upon Mr. Kumar's own reporting and description of his injuries, the medical reports are of limited assistance.

**41**  In addition, although Dr. Guy was a candid, forthright and fair witness, his opinion that Mr. Kumar suffers from chronic pain, or chronic myofascial pain syndrome was based on the opinions of two experts whose reports were not before the court. His opinion on that point is therefore inadmissible, or at least entitled to no weight. I will comment in turn upon the opinions of Dr. Barron and Dr. Guy.

Dr. Barron

**42**  Dr. Barron treated Mr. Kumar before November 2003. He wrote reports about Mr. Kumar's medical condition on August 21, 2002, and October 26, 2003.

**43**  In his report of August 21, 2002, Dr. Barron said that Mr. Kumar had an acute strain of the neck and upper back due to the motor vehicle accident of June 18, 2001. He said the symptoms he has suffered since are likely caused by that accident. But Dr. Barron also opined that the injuries from the September 1997 accident, "certainly left [Mr. Kumar] more susceptible to re-injury and probably explains why he has had symptoms for the length of time that he has." Dr. Barron noted that the September 1997 accident affected Mr. Kumar's neck and upper back, causing an acute cervical strain and he was still symptomatic in March 2000. Dr. Barron observed that Mr. Kumar did not return to the clinic in the fifteen months between March 2000 and June 2001, when he was assessed following the accident of June 18, 2001. However, Dr. Barron did say in his October 26, 2003, report that, "In the long term [Mr. Kumar] should not do any heavy physical labour involving lifting, or work activity above shoulder level as a result of his MVA injuries of June 18, 2001, September 1997, and the most recent motor vehicle accident of August 15, 2003."

**44**  Dr. Barron concluded that Mr. Kumar should consider another occupation because the heavy physical nature of work as a cook would aggravate his neck and upper back pain.

**45**  I agree with counsel for the defendants that Dr. Barron's opinion may have been different had he known when he wrote the October 21, 2002, report that Mr. Kumar was able to work pain-free as a cook. Dr. Barron's later report of October 26, 2003, report does not contain the conclusion that Mr. Kumar would not be able to work as a cook in the future.

**46**  I also agree with the defendants that the factual basis for Dr. Barron's October 26, 2003, report is inconsistent with Mr. Kumar's sworn statement of August 19, 2003, which stated that he was having no problems in 2003 before the August 15, 2003, accident.

**47**  It is also significant that Dr. Barron's conclusions about Mr. Kumar's inability to do heavy lifting in the future were clearly based not only on the June 2001 and August 2003 accidents, but also on the injuries from the September 1997 accident. Furthermore, Dr. Barron described Mr. Kumar's neck and upper back strain from the June 2001 accident as "acute," rather than "chronic."

Dr. Guy

**48**  Dr. Guy's involvement with Mr. Kumar began on November 18, 2003, for follow up treatment related to injuries sustained in the motor vehicle accident from August 15, 2003. He replaced Dr. Barron. Dr. Guy had no opportunity to observe Mr. Kumar after the June 18, 2001, accident and before the August 15, 2003, accident. I initially ruled that Dr. Guy was qualified to give a limited opinion on what constitutes an initial or tentative diagnosis of chronic pain syndrome, but only sufficient to explain his referral to experts. Dr. Guy's conclusion that Mr. Kumar suffers "chronic myofascial pain syndrome," as a result of a series of motor vehicle accidents was disclosed in cross-examination to be based entirely on the opinions of two specialists, Dr. Brown and Dr. Kwee, whose opinions were not before the court. I therefore ignore Dr. Guy's statement in his report that Mr. Kumar suffers from chronic myofascial pain syndrome.

**49**  Dr. Guy agreed that the prognosis in his report that in the long term, there was a possibility of a further requirement of medical treatment, was speculation and a "mug's game." He was relying on others and had no personal basis for saying how anything from the June 2001 accident might influence Mr. Kumar's future. He also agreed that to the extent Mr. Kumar might be limited in his future activities, nothing from Dr. Guy's own work would suggest that the June 2001 accident had anything to do with it.

**50**  Dr. Guy conceded that his knowledge of the June 18, 2001, accident was based entirely on his review of Dr. Barron's, Dr. Brown's and Dr. Kwee's reports, only the former of which was admissible at trial. He agreed that in diagnosing unresolved soft tissue injury, a doctor often has little to go on except the subjective complaints of the patient on which the doctor must rely as being true.

**51**  Dr. Guy said that the typical acute phase for whiplash injuries is about two-to- four months. There is then a transition into a healing phase at which the injuries largely resolve; the symptoms are generally gone within one year.

**52**  Dr. Guy said that if one assumed Mr. Kumar's pain from the September 1997 accident had continued for the two-and-a-half years that Mr. Kumar had complained about it, it would be reasonable to consider whether there was a chronic neck problem. He defined "chronic" as typically meaning longer than three-to-four months. He agreed the September 1997 accident may well be a cause of Mr. Kumar's current complaints.

**53**  Dr. Guy also testified that stress can be caused by many things, including depression, upset, or health worries. He said that stress can cause physical pain. Mr. Kumar had various significant stressors in his life, including his father's stroke and subsequent death, another medical condition and the obvious cumulative stress of so many motor vehicle accidents.

**54**  Mr. Kumar's evidence was confusing when he said he had severe neck and upper back pain and headache from the June 2001 accident, yet he did not see a doctor in July 2001, or buy any medication then. When this evidence is added to Dr. Guy's evidence, one could conclude that Mr. Kumar's injuries were minor and resolved quite quickly. There would have been a recovery from the acute phase of the injuries by the end of June 2001. Mr. Kumar's employment records with Aramark reflect that Mr. Kumar worked full-time, and indeed overtime, in June 2001. I do not accept they contained a mistake about overtime. By mid-July, therefore, the acute stage of the injuries was likely over.

Damages

**55**  Damages must be assessed on the basis that the June 18, 2001, accident was a slight collision at slow speed. There is no evidence either vehicle was damaged. Immediately following the accident, Mr. Kumar told Mr. Nixon that he was "okay". He was responsive and decided to drive on to pick up his son. He did not see the doctor until the next day. This behaviour was consistent with having sustained a mild-to-moderate whiplash injury.

**56**  The defendant's primary position is that the assessment of Mr. Kumar's damage should be based on a scenario characterized as "immediate recovery" and which the defendants say is supported by the following facts:

1. Mr. Kumar experienced some pain and discomfort in his neck and shoulder after the accident which was caused by a mild neck and shoulder strain. However, the defendants say the acute phase of that injury ended within about a week to ten days of the accident and was fully resolved by the middle of July 2001;
2. The June 18, 2001, accident did not the impair Mr. Kumar's ability to enjoy his pre-accident activities or cause any deterioration in his family relationships;
3. Mr. Kumar suffered no stress or depression as a result of the June 18, 2001, accident or any significant physical injuries arising from it;
4. Mr. Kumar was able to return to full-time work within about three days of the accident and continued full-time for about six weeks after the accident. Any work he missed immediately after the accident did not cause him any monetary loss;
5. Mr. Kumar sought no medical attention at all in July 2001 and advances no claim for prescription drug expenses for the period of about seven weeks after the accident. His only claim for special damages during that period is for physiotherapy charges.

**57**  I prefer the defendants' secondary position which they call the "ongoing recovery" characterization of the facts because it is consistent with the objective evidence in the two medical reports of Dr. Barron and the evidence that emerged from the cross-examination of Dr. Guy. The "ongoing recovery" characterization is a solid and reliable basis upon which to assess Mr. Kumar's damages because it is based on the following facts:

1. Mr. Kumar experienced some pain and discomfort in his neck and left shoulder after the June 2001 accident as a result of a mild neck and shoulder strain, but the acute phase of that injury ended about a week to ten days after the accident. Mr. Kumar experienced sporadic pain and discomfort to the end of 2002, but as he said, this injury resolved by January 2003;
2. To the extent Mr. Kumar suffered pain and discomfort for more than a typical recovery period of three months, this prolonged discomfort was probably caused by his pre-existing neck injury from the accident in September 1997;
3. Mr. Kumar suffered no impairment of his ability to enjoy pre-accident activities, nor did he suffer any impairment in his family relationships as a result of the June 18, 2001, accident;
4. Mr. Kumar suffered no stress or depression as a result of injuries from the June 18, 2001, accident. There was no mention of depression in the clinical records between June 18, 2001, and August 15, 2003. Mr. Kumar acknowledged that Dr. Guy said that depression was diagnosed in the fall of 2004, after Mr. Kumar had been involved in three more motor vehicle accidents. Also, there was no claim or reference to depression in his statement of claim which was filed shortly before the August 15, 2003 accident;
5. Mr. Kumar only missed a little work in June 2001, but it caused him no monetary loss. He was then away from work for a further period as a result of ongoing pain and discomfort in his neck and left shoulder. The first part was from August 6, 2001, to October 22, 2001, when he did not work at all. The second part of this period was from October 22, 2001, to November 12, 2001, when he worked part-time on a graduated return-to-work program. I agree with the defendants that Mr. Kumar is therefore entitled to damages for loss of past income in an amount equal to his proven gross wage loss, less 66% of that amount to account for sick benefits received, and less statutory deductions and "Part VII" disability and wage loss benefits;
6. Mr. Kumar missed a total of eight-and-a-half days of work in December 2001 and January 2002. According to the collective agreement, he was entitled to five more sick days starting January 1, 2002. The sick days reduced his lost wages to three-and-a-half days of work and for those days, he is entitled to damages for past income loss in an amount equal to his proven gross wage loss, less 66% for sick benefits and less statutory deductions;
7. Mr. Kumar attended physiotherapy twenty times from June 6, 2001, to August 30, 2001, and the defendants agree he is entitled to special damages for the surcharges paid for those visits;
8. The defendants say there is no evidence that Mr. Kumar consumed the prescription drugs purchased in 2001 or that he took them as a consequence of the injuries sustained in the June 2001 accident.

Causation and the Assessment of Damages

**58**  In ***negligence*** cases, the fact a plaintiff suffers from a pre-existing medical condition engages two distinct issues of law: whether causation can be established, and what the appropriate measure of damages is where the defendant is found liable. As the court said in T.W.N.A. v. Canada (Ministry of Indian Affairs) [*(2003), 22 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=), [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=), at [paragraph] 16: "Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions."

Causation

**59**  As the court stated in Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at [paragraph] 14-15, it has long been held that causation in ***negligence*** cases is established where the injury of the plaintiff would not have occurred "but for" the ***negligence*** of the defendant, or where the defendant's ***negligence*** is found to have "materially contributed" to the occurrence of the injury. In Athey, the court also noted at [paragraph] 34 that under the "thin skull" rule at common law, a defendant can be held liable for a plaintiff's injuries even where the latter suffers from a pre-existing medical condition. The rule "makes a tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition." As the court explained at [paragraph] 20, this is because "the essential purpose of tort law" is to "restore the plaintiff to the position he or she would have enjoyed but for the ***negligence*** of the defendant."

Assessment of Damages

**60**  The court in Athey also noted, however, that once causation is established, a pre-existing medical condition may nevertheless operate to reduce the damages that would otherwise be awarded, according to the "crumbling skull" rule. As Major J. stated at [paragraph]34-35, this rule stems from the "simple idea" that a defendant "need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway." Therefore, if there is a measurable risk that the plaintiff's injuries would have occurred absent the defendant's ***negligence***, the damages awarded are to be correspondingly reduced, because "the defendant need not put the plaintiff in a position better than his or her original position." Accordingly, where a pre-existing medical condition is found to warrant a proportional reduction in damages, "these possibilities are to be given weight according to the percentage chance they would have happened or will happen": Rosvold v. Dunlop [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), at [paragraph] 9; Athey, at [paragraph] 27.

**61**  The distinction between the "thin skull" and "crumbling skull" rules was clarified in York v. Johnston [*(1997), 37 B.C.L.R. (3d) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61BC-00000-00&context=) (C.A.). In that case, the "crumbling skull" rule was applied where a plaintiff suffered a relapse of her multiple sclerosis following a motor vehicle accident. At [paragraph] 6, Newbury J.A. stated:

Of course, the judgment as to the measure of damages is a much more subtle one than that as to causation, not only because it involves a consideration of mere contingencies as well as probabilities, but because of the range of results available in the discounting of the award, as opposed to the "all or nothing" choice that must be made with respect to causation. But the two issues do not operate at cross-purposes even where, as in this case, there is only one "cause" in tort law for the plaintiff's injury. The question is what award is appropriate to reflect the difference between the plaintiff's original state (including the risk, to which she was subject immediately prior to the accident, of the relapse of her latent condition) and the state in which she now finds herself.

See also: K.S. v. J.P.H., [*[2004] B.C.J. No. 1414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X04T-00000-00&context=), [*2004 BCSC 769*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X04T-00000-00&context=), at [paragraph] 70; and Dufty v. Great Pacific Industries, [*[2000] B.C.J. No. 1988*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1B4-00000-00&context=), [*2000 BCSC 1474*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1B4-00000-00&context=), at [paragraph] 123.

**62**  That a latent pre-existing medical condition will trigger the operation of the "crumbling skull" rule was echoed by the Court of Appeal in T.W.N.A., where Smith J.A. similarly noted at [paragraph] 48:

Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather it should be given weight according to its relative likelihood.

The Cause of Mr. Kumar's Alleged Chronic Pain

**63**  Mr. Kumar concedes that his current lower back pain was not caused by the June 2001 accident. But also, Mr. Kumar has not proven that any alleged neck and left upper back chronic pain were caused by the June 2001 accident. I have found the injuries from the June 2001 accident resolved by January 2003. Because of his prior inconsistent statements and particularly those of August 19, 2003, and June 19, 2001, I have rejected Mr. Kumar's evidence that his alleged chronic pain in his neck and upper left back or shoulder area is related to the June 2001 accident.

**64**  Dr. Guy was referred to Mr. Kumar's clinical records and cross-examined about the September 1997 accident. He agreed that the 1997 accident, generally speaking, injured the same areas as the June 2001 accident: the left neck and left shoulder. He also agreed that based on the clinical records, Mr. Kumar was still complaining of symptoms two years after the 1997 accident. He explained that by his definition of the word "chronic," (meaning pain lasting longer than three-to-four months), he would use the term to describe the pain Mr. Kumar may have suffered in July 1999 when Mr. Kumar was complaining of neck pain that arose from the September 1997 accident. Furthermore, Mr. Kumar presented on March 11, 2000, with a complaint of pain in the neck and upper back. Dr. Guy indicated the injuries from the September 1997 accident could be described as causing "chronic" pain in the sense of long-lasting pain.

**65**  Finally, Dr. Guy agreed that to the extent Mr. Kumar may have had a two-and-a-half year period of neck and shoulder pain from the September 1997 accident, those injuries may be a cause of his alleged current pain. I find, therefore, that the effects of the September 19, 1997, accident were significant and had a debilitating effect on Mr. Kumar.

General Damages

**66**  The cases relied upon by counsel for Mr. Kumar for the appropriate range of damages are not helpful because I have found the June 2001 injuries resolved by January 2003. They are not a cause of any alleged current pain.

**67**  Counsel for the defendants rely on the following cases to support their submission that general damages should be assessed at between $5,000 and $10,000: Way v. Frigon, [*[2001] B.C.J. No. 1629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23WG-00000-00&context=), [*2001 BCSC 573*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23WG-00000-00&context=); Nowicki v. Moslehi, [*[2003] B.C.J. No. 632*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S29S-00000-00&context=), [*2003 BCSC 425*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S29S-00000-00&context=); Mangat v. Jackson, [*[2004] B.C.J. No. 467*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T2-00000-00&context=), [*2004 BCSC 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T2-00000-00&context=); Liao v. Doe, et al [*(2005), 21 C.C.L.I. (4th) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4C5-00000-00&context=), [*2005 BCSC 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4C5-00000-00&context=).

**68**  I find Mr. Kumar suffered mild-to-moderate soft tissue injuries in the June 2001 accident. Considering his lack of credibility, general damages are fairly assessed at $12,000.

**69**  I also find, however, that a proportional reduction is in order, given that Mr. Kumar had previously suffered debilitating injuries to the same areas of his body (his neck and left shoulder) in the September 1997 accident. Though this pre-existing condition was asymptomatic when the June 2001 accident occurred, I find that there was a 20% likelihood that the injuries would have resurfaced in any event. This conclusion is based on the severity of the injuries sustained in the September 1997 accident, as supported by both the testimony of Dr. Guy and the fact that Mr. Kumar remained symptomatic from September 1997 to May 2000. Accordingly, the award for general damages is reduced to $9600.

Past Wage Loss

**70**  Mr. Kumar earned $10.60 an hour working 40 hours a week as a full-time cook with Aramark on June 18, 2001. Under the collective bargaining agreement, after a five-day waiting period, the Aramark Health and Welfare Plan provided wage continuation payments of two-thirds of regular wages for a total of 15 weeks.

**71**  Mr. Kumar testified that he missed work on June 19, 20 and 21, 2001 because of the accident. He returned to work on June 24, 2001, after the weekend. Under the collective agreement, Mr. Kumar would have received full pay for those three days pursuant to the sick pay provision. He did not say that those three sick days were not available. Therefore, Mr. Kumar had no wage loss for June 19 to 21, 2001.

**72**  Mr. Kumar testified that he worked until August 6, 2001, and was off work until October 22, 2001, when he started a graduated return to work program. He did not adduce any evidence about how many work days there were between August 6, 2001, and October 22, 2001. As August 6, 2001 was a Monday, Mr. Kumar would have missed four days that week, followed by ten more weeks of work. This would total 54 days of missed work in that period. However, Mr. Kumar would have had two sick days remaining for the year. This would reduce the total number of days missed from work without pay to 52. Again, there was no evidence to suggest those two sick days were not available to him.

**73**  Mr. Kumar was entitled, under the collective agreement, to wage continuation benefits at two-thirds of his salary. In calculating the wage loss claim during those 52 days and the subsequent graduated return to work program, Mr. Kumar is only entitled to the difference between what he would have been paid but for the time he missed because of the June 18, 2001, accident and whatever benefits he received for the time that he missed. I have ruled that Mr. Kumar cannot avoid this deduction for wage continuation benefits because he did not establish that they were in the nature of a private insurance policy: Cunningham v. Wheeler, [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=).

**74**  The wage continuation would not have applied until a further three days passed in the waiting period as required by Aramark's Health and Welfare Plan, so Mr. Kumar's wage loss from August 7, 2001, to October 21, 2001, is $254.40 (for the three days). For the remaining 49 days, Mr. Kumar would have been paid two-thirds of his salary, so the maximum amount he lost during this period was $1,371.22.

**75**  Mr. Kumar testified that he missed another three-and-a-half days of work in December 2001 and five days in January 2002. The Health and Welfare Plan under the collective agreement provided for the reinstatement of five sick days on January 1, 2002, so his final lost wages total three-and-a-half days. Based on the two-thirds recovery under the Health and Welfare Plan, he lost $70.67. For the remaining 49 days plus the three-and-a-half-days, the total is $1,441.89. However, this amount must be subject to a deduction for statutory holidays and the length of time before he returned to work which was unreasonably long as the September 1997 accident prolonged his recovery. A reasonable deduction for those two factors would be 20%. This leaves Mr. Kumar with a past wage loss of $1,153.52.

**76**  Mr. Kumar started the graduated return to work program on October 22, 2001. He returned to work full-time on November 12, 2001. The defendants concede that he missed 28 hours of paid work in the week of October 22, 2001; 14 hours of paid work in the week of October 27, 2001; and ten hours of work in the week of November 5, 2001. Mr. Kumar would have been paid two-thirds of his salary for this period. Therefore, his total wage loss during the graduated return to work program was $369.30. Thus, his total past wage loss is $1,777.22 (the sum of $254.40, $369.30 and $1,153.52).

Special Damages

**77**  The defendants concede that on the "ongoing recovery" view of this case, the physiotherapy visits from June 21, 2001, to August 31, 2001, relate to injuries suffered in the June 18, 2001, accident. Mr. Kumar is awarded $300.00 as the total amount for those visits.

**78**  The defendants concede that Mr. Kumar's prescriptions for Novo-Naprox between August 4, 2001, and September 2, 2002, were for pain from the June 18, 2001, injuries. Those prescriptions total $108.23. He failed to adduce any evidence to prove that the remaining prescriptions from August 4, 2001, until September 2, 2002, were prescribed for the injuries sustained in the June 2001 accident. The defendants are therefore not required to compensate Mr. Kumar for them. (There is evidence he was being treated for allergies).

**79**  Finally, there is no evidence that the prescriptions issued from August 18, 2003, to October 25, 2005, relate to this accident. He suffered lower back injuries in the August 15, 2003 accident for which he was prescribed medication.

**80**  Mr. Kumar's evidence in support of his claim for mileage was vague but the defendants are prepared to allow a reasonable mileage claim which I find to be $200.00.

**81**  I make no award for the physiotherapy from September 10, 2004, to October 8, 2004, as the evidence fails to establish any link to the June 18, 2001, accident. In addition, Mr. Kumar has failed to establish the June 18, 2001, accident caused him to incur the expenses for Drake Medox Rehabilitation expenses. These expenses are all from 2004, which was after the August 2003 accident.

Deduction of Part VII Benefits and Income Tax

**82**  Mr. Kumar admitted that he received Part VII benefits as a result of the June 18, 2001, accident. These included payment of prescriptions and for lost wages. Mr. Kumar's total claim must have deducted from it the value of benefits he did receive or ought to have received from ICBC: Insurance (Motor Vehicle) Act, [*R.S.B.C. 1996, c. 231, s. 25*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B03B-00000-00&context=); Schmitt v. Thomson [*(1996), 132 D.L.R. (4th) 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2GN-00000-00&context=) (B.C.C.A.).

**83**  Furthermore, Mr. Kumar's award for past wage loss is subject to an income tax deduction: Lomax v. Wiens, [*[2004] B.C.J. No. 1651*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0FS-00000-00&context=), [*2004 BCSC 1051*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0FS-00000-00&context=).

Loss of Future Earning Capacity

**84**  Mr. Kumar has not proven that the injuries sustained in the June 18, 2001, accident caused him a loss of either future or past earning capacity. He worked as a cook at the RCMP headquarters until Aramark laid off him and other employees. Mr. Kumar took a similar position with the same company but at Carter GM. It was a management position at higher pay, indicating that Aramark thought quite highly of him. However, in March 2003, Mr. Kumar decided to quit this job to take a Vancouver Community College cooking course in which he lasted only a few weeks.

**85**  There is no evidence to suggest that Mr. Kumar's decision to leave his position at GM Carter was connected with his injuries. Indeed, he gave no evidence about his pain level for the period in which he worked at GM Carter.

**86**  Mr. Kumar gave unreliable evidence about why he dropped out of the cooking course at Vancouver Community College. He testified that chopping, cutting and lifting caused him pain and blamed it on his injuries from the June 2001 accident. However, I have already found those injuries had resolved by January 2003.

**87**  After dropping out of the cooking course, Mr. Kumar took an even better paying job with Aramark. It involved physical labour, including lifting.

**88**  In addition, Mr. Kumar was not on any medication or taking physiotherapy immediately before the August 15, 2003, accident. He suffered an injury to his lower back in the August 15, 2003, accident which he says prevented him from working recently. However, his lower back was not injured in the June 18, 2001, accident.

**89**  Finally, as mentioned, Mr. Kumar's own medical expert agreed it would be a "mug's game" of speculation to say there was a real possibility of future requirement of medical treatment for the June 2001 injuries.

**90**  In summary, Mr. Kumar is awarded the following damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary Damages | $ 9,600.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Wage Loss | 1,778.22 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | 608.23 |  |
|  |  | ---------- |  |
|  | TOTAL | $11,986.45 |  |
|  |  | ---------- |  |

Costs

**91**  On the first day of trial, counsel for the defendants brought an application for dismissal of the plaintiff's case as a remedy for late disclosure and non-disclosure of certain of Mr. Kumar's medical and employment records that had been ordered disclosed by the court. In addition, Mr. Kumar had failed to attend the completion of his examination for discovery scheduled for November 25, 2005. But rather than dismissing the action, I directed Mr. Kumar to appear that afternoon for the continuation of his examination for discovery. The trial was adjourned for a day to accommodate the defendants' application to dismiss the action, and to permit the continuation of his examination for discovery.

**92**  I ruled that a dismissal of Mr. Kumar's action was too drastic a remedy in the circumstances; the prejudice to the defendants from his non-disclosure and late disclosure of documents and failure to attend the continuation of the examination for discovery could be remedied by an immediate continuation of that examination. To dismiss Mr. Kumar's action now remains too extreme a remedy even when his lack of credibility at trial is added to the pre-trial disclosure difficulties. Mr. Kumar's lack of success at trial addresses his failure to give credible evidence.

**93**  The defendants' application that Mr. Kumar pay their costs of and incidental to their half-day application on the first day of trial and the continuation of the examination for discovery is justified. Those costs will be assessed as special costs payable forthwith upon assessment as Mr. Kumar's refusal to appear for the previous continuation of his examination for discovery and all the disclosure difficulties, when considered cumulatively, constitute reprehensible conduct within the meaning of Garep v. Crestbrook Forest Industries Ltd. (No. 2) [*(1994), 45 B.C.A.C. 222*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=) at p. 228, [*119 D.L.R. (4th) 740*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=).

**94**  Counsel may speak to costs if they are unable to agree.

MacKENZIE J.

**End of Document**

[***Lee v. MacLean, [2010] B.C.J. No. 976***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-220H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

G.R.J. Gaul J.

Heard: December 15-18, 2008; May 28-29, 2009; written

submissions, June 5, 2009 (Plaintiff).

Judgment: May 21, 2010.

Dockets: M93853 and M93852

Registry: New Westminster

**[2010] B.C.J. No. 976** | [*2010 BCSC 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WF-00000-00&context=) | [*85 C.C.L.I. (4th) 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WF-00000-00&context=) | [*189 A.C.W.S. (3d) 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WF-00000-00&context=) | [*2010 CarswellBC 1291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WF-00000-00&context=)

Between Shun Lee, Plaintiff, and Audrey E. MacLean and Donald Rea MacLean, Defendants And between Shun Lee, Plaintiff, and Mei Sao, Defendant

(178 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Plaintiff's claim for damages for injuries sustained in two 2003 motor vehicle accidents allowed — The plaintiff was awarded $344,566 in total damages, where 25 per cent was attributed to the defendants in the first 2003 accident and 75 per cent to the defendants in the second — There was no opportunity for the plaintiff to avoid the first accident — Given his pre-existing condition and the fact that the symptoms on the right side of his body were likely to have continued anyway, a 25 per cent reduction was made in non-pecuniary damages and damages for lost earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Cost of future care — Loss of earning capacity — Non-pecuniary loss — Pain and suffering — Plaintiff's claim for damages for injuries sustained in two 2003 motor vehicle accidents allowed — The plaintiff was awarded $344,566 in total damages, where 25 per cent was attributed to the defendants in the first 2003 accident and 75 per cent to the defendants in the second — There was no opportunity for the plaintiff to avoid the first accident — Given his pre-existing condition and the fact that the symptoms on the right side of his body were likely to have continued anyway, a 25 per cent reduction was made in non-pecuniary damages and damages for lost earning capacity.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Plaintiff's claim for damages for injuries sustained in two 2003 motor vehicle accidents allowed — The plaintiff was awarded $344,566 in total damages, where 25 per cent was attributed to the defendants in the first 2003 accident and 75 per cent to the defendants in the second — There was no opportunity for the plaintiff to avoid the first accident — Given his pre-existing condition and the fact that the symptoms on the right side of his body were likely to have continued anyway, a 25 per cent reduction was made in non-pecuniary damages and damages for lost earning capacity.**

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| --- |
| Claim by plaintiff for damages for injuries sustained in two 2003 motor vehicle accidents. The defendants in the Aug. 14, 2003 accident, the MacLean's, admitted liability but argued the plaintiff was partially responsible. The defendant in the Oct. 12, 2003 accident admitted liability but maintained the plaintiff's injuries were minor. They key issue was causation. The plaintiff had been in other motor vehicle accidents in the 1990s. He acknowledged he suffered injuries in those accidents, but claimed that by 2003 the residual effects from those injuries were minimal and he was functioning adequately on all levels at the time. He claimed to have suffered myofascial pain syndrome in his neck with associated pain and spasm in his back, as well as thoracic outlet syndrome on the left side of his body, and headaches and vision problems as a result of the 2003 accidents. The defendants argued the 2003 accidents aggravated his pre-existing condition for only a few months, and that his continued complaints of pain and discomfort likely resulted from flare-ups of his previous injuries, or a serious throat condition he developed in 2005.  HELD: Claim allowed.  The plaintiff was awarded $344,566 in total damages, where 25 per cent was attributed to the defendants in the first 2003 accident and 75 per cent to the defendants in the second. There was no adverse inference to be drawn from the plaintiff's failure to call all of the medical practitioners he had seen over the past 16 years. There was ample evidence before the court to develop a clear understanding of the plaintiff's physical condition. The only liability issue concerned the first accident, and MacLean was 100 per cent liable. The plaintiff could not have foreseen that the defendant's vehicle would advance into the intersection when it did and there was nothing he could have done to avoid the collision. As for the extent of his injuries, the plaintiff clearly had a pre-existing physical condition when he was involved in the two motor vehicle accidents in 2003. He was both a crumbling skull and thin skull plaintiff. The neck, right shoulder and lower back pains he complained of following the 2003 accidents were quite similar to those he complained of after the 1990s accidents. The symptoms would have continued to manifest themselves even if he had not been involved in the 2003 motor vehicle accidents. The nature of the accidents triggered the onset of the thoracic outlet syndrome symptoms on his left side. The concentration problems, headaches and associated vision problems arising after the accidents could at least be partially attributed to those accidents. However, his throat condition was an intervening event. Given his pre-existing condition and the fact that the symptoms on the right side of his body were likely to have continued notwithstanding the 2003 accidents, it was appropriate to make a 25 per cent reduction in non-pecuniary damages and damages for lost earning capacity. He had not failed to mitigate. While he chose not to follow all the recommendations of his medical professionals, his reasons for doing so were rational and not whimsical. He earnestly pursued his recovery with good intentions. The parties agreed that the apportionment of damages should be 25 per cent to the first accident and 75 per cent to the second. The plaintiff was credible when describing the timing, nature and extent of his injuries. An appropriate award for non-pecuniary damages was $85,000, less the 25 per cent discount, for a total of $63,750. He was awarded $45,000 for past lost income. His physical symptoms were unlikely to resolve. On account of his pain and discomfort he was likely to be restricted in the type and amount of work he would be able to perform in the future. His loss equated to $20,000 per year. Deducting the 25 per cent contingency and an additional 3 per cent for his throat ailment, the award for loss of future income earning capacity was $213,566. He was entitled to $7,250 in special damages, and $15,000 as cost of future care, including physiotherapy, a fitness membership, etc. The plaintiff was entitled to his costs on Scale B. |

**Counsel**

Counsel for Plaintiff: W.D. Mussio.

Counsel for Defendants: K.E. Ducey, M. Booth.

**Reasons for Judgment**

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| --- |
| **G.R.J. GAUL J.** |

**1**   The plaintiff, Mr, Shun Lee, was involved in two motor vehicle accidents in 2003. The first occurred on 14 August ("Accident #1") and the second on 12 October ("Accident #2"). I will refer to the two accidents combined as the "2003 Accidents".

**2**  Mr. Lee maintains that he was not responsible for either of the 2003 Accidents. He further claims to have suffered lasting injuries as a result of the accidents and seeks an award of damages under the following headings: non-pecuniary damages, past wage loss, future loss of capacity, special damages and future care costs.

**3**  The defendants in Accident #1, Audrey and Donald MacLean, have admitted liability for the accident. However, they argue Mr. Lee was also partially responsible on account of his own ***negligence*** and therefore there should be a commensurate reduction to any award of damages. The defendant in Accident #2, Mr. Mei Sao, has admitted liability for the accident; however, he maintains Mr. Lee's injuries were minor in nature and that should be reflected in the quantum of damages awarded.

**Facts**

**Plaintiff's health and level of activity: 1993 to 2003**

**4**  Prior to the 2003 Accidents Mr. Lee had been involved in three previous motor vehicles accidents: one in 1993, one in 1994 and one in 1995. I will refer to these accidents collectively as the "1990s Accidents".

**5**  Mr. Lee suffered a possible fracture to the orbital bone above his right eye in the 1993 accident. He acknowledged being responsible for the accident and in light of that fact as well as the fact that he claimed to have suffered no lasting injury or effect from the accident, he sought no compensation from his insurer.

**6**  The physical impact on Mr. Lee of the 1994 accident was more severe. His vehicle was struck from behind and spun around and he suffered injuries to the right side of his body. Specifically, he had recurrent pain that radiated from his neck and right shoulder area down his back. Mr. Lee sought compensation for the injuries he suffered in the 1994 motor vehicle accident. His claim was settled with the other driver's insurer, the Insurance Corporation of British Columbia ("ICBC"), in September 1998.

**7**  In December 1995, Mr. Lee was involved in a third motor vehicle accident. On this occasion his motor vehicle was again struck from behind by another vehicle. Although the evidence relating to this accident is sparse, it would appear Mr. Lee suffered no significant injuries of note.

**8**  Even though Mr. Lee was not the picture of health prior to Accident #1, he was a reasonably active person, given his prior medical history. He skied in the winter and mountain biked in the summer and enjoyed playing with his young children. He also exercised at a local gym and participated in Tae Kwan Do. However, all of his activities were governed by how he felt at the time and more particularly whether he was experiencing the physical pain or discomfort that had developed after the 1990s Accidents.

**Medical Treatment: 1993 to 2003**

**9**  Following the motor vehicle accidents in the mid-1990s, Mr. Lee was seen and treated by a number of medical professionals.

***Dr. Grant Ayling***

**10**  Mr. Lee saw his family physician, Dr. Ayling ten days after the 1994 accident.

**11**  Over the course of the next two and a half years, Dr. Ayling saw Mr. Lee on 18 different occasions. During this period Mr. Lee complained of occasional mild headaches, muscle spasms and discomfort in his neck, mid-back and right shoulder area and pain in his right arm.

**12**  Dr. Ayling recommended a multitude of treatments for Mr. Lee, including physiotherapy, massage therapy, Shiatsu massage, stretching and strengthening programs, all with limited success.

**13**  Dr. Ayling authored a medical legal report dated 4 February 1997. During cross-examination, he confirmed the contents of the report as well as the opinions contained within it. In particular, he acknowledged that in 1997 he diagnosed Mr. Lee to be suffering from:

1. Cervical facet joint strain with secondary soft tissue injuries;
2. Thoracic facet joint strain;
3. Bilateral lateral epicondylitis; and
4. Mild lumbar facet joint strain and secondary soft tissue injuries.

**14**  Under the heading "Disability", Dr. Ayling concluded:

As a result of the motor vehicle accident of October 21, 1994, Mr. Lee was not totally disabled, but has suffered partial disability. There have been a number of days where he has left work early as a result of an increase in the severity of his symptoms but generally, he has missed very little work as a result of the injuries received in this motor vehicle accident. The most persistent regions causing ongoing impact upon his life have been with regard to the upper shoulder region on the right side, with involvement of the right arm and hand. He has also had problems in the mid to lower thoracic region on the right side as well.

He has been troubled with headaches from time to time although these have generally not been persistent in nature and usually are present in the occipital region with radiation to the top of the scalp. He is an electrical engineer and his job is primarily working with the company's computer system which requires a lot of work at the computer terminal and so posture does indeed play a significant role in his overall recovery process.

[...]

Examinations have consistently shown the presence of right trapezius muscle spasm and trigger points since the motor vehicle accident. I expect that this chronic area of muscle spasm has contributed to many symptoms involving the right arm and hand in that the nerve fibres are compressed within the areas of muscle spasm in the neck and upper shoulder region, creating many of the symptoms complained of.

**15**  Under the heading "Prognosis", Dr. Ayling concluded:

Despite the fact that it is now over two years since the motor vehicle accident, I continue to believe that Mr. Lee's ultimate prognosis is likely to that of a good recovery from the injuries received in this motor vehicle accident. His particular work obviously played a role in his recovery process in that he is required to sit for often long periods of time at a computer terminal and that the postural stresses placed upon the mid and upper back and neck regions will have often prolonged the recovery process.

[...]

The main persistent feature has been that of evident soft tissue injuries and as mentioned above these have been primarily centered in the upper right neck and shoulder region, as well as the mid to lower thoracic region on the right side. It is likely that the complaints in the forearm on the right side around the elbow and distally to the hand are also consistent with the motor vehicle accident.

[...]

Mr. Lee has continued to maintain an active lifestyle, although it has obviously been impacted upon by the injuries received in this motor vehicle accident. He maintains a consistent stretching program and has at times worked on strengthening the areas of injury without a complete resolution of symptoms which have occurred as a result of the motor vehicle accident.

**16**  Unable to explain and address all of Mr. Lee's symptomatology, Dr. Ayling recommended that Mr. Lee undergo an unconventional intramuscular stimulation treatment program, a type of acupuncture treatment, offered at the Institute for the Study and Treatment of Pain ("I-Stop").

**17**  In August 1997, Dr. Ayling referred Mr. Lee to Dr. Rhonda Shuckett for an expert medical assessment of Mr. Lee's ongoing symptoms.

**18**  From 1997 to 2001, Dr. Ayling continued to treat Mr. Lee for the pain he was feeling in his neck, shoulders and back. On the occasions that Dr. Ayling would examine Mr. Lee, he would complain of the regular reoccurrence of the pain and discomfort associated with the 1994 motor vehicle accident.

**19**  By 1999, because Mr. Lee reported no substantive resolution of his pain levels, Dr. Ayling again referred Mr. Lee to Dr. Shuckett for a medical consultation.

**20**  Dr. Ayling confirmed that by mid to late 2001 Mr. Lee still required treatment for the physical symptoms related to the 1990s Accidents and continued to recommend massage therapy to address the chronic nature of Mr. Lee's pain and discomfort.

**Dr. Rhonda Shuckett**

**21**  Dr. Shuckett is a medical physician who specializes in rheumatology.

**22**  In August 1997, Dr. Shuckett examined Mr. Lee and prepared a medical legal report dated 25 August 1997. In her report, Dr. Shuckett made the following observations:

[M]ore recently he is doing work as a software programmer in his job as an electrical engineer. He has to spend extended time at a desk and at a computer and he is finding this more and more difficult. He has difficulty sitting for a long time. He finds that his concentration is interrupted. At work he will have to lie on the ground intermittently to stretch.

[...]

The patient has experienced severe pain in the past in that he lost his left thumb in an accident and thus, he has experienced the upper end of pain. I asked him to rate his pain on a scale of zero to 10 being the worst pain he can imagine and zero being no pain. Day to day he says the pain is bearable at a level of 3-4 but it is constantly there and does not go away at all. At times it will go to close to an 8 or 9 out of 10, particularly recently he has had episodes of 8-9 out of 10, because in his newer job he is having more difficulty. About 4 weeks ago he had a spell where he had a very high level of pain. At that time, trying to stretch did not help him at all.

In addition to the pains described above, he has noted an alteration of his right shoulder whereby in certain positions it will tend to "pop out". This had never happened prior to the MVA.

Treatment Advice:

Presently he is on no medications and prefers, understandably, not to be on any medications, particularly considering the chronic nature of his symptoms. He took Ibuprofen for 2 days but this leads to GI upset. He underwent physiotherapy and massage therapy for an interval. He has been doing Tai Kwan Do lightly for the past year but does this in a very limited way. It has somewhat increased his flexibility but has not helped his pain at all. He is still doing some of his sports activities but has had to markedly alter the way he does these. The patient is left handed and thus, he continues to be able to play tennis but his endurance has decreased and is not able to play as well. He throws and (sic) baseball and football and occasionally will throw these with the right hand, however, he does not do this well and tends to throw poorly because of the right arm weakness and locking of the shoulder. He mountain bikes but is unable to take any trails. He does exercise at the gym. He will occasionally play hockey but again he is mostly using his left hand. He has really had to tone down the degree of his exercise.

[...]

Impression:

[...]

The symptoms which he describes are classic for symptoms of TOS ... This condition of a muscular or functional TOS can certainly occur after muscular injury as would occur at the time of twisting in an MVA ...

[I]t appears that most of the twisting and torsion and force was on this patient's right trapezius region and this would explain the presence of right sided TOS after the MVA.

In addition, this patient has suffered a whiplash injury to his neck and more so to the thoracic spines. He has considerable pain and tenderness on palpation in the area between T3 - T10 thoracic spines. Paravertebral muscle spasm is palpable there. Considering that this patient has a torsion twisting type injury and was constrained by his seat belt it appears that most of the whiplash was to the right thoracic outlet region and also to the dorsal or thoracic spine region. It is probable that the pain in the dorsal spine in the thoracic is related to ligaments and muscle injury rather than disc herniation, as disc herniation is not common in this region.

[...]

Impression of Causality and Prognosis:

[...]

I strongly believe that this patient's right sided arm symptoms and tingling in an ulnar distribution along with a positive Adson's test is highly compatible with TOS related to the MVA. He also has evidence of cervical and particularly thoracic paravertebral spasm and tenderness, in keeping with a whiplash injury.

It is always difficult to prognosticate when seeing a patient at one point in time. However, I am seeing him now almost 3 years after the MVA. The fact that his is having ongoing symptoms troubling him, suggests that he may have long term residual pain. I feel we would have to extrapolate from his status at the present time, considering that this is already a long time interval and we are already dealing with chronic pain. Once the pain is chronic and particularly once it is lasting for more than 2 - 3 years, it is much less likely to improved [sic].

Because this patient's work has changed to doing more intense sedentary, prolonged computer work, he is having considerable difficulty and is having to adapt her [sic] work by lying on the floor and stretching, for example. He is doing some sports activities but has had to severely compromise these as far as level of endurance and the degree of stamina and aggressiveness with which he can do these exercises.

**23**  When Dr. Shuckett re-examined Mr. Lee in December 1999 he still had severe complaints regarding his physical well-being. More particularly, Dr. Shuckett observed that Mr. Lee continued to suffer from myofascial pain in the area of his neck and right shoulder and arm.

**Dr. Peter Fry**

**24**  Dr. Fry is vascular surgeon with an expertise in thoracic outlet syndrome. Mr. Lee was examined by Dr. Fry in July 1998 at the request of ICBC. He prepared a medical legal report for ICBC dated 30 July 1998.

**25**  Although Dr. Fry was retained by ICBC with respect to Mr. Lee's injuries from his 1994 accident, it was Mr. Lee who sought and obtained Dr. Fry's opinion concerning his injuries from the 2003 Accidents.

**26**  Although Dr. Fry did not testify at trial, he did provide a full deposition of his evidence. An audio and video recording as well as a written transcript of that deposition were filed as exhibits at trial.

**27**  During the course of his evidence, Dr. Fry acknowledged he authored the 30 July 1998 medical legal report. That report contains the following observations and conclusions:

His symptoms at the present time have progressed in the last 18 months. He is now complaining of pain and tenderness indicating the right elbow, pain in the wrist indicating the dorsum of the hand and also of the area of the lateral epicondyle on the right side. He also indicated pain over the thenar eminence indicating that his symptoms were mainly related to joins. He also complained of a "popping" sound in the shoulder and a grinding sensation with shoulder rotation. He complained of tiredness around the left shoulder, a sensation of fatigue on that side and occasional soreness associated with neck and muscle spasm particularly on the right side. He felt generally fatigued and he felt that these symptoms were getting worse. Any activity with his right arm in an overhead position resulted in a pulling sensation in the elbow and paresthesias to the fourth and fifth fingers. Repetitive movement of the right upper extremity would also produce discomfort in the posterior aspect of his shoulder. He noted increasing weakness on the right side as far as his grip was concerned.

[...]

Impressions

My impression at the time having completed his physical examination was that he had evidence of a vascular and neurogenic thoracic outlet syndrome on the right and left side and that he also had some evidence of shoulder pathology unrelated to this condition on the right side.

[...]

Summary & Opinion

In summary, there is little doubt that Mr. Lee does in fact have signs and symptoms consistent with thoracic outlet syndrome particularly on his right side. One can demonstrate on physical examination definite evidence of compromise of the neurovascular bundle within the thoracic outlet not only on the right but also on the left side, his dominant side, which, incidentally, is essentially asymptomatic apart from during the physical examination. This brings up the question of whether this individual had a small thoracic outlet from a developmental standpoint since he clearly has evidence of a compromised thoracic outlet at the present time even on the left side which is asymptomatic. Complicating the issue is the fact that at the present time he clearly has evidence of right sided thoracic outlet syndrome with ulnar nerve symptoms involving nerve roots C7-8 and T1 and these symptoms are reproducible when putting his through provocative manoeuvres. What concerns me, however, is the fact that he was able to backpack around Europe and, I believe, in the Grand Canyon as well without any significant disability or exacerbation of his symptoms which would have to be viewed as very atypical of a patient with "active" thoracic outlet syndrome. One also must recognize that many of his symptoms are not consistent with a diagnosis of thoracic outlet syndrome and I am unable to suggest a diagnosis for his upper body tingling and numbness that is reported by several observers particularly Dr. Ayling since this does not fit any obvious neurogenic pattern. One also has to wonder whether Mr. Lee has a low pain threshold in reference to some of the symptoms that his is complaining of. Nevertheless, he does have evidence of thoracic outlet syndrome on the right side and this is what you have asked me to comment on in reference to his disability.

As far as the issue of causation is concerned he has had three motor vehicle accidents. I think the pattern here is probably consistent with a significant injury to the thoracic outlet due to whiplash occurring during the first accident which likely produced scarring of the scalene muscles, etc. which in an individual who perhaps already had a "small" thoracic outlet then made him vulnerable for the second accident occurring in October of 1994 and possibly exacerbated by the third accident in 1995. It would seem to me the most likely explanation is a combination of these several factors that have ultimately resulted in mild to moderate thoracic outlet syndrome on the right side and evidence of thoracic outlet compression on the left side without significant symptoms.

As far as occupation is concerned, my understanding is that he has not lost any significant time off work. As far as disability goes, he has ongoing symptoms, many of which can not be explained by thoracic outlet syndrome, and I would defer to Dr. Shuckett in reference to explanation of his other musculoskeletal problems. Certainly as she has indicated he has ongoing symptoms some four years out from the original accident and I think there is a reasonably possibility that he will require first rib resection on the right side in order to resolve his current symptoms. He may well require the same procedure on the left side if he ultimately develops symptoms on that side but it would be very difficult to relate that aspect to any of his motor vehicle accidents.

**28**  During his testimony, Mr. Lee acknowledged that by 1995 he was having difficulty sitting in one place for more than 45 minutes. The situation improved somewhat by the end of the decade; however, he still had problems sitting for prolonged periods and difficulty concentrating at work, both of which he attributed to the pain and discomfort he continued to suffer from the 1990s Accidents.

**29**  Although hesitant at first, during cross-examination Mr. Lee eventually agreed with the suggestion that he had told Dr. Fry during their appointment in July 1998 that his physical symptoms had been worsening over the past 18 months. He also acknowledged that in 1999 he informed Dr. Shuckett that he continued to have pain in his right shoulder area most days. Around this same time Mr. Lee declined the suggestion from one of his doctors that he undergo Botox treatment for the pain in his shoulder. He decided against this treatment because he was opposed to any bodily intrusive measures and because there was no guarantee it would resolve his pain in any event.

**30**  Mr. Lee acknowledged that he felt periodic pain and discomfort, predominantly in his right shoulder area and lower back during the time period leading up to Accident #1.

**Activities: 1994 to 2003**

**31**  Although still struggling with regular flare-ups of pain and spasms in the shoulders, neck and back, by the mid to late 1990s Mr. Lee was managing to cope with the residual effects of his injuries. However, there is no question those effects were still present.

**32**  In June 1994, Mr. Lee travelled and holidayed in Europe with his sister during which time they backpacked, rollerbladed and cycled. Mr. Lee was able to participate in these activities notwithstanding the physical discomfort he experienced doing them.

**33**  By 1995, Mr. Lee had resumed a light regime of weekly Tae Kwon Do, and had recommenced skiing, cycling and playing tennis. He managed these activities by regularly stretching and by resting whenever his pain or discomfort reached a level necessitating it.

**34**  In the fall of 1996, Mr. Lee hiked a portion of the Grand Canyon with his family. Again, he relied on regular breaks to rest and stretch in order to complete this trip.

**35**  Greg Chin, a friend of Mr. Lee's, described how in 1997 he and Mr. Lee succeeded in hiking up Mount Seymour. Mr. Chin also described how in the later part of the 1990s the two of them would engage in mountain biking on challenging terrain. Mr. Chin noted that although Mr. Lee would always complain of physical discomfort, he was able to participate in the activities.

**36**  In 1999 the Lee's first child was born. Their second child arrived in 2002. During the course of his evidence at trial, Mr. Lee acknowledged that the birth of his children curtailed and modified the nature and extent of his social and sporting activities and that during the time leading up to Accident #1, he did experience the occasional reoccurrence of pain in his neck, shoulders and back.

**Employment: 1995 to 2003**

**37**  Mr. Lee is an electrical engineer, having graduated from the faculty of Applied Science at the University of British Columbia in 1991.

**38**  From 1991 to 1995 Mr. Lee worked as a consultant in the area of electro-engineering power distribution.

**39**  In 1995, Mr. Lee was an employee with MDS AutoMed Ltd. ("AutoMed") primarily doing computer network administration. Over the next two year, Mr. Lee's duties changed and he became more involved in computer software design.

**40**  Geoff Auchinleck also worked at AutoMed and often collaborated with Mr. Lee on company projects.

**41**  In 1997, Mr. Auchinleck left AutoMed and began a new company, Neoteric Technology Ltd. ("Neoteric"). Recognizing the need for a program developer to write computer code, Mr. Auchinleck asked Mr. Lee to join his company. During his testimony, Mr. Auchinleck explained that he had no concerns about Mr. Lee's physical health or ability to perform his employment duties when he invited Mr. Lee to join Neoteric.

**42**  Initially Mr. Lee worked on contract with Neoteric. He received shares in Neoteric as a portion of his compensation during his early years with the company, in addition to a modest salary. Mr. Lee's income tax records indicate he earned $45,000 in 2000; and $60,000 in 2001 and 2002.

**43**  In 2003, Mr. Lee's employment status with Neoteric was converted from independent contractor to full time employee. His new employee status did not alter his remuneration which remained around $60,000 per annum.

**44**  Mr. Lee's gross business income for the year 2002 was $75,745 which included income received on account of his being a shareholder of Neoteric as well as income he received for performing work for other clients. His employment income of $59,999.94 for 2003 was supplemented by an additional $29,000 from contracts he performed for private clients.

**Accident #1: 14 August 2003**

**45**  At approximately 9:00 a.m. on 14 August 2003, Mr. Lee was driving a 1990 Mercedes-Benz 190E sedan eastbound on 12th Avenue in Vancouver. When he arrived at the intersection of 12th Avenue and Main Street, Mr. Lee stopped his vehicle as the traffic light had turned red. Mr. Lee's was the first vehicle in the left hand turning lane. His intention was to turn left onto Main Street northbound when the light turned green.

**46**  Around the same time, Mr. MacLean was driving his 2000 Toyota Echo south on Main Street. When he came to the intersection of Main Street and 12th Avenue, he stopped his car in the left hand turn lane. His evidence was unclear whether the traffic light was red, amber or green. Nevertheless, his plan was to turn left onto 12th Avenue eastbound.

**47**  Mr. MacLean's evidence regarding where he stopped his vehicle in relation to the intersection was also inconsistent and unclear. At one point in his testimony, he indicated that his vehicle was stopped with its front portion partially in the intersection. At another point he indicated that after his vehicle came to a stop he allowed it to roll forward into the intersection. In general I found Mr. MacLean's evidence unpersuasive and where it conflicted with that of Mr. Lee, I have accepted Mr. Lee's evidence.

**48**  While stopped at the intersection waiting to turn left onto Main Street, Mr. Lee saw Mr. MacLean's vehicle. It was motionless and had come to a stop ahead of the cross walk that traverses Main Street.

**49**  When the eastbound traffic light on 12th Avenue turned green, Mr. Lee proceeded to make his left hand turn onto Main Street. At some point during his turn, Mr. Lee noticed the defendant's vehicle moving towards his from the left and was unable to avoid a collision.

**50**  Mr. MacLean's vehicle struck the driver's side of Mr. Lee's vehicle. At the point of impact Mr. Lee's vehicle was approximately two thirds of the way through its turn.

**51**  The damage to Mr. MacLean's vehicle was minimal. However the damage to Mr. Lee's vehicle was more substantial. There was a "punch mark" on the driver's side rear wheel well and the total cost to repair Mr. Lee's vehicle was $2,413.44.

**Condition & Treatment Post Accident #1**

**52**  Immediately following Accident #1, Mr. Lee recalls having spasms in his right leg and developing stiffness and pain on the right side of his body.

**53**  Over the next few days, the pain on Mr. Lee's right side became more constant and pronounced. The level of pain and discomfort increased to the point where it began causing Mr. Lee concentration problems at work.

**54**  Dr. Ayling examined Mr. Lee on 22 August 2003 and observed that Mr. Lee had paracervical muscle and trapezius muscle spasms on both sides of his body, though more pronounced on the right side. To address Mr. Lee's physical condition, Dr. Ayling recommended that Mr. Lee increase his training and stretching at the gym and continue with massage therapy.

**55**  A second examination by Dr. Ayling on 11 September 2003 disclosed similar symptomatology. Mr. Lee also had muscle spasms on the left side of his body.

**56**  On 8 October 2003, Dr. Ayling examined Mr. Lee a third time. Mr. Lee continued to complain of pain in his neck, upper shoulder and lower back areas as well as headaches. Dr. Ayling recommended that Mr. Lee commence physiotherapy. For reasons that are not clear, Mr. Lee did not attend physiotherapy.

**Accident #2: 12 October 2003**

**57**  On 12 October 2003, Mr. Lee was driving a 2001 Audi A4 Quattro sedan eastbound on Canada Way, in Burnaby. He, his wife, Betty, and their two children were en route to Mr. Lee's sister's home.

**58**  At the intersection of Canada Way and 17th Avenue, Mr. Lee stopped his car behind one that was waiting to make a left-hand onto 17th Avenue.

**59**  Mr. Sao was driving his 1987 Nissan pickup truck eastbound on Canada Way at around the same time as Mr. Lee. The roads were wet, as it had been raining that day. Mr. Sao's vehicle was travelling behind Mr. Lee's and when the Lee vehicle came to a stop Mr. Sao attempted to switch lanes to the right in order to pass it.

**60**  Mr. Sao did not change lanes soon enough and as a result the front driver side of his vehicle's bumper struck the rear passenger side of Mr. Lee's vehicle. Mr. Sao testified that he believed he was travelling between 45 and 48 kilometres per hour when the accident occurred.

**61**  Mr. Lee described the collision as a "heavy jolt". Betty Lee described the collision in a similar way and noted that the Lee's two children who were asleep in the back of their vehicle were awaken by the impact.

**62**  Mr. Sao stopped his vehicle nearby and spoke with Mr. Lee. The two men exchanged driver and vehicle information and then continued on their respective ways.

**63**  The damage to Mr. Lee's vehicle was approximately $2,600. The damage to Mr. Sao's vehicle was approximately $1,900.

**Condition & Treatment Post Accident #2**

**64**  Mr. Lee felt physical discomfort and stress in his upper body as he drove to his sister's house immediately after Accident #2. In the days that followed the accident, Mr. Lee developed headaches and the residual pains from Accident #1 became more acute.

**65**  Mr. Lee went to see Dr. Ayling on 20 October 2003. Dr. Ayling observed that Mr. Lee had a full range of motion in his neck, although there was some decreased flexibility to the left. He noted spasms in the paracervical muscle as well as the trapezius muscle, with the spasms being more pronounced on the right side of Mr. Lee's body. Mr. Lee also complained of tenderness in his back, particularly on the right side.

**66**  Dr. Ayling recommended that Mr. Lee undergo physiotherapy and continue with his strength and flexibility exercises at the gym.

**67**  Between 2003 and 2005, Mr. Lee was examined multiple times by Dr. Ayling. Dr. Ayling consistently advised and encouraged Mr. Lee to continue his exercise routine, as well as his physiotherapy. Dr. Ayling also recommended that Mr. Lee commence I-Stop acupuncture treatments. To assist in developing a treatment plan for Mr. Lee, Dr. Ayling referred Mr. Lee to Dr. Anthony Salvian, a vascular surgeon, and Dr. Rhonda Shuckett, a rheumatologist, for further assessment of Mr. Lee's condition, particularly the thoracic outlet syndrome.

**68**  In November 2003, Mr. Lee confirmed to his physiotherapist that his sitting tolerance was 60 minutes. This suggests his tolerance was better than his condition before Accident #1. He also informed his therapist that he continued to have pain and stiffness on the right side of his body.

**69**  In December 2003 and again in January 2004, Mr. Lee reported to his physiotherapist that he was exercising and able to play with his children, including holding them above his shoulders. At the latter appointment, he advised that he was "feeling good". Mr. Lee attributed this improvement to the acupuncture treatment he was following. Notwithstanding these positive reports, Mr. Lee continued to occasionally suffer from headaches, and pain in his neck, shoulders and back. The degree of the discomfort was such that by late 2004 or early 2005 it was affecting his ability to concentrate at work.

**70**  In early 2005, Mr. Lee developed a problem with his voice. He was eventually diagnosed as suffering from a serious virus. A growth that had developed in his throat required multiple surgeries between 2005 and 2007. Mr. Lee acknowledged to his doctors that the ailment and treatment caused strain on his shoulders and resulted in pain and discomfort in that area of his body.

**71**  In February 2006 and again in July 2006, Mr. Lee was seen by Dr. Salvian and Dr. Russell O'Connor, two medical specialists regarding Mr. Lee's on-going symptoms of thoracic outlet syndrome. Neither of these medical doctors provided evidence at trial; however, I understand their clinical records were made available to the defendants.

**72**  A CT scan and an MRI were conducted in March 2006. The results indicated that Mr. Lee had a mild multi-level spondylosis and a small left C6-7 disc herniation that compressed slightly on the left C7 nerve root.

**73**  By the end of 2006 and into 2007, Mr. Lee's activity level had reduced significantly. He had stopped his acupuncture treatments and had replaced them with chiropractic treatments. He had also begun seeing a naturopathic doctor to address all of his ailments including some that had no relationship with his history of motor vehicle accidents. Mr. Lee was no longer engaged in active sports such as skiing and mountain biking, and found skating with his son to be tiring. He also found his energy levels to be low and this impacted his ability to take on and complete tasks at both work and at home.

**74**  In late 2007, Mr. Lee travelled to Europe for a combined business trip and vacation. He advised Dr. Ayling upon his return that he did not feel too bad while he was away but since his return to work the pain in his neck and arms had flared-up.

**75**  Although he was hesitant to try Botox treatments earlier, by mid 2007 Mr. Lee was prepared to undergo such treatment. Consequently, Dr. Ayling referred him to Dr. O'Connor, a physical medicine and rehabilitation specialist, for the purpose of assessing Mr. Lee's candidacy for Botox treatment.

**76**  During 2008, Mr. Lee had two Botox injections on the right side of his body. The results of the treatments were not positive, as Mr. Lee continued to suffer from pain and discomfort on his right and left side of his body.

**77**  Mr. Lee's difficulties working as a computer programmer have continued to the present, and he continues to have difficulty completing his household chores.

**78**  With respect to his present activity level, Mr. Lee is not as aggressive or adventuresome as he once was. He no longer skis or mountain bikes like he used to and now only partakes in milder activities, such as walking and skating with his family. He continues to do exercises at home, particularly on an elliptical trainer; but he finds it can aggravate the pain in his back.

**Expert Evidence / Opinion**

***Dr. Ayling***

**79**  During the course of his evidence, Dr. Ayling confirmed that his diagnosis of Mr. Lee's injuries after the 2003 Accidents was essentially the same as the one he provided for Mr. Lee's 1990s Accident. He also confirmed that on most of the occasions he saw Mr. Lee since 1994, Mr. Lee was experiencing spasms in his neck, shoulder and back areas.

**80**  In a medical legal report dated 11 September 2008, Dr. Ayling articulated his expert opinion as follows:

DIAGNOSIS

Motor vehicle accident August 14, 2003:

1. Cervical facet joint strain with secondary soft tissue injuries.
2. Thoracic facet joint strain with secondary soft tissue injuries.
3. Lumbar facet joint strain with secondary soft tissue injuries.
4. Right temporomandibular joint strain.
5. Right sacroiliac joint strain.

Motor vehicle accident October 12, 2003:

1. Cervical facet joint strain with secondary soft tissue injuries.
2. Thoracic facet joint strain with secondary soft tissue injuries.
3. Lumbar facet joint strain with secondary soft tissue injuries.
4. Bilateral thoracic outlet syndrome.

Prior to the motor vehicle accidents occurring in 2003, Shun was initially involved in a motor vehicle accident occurring in December 1993, which was a direct head on impact and resulted in some minor facial injuries but his symptoms had settled within fairly short order. His second motor vehicle accident was of a more significant nature and occurred on October 21, 1994 in which his vehicle was T-boned. Following this motor vehicle accident, he had significant soft tissue injuries involving the cervical, thoracic and lumbar regions as well as bilateral lateral epicondylitis and further reports indicated the presence of thoracic outlet syndrome on his right side. Shun continued to have problems attributable to the motor vehicle accident of 1994 prior to the accident of 2003. He had intermittent pain associated with the right neck and with associated radiation into the right arm, most likely as a result of a combination of the right thoracic outlet syndrome and persistent, chronic spasm in the right neck and upper shoulder regions.

**81**  Under the heading "Prognosis", Dr. Ayling provided the following opinion of Mr. Lee's condition:

Prior to the motor vehicle accident of August 14, 2003, Shun continued to have some residual discomfort associated with the right neck and upper shoulder region as well as some mild numbness; particularly involving the ulnar aspect of his right hand which were left over from the previous motor vehicle accident of October 21, 1994. While there were still residual symptoms, they did not have a significant impact on his overall function and he was able to maintain most of his activities.

[...]

It is well recognized that following motor vehicle accidents there is always a heightened risk for further exacerbation of the previously injured areas should another similar type of injury occur. If however, an individual is able to fully recover, and maintain good strength and flexibility in the previous injured areas, then there is a strong case to be made for the fact that future traumas would have less of an impact upon their overall condition. However, in Shun's situation, he still had some residual injuries present almost nine years later following the previous motor vehicle accident and it would be difficult to imagine that he will achieve a situation where he will be completely pain free in the future. The fact that a second motor vehicle accident occurred within a period of two months also did not help and has probably played a significant role in creating the current situation where he continues to experience significant disability in the form of pain and an inability to perform at the same level of activity and function which he had prior to the 2003 motor vehicle accidents.

[...]

Shun continues to have ongoing pain and clinical evidence of soft tissue injuries in his mid to lower thoracic region as well as some lower back pain; particularly associated with the right sacroiliac joint region. Both these areas have contributed to this inability to sit for long periods of time and this has created problems in his work as a computer programmer and designer.

[...]

To further complicate this situation, Shun has had a problem over the past approximately three and a half years with his voice ... Although there has been some improvement in Shun's voice, he continues to have a very hoarse and husky quality to his voice. This would also have a role in limiting his ability to change occupations; particularly if it was to one where a lot of voice use was required such as in sales or promotion position.

Given that it is now five years since the initial motor vehicle accident of August 14, 2003, it is unlikely that his symptoms are going to significantly improve beyond the current situation. In fact, he has been dealing to some degree with some chronic spasm with associated discomfort in the right neck and upper shoulder region radiating into the right arm and had for almost fourteen years since the motor vehicle accident of October 21st, 1994. The symptoms have clearly been exacerbated in the two 2003 motor vehicle accidents and have most definitely impacted upon his prognosis in an adverse fashion. Complicating the situation is that subsequent to the second motor vehicle accident in 2003, he has developed a left thoracic outlet syndrome which had been present previously but was completely asymptomatic as noted by Dr. Peter Fry in his reports.

It should also be pointed out that over a period of eleven years from March 1995 to March 2006, there has been the development of some mild multi level spondylosis in the cervical spine which have probably occurred as a result of the combination of these motor vehicle accidents and the chronic stress placed upon the cervical spine by the persistent muscle spasm and soft tissue injuries in the adjacent areas of the neck and upper shoulder regions. Consequently, it would be anticipated that there will be continued gradual deterioration in the region of the cervical spine with the continued presence of the ongoing chronic spasm associated with the adjacent soft tissue structures in the neck region.

***Dr. Shuckett***

**82**  Two expert medical legal reports relating to the present case were authored by Dr. Shuckett. One was dated 8 February 2007 and the other 25 September 2008.

**83**  In her first report, Dr. Shuckett diagnosed Mr. Lee with the following conditions:

1. Cervicogenic headaches;
2. Neck pain mainly related to soft tissue, or connective tissue, injury;
3. Myofascial pain syndrome of neck and shoulder girdle region with painful trigger points in the right neck and shoulder girdle area;
4. Right upper extremity symptoms;
5. Mid back pain of a mechanical nature; and
6. Mechanical low back pain and sacroiliac ligament dysfunction.

**84**  With respect to Mr. Lee suffering from thoracic outlet syndrome, Dr. Shuckett opined as follows:

Whether or not he has left thoracic outlet syndrome (TOS) is equivocal to me. He may have some left ulna nerve entrapment.

He did have some thoracic outlet syndrome after the more remote MVA of 1994 and, therefore I believe that he was predisposed to this from the 1994 MVA with some ongoing residual which was then exacerbated significantly with the 2003 MVAs.

Thus, this current right sided thoracic outlet syndrome is, I believe, a composite of the prior 1994 MVA as well as the 2003 MVAs. The 2003 MVAs materially contributed to the current right-sided thoracic outlet syndrome.

**85**  Dr. Shuckett was also of the opinion that Mr. Lee did not suffer from fibromyalgia or chronic pain syndrome.

**86**  Based upon the passage of time since the motor vehicle accidents, Dr. Shuckett concluded that Mr. Lee's present condition would be his norm and that it was unlikely his symptoms would improve significantly.

**87**  Dr. Shuckett reassessed Mr. Lee on 24 September 2008 and provided her supplemental views and opinions in her second medical report. In essence, Dr. Shuckett's opinion of Mr. Lee's injuries remained essentially the same, except for her inclusion of thoracic outlet syndrome of the right arm as a part of her diagnosis. That diagnosis was a qualified one as she noted the condition was present following Mr. Lee's 1994 motor vehicle accident.

**88**  Dr. Shuckett expressed her updated view of Mr. Lee's condition and prognosis as follows:

If not for the 2003 MVAs, I suspect that he would be working full-time and not as symptomatic as he is now. However, I do acknowledge some pre-existing right thoracic outlet syndrome and neck symptoms which would be expected to place him at greater risk for re-injury of these areas with the subject MVAs. As far as causality goes, I feel it would be instructive to have records from his family physician between the time of 1994 MVA and the 2003 subject MVAs.

[...]

By this time, it is already approximately five years since the subject MVAs. By this late point in time (well beyond two years after the MVAs), the fact that he has ongoing symptoms which are interfering with his activities of daily living and his occupation suggest that he has probably achieved maximum medical recovery.

I believe that there is a high chance that he will just have to live around his current symptoms ...

[...]

I do not have any treatment suggestions at this time other than regular exercise such as regular walking.

***Dr. Fry***

**89**  Unlike his role in relation to Mr. Lee's 1990s Accidents, Dr. Fry provided opinion evidence on behalf of Mr. Lee in respect to the 2003 Accidents. His medical legal reports dated 4 April 2007 and 8 July 2008 were filed as exhibits at trial. As previously mentioned in these reasons, the plaintiff presented Dr. Fry's evidence by way of video deposition.

**90**  Dr. Fry confirmed that he had previously identified in 1998 that Mr. Lee was likely suffering from thoracic outlet syndrome on both sides of his body, though Mr. Lee was asymptomatic on the left side.

**91**  In his report dated 4 April 2007, Dr. Fry concluded as follows:

This is a very complex case of an individual who has been involved in apparently 5 motor vehicle accidents over the years which have been associated with various degrees of soft tissue injury, neurological symptoms and been associated with various other diagnoses as well.

Unfortunately Mr. Lee is not a very good historian and there were certain memory lapses with respect to specifics of accidents of which he has been questioned.

Be that as it may, as noted in Dr. Shuckett's report there is compelling evidence that he developed signs of neurological symptoms with respect to the right arm consistent with a diagnosis of neurogenic thoracic outlet syndrome after the accident of 1994

Findings following that accident both by myself and Dr. Shuckett showed signs of compression of the thoracic outlet on the left side as well although following the accident of 1994 this seemingly was not producing too much in the way of difficulty but following the accident of August 2003 and October 2003 his left arm started to provide him with significant symptoms, this being his dominant arm.

It would seem from the history that it was in fact the accident of October 2003 that started to produce the problems on the left side.

There is no question that he has active symptoms compatible with a diagnosis of thoracic outlet syndrome, both neurogenic and vasculogenic on the left, and clearly he had evidence of some compression in this area at the time I originally say him for a medical-legal report for ICBC in July 1998.

Equally clearly the problem with the thoracic outlet has progressed since that period of time and the medical evidence would point to the last two accidents particularly the October 2003 as being responsible for this change.

It would therefore seem that we identified him originally as an individual who had small thoracic outlets perhaps from a developmental standpoint or perhaps related to the four motor vehicle accidents that occurred prior to the event of October 2003.

[...]

I think significantly at the present time he shows evidence of more serious compression of the thoracic outlet given that there is clinical evidence that the venous drainage of the arm on the left is impaired compared to the right side. This is an indication of fairly severe compression in this area, basically involving not only the vein but the artery where you can develop a bruit or turbulence during provocative testing for thoracic outlet syndrome and the reproduction of neurological symptoms that appear to involve both upper and lower plexus.

This being the case, I think it is highly that at some point in time Mr. Lee is going to require definitive surgery for thoracic outlet syndrome on the left.

[...]

I would opine that the accident of October 2003 was most likely responsible for provoking or exacerbating symptoms on the left side in a setting where he clearly had previous compression of the thoracic outlet and was therefore somewhat vulnerable to this injury.

**92**  Dr. Fry reassessed Mr. Lee on 8 July 2008 and reconfirmed his opinion that the 2003 Accidents reinitiated Mr. Lee's symptoms of thoracic outlet syndrome or exacerbated Mr. Lee's pre-accident symptoms. Curiously, Dr. Fry reached the conclusion even though it was unclear to him from the medical records he says he reviewed whether Mr. Lee had any symptoms prior to the accidents of 2003.

**93**  In his supplement medical legal report, Dr. Fry observed and concluded:

[T]here appears to be some subtle changes in terms of an improvement to some extent on the right side perhaps related to his Botox treatment but the left-sided symptoms and signs of neurogenic thoracic outlet syndrome remain impressive.

[...]

I think as I mentioned that on balance his symptoms are sufficiently severe that on the left side I would definitely entertain the thought of surgery ie first rib resection but on the right side the situation is less clear in that I suspect a significant portion of his symptoms are emanating from his cervical spine and soft tissue injuries associated with his neck.

***Dr. Alan York***

**94**  Mr. Lee was examined by Dr. York, an expert in rheumatology, on 12 October 2007. Dr. York was retained by the defendants' insurers, ICBC. Dr. York's diagnosis of Mr. Lee's condition consisted of the following:

1. Muscle spasms extending from the lower back proximally to the upper back to the neck;
2. Cervicogenic headaches;
3. Neurologic complaints in the right arm;
4. Left sided thoracic outlet syndrome; and
5. Localized myofascial pain syndrome.

**95**  Dr. York was at a loss to explain how such apparently minor motor vehicle accidents could precipitate the onset of thoracic outlet syndrome.

**96**  Under the heading "Prognosis", Dr. York opined as follows:

I would expect a gradual recovery of such complaints with the passage of time. His relative young age, his previously discipline of exercise and the absence of significant psychopathology are positive prognostic factors, as is the absence of use of analgesics, however, this is reportedly due to lack of efficacy and intolerance of side effects.

[...]

I would recommend that Mr. Lee be encouraged to maintain a level of exercise to continue to mobilize his neck. Ergonomic review of his work station might be of benefit if it has not already been pursued.

***Meghan Cameron***

**97**  Ms. Cameron is a qualified occupational therapist, registered with the College of Occupational Therapists of British Columbia. She was retained by Mr. Lee to prepare a physical capacity evaluation and a cost of future care analysis.

**98**  In preparation of her reports, Ms. Cameron met with Mr. Lee on two occasions in early April 2008.

**99**  In the physical capacity evaluation report dated 28 April 2008, Ms. Cameron concluded:

In my opinion, with consideration only to his present physical capacity, Mr. Lee is considered to be employable (ie. with some physical restrictions) on a part-time basis in sedentary job titles with significant sitting requirements and on a full time basis, in a restricted selection of light strength job titles. Although he performed work in a medium strength category, and demonstrated the ability to lift into a heavy strength category below knuckle level, he reported significant increases in pan when handling this weight.

[...]

With respect to Mr. Lee's occupation as an Electrical Engineer / Software Developer, the National Occupational Classification (NOC) classifies this job under the heading Software Engineers (NOC #2173). The NOC indicates that job titles under this heading require limited strength capacity (the ability to handle loads up to 5 kilograms / 11 pounds), the ability to work in sitting, and upper limb coordination (the ability to coordinate the movements of the upper extremities).

Based on this assessment, Mr. Lee meets the strength requirements of this position. However, he does not meet the requirements for sitting and upper limb coordination, which are significant aspects of his job as outlined by the NOC and as reported by Mr. Lee.

**Analysis**

**Plaintiff's Failure to call Expert Medical Witnesses - Adverse Inference**

**100**  It is clear that over the course of the past 16 years or so, Mr. Lee has seen and been treated by many medical doctors. Not all of those medical practitioners prepared medical legal reports or testified at the trial.

**101**  Dr. Salvian and Dr. O'Connor are two physicians who treated Mr. Lee and from whom there is no evidence. The defendants argue that the Court should draw an adverse inference against Mr. Lee on account of this fact.

**102**  The issue of drawing an adverse inference on account of a failure to call a witness was addressed in *Buksh v. Miles*, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=) at paras. 31-33, where Saunders J.A. observed the following:

The general proposition long applied in British Columbia, stated by Mr. Justice Davey in *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.), is that an inference adverse to a litigant may be drawn if, without sufficient explanation, that litigant fails to call a witness who might be expected to give supporting evidence. Further, said Mr. Justice Davey at 689, a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so".

It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

A judge trying a case with a jury is bound to instruct the jury as to the applicable law, and thereby to assist the jury in its consideration of the evidence and determination of the facts. Whether an adverse inference is drawn from failure to call a witness is a question for the trier of fact ... However, it bears reminding that the delivery of medical care is not now as it was in 1964 when Mr. Justice Davey made his comments in Barker. There is, today, a proliferation of "walk-in" medical clinics where the role of the "walk-in" clinic physician may be more limited than was the role of a family physician in 1964. Further, even people who have a family doctor may attend one or more such clinics as a matter of convenience, but still rely upon their family physician for core medical advice and treatment. The proposition stated by Mr. Justice Davey does not anticipate the present model of medical care. Likewise, the discovery process available to both sides of a lawsuit is not now as it was in 1964 when, in explaining his view on the need to call all treating physicians, Mr. Justice Davey referred to the professional confidence between doctor and the patient. Today, the free exchange of information and provision of clinical records through document discovery raises the possibility that an adverse inference may be sought in circumstances where it is known to counsel asking for the inference that the opinion of the doctor in question was not adverse to the opposite party.

**103**  In the circumstances of this case, I find no grounds to draw the inference the defendants urge I should. The defendants had access to the clinical records of both doctors and could have called them as witnesses if they believed their evidence was vital to their case.

**104**  Moreover, I am satisfied there is ample evidence before the Court, in the form of oral testimony, medical legal reports and clinical notes and records to develop a clear understanding of Mr. Lee's physical condition.

**Liability**

**105**  Liability was admitted on behalf of the defendant in Accident #2. The only live issue relating to liability relates to Accident #1.

**106**  I find Mr. Lee was in the course of making a legal left hand turn on a green light when Mr. MacLean improperly and without warning advanced his vehicle into the intersection and collided with Mr. Lee's vehicle.

**107**  I am satisfied that Mr. MacLean's vehicle was stopped before the cross-walk and that he allowed his vehicle to creep ahead onto and over it while his traffic light remained red. While a small portion of his vehicle may have been in the intersection when Mr. Lee began his turn, I find the vehicle was stationary at that point.

**108**  I do not accept Mr. MacLean's argument that Mr. Lee should have taken more care in entering the intersection and performing the turn and by not doing so he was partially responsible for the accident. In particular, I reject the suggestion that Mr. Lee breached his duty to keep a proper look out for other vehicles and should have been able to avoid the collision with Mr. MacLean's vehicle. I find Mr. Lee could not have foreseen that the defendant's vehicle would advance into the intersection when it did and consequently I find he could not have done anything to avoid the collision.

**109**  I therefore find Mr. MacLean 100% liable for Accident #1.

**Causation**

**110**  Causation is a major issue in this litigation.

**111**  Mr. Lee acknowledges that he suffered injuries in the 1990s Accidents but he insists that by 2003 the residual effects from those injuries were minimal and he was functioning adequately on all levels at the time.

**112**  Mr. Lee accepts that his pre-accident health issues are relevant factors to be considered when assessing and determining his present claim, and more particularly when addressing the question of causation; however, he maintains they are not the main cause of his current physical difficulties. In particular, he points to the physical symptoms that developed on the left side of his body after the 2003 Accidents and argues these are uniquely attributable to those accidents.

**113**  The defendants argue that the 2003 Accidents aggravated Mr. Lee's pre-existing condition for only a few months and that his continued complaints of pain and discomfort likely resulted from flare-ups of his previous injuries or the serious throat condition he developed in 2005.

**114**  The Supreme Court of Canada set out the legal test for causation in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paras. 13-14:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the ***negligence*** of the defendant.

**115**  The test for causation was further refined in *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), where McLachlin C.J. observed at paras. 21 and 23:

[21] First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory ***negligence*** may be apportioned, as permitted by statute.

[...]

[23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": Snell v. Farrell, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), at p. 327, *per* Sopinka, J.

**"Crumbling Skull" vs. "Thin Skull"**

**116**  Mr. Lee clearly had a pre-existing physical condition when he was involved in the two motor vehicle accidents in 2003. The jurisprudence that addresses the situation of a plaintiff with pre-existing physical issues has created two categories of claimants: the "crumbling skull" claimant and the "thin skull" claimant.

**117**  In *Filsinger v. ICBC*, [*2009 BCSC 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3P5-00000-00&context=) at paras. 24-26 [*Filsinger*], Rice J. neatly articulated the two categories at paras. 24 to 26:

The issue is whether this is a "thin skull" or a "crumbling skull" situation. Both address the circumstances of a pre-existing condition, and its effect upon the accident victim. The law is that the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the accident: Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 35, [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The court requires "a measurable risk" or "a real or substantial possibility and not speculation" that the pre-existing condition would have manifested itself in the future regardless of the plaintiff's (sic) ***negligence***. The measurable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence: Athey v. Leonati, at para. 27.

The injury is deemed "thin skull" when there is a pre-existing condition that is not active or symptomatic at the time of the accident, and that was unlikely to become active but for the accident.

A "crumbling skull" injury is also one where there is a pre-existing condition, but one which is active or likely to be active. If the injury is proven to be of a think skull nature, then the defendant is liable for all of the plaintiff's injuries resulting from the accident. If it is of a crumbling skull nature, then the plaintiff is liable only to the extent that the accident caused an aggravation to the existing condition.

**118**  Applying the principles enunciated in *Filsinger*, I am satisfied Mr. Lee is both a "crumbling skull" and "thin skull" plaintiff. The determination of which depends upon the precise injury.

**119**  The neck, right shoulder and lower back pains Mr. Lee complained of following the 2003 Accidents were quite similar to those he complained of after the 1990s Accidents. I am satisfied that these symptoms would have continued to manifest themselves even if Mr. Lee had not been involved in the 2003 motor vehicle accidents.

**120**  With respect to the left side of Mr. Lee's body, the issue is more difficult. I accept the evidence of Dr. Fry that in 1998 Mr. Lee exhibited signs of thoracic outlet syndrome on the left side of his body, even though Mr. Lee was asymptomatic at the time. I am persuaded by the evidence of Dr. Fry and Dr. Shuckett that the nature of Accident #1 and Accident #2 were such that they triggered the onset of the thoracic outlet syndrome symptoms on Mr. Lee's left side and are therefore attributable to those accidents.

**121**  I also find that the concentration problems, headaches and associated vision problems that arose after the 2003 Accidents can at least be partially attributed to those accidents.

**122**  I have considered the problem Mr. Lee has had with his throat and the effects it has had on his general physical condition. I find this condition did exacerbate his physical symptoms, especially the pain and stiffness he has experienced in his neck and shoulder areas. I consider this throat condition to be an intervening event, not attributable to either Accident # 1 or Accident #2.

**123**  Given the pre-existing condition of Mr. Lee and the fact that the symptoms on the right side of his body were likely to have continued, notwithstanding the 2003 Accidents, I find that it is appropriate to make a 25% reduction in the non-pecuniary damages as well as the award for loss of earning capacity.

**Plaintiff's Failure to Mitigate**

**124**  The defendants argue that there should be a further reduction in any award to Mr. Lee on account of his alleged failure to mitigate his damages.

**125**  The defendants point to Mr. Lee's hesitancy to have surgery to address his symptoms and his failure to continue with his exercise routine on a regular basis. They also note his reluctance to use medications to address the discomfort associated with his injuries. In short, the defendants maintain that Mr. Lee failed to follow the advice of his medical doctors.

**126**  The onus rests on the defence to satisfy the Court that Mr. Lee has acted unreasonably in not following recommended treatment of his physicians. The defendants must also prove, the extent, if any, to which Mr. Lee's damages would have been reduced had the treatment been followed: *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=); *Myatt v. Holicza,* [*2000 BCSC 1149*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22N4-00000-00&context=).

**127**  I do not agree with the submission of the defendants with respect to mitigation. While it is true that Mr. Lee chose not to follow all of the recommendations of his medical professionals, I find his reasons for doing so were rational and not whimsical. I find he has earnestly pursued his full recovery with good intentions and therefore he should not be penalized for not complying with everything his doctors have suggested or recommended.

**128**  As I am not persuaded that had he accepted and adhered to all of those recommendations the outcome would have been different, I reject the defendants' argument for a further discount to any award for failure to mitigate.

**Damages**

**Multiple Accidents - Apportionment of Damages**

**129**  The parties are in general agreement that in the event the Court makes an award of damages, the apportionment of those damages should be 25% to Accident #1 and 75% to Accident #2.

**Non-Pecuniary Damages**

**130**  Mr. Lee claims he suffered or developed a number of injuries as a result of the 2003 Accidents. In particular he claims to have suffered myofascial pain syndrome in his neck with associated pain and spasm in his back, as well as thoracic outlet syndrome on the left side of his body. He has also suffered headaches and vision problems on account of the accidents.

**131**  Mr. Lee seeks an award for non-pecuniary damages in the range of $100,000. In support of this position, he relies upon the following decisions: *Niloufari v. Coumont*, [*2008 BCSC 816*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G31K-00000-00&context=); *Notenbomer v. Andjelic*, [*2008 BCSC 509*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X4BC-00000-00&context=); *Pelkinen v. Unrau*, [*2008 BCSC 375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1DY-00000-00&context=); and *Whyte v. Morin*, [*2007 BCSC 1329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X45D-00000-00&context=).

**132**  The defendants argue that Mr. Lee suffered from pre-existing injuries that had not completely resolved themselves at the time of the 2003 Accidents. They maintain that at best Mr. Lee suffered transitory mild soft tissue injuries that lasted for only a few months and that any recurrent pains or discomfort are attributable to his pre-existing condition or his intervening throat condition.

**133**  The defendants submit that the range of non-pecuniary damages is $10,000 to $20,000, with $3,000 to $4,000 being attributed to Accident #1 and the balance attributed to Accident #2.

**134**  In support of their position on non-pecuniary damages, the defendant rely on the following case authorities: *Hoskin v. Trisevic*, [*2002 BCSC 903*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2PP-00000-00&context=); *Farrant v. Laktin*, [*2008 BCSC 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1R1-00000-00&context=); *Read v. Marques*, [*2003 BCSC 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G565-00000-00&context=); *Harandi v. Khan*, [*2003 BCSC 714*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X33B-00000-00&context=); *McLaughlin v. Scott*, [*2001 BCSC 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23YF-00000-00&context=); and *McKee v. Biver* (13 June 2005), Vancouver M021432 (B.C.S.C.).

**135**  I found Mr. Lee to be a credible witness when he described the timing, nature and extent of his injuries. In doing so, I accept that he had pre-existing pains prior to the 2003 Accidents, some of which were identical to those which developed after the 1990s Accidents.

**136**  Mr. Lee is entitled to be compensated for his injuries. I do not find those injuries to have been as trivial or transient as suggested by the defendants. On the whole I favour Mr. Lee's description of the injuries and find that an appropriate award for non-pecuniary damages to be $85,000. There will, however, be a 25% contingency discount to this amount on account of Mr. Lee's pre-existing physical ailments.

**137**  As a result, the award for non-pecuniary damages is $63,750.

**Past Wage Loss**

**138**  Up until the 2003 Accidents, Mr. Lee was managing the pain and discomfort he felt from the injuries associated with the motor vehicle accidents in the 1990s.

**139**  I accept the evidence of Mr. Lee and that of Mr. Auchinleck regarding the decline in Mr. Lee's productivity following the 2003 Accidents.

**140**  The two men had pointed discussions in 2005 and 2006 regarding the needs of Neoteric and Mr. Lee's inability to perform as he once did. By this time, Mr. Lee had abandoned his extra contract work for private clients so that he could concentrate on his work for Neoteric. Mr. Lee's wage increases were less than those of his Neoteric colleagues because of Mr. Lee's inability to perform his duties to the level expected of him.

**141**  The situation at Neoteric was deteriorating by the end of 2007. Mr. Lee was not working at anything near his capacity or ability, yet he was drawing a full salary. This had a negative impact on the morale of the other Neoteric employees who were working and producing at full capacity. It also impacted Mr. Lee, as he knew he was not working and producing the way he should and sensed his colleagues begrudged the fact that he continued to be paid a full salary. This added stress on Mr. Lee exacerbated his physical condition.

**142**  In December 2007, Mr. Auchinleck met with Mr. Lee and discussed the difficulties Mr. Lee was having and the problems they were causing for Neoteric. Mr. Lee had been a valued and productive worker for the company and Mr. Auchinleck wished to find a resolution that would benefit the company without prejudicing the financial wellbeing of Mr. Lee and his family. At the conclusion of their meeting, they decided Mr. Lee would be converted from a full time employee with Neoteric to a part-time contractor. A written contract confirming Mr. Lee's status with the company was executed on 22 December 2007 (the "Employment Agreement"). The Employment Agreement acknowledged that Mr. Lee would continue to receive a salary of $82,000 per annum but that there would be no annual remuneration review. The agreement also contained the following terms:

It is recognized that due to his current physical condition as a consequence of injuries sustained in his automobile accidents in August and October 2004 (sic), that Shun Lee will be expected to maintain an approximate workload of 50%. The actual productivity will be reviewed /determined at periodic intervals.

As a result of Shun Lee's reduced workload, the full salary is considered to be an advance that will be reduced by the reviewed performance of his duties. It is expected that Shun Lee will continue to attempt to recover the expected differential and will reimburse Neoteric based upon an end of the year review of his productivity.

**143**  There were no improvements in Mr. Lee's productivity in 2008. By the end of 2008, Mr. Auchinleck was in negotiations to sell Neoteric to another corporation as Neoteric was facing financial difficulties which needed immediate attention.

**144**  On January 30, 2009, Mr. Lee was placed on permanent leave from Neoteric. He has received no remuneration from the company since that time.

**145**  On 16 April 2009, the business interests and assets of Neoteric were purchased by Haemonetics Corporation. All shareholders of Neoteric, including Mr. Lee, received compensation from Haemonetics for their respective shares.

**146**  Mr. Auchinleck candidly admitted during his cross-examination that the Employment Agreement was drafted with Mr. Lee's present litigation in mind. According to Mr. Auchinleck, under the Employment Agreement, 50% of Mr. Lee's salary was an "advance" which Mr. Lee is expected to repay from any award he receives in this action.

**147**  Although the defendants are correct to point out that Mr. Lee did not miss a significant number of days from work on account of his injuries, and his taxable income remained constant or increased marginally in the years after the 2003 Accidents, those are not the only yardsticks to be used in determining and calculating any past wage loss Mr. Lee may have suffered.

**148**  In *Kahle v. Ritter*, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=), D.M. Smith J., as she then was, clearly framed the analysis of past wage loss, at para. 109

Proof of a loss of opportunity claim requires a plaintiff to establish on a balance of probabilities a causal connection between the injuries sustained in the accident and the loss of opportunity ... Past income loss is not an assessment of a hypothetical or future event which is based on a real and substantial possibility of its occurrence (the test for future or hypothetical event), but rather is proof on a balance of probabilities that the injuries caused the loss of opportunity. In short, the issue is whether Mr. Kahle has established on a balance of probabilities that but for the accident he would have realized this income.

**149**  Mr. Lee submits he lost approximately $82,000 in past wages and income on account of his injuries from the 2003 Accidents. This figure includes 50% of his 2008 salary which he argues needs to be repaid. Mr. Lee classifies this as a "gratuitous payment" from his employer and argues the defendants cannot take advantage of Neoteric's generosity towards him and attempt to avoid compensating him for lost income: *Kask v. Tam* [*(1996), 21 B.C.L.R. (3d) 11*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2CN-00000-00&context=) (C.A.); *Frers v. De Moulin*, [*2002 BCSC 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0T1-00000-00&context=). Mr. Lee also argues that he has fallen behind in terms of professional advancement and points to the other computer programmers with Neoteric who earned a higher salary than he ever did. Finally, Mr. Lee claims he lost his health care benefit package which equates to approximately $2,500 per year.

**150**  I accept Mr. Lee did lose some income on account of his injuries from the 2003 Accidents. The figure is not as great as suggested by Mr. Lee because I find he would have faced some of the losses irrespective of the injuries in question. In particular, I find his recurring neck, back and right should problems would have impacted on his advancement with the company and affected his annual income. His serious throat condition that developed in 2005 and lasts to this day is also a consideration and I find it would have contributed to a loss of income, irrespective of the 2003 Accidents.

**151**  In all the circumstances, I award Mr. Lee $45,000 for past loss of income.

**Future Loss of Capacity**

**152**  The standard of proof for making an award for loss of future earning capacity is simple probability and not balance of probabilities: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) [*Rosvold*].

**153**  In assessing whether Mr. Lee is entitled to compensation under this heading of damages, it is useful to keep in mind the list of considerations that Finch J., as he then was, set out in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.):

1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**154**  I accept Mr. Lee's argument that his physical symptoms are unlikely to resolve themselves given how much time has passed since the accidents. Moreover, I accept that on account of his pain and discomfort Mr. Lee will likely be restricted in the type and amount of work he will be able to perform in the future. On the whole I find Mr. Lee has met the criteria set out in Brown, and is therefore entitled to an award for his loss of future earning capacity.

**155**  Assigning a quantum of damages under this heading is not a precise mathematical calculation: *Rosvold*. The answer to the question involves the Court looking into the future as best it can and predicting how much additional income Mr. Lee would have earned but for the injuries he suffered in the 2003 Accidents.

**156**  Mr. Lee seeks $500,000 for his loss of future earning capacity. He reaches this figure by arguing that for the remainder of his working life (ie. until he is 65 years old) he will be restricted to working part-time and will likely lose approximately $40,000 per year. Actuarial evidence presented in the form of a written report from Mr. Darren Benning, president of PETA Consultants Ltd., supports the assertion that Mr. Lee's total loss would be between $500,000 and $600,000.

**157**  While I find Mr. Lee has suffered some loss of future earning capacity, that loss is not as significant as he claims, nor is it solely attributable to the injuries resulting from Accident # 1 and Accident #2.

**158**  I find that on account of his pre-existing injuries, Mr. Lee had clear functional limitations in 2003 when he had the accidents that are the subject of this litigation and that these limitations continue to exist to the present day. I also find that his throat condition, which is completely unrelated to the accidents, will also impact upon his future potential to earn an income.

**159**  I find that Mr. Lee's loss of future earning capacity equates to $20,000 per year. Using Mr. Benning's actuarial calculations, I conclude that Mr. Lee's gross loss under this heading is $296,620. Deducting the 25% contingency on account of his pre-existing injuries, and an additional 3% for his throat ailment, the award for loss of future income earning capacity is $213,566.

**Special Damages**

**160**  Mr. Lee seeks compensation for the out-of-pocket expenses he has incurred addressing the treatment of his injuries.

**161**  The parties have agreed that the $395 sought for the physiotherapy treatments is appropriate. Their agreement ends there.

**162**  The defendants argue that Mr. Lee has not established that the remaining expenses relating to the various treatments he underwent were reasonably necessary as a result of the 2003 Accidents. To a certain extent, I agree.

**163**  I find it was reasonable for Mr. Lee to undergo the I-Stop acupuncture treatment and the Botox treatments, and therefore the expenses, including travel costs, associated with them are reimbursable. The same cannot be said of the expenses relating to the naturopathic treatment and medications. On the evidence before me I am not satisfied this treatment was necessary to address the injuries from the 2003 Accidents. Some of these latter expenses related to physical conditions or ailments completely unrelated to the accidents, and therefore I reject them.

**164**  Nor am I satisfied that the remaining expenses categorized by Mr. Lee as "miscellaneous" or those incurred after the date of trial are attributable to the injuries from the 2003 Accidents. Some of those costs relate to naturopathic treatment or medications that I am not persuaded are associated with the Mr. Lee's injuries.

**165**  In total, I award Mr. Lee $7,250 in Special Damages.

**Future Care**

**166**  I agree with Mr. Lee's submission that he should be compensated for the reasonably necessary or foreseeable expenses he will incur for his future medical care. However, as with all of the other headings of damages, the expenses must be attributable to the disability resulting from the injuries suffered in the 2003 Accidents and not his pre-existing condition.

**167**  Mr. Lee seeks an award under this heading of damages for $123,000. This amount is based upon the cost of future care analysis dated 14 May 2008, that was prepared by Ms. Cameron and an actuarial assessment of her recommendations that was completed by Mr. Benning.

**168**  The medical experts who provided evidence at trial did not opine to any significant degree on the question of Mr. Lee's future needs. There was a consensus that he would have long term physical issues, however there was no agreement with respect to how those issues should be addressed.

**169**  Having considered the evidence of the medical doctors, as well as that of Ms, Cameron, I find that Mr. Lee's claim for future care is inflated. I am not persuaded that he requires all of the items and services that are recommended by Ms. Cameron.

**170**  I do not agree with Ms. Cameron's recommendations regarding household assistance for Mr. Lee, nor do I accept that all of the ergonomic office equipment suggested is appropriate in the circumstances. I am equally unpersuaded that on account of his injuries from the 2003 Accidents Mr. Lee requires supplementary household assistance and marital counselling.

**171**  I accept that Mr. Lee will need long-term physiotherapy and possibly surgical intervention to address the injuries he suffered in the 2003 Accidents. He will also need to maintain a regular regime of exercise and stretching, both at home and at a fitness facility. Finally, I accept that he may require additional Botox treatments or some other similar form of treatment. Although I reject the suggestion that Mr. Lee requires all of the home and office equipment listed by Ms. Cameron, I will allow for an ergonomic office chair. I have reached this conclusion notwithstanding the fact that in the late 1990s Dr. Ayling recommended that Mr. Lee obtain such a chair and Mr. Lee chose not to do so because of the cost.

**172**  Mr. Lee has, in the past, shown a focused determination to overcome his physical limitations. Although his activity levels have diminished over time, I do not attribute that fact solely to the pain and discomfort associated to the injuries he suffered in the 2003 Accidents. After the 1990s Accidents Mr. Lee was able to manage his levels of pain and discomfort to such a degree that he was able to lead a reasonably normal life. I see no reason why Mr. Lee should not be able to reproduce those results if he approaches his future rehabilitation with the same drive as he has shown in the past.

**173**  I will therefore allow Mr. Lee's claim for the cost of the following items:

1. Physiotherapy;
2. Kinesiology consultations;
3. Fitness centre membership
4. Ergonomic office chair; and
5. Botox or similar treatments.

**174**  Using the costs Ms. Cameron assigned to these items and Mr. Benning's actuarial assessment of those costs as a general guideline, I award Mr. Lee $15,000 in future case costs.

**Summary**

**175**  In summary, I find in favour of the plaintiff and make the following award:

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Non-pecuniary damages: | $63,750 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Past Wage Loss: | $45,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Future loss of capacity: | $213,566 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Special damages: | $7,250 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Cost of Future Care: | $15,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | \* Total: | $344,566 |  |

**176**  I attribute 25% of the final award to the defendants in Accident #1 and the remaining 75% to the defendant in Accident #2.

**177**  The monetary awards I have made do not include tax gross up, management fees or any other ancillary considerations. If the parties cannot agree on any of these items, then they may set the matter down for hearing before me on a date that is mutually convenient to all parties.

**178**  Mr. Lee is entitled to his costs on scale B, with leave to apply.

G.R.J. GAUL J.

**End of Document**

[***Low v. Pfizer Canada Inc., [2014] B.C.J. No. 2028***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G01G-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: February 13, 2014.

Judgment: August 5, 2014.

Docket: S-128719

Registry: Vancouver

**[2014] B.C.J. No. 2028** | 2014 BCSC 1469 | [2014] 9 W.W.R. 716 | 2014 CarswellBC 2321 | 125 C.P.R. (4th) 348 | 244 A.C.W.S. (3d) 286 | 68 B.C.L.R. (5th) 405

Between Britton Low, Plaintiff, and Pfizer Canada Inc., Pfizer Inc., Pfizer Ireland Pharmaceuticals, Pfizer Research and Development Company N.V./S.A., Defendants

(101 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Actions — Causes of action — Parties — Class or representative actions — Certification — Pleadings — Determination of whether plaintiff's claim disclosed cause of action for purpose of Class Proceedings Act — Claim disclosed cause of action — Plaintiff sought to certify class action alleging that defendants wrongfully obtained and relied on Viagra patent found invalid because application did not comply with Patent Act's disclosure requirements, inflating price of Viagra by delaying introduction of competing generic versions — Pleadings disclosed cause of action in interference with economic relations and in unjust enrichment, but not in waiver of tort.**

**Commercial law — Unjust enrichment — Determination of whether plaintiff's claim disclosed cause of action for purpose of Class Proceedings Act — Claim disclosed cause of action — Plaintiff sought to certify class action alleging that defendants wrongfully obtained and relied on Viagra patent found invalid because application did not comply with Patent Act's disclosure requirements, inflating price of Viagra by delaying introduction of competing generic versions — Pleadings disclosed cause of action in interference with economic relations and in unjust enrichment, but not in waiver of tort.**

**Tort law — Interference with economic relations — Determination of whether plaintiff's claim disclosed cause of action for purpose of Class Proceedings Act — Claim disclosed cause of action — Plaintiff sought to certify class action alleging that defendants wrongfully obtained and relied on Viagra patent found invalid because application did not comply with Patent Act's disclosure requirements, inflating price of Viagra by delaying introduction of competing generic versions — Pleadings disclosed cause of action in interference with economic relations and in unjust enrichment, but not in waiver of tort.**

|  |
| --- |
| Determination of whether the plaintiff's claim disclosed a cause of action for the purpose of the Class Proceedings Act. The defendants obtained a patent for Viagra in 1998. In 2006, a competitor applied for a notice of compliance for a generic version of the drug, prompting the defendants to apply to prohibit the issuance of a notice of compliance. The patent was found to be invalid in 2012 because the application for it did not comply with the Patent Act's disclosure requirements. The plaintiff sought to certify a class action alleging that the defendants wrongfully obtained and relied on the patent, inflating the price of Viagra by delaying the introduction of competing generic versions. The pleaded causes of action were interference with economic relations, waiver of tort and unjust enrichment. The proposed class members were residents of British Columbia who purchased Viagra during the period between the application for the notice of compliance and the invalidation of the patent.  HELD: The claim disclosed a cause of action.  It was not plain and obvious that the Patent Act was a complete bar to an action by the plaintiff on other grounds. Parliament chose not to create a right of action for consumers arising directly from a breach of the Act, but did not bar an action by them if conduct that was in breach of the statute was relevant to a common law cause of action. The pleadings disclosed a cause of action in interference with economic relations. The pleadings stated that the defendants intended to cause the class members economic harm and it appeared that the competitor would have the right to bring an action against the defendants for losses arising from the inability to market a generic during the period for which the plaintiff claimed damages. The pleadings disclosed a cause of action in unjust enrichment. The question of whether the defendants' reliance on the patent provided a juristic reason for the enrichment might involve a fact-specific inquiry into whether they obtained it through knowing and deliberate non-disclosure. The pleadings did not disclose a cause of action in waiver of tort. The disclosure requirements were created by a statute, the statute did not create a private law remedy and the requirements did not exist at common law. Waiver of tort could therefore only apply as an alternative remedy for the tort of interference with economic relations, but the former was fundamentally inconsistent with the latter because the former relieved the plaintiff of the need to prove loss. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, *SBC 2004, CHAPTER 2*,

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=)(1), s. 4(1) (a)

Competition Act, [*R.S.C. 1985, c. C-34*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB61-JXG3-X3FD-00000-00&context=),

Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=),

Food and Drugs Act, [*R.S.C. 1985, c. F-27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9X1-JN6B-S1KB-00000-00&context=),

Food and Drug Regulations, *C.R.C., c. 870*,

Patent Act, [*R.S.C. 1985, c. P-4, s. 27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5XM2-JNG1-FJTD-G1GJ-00000-00&context=), s. 44, s. 53(1), s. 55.2(4), s. 55.2(4)(c), s. 55.2(4)(d), s. 60, s. 60(1)

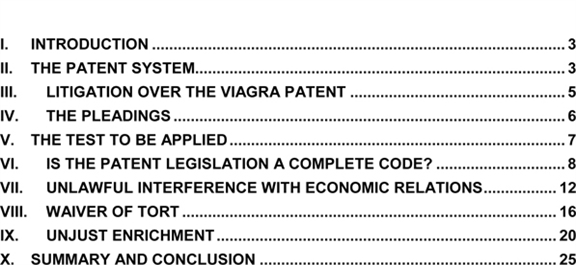
Patented Medicines (Notice of Compliance) Regulations, [*SOR/ 93-133, s. 5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5PNY-PTD1-JXG3-X033-00000-00&context=), s. 6, s. 8, s. 8(1)

**Counsel**

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Counsel for Defendants: W.W. McNamara, R. Sutton, N. Marcus.

**Table of Contents**



**Reasons for Judgment**

N.H. SMITH J.--

**I. INTRODUCTION**

**1**  The plaintiff seeks to certify a class action against the manufacturers of the drug Viagra. He alleges that the defendants wrongfully obtained and relied on a patent, which inflated the price of the drug by delaying the introduction of competing generic versions.

**2**  The defendants Pfizer Canada Inc., Pfizer Inc., Pfizer Ireland Pharmaceuticals, and Pfizer Research and Development Company N.V./S.A., (collectively "Pfizer") market Viagra as a treatment for male erectile dysfunction. Pfizer obtained a patent for Viagra in 1998, but the Supreme Court of Canada in 2012 found the patent to be invalid because Pfizer's application for it had not complied with the disclosure requirements of the *Patent Act*, [*R.S.C. 1985, c. P-4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB01-FH4C-X0M0-00000-00&context=).

**3**  The only issue on this application is whether the plaintiff's claim discloses a cause of action for the purposes of s. 4(1)(a) of the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* [*CPA*]. If the Court finds that it does, the other requirements for certification set out in s. 4(1) will be addressed in a further application.

**II. THE PATENT SYSTEM**

**4**  Pfizer obtained Patent 2,163,466 ("Patent '446") from the Canadian Intellectual Property Office, pursuant to the *Patent Act*. The Act governs applications for and granting of patents for inventions, as well as the expiry of and challenges to those patents.

**5**  Section 27 sets out the specifications of an invention that must be included with an application for a patent, including a description specific enough to allow a person with sufficient skill to duplicate the invention. Once issued, a patent is valid for 20 years (s. 44). In *Teva Canada Ltd. v. Pfizer Canada Inc.*, [*2012 SCC 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X220-00000-00&context=) at para. 32, the Supreme Court of Canada said this system is based on a "bargain" or *quid pro quo*:

... the inventor is granted exclusive rights in a new and useful invention for a limited period in exchange for disclosure of the invention so that society can benefit from this knowledge.

**6**  The specification filed as part of the patent application must be sufficient to allow "a reasonably well informed artisan dealing with a subject-matter with which he is familiar to make the thing, so as to make it available for the public at the end of the protected period" (*Teva* at para. 33, citing *Tubes, Ld. v. Perfecta Seamless Steel Tube Company, Ld.* (1902), 20 R.P.C. 77).

**7**  A patent is void if information provided in the application is untrue or intentionally misleading. Section 53(1) of the Act reads:

1. (1) A patent is void if any material allegation in the petition of the applicant in respect of the patent is untrue, or if the specification and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and the omission or addition is wilfully made for the purpose of misleading.

**8**  The federal court has jurisdiction to declare a patent invalid or void at the instance of the Attorney General of Canada or "any interested person" (s. 60(1)).

**9**  The marketing and sale of prescription medications is also regulated by the *Food and Drugs Act*, [*R.S.C. 1985, c. F-27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9X1-JN6B-S1KB-00000-00&context=) [*FDA*], and the *Food and Drug Regulations*, *C.R.C., c. 870*. Essentially, a prescription medication, whether patented or generic, cannot be marketed until the Minister of Health (the "Minister") has issued a Notice of Compliance ("NOC") confirming the safety and efficacy of the medication.

**10**  Disputes between patent holders and makers of generic drugs are governed by the *Patented Medicines (Notice of Compliance) Regulations,* [*SOR/93-133*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W3Y-TSS1-FG68-G072-00000-00&context=), made under the *Patent Act* (the "NOC Regulations"). Under s. 5 of the NOC Regulations, a manufacturer may apply to the Minister for an NOC for a generic version of a patented drug, alleging that the patent is invalid or will not be infringed. A notice of that application must be served on the patent holder.

**11**  Section 6 allows the patent holder to then seek an order from the Federal Court prohibiting the Minister from issuing the NOC for the generic drug until the patent has expired. The commencement of the Federal Court proceeding automatically stays the issuance of the NOC for the generic drug for up to 24 months. If the prohibition application is dismissed, s. 8 allows the generic manufacturer to recover losses incurred during the period of the stay. If the prohibition application is allowed, but reversed on appeal, the generic manufacturer has a claim for losses to the date of the reversal.

**III. LITIGATION OVER THE VIAGRA PATENT**

**12**  In 2006, Novopharm Limited, now Teva Pharmaceuticals Ltd. ("Teva"), sought an NOC to market a generic version of the active ingredient in Viagra: sildenafil citrate ("Sildenafil"). Pfizer responded by commencing prohibition proceedings under the NOC Regulations and was successful in both the Federal Court and the Federal Court of Appeal. However, the Supreme Court of Canada allowed Teva's appeal on November 8, 2012.

**13**  The Court found in *Teva* that Pfizer's patent application had not sufficiently identified Sildenafil as the effective ingredient in Viagra. Anyone attempting to duplicate the drug would therefore need to conduct further testing. The Court said at para. 80:

... the public's right to proper disclosure was denied in this case, since the claims ended with two individually claimed compounds, thereby obscuring the true invention. The disclosure failed to state in clear terms what the invention was. Pfizer gained a benefit from the Act -- exclusive monopoly rights -- while withholding disclosure in spite of its disclosure obligations under the Act. As a matter of policy and sound statutory interpretation, patentees cannot be allowed to "game" the system in this way.

**14**  The Court declared Pfizer's patent to be "void" but subsequently amended its order to refer to Teva "having established its allegation that (the patent) is not valid" and to dismiss Pfizer's application for a prohibition order. The change was apparently made on the basis of authorities that a final determination that a patent is void cannot be made in a proceeding that only seeks to prohibit the issuance of an NOC.

**15**  Meanwhile, another generic manufacturer, Apotex Inc. ("Apotex"), had brought a separate action to invalidate Pfizer's patent under s. 60 of the *Patent Act*. On November 20, 2012, the Federal Court held in *Apotex v. Pfizer Ireland Pharmaceuticals*, [*2012 FC 1339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4G1-JBT7-X15X-00000-00&context=), that it was bound by *Teva* and gave summary judgment in favour of Apotex, declaring Pfizer's patent "invalid and void." The court noted that that a declaration of invalidity means that the patent "is, and has been void all along (ie. *ab initio*)" (original emphasis, at para. 27). The judgment was upheld by the Federal Court of Appeal on January 22, 2014: *Pfizer Ireland Pharmaceuticals v. Apotex Inc.,* [*2014 FCA 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4G1-FBFS-S2TN-00000-00&context=).

**IV. THE PLEADINGS**

**16**  The plaintiff's Notice of Civil Claim briefly sets out the above history, including Pfizer's obtaining Patent '446 for Viagra, Teva's application for an NOC for its generic version, Pfizer's application to prohibit issuance of the NOC and the Supreme Court of Canada decision. It then alleges in para. 15:

Within days following the Supreme Court of Canada judgment, Pfizer announced a reduction in the price of Viagra to the same level as that of generic sildenafil.

**17**  The plaintiff's key allegations are found in paras. 20-22:

As a consequence of its improper disclosure of the invention of sildenafil, Pfizer gained a benefit from the *Patent Act* - exclusively monopoly rights - while withholding disclosure contrary to its legal obligation. Pfizer gamed the patent system in order to obtain exclusive monopoly rights.

Despite the invalidity of Patent 446, Pfizer used Patent 446 to prevent the introduction of generic sildenafil from 2006 until 2012.

As a result of its unlawfully obtained monopoly over sildenafil, Pfizer was able to overcharge the plaintiff and the other Class Members for Viagra as compared to the price Pfizer could have charged for Viagra in the presence of generic competition. The difference between the revenue Pfizer collected by charged the actual price for Viagra and the revenue which Pfizer would have collected at the price prevailing in the presence of generic competition (the "Viagra overcharge") represents Pfizer's ill-gotten gains.

**18**  The plaintiff pleads three causes of action arising from that conduct:

1. unlawful interference with economic relations;
2. waiver of tort; and
3. unjust enrichment.

**19**  The members of the proposed class are all British Columbia residents who purchased Viagra between January 1, 2006, to November 30, 2012 (approximately the period from Teva's NOC application to the decisions invalidating and/or voiding the patent).

**V. THE TEST TO BE APPLIED**

**20**  Section 4(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) [*Microsoft*], the Supreme Court of Canada said this test is satisfied unless, assuming all facts pleaded to be true, it is "plain and obvious" that the plaintiff's claim cannot succeed. This is the same test set out by the Court in *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959*, for a motion to strike out pleadings. In that case, the Court said at 980:

[I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect... should the relevant portions of a plaintiff's statement of claim be struck out...

**21**  In *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, [*2014 BCCA 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1CY-00000-00&context=), the Court of Appeal stressed at para. 64 that this test is an easy one to meet, but is not automatic.

... scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context. Certainly the *Hunt v. Carey* test is an easy one to meet, but it is not surmounted in *all* cases. As recent decisions of the Supreme Court of Canada discussed below illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.

**VI. IS THE PATENT LEGISLATION A COMPLETE CODE?**

**22**  Before dealing with the specific causes of action alleged by the plaintiff, it is necessary to consider the general effect of the *Patent Act* and the NOC Regulations. Pfizer argues that they constitute a complete code governing the marketing of patented drugs, including all related rights and remedies. Because the legislation creates no cause of action for individual purchasers of the products, Pfizer says no claim by the plaintiff can succeed.

**23**  In *Apotex Inc. v. Abbott Laboratories Ltd.*, [*2013 ONSC 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFT1-FCYK-22SG-00000-00&context=), a case involving the NOC Regulations that are at issue here, a generic manufacturer alleged breach of the legislative scheme and sought damages for unjust enrichment. The court said at para. 152:

Apotex has argued that the legislation does not oust prior rights and it assumes that there was a pre-existing cause of action, but that cannot be the case in these circumstances. A generic drug manufacturer has no right to patent-related restitution based on unjust enrichment or otherwise that has no statutory background or foundation. Here, the background or foundation and the only source of the entitlement is to be found entirely in the statutory framework that Parliament created, and as is plain from its language, both initially and as amended, and from the Federal Court of Appeal's decision in *Eli Lilly*, that framework constitutes a complete code and does not leave room for any stand-alone equitable remedies.

**24**  The court at para. 17 described the NOC Regulations as a scheme designed by Parliament to balance the rights of patent holders with procedures to ensure accelerated market access for generic manufacturers. Both parties before the court were participants in the patent system who had rights and obligations under the Act and the NOC Regulations. The position of the ultimate consumer of the patented product was not addressed.

**25**  In *Koubi v. Mazda Canada Inc.,* [*2012 BCCA 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24SF-00000-00&context=), the Court of Appeal held that a comprehensive legislative scheme intended to regulate a specific subject area will operate to exclude common law causes of action related to that subject matter. The issue in that case was whether a breach of the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* [*BPCPA*], could constitute a legal wrong on which a claim of waiver of tort could be based. The Court of Appeal held at para. 63 that the Act was "an exhaustive code regulating consumer transactions, directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace." At para. 65, the Court of Appeal held:

I conclude the chambers judge erred in failing to comprehensively address the objectives and provisions of the *BPCPA*. Had she done so, I am satisfied she would have recognized it represents a comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations it creates. In essence, it has occupied the field of consumer rights and remedies arising from deceptive acts by suppliers. Mazda's statutory wrongdoing under ss. 4 and 5 of the Act cannot therefore provide the predicate unlawful act required for a cause of action based on waiver of tort and restitutionary damages. Ms. Koubi is restricted to the remedies provided by the Act. I am satisfied Ms. Koubi's claim for restitutionary damages and disgorgement of profits arising from waiver of tort does not disclose a cause of action.

**26**  The legislation at issue in *Koubi* provided specific rights of action for consumers in the position of the plaintiff, including a right to bring action for damage or loss caused by a deceptive act and a right to apply for declaratory or injunctive relief. The court referred to its previous decision *Macaraeg v. E Care Contact Centres* Ltd., [*2008 BCCA 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X4CT-00000-00&context=), where it said at paras. 73-74:

The law is clear: the general rule is there is no cause of action at common law to enforce statutorily-conferred rights. The exception arises when, on a construction of the legislation as a whole, the court concludes the legislators intended that statutorily-conferred rights can be enforced by civil action. ...

In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. ...

**27**  In *Wakelam*, the Court of Appeal reached the same conclusion in regard to the *BPCPA* (at para. 66) and in regard to the *Competition Act*, R.S.C., 1985, c. C-34. On the latter statute, the court said at para. 90:

Section 36 clearly limits recovery for pecuniary loss to "the loss or damage proved to have been suffered" by the plaintiff, together with possible investigatory costs incurred by the plaintiff. I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. It follows in my view that the certification judge did err in finding that the pleading disclosed a cause of action under the *Competition Act* for which a court might grant restitutionary relief; and that accordingly, paras. 34-38 of Ms. Wakelam's statement of claim do not disclose a cause of action.

**28**  The result in *Wakelam, Koubi* and *Macaraeg* was that the statutory remedies available to the plaintiff replaced and excluded remedies the plaintiff might otherwise have at common law. The plaintiff in this case argues they are distinguishable on that basis--because the legislation provides no remedy to consumers for breaches of the Act or regulations, the legislature could not have intended the legislation to be a complete code.

**29**  In *R. v. Saskatchewan Wheat Pool,* [*[1983] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M278-00000-00&context=), the Supreme Court of Canada made clear that there is no separate tort of "breach of statute," although conduct in violation of a statute may be evidence of ***negligence***. In comparing British and American approaches to the issue, the Court approved the statement at 218 that:

Intellectually more acceptable, because less arcane, is the prevailing American theory which frankly disclaims that the civil action is in any true sense a creature of the statute, for the simple enough reason that the statute just does not contemplate, much less provide, a civil remedy. Any recovery of damages for injury due to its violation must, therefore, rest on common law principles. But though the penal statute does not create civil liability the court may think it proper to adopt the legislative formulation of a specific standard in place of the unformulated standard of reasonable conduct, in much the same manner as when it rules peremptorily [sic] that certain acts or omissions constitute ***negligence*** as a matter of law.

**30**  The Court concluded at 225-226:

Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of ***negligence***. ***Negligence*** and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e. principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of ***negligence*** on the part of the defendant.

**31**  Although *Saskatchewan Wheat Pool* referred to ***negligence***, there is no reason in principle why the same reasoning should not apply where conduct that amounts to a breach of statute also gives rise to or is evidence in support of another cause of action at common law. It could not do so in *Koubi* because the statute also gave the plaintiff a statutory remedy for the breach, thereby replacing and excluding any alternate claim at common law.

**32**  In this case, the *Patent Act* allows the Governor in Council to make regulations, including regulations that that confer rights of action. Section 55.2 (4)(c) and (d) provide for regulations:

1. The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1), including, without limiting the generality of the foregoing, regulations

...

(*c*) governing the resolution of disputes between a patentee or former patentee and any person who applies for a notice, certificate, permit or other document referred to in paragraph (*a*) as to the date on which that notice, certificate, permit or other document may be issued or take effect;

(*d*) conferring rights of action in any court of competent jurisdiction with respect to any disputes referred to in paragraph (*c*) and respecting the remedies that may be sought in the court, the procedure of the court in the matter and the decisions and orders it may make; and

**33**  The NOC Regulations are made pursuant to s. 55.2(4). However, the section does not include power to make regulations giving a right of action to consumers. The rights of action that can be created by regulation relate only the disputes referred to in para. (c). In the context of this case, that means only a patent holder and a generic manufacturer seeing an NOC.

**34**  Parliament clearly chose not to create a right of action for consumers arising directly out a breach of the Act. But I agree with the plaintiff that it does not explicitly or by implication bar an action by consumers if the conduct that was in breach of statute is also relevant to a common law cause of action.

**35**  I therefore conclude that, while the patent legislation does not confer any rights or remedies on which the plaintiff can rely directly, it is not plain and obvious that the statute, in itself, is a complete bar to an action by the plaintiff on other grounds.

**VII. UNLAWFUL INTERFERENCE WITH ECONOMIC RELATIONS**

**36**  The plaintiff claims damages for intentional interference with economic relations based on the difference between the price he and other class members paid for Viagra and the lower price they would have paid if generic sildenafil had been available. Paras. 23-24 of the Notice of Civil Claim read:

The acts particularized in paragraphs 16 to 22 were unlawful acts undertaken by Pfizer with the intent to injure the plaintiff and other Class Members. As such, the Defendants are liable for the tort of intentional interference with economic interests.

The plaintiff and other Class Members suffered damages as a result of the defendants' unlawful interference with their economic interests.

**37**  The plaintiff has subsequently proposed, but not yet filed, an Amended Notice of Civil Claim, in which para. 23 is amended to read:

1. The acts particularized in paragraphs 16 to 22 were unlawful acts undertaken by Pfizer with the intent to [injure] cause economic harm to the plaintiff and other Class Members as an end in itself or as a necessary means of enriching the Defendants. The unlawful acts undertaken by the Defendants are actionable by third party generic drug manufacturers, or would be actionable by third party generic drug manufacturers, if those generic drug manufacturers had suffered a loss. As such, the Defendants are liable for the tort of intentional interference with economic interest.

**38**  The tort of intentional interference with economic relations provides a remedy to victims of intentional commercial wrongdoing. The essential elements of the tort are: (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result (*Microsoft* at para. 81).

**39**  Those elements were clarified in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.,* [*2014 SCC 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X257-00000-00&context=) [*Bram*], and the plaintiff's proposed amendment to para. 23 of the Notice of Civil Claim is clearly intended to bring the claim within the language of that case. The release of the Supreme Court of Canada's judgment in *Bram* was nearly contemporaneous with the oral argument on this application and I requested further written submissions on it.

**40**  In *Bram*, the Court described the basic nature of what it refers to as the "unlawful means tort" at para. 23:

Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party) ...

**41**  Before *Bram*, there was uncertainty about what conduct was required to satisfy the requirement of unlawful means, with some authorities suggesting it was sufficient if the defendants had committed acts that they were "not at liberty to commit" (at para. 71). The Court in *Bram* approved a narrower definition--the defendant's means are unlawful only if "they support a civil action for damages or compensation by the third party, or would do so except for the fact that the third party did not suffer any loss as a result of the defendant's acts" (at para. 86).

**42**  The plaintiff says that requirement is satisfied by the s. 8 of NOC Regulations, which provides a remedy to a generic manufacturer whose product is kept off the market by a patent holder's unsuccessful application by to prohibit issuance of an NOC. Section 8(1) reads in part:

1. (1) If an application made under subsection 6(1) is withdrawn or discontinued by the first person or is dismissed by the court hearing the application or if an order preventing the Minister from issuing a notice of compliance, made pursuant to that subsection, is reversed on appeal, the first person is liable to the second person for any loss suffered during the period

(*a*) beginning on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations,

...

(*b*) ending on the date of the withdrawal, the discontinuance, the dismissal or the reversal.

(In the cumbersome language of the regulations, as they apply in this case, the "first person" is the patent holder and the "second person" is the generic manufacturer.)

**43**  It therefore appears that Teva would have the right to bring action against Pfizer for losses arising from its inability to market its generic from some date in or about 2006, when it could have received the NOC, to November 2012, when it was successful at the Supreme Court of Canada. That is also period for which the plaintiff claims damages.

**44**  Although the plaintiff is owed no duties and has no direct claim under the patent legislation, the claim now advanced arguably falls precisely into the category of "parasitic" claims referred to in *Bram*. The Court said at para. 45:

... the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offences and breaches of statute would not be *per se* actionable under the unlawful means tort, but the tort would be available if those acts also give rise to a civil action by the third party and interfered with the plaintiff's economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be therefore no potential liability under the unlawful means tort. This approach avoids "tortifying" the criminal and regulatory law by imposing civil liability where there would not otherwise be any ...

**45**  Similarly, at para. 74, the Court said the limitation of liability to actionable civil wrongs "does not expand the type of conduct for which a defendant may be held liable but merely adds another plaintiff who may recover if intentionally harmed as a result of that conduct."

**46**  Pfizer emphasizes the Court's references to "actionable civil wrongs" and "common law principles." It argues that the tort is not available where the actionable wrong relied upon is purely statutory.

**47**  In *Apotex Inc. v. Merck & Co.,* [*2009 FCA 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FD4T-B0JK-00000-00&context=), the Federal Court of Appeal held that a claim under s. 8 of the regulations does not include an unjust enrichment claim for disgorgement of profits earned by the patent holder. The recoverable loss limited to "loss suffered by the second person by reason of the stay or the profits that it would have made during the period when it was prevented from going to market" (at para. 89). That judgment was specifically approved by the Ontario Superior Court of Justice in *Apotex Inc. v. Eli Lilly and Company*, [*2013 ONSC 5937*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFX1-DY33-B215-00000-00&context=), which referred to the regulations as "part of a complete statutory code governing patent law" at para. 6.

**48**  The last two cases stand only for the proposition that the damages recoverable by a generic manufacturer in an action under s. 8 are limited by the language of that section. They do not address a right of action by another party arising under the unlawful means tort.

**49**  I am not satisfied that the requirement in *Bram* that there be a "civil action" available to the third party necessarily excludes a purely statutory cause of action. The phrase "civil action" can be defined very broadly. *The Dictionary of Canadian Law*, 3rd ed. (Toronto: Carswell, 2004), defines it at 192 as "any type of action except criminal proceedings." *Black's Law Dictionary*, 9th ed. by Bryan Garner (St. Paul, MN: Thomson West, 2009) defines it at 34 as "an action brought to enforce, redress or protect a private or civil right; a noncriminal litigation"

**50**  The Supreme Court of Canada in *Bram* clearly did not intend to provide an exhaustive categorization of the actions available to third parties that may support a claim under the unlawful means tort. At para. 74, the Court explicitly said "details relating to the scope of what is 'actionable' may need to be worked out in the future."

**51**  *Bram* also makes clear, at para. 93, that the unlawful means tort does not require there to be an existing relationship between the plaintiff and the third party at the time of the defendant's wrongful act.

There need be no contract or even other formal dealings between the plaintiff and the third party so long as the defendant's conduct is unlawful and it intentionally harms the plaintiff's economic interests.

**52**  On the question of intention, which is a separate element of the tort, the Court at para. 95 set what may be a difficult standard for the plaintiff to meet.

It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

**53**  Pfizer argues that it was not intending to harm purchasers, but intending to protect its legitimate interest in the manner allowed by the applicable legislation. Pfizer's intention at the relevant time is a question of fact that cannot be resolved on this application. At this stage, it is sufficient that the plaintiff explicitly pleads that Pfizer intended to cause him and other Class Members economic harm.

**54**  In view of the low threshold that the plaintiff must meet on this application, I cannot say that he has failed to state a cause of action in interference with economic relations, or that his claim is "certain to fail."

**VIII. WAIVER OF TORT**

**55**  Para. 28 of the Notice of Civil Claim reads:

Further, or alternatively, the plaintiff waives the tort and pleads that he and the other Class Members are entitled to recover the unjust enrichment accruing to the defendants on restitutionary principles rather than their tort damages.

**56**  That pleading raises the controversial and still poorly-delineated concept of "waiver of tort." The short definition of the doctrine is that the plaintiff gives up the right to sue in tort and elects to base the claim in restitution. This allows the plaintiff to recover the benefits obtained by the wrongdoer, rather than damages measured by the plaintiff's loss (*Microsoft* at para. 93; *Koubi* at para. 16.)

**57**  The major controversy surrounding waiver of tort is whether it is an independent cause of action or only an alternate remedy. As the Court of Appeal said in *Koubi* at para. 18:

The significance of this distinction lies in the fact that, if waiver of tort is only remedial, the plaintiff must prove all elements of the underlying wrong, including loss, before it may elect to seek benefits in the hands of the defendant. If it is an independent cause of action, however, the plaintiff need only prove wrongful acquisition of a benefit by the defendant before claiming disgorgement of that benefit: Lord Goff of Chieveley and G. Jones, *The Law of Restitution,* 7th ed (London: Sweet & Maxwell, 2007), c. 36-001.

**58**  In *Microsoft*, the Supreme Court of Canada said the appeal before it (which also dealt with s. 4(1) of the *CPA*) was not "the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded" (at para. 97). The Court said it was not plain and obvious the claim would not succeed. However, the Court of Appeal was aware of and referred to *Microsoft* when it struck the waiver of tort claim in *Wakelam*.

**59**  I find that the general question of whether waiver or tort is an independent cause of action is one that does not need to be resolved in this case. Although it may or may not be an independent cause of action in some circumstances, as pleaded in this case it could only be an alternate remedy.

**60**  Whatever waiver of tort may be, it must be based on some identified wrongdoing. In *Aronowicz et al v. Emtwo Properties Inc. et al.* [*(2010), 98 O.R. (3d) 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22VM-00000-00&context=) (C.A.), the Ontario Court of Appeal said at para. 82:

Whether the claim exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing.

**61**  The wrongdoing alleged in this case a violation of or non-compliance with the *Patent Act* and the benefit Pfizer gained from that conduct. But, as said earlier, that wrongdoing only arose in the context of statute that creates the obligations and defines the wrongs. No rights related to patents, as such, exist at common law.

**62**  Pfizer is alleged to have abused or "gamed" the patent system by not complying with the disclosure requirements of the Act. Nothing in the statute creates a private law remedy for that conduct. Put another way, the statute does not make that conduct a wrong done to the plaintiff or anyone else, other than the authorities who were induced to issue the patent.

**63**  The legislation creates only one private right of action. That action arises not from the patent itself, but from a patent holder's application to prohibit issuance of an NOC for a generic version of the product and the automatic stay that accompanies the application. That is apparently what Notice of Civil Claim is referring to when it alleges that Pfizer used the patent to prevent the introduction of generic Sildenafil. Assuming Pfizer's conduct in bringing those ultimately unsuccessful proceedings can be characterized as wrongful, the statute defines and identifies the only parties who can claim to be victims of that wrongdoing.

**64**  In creating a patent system that provides no remedy for ultimate consumers of patented--even wrongly patented--products, Parliament in effect did not recognize any wrong that could be done to them in that system. There is therefore nothing for the plaintiff to "waive" except the entirely derivative or "parasitic" tort of interference with economic relations. If waiver of tort applies at all, it could only be as an alternative remedy for that tort.

**65**  But as an alternative remedy, waiver of tort is fundamentally inconsistent with the tort of interference with economic relations. Waiver of tort relieves the plaintiff of the need to prove loss, but such loss is an essential element of the tort.

**66**  Further, the plaintiff's ability to claim interference with economic relations rests entirely on the existence of the claim available to generic manufacturers under s. 8 of the NOC Regulations. That is an action for "loss suffered." It is analogous to a tort action in that the plaintiff must prove loss as an essential element of its cause of action and damages are assessed on the basis of that loss.

**67**  In *Apotex Inc. v. Merck & Co.*, [*2009 FCA 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FD4T-B0JK-00000-00&context=), the Federal Court of Appeal clearly stated that s. 8 leaves no room for restitutionary remedies. Similarly, Mr. Justice Quigley of the Ontario Superior Court of Justice held at para. 173 in *Apotex v. Abbott Laboratories Limited*, [*2013 ONSC 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFT1-FCYK-22SG-00000-00&context=), that s. 8 barred a generic manufacturer from seeking a common law restitutionary remedy in a provincial superior court.

Any equitable rights which might have operated but for the *NOC Regulations* cannot be relied upon because: (a) the statute establishes a scheme for compensation and, as such, common law rights are excluded; and, (b) with irresistible clearness, Parliament intended to eliminate any claim to unjust enrichment.

**68**  The tort of interference with economic relations expands potential liability beyond s. 8, but only in a limited way. The Court in *Bram* said at para. 45:

This rationale of the tort supports a narrow definition of "unlawful means": the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party.

**69**  And at para. 74:

Restricting unlawful means to acts that would give rise to civil liability to the third party (or would do so if the third party suffered loss from them) provides a coherent and rational basis for the development of the unlawful means tort. The limitation of unlawful means to actionable civil wrongs provides certainty and predictability in this area of the law, since it does not expand the types of conduct for which a defendant may be held liable but merely adds another plaintiff who may recover if intentionally harmed as a result of that conduct.

**70**  In limiting the tort to one that "merely adds another plaintiff who may recover if intentionally harmed," the Court was tying the claim firmly to the existing cause of action. In my view, that must include the measure or legal basis of the damages or compensation available in the existing cause of action.

**71**  While the loss suffered by an ultimate consumer of Viagra will obviously differ in amount from that suffered by a generic manufacturer, it must in my view be assessed with reference to the same basic principles. To allow a purely restitutionary claim as an alternative remedy would be to introduce compensation calculated on a completely different basis and possibly in a much greater amount. That would do more than simply add another plaintiff. It would widen the scope of potential liability far beyond the narrow one contemplated in *Bram*.

**72**  I therefore conclude that it is plain and obvious that a claim in waiver of tort cannot succeed in this case.

**IX. UNJUST ENRICHMENT**

**73**  The plaintiff claims that Pfizer is required to make restitution to him and other class members for the amount they were overcharged for Viagra or to disgorge that amount. This claim is based on the principle of unjust enrichment. Paragraphs 29-31 of the Notice of Civil Claim read:

The plaintiff and the other Class Members are entitled to recover from Pifzer under restitutionary principles arising out of both unjust enrichment and wrongful conduct in respect of the conduct described at paragraphs 16 to 22 above.

Pfizer has been unjustly enriched by the receipt of the Viagra overcharge. The plaintiff and the Class Members have suffered a deprivation in the amount of such Viagra overcharge. Since Pfizer was unjustly enriched as a result of its abuse of the patent system including the Patent Act, there can be no juridical reason justifying Pfizer's retaining any part of the Viagra Overcharge.

Further, or alternatively, Pfizer's receipt of the Viagra overcharge constitutes ill-gotten gains acquired because of abuse of the patent system and Pfizer may not in good conscience retain it.

**74**  The proposed Amended Statement of Claim adds the following sentence to para. 30:

Any contracts by which Pfizer received the Viagra overcharge are void because they are against public policy, illegal and based on a mutual mistake as to the validity of Pfizer's patent monopoly.

**75**  The well-established elements of unjust enrichment claim are: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. In *Pacific National Investments Ltd. v. Victoria,* [*2004 SCC 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12T-00000-00&context=), the Supreme Court of Canada said at para. 13:

The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of "'palm tree' justice" (*Peel (Regional Municipality) v. Canada*, [*[1992] 3 S.C.R. 762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6096-00000-00&context=), at p. 802) that varies with the temperament of the sitting judges. On the contrary, as the Court recently reaffirmed in *Garland v. Consumers' Gas Co.*, [*[2004] 1 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B111-00000-00&context=), [*2004 SCC 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B111-00000-00&context=), a court is to follow an established approach to unjust enrichment predicated on clearly defined principles. However, their application should not be mechanical. Iacobucci J. observed that "this is an equitable remedy that will necessarily involve discretion and questions of fairness" (para. 44).

**76**  There is no dispute about the fact the plaintiff has properly pleaded the first two elements of enrichment and deprivation. Those two elements are, in themselves, "morally neutral." It is the third element--the absence of juristic reason--that renders the enrichment "unjust" (*Pacific National* at para. 22.).

**77**  *Pacific National* also summarizes the two stage process for determining the issue of juristic reason, previously stated in *Garland v. Consumers' Gas Co.*, [*2004 SCC 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B111-00000-00&context=), cited in the authorities above, at paras. 23, 25:

The use of the expression "juristic reason" in this connection emphasizes that "unjust" is to be addressed as a matter of law and legal reasoning rather than a free-floating conscience that may risk being overly subjective; see L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 S.C.L.R. (2d) 211, at p. 219. This third step has to some extent been redefined and reformulated in *Garland, supra*, at paras. 44-46. There are now two stages to the juristic reason inquiry. At the first stage, a claimant (here the appellant) must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donative intent, and "other valid common law, equitable or statutory obligatio[n]" (*Garland*, at para. 44). The categories may be added to over time (para. 46). On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff (here the appellant) will have made out a *prima facie* case of unjust enrichment. ...

...

At the second stage, the onus shifts to the defendant (here the respondent City), who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. In the absence of a convincing rebuttal, the transfer of wealth will be reversed. According to *Garland*, it is at this stage that the court should have regard to the reasonable expectation of the parties and public policy considerations.

**78**  Because absence of juristic reason is an essential part of the cause of action, the plaintiff is put in the unusual position of having to prove a negative (*Pacific National* at para. 24). The Notice of Civil Claim and the proposed amended notice make two allegations that attempt to negate apparent juristic reasons.

**79**  The plaintiff pleads that Pfizer obtained its patent and sought to enforce it through intentional conduct that amounted to an abuse of the patent system. Pfizer argues that it was exercising its rights under the patent legislation. It applied for and received a patent. When a generic manufacturer sought to enter the market, Pfizer exercised its rights under the regulations to seek to prohibit the issuance of the NOC and trigger the statutory stay. Pfizer's position was upheld at two levels of court before finally being rejected by the Supreme Court of Canada.

**80**  The fact that the defendant was operating under statutory rights or authority will usually, but not necessarily, provide a juristic reason. For example, in *Garland*, the defendant billed its customers each month and charged a late payment penalty of five percent of the unpaid amount. Those charges were approved by the Ontario Energy Board under its statutory authority.

**81**  The Court found that, depending on when payment was made, the penalty amounted to an illegal rate of interest under the *Criminal Code*, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=). The board orders authorizing it were constitutionally inoperative to the extent they were in conflict with the criminal code.

**82**  That did not, in itself, conclude the matter because the defendant's reliance on the orders was relevant to determining the reasonable expectation of the parties in the second stage of the analysis. In the absence of actual or constructive notice that the board orders were invalid, the defendant's reliance on them provided a sufficient juristic reason. That changed when the action to recover the charges was commenced as described at paras. 59-60:

After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced.

**83**  The plaintiff's position in this case, as I understand it, is similar to *Garland* in that the plaintiff, while alleging the Viagra patent was void from its inception in 1998, only seeks restitution for the period beginning in 2006. That is when Teva sought to put its generic version on the market and Pfizer took steps to prevent it.

**84**  The question of whether Pfizer's reliance on the patent provides a juristic reason may involve a fact specific inquiry into Pfizer's knowledge and intention. When a patent holder relies on its patent in good faith and has no reason to expect that it will be declared invalid, a subsequent declaration of invalidity may not negate the juristic reason for enrichment. At the other extreme, one cannot imagine reliance on a patent being a sufficient juristic reason if the patent was obtained by fraud.

**85**  The plaintiff does not allege fraud, but he does allege that the patent was wrongfully obtained through knowing and deliberate non-disclosure, amounting to an abuse of the system. Depending on the evidence, that allegation may go to issues of reasonable expectation and public policy and may be sufficient to exclude the patent legislation as a sufficient juristic reason.

**86**  It is therefore not plain and obvious that the pleadings disclose no cause of action on that point.

**87**  I have come to a different conclusion on the plaintiff's second ground for alleging absence of juristic reason, which refers to the contracts by which Pfizer received the alleged overcharge.

**88**  The contracts in question would be the contracts between Pfizer and direct purchasers, such as distributors or pharmacies, from whom the alleged overcharge was presumably passed on to the plaintiff and other class members. The plaintiff has failed to show, as a matter of law, how such contracts could be against public policy, illegal or void for mutual mistake.

**89**  The plaintiff relies on *Microsoft* and on *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, [*2009 BCCA 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XB-00000-00&context=). In *Microsoft*, the plaintiff alleged that contracts between the defendants and direct purchasers were illegal because they violated U.S. antitrust laws and the *Competition Act*, as well as constituting a restraint of trade at common law. The Court held that those issues had to be resolved at trial. In *Tracy*, contracts were illegal under the *Criminal Code*.

**90**  The plaintiff in this case has not alleged any statutory or other basis for the illegality of the contracts. He provides no authority for the proposition that a contract for sale of a legal product, the price of which is not subject to any direct regulation or restriction, is illegal merely because the price charged could or should have been lower.

**91**  As for mistake, the plaintiff relies on *Pacific National*. In that case, a contract between a developer and the city required the developer to construct certain improvements, in exchange for the city agreeing to rezone the property to accommodate the development. However, the city later downzoned the property in a way that prevented part of the development, but sought to retain the benefit of the improvements that had been provided.

**92**  The Court found that the city did not have the statutory authority to demand the improvements provided for in the contract. On the issue of common mistake, the court said the parties contracted under a mistake of law as to the enforceability of their agreement (at para. 39).

**93**  Although the statement of claim refers to mutual mistake, the plaintiff's pleading actually alleges facts suggesting common mistake. The difference was explained by the Alberta Court of Appeal in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, [*[2004] 1 W.W.R. 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-FG68-G567-00000-00&context=) at para. 12:

Common mistake occurs when the parties make the same mistake. For example, one party contracts to sell a vase to another when unbeknown to both, the vase was destroyed and no longer exists. Mutual mistake occurs when both parties are mistaken, but their mistakes are different. In this event, the parties misunderstand each other and are, to use the vernacular, "not on the same page".

**94**  The allegation here is a common mistake by buyer and seller as to the validity of the patent. It is difficult to understand how the plaintiff can allege common mistake when the essence of its claim is that Pfizer, the seller under the contracts, knew or ought to have known the patent was invalid.

**95**  More important, the doctrine of common mistake requires that the mistaken fact be fundamental to the agreement between the parties, in that it constitutes the underlying assumption on which the entire contract was based: *Munro v. Munro Estate* [*(1995), 4 B.C.L.R. (3d) 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2FT-00000-00&context=) at para. 14 (C.A.).

**96**  The contracts at issue were contracts for sale of a drug that had a specific intended and approved purpose and an anticipated physical benefit to its ultimate users. The existence and presumed validity of the patent may have affected the price, but the plaintiff has pleaded no facts to suggest the price was the fundamental fact on which the contracts were based. As Pfizer argues, there is no allegation that the plaintiff, other class members or the intermediate purchasers who were parties to the contracts would have refused to pay the price demanded if they had known the patent was possibly invalid.

**97**  For those reasons, I find that to the extent the plaintiff relies on alleged abuse of the patent system, the pleadings disclose a cause of action in unjust enrichment. They do not disclose a cause of action to extent they rely on issues relating to the contracts to which Pfizer was a party.

**X. SUMMARY AND CONCLUSION**

**98**  For the purpose of certification under s. 4(1)(a) of the *CPA*, the pleadings disclose a cause of action in intentional interference with economic relations.

**99**  The pleadings also disclose a cause of action in unjust enrichment to the extent the plaintiff alleges that the existence of Patent '446 and Pfizer's reliance on procedures under the *Patent Act* and regulations cannot constitute a juristic reason for the alleged enrichment. The additional ground alleged in the proposed amendment to para. 30 the Notice of Civil Claim does not disclose a cause of action.

**100**  The pleadings do not disclose a cause of action or alternate remedy based on waiver of tort.

**101**  By agreement of the parties, the remaining requirements for certification in s. 4(1) will be addressed at a further hearing.

N.H. SMITH J.

**End of Document**

[***Midgley v. Nguyen, [2013] I.L.R. para. M-2683***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1GX-00000-00&context=)

Canadian Insurance Law Reporter Cases

British Columbia Supreme Court

Before: Dardi J

Decision: April 22, 2013.

Docket No. M115224

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2010s* > *2013***

**[2013] I.L.R. para. M-2683** | [*[2013] B.C.J. No. 805*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-206B-00000-00&context=) | [*2013 BCSC 693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-206B-00000-00&context=)

Scott Midgley Plaintiff v. Tan Hai Nguyen and Tan Trung Nguyen Defendants

**Case Summary**

**Tort, motor vehicle — Causation — Personal injury damages — No damage occurred to plaintiff's vehicle when it was rear-ended by defendants' vehicle in 2004 — In 2011, plaintiff was diagnosed with torn labrum in his right hip — Plaintiff also alleged ongoing issue from a lumbar spine injury, chronic pain disorder, depression, and anxiety, all as result of accident - - Court accepted medical evidence that plaintiff currently suffered from conditions as alleged — Court found plaintiff did sustain injuries in accident despite undamaged vehicle — Court accepted plaintiff had no significant symptoms pre-accident — Court noted danger of applying temporal reasoning in determining legal causation, but found with timeline of events in context of all evidence, inference of causation was strong — Plaintiff met "but for" test — Court awarded non-pecuniary damages of $110,000.**

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| **Facts:** The plaintiff alleged he was injured in a motor vehicle accident. The defendants admitted liability but disputed the claim for personal injury damages. There was no damage to the plaintiff's vehicle when it was rear-ended by the defendants' vehicle. The accident occurred in 2004. In 2011, the plaintiff was diagnosed with a torn labrum in his right hip; he claimed this injury was sustained in the accident. He also alleged an ongoing issue from a lumbar spine injury, chronic pain disorder, depression, and anxiety as a result of the accident. The issue before the Court was whether there was a causal connection between the accident and the plaintiff's current complaints.  HELD: The action was allowed.  The Court accepted that the plaintiff continued to suffer from chronic pain, anxiety, and depression. It found that the plaintiff was a "grin and bear it" type of individual, and accepted that he had changed considerably since the accident. On the issue of causation, the Court found that the plaintiff did sustain injuries in the accident, despite his undamaged vehicle. The Court accepted the plaintiff had no significant symptoms prior to the accident. Noting the danger of applying temporal reasoning in determining legal causation, the Court nevertheless found that with the plaintiff's timeline of events in the context of all the evidence, an inference of causation was compelling. The Court concluded that the plaintiff had met the "but for" test. The Court found similarly with respect to the plaintiff's psychological injuries. It awarded non-pecuniary damages of $110,000 and approximately $532,000 for loss of income, both past and future. |

**Counsel**

D. Osborne for the plaintiff; J. Lindsay, QC, D.M. Jeffrey, and P. Tung for the defendants.

**Reasons for Judgment**

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| **D.J. DARDI J.** |

**INTRODUCTION**

**1**  The plaintiff, Scott Midgley, alleges he was injured in a motor vehicle accident on March 26, 2004 (the "2004 Accident"). The defendants have admitted liability for the 2004 Accident. At issue in this action is the assessment of Mr. Midgley's claim for damages.

**2**  The defendant, Mr. Tan Nguyen, hit the rear end of the motor vehicle driven by Mr. Midgley. While there is an allegation that the defendants' vehicle sustained some damage, it is uncontroversial that there was no damage to Mr. Midgley's vehicle.

**3**  In 2011, Mr. Midgley was diagnosed with a torn labrum in his right hip, which injury he alleges he sustained in the 2004 Accident. He also alleges that, as a result of the 2004 Accident, he continues to suffer from a lumbar spine injury, chronic pain disorder, depression and anxiety. The principal controversy is whether there is a causal connection between the 2004 Accident and Mr. Midgley's current complaints. The primary contention of the defendants is that Mr. Midgley has failed to prove his case; their submissions are anchored in an attack on Mr. Midgley's credibility.

**4**  This case, which was heard over 27 days, was hard fought on all fronts. The parties are far apart in the various heads of damages, including non-pecuniary damages, loss of past and future earning capacity, cost of future care and special damages.

**5**  Mr. Midgley sustained personal injuries in a subsequent motor vehicle accident on October 10, 2006 (the "2006 Accident"). In this action, Mr. Midgley is not seeking damages in relation to the 2006 Accident; his lawsuit in relation to that accident settled prior to the commencement of this trial. Mr. Midgley takes no issue with the defendants' submission that the injuries he sustained in the 2006 Accident are indivisible and that the appropriate manner to assess damages in this action is to assess damages globally and to deduct any settlement arising from the 2006 Accident from any damage award: *Ashcroft v. Dhaliwal*, [*2008 BCCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M3DN-00000-00&context=); *Bradley v. Groves,* [*2010 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20X0-00000-00&context=).

**6**  The complexity of this case was compounded by the fact that witnesses were recalling material events more than seven years after those events occurred.

**7**  Before addressing the damages analysis, I turn to the facts established on the evidence. I will address the facts in the following order:

1. General Background;
2. Preliminary Comments on Mr. Midgley's Evidence;
3. The 2004 Accident;
4. Mr. Midgley's Return to Work at Weyerhaeuser after the 2004 Accident;
5. The 2006 Accident;
6. The 2006 Accident to Date of Trial;
7. Expert Medical Evidence;
8. Conclusions on Mr. Midgley's Condition.

My findings on these matters will then guide the determination of Mr. Midgley's damages.

**FACTS**

**General Background**

**8**  Mr. Midgley lives in Rosedale, British Columbia, with his wife, Maxine Midgley. Mr. Midgley is currently operating a gym in Chilliwack, but at the time of the 2004 Accident he was employed as a mill worker at the Trus Joist Weyerhaeuser plant on Annacis Island, B.C. ("Weyerhaeuser").

**9**  As a teenager, Mr. Midgley became very accomplished in martial arts; he became a professional kickboxer at age 17. He rose to become world-ranked in that field and when he retired at the age of 21, he was ranked fourth in the world in his category. He was named athlete of the year in Chilliwack in 1986.

**10**  Mr. Midgley worked throughout his high school years. After completing high school, he was employed in a variety of jobs, including in the bakery department of a grocery store and as a security doorman for a Chilliwack businessman, Mr. Yates, who had been a supporter of his kickboxing career. In 1987, Mr. Midgley obtained his certification for underwater welding, but other than performing demonstrations at Expo 86, he never obtained any employment in that field. In approximately 1988, Mr. Midgley moved to Calgary where he worked in various capacities, including at a grocery store, as a deliveryman and as an entry-level office worker for an oil company. He also took some night school post-secondary courses in pipe-design at a vocational institute in Alberta.

**11**  In 1988, he was in a motor vehicle accident in Calgary, in which he sustained an injury to his left shoulder. He recovered from his injuries, although his shoulder injury continues to be aggravated intermittently by certain activities such as shoulder-checking when he is driving.

**12**  In 1993, Mr. Midgley returned to Chilliwack. For approximately four years he worked as a sprinkler system installer, which was very physically demanding work. From approximately 1993 to 1996, Mr. Midgley seriously pursued body-building but he ultimately decided to quit that pursuit. While he was pursuing body-building, for a two-year period, he took steroids under the supervision of his doctor. From 1997 to 2001, he worked in various sales positions and pursued various entrepreneurial ventures, all of which eventually failed.

**13**  On June 1, 2001, Mr. Midgley began to work as a mill worker with Weyerhaeuser. The company manufactures multi-strand wooden polymeric structure elements for use in residential and industrial construction.

**14**  At Weyerhaeuser, prior to the 2004 Accident, Mr. Midgley worked 12-hour shifts, four days per week, as a green end/veneer operator. In the almost three years he worked at Weyerhaeuser, prior to the 2004 Accident, Mr. Midgley never missed a shift.

**15**  Prior to the 2004 Accident, Mr. Midgley was very physically active and pursued various sporting activities with his wife, such as baseball, golf, skiing and water sports. He took great pride in maintaining his physical fitness and regularly attended the gym. He enjoyed a happy marriage and an active social life. The evidence shows that he was an outgoing and gregarious individual who had a positive outlook on life.

**Preliminary Comments on Mr. Midgley's Evidence**

**16**  The defence provided extensive submissions regarding Mr. Midgley's credibility.

**17**  While initially suggesting that Mr. Midgley was "less than careful when giving evidence under oath", in final submissions, the defendants urged this Court to find that Mr. Midgley fabricated aspects of his evidence. They allege a multitude of inconsistencies in the way Mr. Midgley described the 2004 Accident, his kickboxing instruction, his income, and his return to work at Weyerhaeuser after the 2004 Accident. According to the defendants, Mr. Midgley's testimony "largely depends on what he was asked and what information he was trying to convey".

**18**  Mr. Midgley's counsel, *contra*, says that Mr. Midgley was a sincere witness, who genuinely tried to provide accurate testimony. He emphasized that Mr. Midgley's evidence was supported by the credible testimony of other witnesses. Mr. Midgley strenuously asserts that the accusations made by the defence that he engaged in fabrication and enlisted others to do so, was without foundation.

**19**  The assessment of Mr. Midgley's credibility and reliability is key in determining the causation of his injuries and the nature and severity of those injuries. This assessment is also critical to the weight to be given to the various medical opinions to the extent that they are predicated upon Mr. Midgley's reporting of material facts.

**20**  The court summarized the factors to be considered in the assessment of credibility in *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) at para. 186, aff'd [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=):

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* [*(1926), 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont. H.C.); *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Faryna*]; R. v. S.(R.D.), [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

**21**  When a plaintiff is accused of deliberate deceit, more than mere speculation and innuendo is required. As the court aptly observed in *Hardychuk v. Johnstone*, [*2012 BCSC 1359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2PF-00000-00&context=) at para. 9, "[a] charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made". Moreover, fairness requires that a plaintiff be afforded an opportunity to address the allegations upon which the attack on his or her credibility is based: *Browne v. Dunn* (1893) 6 R. 67 (U.K.H.L.); *Hardychuk* at para. 11; *Gill Tech Framing Ltd. v. Gill*, [*2012 BCSC 1913*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X334-00000-00&context=) at paras. 31-33. While this principle has been described in the jurisprudence as a "sound principle of general application", it is not an absolute rule. Ultimately, the extent of its application is "within the discretion of the trial judge after taking into account all of the circumstances of the case": *R. v. Lyttle*, [*2004 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B109-00000-00&context=) at para. 65.

**22**  I will endeavour to outline below some aspects of Mr. Midgley's evidence which were highlighted by the defence, but I do not propose to address each of the alleged deficiencies of Mr. Midgley's evidence. I will address what I have found to be the most pertinent allegations in my reasons in the context in which they arise.

**23**  Mr. Midgley testified that he served as an auxiliary officer with the RCMP in Chilliwack and that he was invited to attend "depot". He testified that he wore a uniform and carried a gun. The defence asserts that this evidence is "incredible and not believable". However, the defence did not call any evidence to refute Mr. Midgley's testimony. I am not persuaded that this Court can take judicial notice of the fact Mr. Midgley would not have been permitted to carry a gun in 1988, when he says he served as an auxiliary RCMP officer. The defence also says that Mr. Midgley's testimony that he received papers to attend "depot" in Ottawa was untrue because the RCMP "depot' is not located in Ottawa. However, Mr. Midgley's evidence was that depot was "in Ottawa or back east".

**24**  I do not find that Mr. Midgley's description of the hiring process and the physical demands of his Weyerhaeuser job was an exaggeration, as is alleged by the defence. In fact, Mr. Bill Paul, the human resources manager at Weyerhaeuser, confirmed that Mr. Midgley's description of the competitive hiring process was accurate.

**25**  The defendants submit that Mr. Midgley's evidence regarding his kickboxing instruction is not reliable, cannot support his claim, and dramatically changes. Mr. Midgley testified that he has given private lessons periodically, to both children and adults, from the time he first became an accomplished kick-boxer. In cross-examination, he clarified that he "seriously began teaching after the Accident", when he started teaching and training out of his garage in Chilliwack. However, because of his injuries, it became too painful for him to demonstrate his kicks and he eventually had to shut down that operation. He was forthright in acknowledging that he was unsure of the time frame in which he eventually ceased his kickboxing instruction. I note that he readily acknowledged that he continued providing instruction in weight-lifting and personal training after he ceased his kickboxing instruction.

**26**  After the 2004 Accident Mr. Midgley sustained an injury to his left foot while trying to demonstrate a "round kick". The defendants suggest that Mr. Midgley's ability to demonstrate a kick confirms that he was continuing to kick box and "likely able to pivot on his right leg or support himself on his right leg while striking with his left leg at the level of an adult's elbow". Mr. Midgley was not cross-examined on this incident. The evidence does not show the circumstances in which Mr. Midgley sustained this injury, including on whom Mr. Midgley was performing his kicks - adult or child - nor whether this particular activity afterwards caused Mr. Midgley pain in his hip and back.

**27**  I accept Mr. Midgley's evidence that after the 2004 Accident, he tried to work through what he genuinely believed was a soft tissue injury from which he would recover. Sometime later, he came to the realization that certain activities were causing him severe pain and he came to terms with the reality of his limitations, including how those limitations related to instructing and demonstrating kickboxing.

**28**  In assessing the plausibility of Mr. Midgley's evidence, I have kept in mind that as a former professional athlete, he is a "grin and bear it" type of individual. In a kickboxing match, after sustaining a compound fracture to his jaw in the first round, Mr. Midgley continued to fight a further six rounds. In my view, this demonstrates his capacity for enduring considerable physical pain.

**29**  The defence points out what they allege is an inconsistency in Mr. Midgley's evidence regarding his description of his training of various individuals in kickboxing. I am not persuaded that Mr. Midgley's evidence regarding his kickboxing "speciality" was inconsistent. It was apparent from his testimony that his speciality in teaching differed in some aspects from the type of martial arts he competed in. In my view, defence counsel has misconstrued his evidence on this point. In any case, any discrepancy in Mr. Midgley's evidence regarding his speciality in kickboxing is of no moment.

**30**  The defence spent considerable time in cross-examination reviewing Mr. Midgley's tax returns, starting from 2001. He readily acknowledged that he could not recall the details of his income and expenses. Mr. Midgley stated in cross-examination that he had not reviewed these income tax returns for several years. I have also considered that Mr. Midgley did not prepare his own income tax returns; he relied upon his accountant - to whom he provided the pertinent information - to prepare the returns. I cannot conclude that Mr. Midgley's imprecise memory in recalling his income and expenses from several years earlier was a deliberate attempt to mislead the court on his activities or income, either prior to or after the 2004 Accident. It is more likely that he was genuinely mistaken.

**31**  On a related point, it clearly emerged on Mr. Midgley's cross-examination that his estimates of his earnings from his kickboxing instruction before the 2004 Accident were inaccurate or his stated income and related expenses were not accurately reflected on his income tax returns. If Mr. Midgley failed to accurately report his income from kickboxing or any other income or inaccurately claimed expenses on his income tax returns, he cannot be excused. However, I am not persuaded that any failure on his part in this regard diminishes the credibility of his evidence on the central issues at trial.

**32**  The defence also points out that Mr. Midgley gave inconsistent evidence regarding his ability to "work out" in the gym following the 2004 Accident.

**33**  Mr. Midgley testified regarding the importance to him, prior to the 2004 Accident, of exercising and maintaining an active lifestyle. He had worked out regularly since he was 14 years old and derived considerable enjoyment and positive emotional benefit from maintaining a high level of physical fitness.

**34**  In his examination in chief, Mr. Midgley testified that there was a period - "a good year plus" - after the 2004 Accident, that he was not able "to work out". The defence points out that his entries in his pain diary, which were admitted by agreement at trial, show that in fact he attended the gym on a few occasions in 2004 and then on a more regular basis in February through May 2005, prior to his graduated return to work in June 2005.

**35**  On cross-examination, Mr. Midgley explained that his doctor had recommended that he attend the gym for rehabilitation purposes, in order to attempt to return to work. The preponderance of the evidence supports a finding that his attendances at the gym were focused on rehabilitation efforts and did not constitute the strenuous "work-outs" he routinely performed prior to the 2004 Accident. The fact that he had a faulty recall of precisely when he may have attended the gym for this purpose some seven years earlier does not undermine his credibility. Nor do I find the fact that he was providing personal training and weight-lifting instruction after the 2004 Accident inconsistent with his evidence on his physical limitations.

**36**  The defence points out that Mr. Midgley went on a motorcycle trip to the Kootenays with his friends in 2010 and has taken vacations with his wife since the 2004 Accident. During the motorcycle trip, Mr. Midgley stopped frequently to rest and, because of his pain symptoms, left his friends to go home early. His wife corroborated that he can only ride his motorcycle for short periods of time. In any case, there is no medical evidence that a person with his injuries would be incapable of either the motorcycle trip or the vacations. The court was left with the impression that Mr. Midgley suffered through pain and discomfort during his vacations with his wife, in order to avoid any further strain on his marriage.

**37**  I found it troubling that Mr. Midgley admitted telling his family physician, Dr. Klassen, that he was well enough to try to return to his regular duties at Weyerhaeuser, when in fact he was not. However, the fact that Mr. Midgley told his doctor this does not cause me to disbelieve his evidence at trial. At the time, Mr. Midgley may have convinced himself that he would be able to resume work and he clearly made this representation in a determined effort to keep his job at Weyerhaeuser.

**38**  During his testimony, Mr. Midgley sometimes struggled to maintain his train of thought and remain focused. On occasion, he had faulty recall or only partial recall of dates and specific events. On the other hand, he was forthright when he could not remember details about any particular matter and he readily acknowledged when he was mistaken. Given that he was being asked to recall matters over a time frame of many years, his mistakes in the chronological order of events did not cause me to generally disbelieve him. I am not persuaded Mr. Midgley engaged in any deliberate attempts to be misleading. Overall, he left the court with the impression that he was genuinely attempting to answer questions truthfully and endeavouring to provide a forthright account of pertinent events.

**39**  In the final analysis, despite the frailty of some aspects of Mr. Midgley's testimony, I conclude, on the evidence as a whole, that Mr. Midgley's general credibility under oath on key matters was not successfully impugned. His evidence was largely consistent with the testimony of the non-party lay witnesses. On some points Mr. Midgley was not given an opportunity to address the allegations upon which the attack on his credibility was based. I found some of the criticism of his evidence levelled by the defence unpersuasive. While I find that there were shortcomings and inconsistencies in Mr. Midgley's evidence, I am not persuaded that they were particularly significant in the context of the evidence as a whole.

**The 2004 Accident**

**40**  On March 26, 2004, Mr. Midgley, while driving his subcompact vehicle to work at the Weyerhaeuser mill, was rear-ended by a full-size sports utility vehicle operated by the defendant, Mr. Nguyen. Mr. Midgley was wearing a seatbelt. Mr. Midgley's vehicle did not sustain any damage in the collision.

**41**  There is a conflict on the evidence as to whether the defendants' vehicle sustained any damage in the collision. Mr. Nguyen maintains that there was no damage to the vehicle. In contrast, Mr. Midgley says he observed "black plastic pieces" on the roadway, in front of the defendants' vehicle and damage to the front bumper of that vehicle. There was no opinion evidence tendered at trial that the force of the impact in this case could not have produced the injury alleged by Mr. Midgley. In absence of such evidence, it is not necessary for me to make a finding as to the extent of the damage, if any, to the defendants' vehicle.

**42**  Mr. Midgley's body position at the time of impact is the subject of considerable controversy. The defence forcefully asserts that Mr. Midgley has fabricated his evidence on this point.

**43**  Mr. Midgley testified that at the moment of impact, he had loosened his seat belt with his left hand and was leaning forward to the right to retrieve his water bottle on the passenger's side of his vehicle. His water bottle had slid off the front passenger's seat as he stopped for an amber traffic control light at the intersection. He stated that the impact knocked his baseball hat off his head. He sat back up and pulled his car over to the side of the road. When he got out of his car, he realized that he was in shock and that "there was something wrong"; he felt pain down to his knees and it was painful for him to walk.

**44**  It is uncontroversial that, after the collision, Mr. Midgley exchanged information with Mr. Nguyen. He immediately proceeded to attend the emergency department at Surrey Memorial Hospital. He was discharged after being assessed and given a prescription for pain medication. The next day, he described his hips and lower back "aching like a toothache".

**45**  Mr. Midgley was thoroughly cross-examined on the statement prepared by an ICBC employee on April 5, 2004, regarding the 2004 Accident ("the Statement"), as well as on a diary entry he prepared shortly after the 2004 Accident .The Statement was admitted by agreement.

**46**  The defence forcefully asserts that there are significant inconsistencies between the Statement he gave shortly following the 2004 Accident and his evidence in trial. For the reasons that follow, I do not agree.

**47**  Prior to impact, Mr. Midgley testified that he had been talking to his wife on his cell phone. He says he was holding the cell phone and releasing his seatbelt at the same time. The defence points out that, in the Statement, he states that he was holding his cell phone in his right hand and at trial he stated that he was holding it in his left hand. I find that nothing turns on this discrepancy.

**48**  The defendants also say there is a significant discrepancy between his Statement and his evidence in trial, in that the Statement refers to him travelling at 10 to 15 kph and that he was slowing down for a yellow light when he was hit. At trial, Mr. Midgley maintains that he was stopped. Notably, this accords with the defendant, Mr. Nguyen's testimony at trial. In any case, this is not a discrepancy to which I attach any weight.

**49**  The defence points out that his Statement did not refer to his body position at the time of impact. He maintained that when he provided the Statement it did not occur to him that his body position was a relevant detail. I found his explanation entirely plausible.

**50**  In cross-examination, Mr. Midgley was referred to and adopted the portion of the Statement in which he stated that "as soon as I went to get out of the car, I felt like I was twisted. My mid-back and lower hips were sore." I also note the fact that his hat dropped off his head is consistent with him leaning over to the right at the time of impact.

**51**  I cannot conclude that the hand-written entry in his diary that Mr. Midgley prepared shortly after the 2004 Accident reveals any inconsistencies that are significant in the context of the evidence a whole. That entry states in part:

I was hit and screamed probably because I didn't know what was happening. I pulled over onto King George HWY. I found myself stumbling around to organize things on the front seat, water bottle was now on the floor, lunch, nuts, hat, was knocked off my head to the floor. ...

**52**  I do not find Mr. Midgley's testimony, that he was reaching for the water bottle at the time of impact, inconsistent with his notation that, after the impact, the water bottle was in fact on the floor.

**53**  I reject the defence contention that Mr. Midgley fabricated his evidence regarding his body position, after he was told in January 2005 that a CT scan had revealed a mild protrusion on his left lumbar spine. According to the defence, he viewed this scan as "his ticket".

**54**  On my review of the medical records, the first time Mr. Midgley reported his body position to a health care professional was on July 25, 2005. In the assessment form for the Fraser Valley Physiotherapy and Rehabilitation Centre Ltd., he reported that he was rear-ended in "odd position (slammed on brakes), 1 hand on wheel, 1 hand reaching for H2O bottle." Notably, the first medical-legal report that refers to any causal link between his body position and the injuries he sustained in the 2004 Accident is that of Dr. O'Connor, which was not prepared until 2011.

**55**  Mr. Midgley struck me as a somewhat unsophisticated individual, who lacked sufficient guile in 2005, before he received any medical opinion of a causal connection between his body position and his injury, to fabricate his evidence regarding his body position.

**56**  In short, I accept Mr. Midgley's evidence that he was bent forward and twisted to the right, reaching to the passenger's side when his vehicle was struck from behind. In reaching this conclusion, I have considered the entire body of evidence and, in my view, it best harmonizes with the probabilities of this case.

**Mr. Midgley's Return to Work at Weyerhaeuser after the 2004 Accident**

**57**  There was considerable trial time spent on Mr. Midgley's return to work at Weyerhaeuser after the 2004 Accident.

**58**  Prior to the 2004 Accident, Mr. Midgley worked at Weyerhaeuser as a "green end/veneer dryer" operator. He worked 12-hour shifts four days on/four days off with two-day shifts per week. Mr. Midgley worked on what is typically described as the "green end" or "green chain" on a variety of machines. His job entailed feeding and unloading sheets of eight-foot veneer sheets from the dryer machine. When working on "the dryer infeed", he shifted the veneer from a conveyer onto the dryer belt. On the "dryer outfeed", he removed the dried veneer off the belt and placed it on a cart. Once the veneer cart was loaded it would have weighed approximately 1,500 pounds. He then pushed the loaded cart into position for pick-up by a forklift. Several times per shift, Mr. Midgley was also required to clear jams in the dryer outfeed machines. He also performed regular maintenance work in the mill as was required.

**59**  The work on an assembly line as a dry-operator was repetitive and machine-paced and required long hours of standing, twisting and turning, lifting, stooping, as well as occasional heavy maintenance work. The evidence as a whole, including that of Mr. Roger Williams, Mr. Ryan Simonson, and the job function analysis commissioned by Weyerhaeuser, supports a finding that the work was physically demanding. To the extent that the defence asserted otherwise, I reject those submissions.

**60**  Although the evidence was confusing on this point, on balance, the evidence shows that after the 2004 Accident, Mr. Midgley took approximately three weeks off work, including a week of previously scheduled vacation time. Mr. Paul confirmed that the initial period after the 2004 Accident was recorded as short-term disability (up until April 12, 2004) and thereafter, Mr. Midgley took his scheduled vacation.

**61**  The central dispute is whether in April 2004, Mr. Midgley returned to working his regular shift on the green chain on a sustained basis. This is a pivotal issue in this lawsuit, because of Mr. Midgley's reports to the various health care professionals who assessed him that he was not able to return to his "regular job" after the 2004 Accident.

**62**  Mr. Midgley maintains that in May 2004, shortly after he returned to Weyerhaeuser, he was chosen to be the summer relief worker in the remanufacturing department at Weyerhaeuser. The regular crew members in the remanufacturing department vote as to who they would like to elect to be temporary holiday replacement workers, primarily based on what they perceive to be a worker's compatibility with the "reman" team. The various witnesses who testified referred to the work in the remanufacturing department as "reman" and therefore, for convenience, I will refer to it as "reman" in these reasons. It is not disputed that this work, which involved packaging the finished work product, was considerably lighter work than the green chain work that Mr. Midgley had performed prior to the 2004 Accident.

**63**  Mr. Midgley explained that, although he was assigned to "reman" for summer relief, he nonetheless reported first to the green chain on each shift before he would be called to reman. He stated that during the time he was temporarily assigned to reman, he would perform relief work on the green chain for 25 minutes, up to three times per day. He says that during the pertinent period, he may have done the "odd shift" at the green chain but that he never did a full four-day rotation. In October 2004, when he was required to return to his regular shift rotation on the green chain, he could not perform those duties on a sustained basis.

**64**  In October-November 2004, Mr. Midgley attended the mill and performed light or restricted duties for some period of time. However, he found that attendance at the mill aggravated his injuries and he discontinued working. He attempted a graduated return to work in September-October 2005, which was unsuccessful. His last day of work at Weyerhaeuser was October 26, 2005.

**65**  The defendants say that Mr. Midgley fabricated his evidence about his return to work. They rely on the Weyerhaeuser time cards and assert that when Mr. Midgley returned to work in 2004, he continued to work at his regular on-call job, on the shifts assigned to him, in the areas that were assigned to him, without accommodation, until October 21, 2004. They strenuously argue that he was never assigned to "reman" as he alleges, but rather that he continued to work his regular rotations on the green chain. They do not dispute that, from time to time, he would be moved to the reman area and that the time cards may not accurately reflect each and every time that happened.

**66**  Mr. Paul, who is the human resources manager at Weyerhaeuser, was called by the defence. He acknowledged in cross-examination that when completing pertinent documentation he indicated that Mr. Midgley's condition appeared to first affect his work in April 2004, within days of the 2004 Accident. He also confirmed that, as a result of his condition, Mr. Midgley's performance on the job changed and, for some period of time, he was temporarily assigned to light duties. Mr. Paul confirmed that green chain workers routinely perform vacation relief work in the reman department and that, in particular, in 2004, Mr. Midgley provided vacation relief in the reman department.

**67**  I turn to address the Weyerhaeuser time cards which were produced after Mr. Midgley was examined for discovery. According to Mr. Paul, the time cards were produced by the time card entry system for hourly production workers. This information generated the payroll for the production workers. The hours were entered by the associates and approved by the supervisors.

**68**  Mr. Paul testified regarding the different coding for the reman department and the green end. Insofar as the reliability of the department coding, Mr. Paul explained that "any time entry system is subject to errors". According to Mr. Paul, it was more probable that Mr. Midgley's work in a pertinent period was coded incorrectly in the green end, when he was actually working in the reman department than "vice versa." This was because the green end was Mr. Midgley's regular assignment and changing it would require someone to manually amend the department coding. The tenor of Mr. Paul's evidence was that, although it was the associate's responsibility to enter the correct hours into the correct department and the supervisor's responsibility to approve an accurate time card, there was clearly room for error in the time card entries.

**69**  In cross-examination, Mr. Paul candidly acknowledged that there were "glitches" in the payroll system that had been installed shortly before the 2004 Accident. He further clarified that any issues would have been compounded by the fact that the system called upon the various supervisors and associates to actually specify or itemize which department they were working in on any given day.

**70**  The defence also called Mr. Duane Postles, who is currently the safety manager with Weyerhaeuser. Prior to being promoted to safety manager, he was a shift supervisor. He was Mr. Midgley's shift supervisor when Mr. Midgley had worked "on call" and periodically rotated through his shift. I note parenthetically that Mr. Postles acknowledged in cross-examination that prior to the 2004 Accident, Mr. Midgley was well-liked and a highly capable worker with a good attitude. He also described Mr. Midgley as very dynamic, driven and reliable. Mr. Postles has no recollection of working with Mr. Midgley in October 2004, when Mr. Midgley was assigned to his shift.

**71**  In cross-examination, Mr. Postles admitted that, although the time cards and shift lists suggest that Mr. Midgley was working on the green chain after the 2004 Accident, it was "quite possible" he was in fact working doing summer relief in the reman department during that time.

**72**  On the totality of the evidence, I cannot conclude that either the time cards or the shift list roster are determinative of whether Mr. Midgley was assigned as a holiday relief worker "in the reman department" after the 2004 Accident. I note that the shift list dated June 17, 2004, has a "VR" placed next to Mr. Midgley's name. It can reasonably be inferred that this refers to Vacation Replacement or Vacation Relief.

**73**  Contrary to the defence assertions, the evidence falls short of establishing that the fact that Mr. Midgley worked some night shifts and performed some overtime in this period, is inconsistent with him having been assigned summer relief work in the reman department.

**74**  In assessing the evidence on this point, it is important to appreciate that Mr. Midgley was recalling his work schedule in 2004, some seven and a half years prior to trial. As a general observation, Mr. Midgley was clearly confused at certain points with respect to the time frames in which he was on a graduated return to work program, working light duties, or when he was performing his duties on a regular shift. He candidly admitted when he could not recall dates and time frames. Moreover, when a document showed that he had been inaccurate in his recollection as to specific dates or time frames, he readily acknowledged any inaccuracies in his testimony.

**75**  Initially in his evidence, Mr. Midgley testified that he had been posted on a regular shift in the spring of 2004, but a review of his employment record shows that he was not placed on shift on any permanent basis until October 19, 2004. I find that Mr. Midgley was genuinely mistaken as to when he was permanently placed on shift. This is not surprising, as it was established through the evidence of Mr. Paul and Mr. Postles that Mr. Midgley in fact, by June 1, 2004, had been placed on "shift 2" temporarily, to replace another shift member who was on leave. Mr. Midgley worked on that shift through to October 2004.

**76**  During cross-examination, Mr. Midgley was also referred to his "pain diary". Some of the pain diary entries clearly refer to "at work" or "back to work". The defendants contend that if Mr. Midgley had not been working on the green chain through the summer of 2004, he would have recorded that in his diary. According to Mr. Midgley, when he made those notations, his reference to "work" meant attending at the Weyerhaeuser mill. I found his explanation plausible.

**77**  Mr. Midgley steadfastly maintained in cross-examination that after the 2004 Accident, he did not resume working regular rotations on the green chain on any sustained basis. In cross-examination, Mr. Midgley testified as follows as to what he meant when he explained his return to "work" to the various health care professionals who assessed him:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Do you acknowledge that you did not tell any of the doctors who have seen you about your injuries in this accident that you were working for six months after the accident? |  |
|  | A |  | Well, I wasn't working in my job for six months afterwards is what I'm trying to say. Reman is not my permanent position, I can't stay there. I wish I could. I might still be there today. But not in my job. |  |
|  | Q |  | You didn't tell them that you were working for that six-month period? |  |
|  | A |  | That's not working to me, I'm not in my - - it's an easy, light duty job, that's not what my job entitled. They asked me what my job entitled, it's a hard labour job. That's my job. The green - - or the Reman is not my job, it's not a permanent position. You wish it was but it's not. |  |

**78**  I found the evidence of Mr. Simonson, who was called as a witness by Mr. Midgley, persuasive. He testified regarding working with Mr. Midgley at the same shift in the summer of 2004 in the reman department at Weyerhaeuser. He was a credible and objective witness who provided clear and convincing testimony. I accept his evidence.

**79**  According to Mr. Simonson, Mr. Midgley held the summer relief position from the end of April/early May 2004 for five or six months. The team within which he worked in the reman department chose Mr. Midgley for the summer relief position because of his likeability and compatibility.

**80**  He recalled that Mr. Midgley worked with him on "shift 2", doing packaging and that Mr. Midgley, during the summer of 2004, was not required to do any heavy lifting. He described packaging the lumber packages on a conveyer belt like wrapping a large Christmas present. Mr. Midgley could stand or sit as he preferred. He had a clear recollection that Mr. Midgley wore a back brace and a belt during this period. He also corroborated Mr. Midgley's evidence that members of the reman department performed break-relief work on the green chain and that working in the reman department was nowhere near as strenuous as working on the green chain. The employees could move around freely, they had longer breaks and it did not involve machine-paced repetitive work, which Mr. Simonson described as "extremely physical". In short, the work in the "reman department" was preferred to the green chain by all workers because it was considerably less physically demanding work.

**81**  Despite his imprecise recall of the dates, on balance, I found Mr. Midgley's evidence regarding his return to employment to be credible. In my view, Mr. Midgley's answers at trial did not appear to be tailored. If indeed he had fabricated his testimony at trial one would have expected his evidence on this point to be more honed. I cannot conclude that he deliberately intended to deceive or mislead the court as is alleged by the defence.

**82**  In summary, the preponderance of the evidence supports a finding that in the period following the 2004 Accident until October 2004, Mr. Midgley did not resume working regular shift rotations on the green chain on a sustained basis; shortly after his return he was assigned summer relief work in the reman department. Thereafter, until October 2004, he worked for the most part in the reman department, routinely wearing a back brace and a weight-lifting belt for support.

**83**  On this point, I find no significant inconsistencies or inaccuracies in what he reported to the various health professionals who assessed him. In my view, none of the doctors who assessed him demonstrated any significant misunderstanding of Mr. Midgley's return to work after the 2004 Accident. In reaching this conclusion, I have considered the entire body of evidence and, in my view, it best harmonizes with the preponderance of probabilities of this case.

**The 2006 Accident**

**84**  Mr. Midgley sustained injuries in a motor vehicle accident which took place on October 10, 2006. After a passing truck dropped cargo onto Highway 1, his vehicle spun and hit a barricade and then slid off the highway into a median. He was taken from the scene in an ambulance but was released from the hospital the same day. Notably, at the time of the 2006 Accident, Mr. Midgley was not working.

**85**  As a result of the 2006 Accident, Mr. Midgley suffered from headaches and the prior injury to his left shoulder was aggravated. He also sustained an aggravation of his low back pain. The headaches and aggravation of his back and shoulder injuries subsided a year or so after the 2006 Accident; Mr. Midgley eventually recovered to his pre-2006 Accident condition.

**2006 Accident to the Date of Trial**

**86**  After he left Weyerhaeuser Mr. Midgley worked in various positions. He worked in an investment office for approximately two to three months. He also worked for Mr. Miller in a steel company for one month and worked as a personal trainer for Mr. Miller's staff and family for eight months. He also worked for Mr. Yates in a private liquor store in Sardis for some six weeks. I note parenthetically that both Mr. Miller and Mr. Yates testified at trial and I will refer to their evidence later in these reasons.

**87**  Mr. Midgley sought counselling in 2006 for his psychological issues through an employee assistance program.

**88**  Mr. Midgley opened a gym facility in Chilliwack on January 5, 2009. Since that time, he has operated the gym as a sole proprietorship with three employees. He greets clients and offers limited personal training sessions.

**89**  In late 2011 Mr. Midgley was involved in a motor vehicle accident in which he rear-ended another vehicle. He did not sustain any injuries in that accident.

**Expert Medical Evidence**

**Plaintiff's Experts**

**90**  Mr. Midgley relied on the expert evidence of Dr. Klassen, Dr. Shuckett, Dr. McKenzie, Dr. Hamm, Dr. O'Breasail and Dr. O'Connor. Dr. Klassen, who was Mr. Midgley's family doctor, died tragically while on vacation in 2009. Each of the other doctors attended for cross-examination at trial. The key portions of their reports are summarized below:

1. **Dr. Klassen**

**91**  Dr. Klassen prepared a report dated May 17, 2006, five months before the 2006 Accident. It was his opinion that Mr. Midgley, as a result of the 2004 Accident, sustained an injury to his lumbar spine, which caused him pain, tenderness, spasms and limitation of movement. As of May 2006, Mr. Midgley's condition had not improved. He opined that Mr. Midgley was unable to return to his former job at Weyerhaeuser and that Mr. Midgley demonstrated probable "permanent disability". However, he was of the view that Mr. Midgley could perform a job which did not strain his lumbar spine.

1. **Dr. Shuckett**

**92**  Dr. Shuckett, a rheumatologist, assessed Mr. Midgley on October 2, 2007. In her report dated October 23, 2007, she states that her diagnoses, as a result of the two motor vehicle accidents in 2004 and 2006, included right sacroiliac joint dysfunction with tenderness and stress pain and mechanical low back pain, "which is likely musculo-ligamentous in origin". She also noted that an acetabular labral tear of Mr. Midgley's right hip should be ruled out.

**93**  Insofar as prognosis, she states that Mr. Midgley likely had made "maximum medical recovery" by October 2007.

1. **Dr. Gerard McKenzie**

**94**  Dr. McKenzie is an orthopedic surgeon who assessed Mr. Midgley on October 3, 2007. In his report dated October 7, 2007, he states his diagnosis was "unspecific low back pain", which was triggered by the 2004 Accident. He opined that even prior to the 2006 Accident, Mr. Midgley's pain had become chronic and that Mr. Midgley suffers from chronic pain syndrome.

**95**  In his view, the prognosis for Mr. Midgley's lower back pain is poor and that there is a very high likelihood that he will continue to suffer persistent discomfort.

1. **Dr. Douglas Hamm**

**96**  Dr. Hamm, an occupational medicine specialist, assessed Mr. Midgley on June 8, 2010. In his report dated July 2, 2010, he concluded that as a result of the 2004 Accident, Mr. Midgley developed persisting lumbar pain with occasional shooting pains up the right paravertebral area and also in his left leg. In Dr. Hamm's view, Mr. Midgley suffers from post-traumatic chronic mechanical low back pain, which is aggravated by prolonged postures and repetitive forceful movements. He states as follows:

It is my own opinion that it is the accident of March 26, 2004 which has resulted in Mr. Midgley's current level of symptomatology and disability as noted above. In my opinion, the accident of October 10, 2006 caused additional pain intensity but did not essentially alter the pattern of Mr. Midgley's pre-existing pain and disability.

**97**  As of 2010, Mr. Midgley was not able to tolerate prolonged sitting or prolonged walking without developing increased pain. In Dr. Hamm's opinion, Mr. Midgley is not capable of tolerating his former work as a dryer-operator nor is he suited for work which requires heavy strength physical demands.

**98**  He concluded that for the foreseeable future, Mr. Midgley will likely continue to experience mechanical low back pain, with exacerbation from over-exertion or prolonged postures. According to Dr. Hamm, this will "adversely impact his options for employment."

1. **Dr. O'Breasail**

**99**  Dr. O'Breasail is a psychiatrist who assessed Mr. Midgley on June 14, 2010.

**100**  In his report dated December 23, 2010, he states that Mr. Midgley is suffering from chronic pain and following the 2004 Accident, he suffered a Major Depression, which is now in partial remission. Mr. Midgley experienced depressed mood, decreased drive and motivation, cognitive difficulties with impairment in concentration and memory, irritability and a generally low frustration tolerance. He has become more socially withdrawn and enjoys life much less.

**101**  He opined that Mr. Midgley will likely suffer chronic pain in the long term and will continue to experience mood difficulties. His opinion is that Mr. Midgley has a permanent partial disability.

**102**  He concluded that, in addition to the physical problems it caused, the 2004 Accident was primarily responsible for Mr. Midgley's disabling psychological injuries.

1. **Dr. Russell O'Connor**

**103**  Mr. Midgley was assessed by Dr. O'Connor, a physical medicine and rehabilitation specialist, on June 1, 2011.

**104**  In his report dated June 1, 2011, he stated that, because of Mr. Midgley's complaints of deep right buttock pain that worsened with rotation of the hip and the mechanism of the injury in the 2004 Accident, he suspected Mr. Midgley had sustained a labral tear in the right hip in the 2004 Accident. He recommended that an MRI arthrogram be carried out to determine if that was the case. In his first report, he states as follows:

During the accident, the mechanism of injury to his hip was loading of the hip inn (sic) full flexion where he was bent forward and off to the right, putting his right hip in a maximum hip impingement-type position and then was rear-ended. For this reason a hip arthrogram should be done to look for this type of hip injury.

**105**  A right hip MRI arthrogram which was performed on July 27, 2011, confirmed Dr. O'Connor's suspicion that Mr. Midgley had sustained a tear to the labrum of the right hip. The labrum is the connective tissue or cartilage that surrounds the ball and socket joint in the hip. The MRI arthrogram showed that Mr. Midgley had a cam-type impingement in his hip socket -a boney bump on the ball of the femur that sits inside the hip joint - which put him at an increased risk for a labral tear. Dr. O'Connor's opinion is that the 2004 Accident caused Mr. Midgley's labral tear. Dr. O'Connor also opined that the 2004 Accident aggravated the pre-existing degenerative changes in Mr. Midgley's back and caused an increase in the severity and frequency of Mr. Midgley's low back pain, particularly on the right side.

**106**  In Dr. O'Connor's opinion, Mr. Midgley was unable to return to his previous occupation as a dryer-operator in Weyerhaeuser and would never be able to do so. In his view, Mr. Midgley is capable of moderate level work but not on a full-time basis.

**107**  With respect to prognosis, he stated that it is possible, with surgery, Mr. Midgley's hip and buttock pain would improve, but without further surgery, in all probability, there will be no improvement in his condition. It is his opinion that without further intervention, Mr. Midgley's back pain should be considered to have plateaued. However, given that the hip pain is the trigger for the flares of pain he experiences six to seven times a year, there may be some improvement with his back pain if the labral problem is addressed surgically.

**108**  In his August 10, 2011, report, Dr. O'Connor concludes as follows:

The surgery for the hip labral repair and removal of the bones causing the impingement will not return the hip to normal. But getting rid of the bone spurs may slow the deterioration of the hip down. The repair of the labrum may decrease the frequency and severity of the flares of pain. We will know more after the surgery. He will need physio and strength and conditioning after the hip surgery for about 6 months.

**Defendants' Experts**

1. **Dr. Miller**

**109**  Dr. Miller, a psychiatrist, conducted an assessment of Mr. Midgley on September 30, 2011. He addressed the opinion of Dr. O'Breasail on behalf of the defence.

**110**  In his assessment dated September 30, 2011, Dr. Miller essentially agreed with Dr. O'Breasail's opinion. Although Mr. Midgley's depressive symptoms have remitted to a significant extent, he agreed that some of the symptoms he presents with, such as disturbance of mood, anger and frustration and anxiety regarding his current circumstances, are depressive in nature. He also observed that there may well have been times in the past few years that there had been sufficient depressive symptoms to warrant a diagnosis of Major Depression.

**111**  Dr. Miller also stated that Mr. Midgley has chronic pain symptoms that are sufficient for a diagnosis of chronic pain disorder. He also opined that Mr. Midgley's self-esteem and his coping mechanisms, which included exercising at a high intensity, have both been reduced because of his inability to maintain a high level of physical activity.

**112**  In his opinion, Mr. Midgley, who enjoys physical activities, is capable of "limited and relatively low-stress work" that is consonant with his physical limitations.

**113**  Insofar as treatment, he agrees with Dr. O'Breasail that Mr. Midgley requires further treatment for his psychological issues, including cognitive behavioural treatment. However, in contrast to Dr. O'Breasail, Dr. Miller does not recommend anti-depressant medication for Mr. Midgley. He is of the view that if Mr. Midgley, after ceasing the use of anabolic steroids, continues to have mood problems, there should be consideration of the usage of a mood stabilization medication.

1. **Dr. Schweigel**

**114**  Dr. Robert Schweigel, an orthopedic surgeon, who assessed Mr. Midgley on behalf of the Defendants on August 8, 2011, prepared a report dated August 8, 2011.

**115**  In his report, he described Mr. Midgley as cooperative through the history and physical assessment. According to his report Mr. Midgley did not complain of any pain during the examination of his hips.

**116**  Dr. Schweigel emphasized that Mr. Midgley has degenerative disc disease in his lumbar spine; he has a mild disc protrusion at L5-S1 and some mild disc bulging at L4-5. It is his view that the degenerative disc disease pre-existed the 2004 Accident. However, he also notes that, on review of his family doctor's notes, Mr. Midgley was "relatively asymptomatic" with respect to the lumbar spine prior to the 2004 Accident.

**117**  Dr. Schweigel stated in his report that Mr. Midgley's ongoing mechanical back pain symptoms and the pain he persistently experiences in his right buttock region are likely from the degenerative disc disease in his lumbar spine.

**118**  Dr. Schweigel concluded that Mr. Midgley did sustain soft tissue injuries in both the 2004 and 2006 accidents. In his view, Mr. Midgley would have been limited with respect to impact and heavy activities for probably three to six months after sustaining these soft tissue injuries, after which he would have expected that Mr. Midgley could have worked.

**Response Report of Dr. O'Connor to Dr. Schweigel**

**119**  In response to the report of Dr. Schweigel, Dr. O'Connor, in his report dated September 9, 2011, explains why he disagrees with Dr. Schweigel's opinion that Mr. Midgley's degenerative changes in his spine are the cause of Mr. Midgley's complaints. He states as follows:

The reason I disagree with Dr. Schweigel on this point is Mr. Midgley was relatively asymptomatic, functioning well and in fact at an elite level of physical activity prior to the accident. Mr. Midgley was showing no signs of being limited by his back pain according to the medical information I have available to me at the time of this report. Mr. Midgley was involved in a motor vehicle accident and subsequently had ongoing back and hip pain that became incapacitating and prevented him from both competing and working in a competitive environment. The main change, in my opinion, was the motor vehicle accident. The mechanism of injury of the 2004 MVA (despite it being a low velocity impact) is important with regards to helping make the diagnosis. Mr. Midgley described being hyperflexed at both the back and the hip, and twisted to the right getting something off the floor on the passenger foot well. This puts his right hip into a hyperflexed, internally rotated, and relatively adducted position to his trunk, which put him at prime risk for injury to his labrum on the right side and injury to his low back. It is my opinion he suffered a labral and hip injury as a result of the MVA.

**Adverse Inference**

**120**  Since 2009, Mr. Midgley has been treated by Dr. J. Coppin. Dr. Coppin did not give evidence and the defence asked that I draw an adverse inference from the plaintiff's failure to call him.

**121**  It is well-established on the authorities that an inference adverse to a litigant may be drawn if that litigant fails to call a witness who could reasonably be expected to provide supporting evidence. In *Buksh v. Miles*, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=), the British Columbia Court of Appeal provides guidance on the factors which inform the analysis of whether an adverse inference should be drawn for the failure to call a treating physician. The factors include the following: the explanations proffered for not calling a witness, the nature of the evidence that could be provided by the witness and the extent of disclosure of that physician's clinical notes.

**122**  Dr. Coppin's complete records were disclosed to the defence. I have no grounds for assuming that Dr. Coppin's evidence could not have been obtained by the defence.

**123**  Mr. Midgley's counsel points out that Dr. Coppin first became involved with Mr. Midgley's care more than five years after the 2004 Accident and only when his long-term family physician died suddenly. Dr. Coppin apparently provides homeopathic hormonal balancing and anti-aging treatments at his clinic. Mr. Midgley testified that Dr. Coppin treated him regarding his heart palpitations and hormone balancing. It is not alleged that this condition is related to the 2004 Accident.

**124**  I accept Mr. Midgley's counsel's submission that, given the nature of the treatment Dr. Coppin provided, it cannot reasonably be inferred that Dr. Coppin could have provided cogent evidence in this case, particularly in light of the multitude of other medical opinions proffered by Mr. Midgley.

**125**  In my view, this is not an appropriate case to conclude that an adverse inference should be drawn against Mr. Midgley for his failure to call Dr. Coppin.

**Conclusions on Mr. Midgley's Condition**

**126**  Mr. Midgley contends that, as a result of the 2004 Accident, he sustained the following injuries:

1. injuries to his neck;
2. a torn labrum in his right hip;
3. injuries to his low back;
4. chronic pain disorder, depression and anxiety.

**127**  In this section, I will set out my findings on Mr. Midgley's condition, including the assessment of the severity of his persisting symptoms. I will address causation in the next section of these reasons.

**128**  I note that Mr. Midgley is not seeking to prove that the mild disc protrusion at L5/S1 initially revealed by the CT scan of his lumbar spine in December 2004 was caused by the 2004 Accident. I also note parenthetically that neither does his counsel assert that the cardiac problems Mr. Midgley experienced in 2008 are related to the 2004 Accident.

**129**  It is key to observe that the medical experts who assessed Mr. Midgley relied on him, to varying degrees, to describe his history and the multiple medical opinions adduced in this case have been based to a large extent on Mr. Midgley's subjective reporting of his symptoms.

**130**  As was emphasized by defence counsel, the weight that can be given to those experts opinions ultimately turns on the court's assessment of Mr. Midgley's evidence at trial and the consistency of that evidence with the information that he previously communicated to the various professionals who treated and assessed him; *Edmondson v. Payer*, [*2011 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XC-00000-00&context=) at para. 21, aff'd [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=).

**131**  Insofar as the defence submissions relating to Mr. Midgley's evidence at trial and the alleged inconsistencies with the information he previously provided to various medical professionals, the court's observations in *Edmondson* are instructive:

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

**132**  These observations are particularly apt in this case, in which Mr. Midgley has seen a multitude of health care professionals and physicians over an eight-year period, "particularly given the human tendency to reconsider, review and summarize history in light of new information": *Burke-Petramala v. Samad*, [*2004 BCSC 470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B283-00000-00&context=) at para. 104. In the circumstances, it is not surprising that some variation can be found between Mr. Midgley's testimony and the entries in the clinical records, which purport to record his history.

**133**  The overarching submission of the defence is that Mr. Midgley is exaggerating the severity of his current complaints.

**134**  The following hospital record from July 25, 2008, was put to Mr. Midgley in cross-examination:

He is still very active, though, doing a lot of weights. He had a very hard work out the preceding afternoon/morning and he had no chest pain during it.

**135**  The context of this entry must be kept in mind. Mr. Midgley was attending the hospital in the middle of the night for an unrelated medical issue - heart palpitations. We do not know the questions posed by the doctor that elicited the recorded information and the notation does not purport to be a direct quotation. This may have been the doctor's words, not Mr. Midgley's, and Mr. Midgley would not have had any opportunity to correct any misunderstanding of what he said. Nor do we know everything that Mr. Midgley may have said to the attending physician.

**136**  On the totality of the evidence, I cannot conclude that Mr. Midgley attempted to mislead the court or exaggerate or embellish the extent of his injuries or the severity of his current symptoms to advance his litigation objectives. I find that Mr. Midgley was and is motivated to be as physically active as possible. In my view feigning injuries or a contrived disability would be incompatible with Mr. Midgley's life-long focus on maintaining his physical conditioning and the pride he took in his physical achievements. Notably, none of the physicians who assessed Mr. Midgley have found any amplification of his symptoms or exaggerated pain behaviour.

**137**  I next address the injuries Mr. Midgley alleges he sustained in the 2004 Accident.

**138**  The evidence shows that in the 2004 Accident, Mr. Midgley sustained a mild cervical and thoracic spine injury which resolved within a matter of weeks.

**139**  At trial, Mr. Midgley's primary complaint was the persistent pain that is centered in and around his right buttock. Mr. Midgley described a "toothache" type of sensation deep in his right hip in the buttock area which has persisted since the 2004 Accident. It is worse with the internal or external rotation of his hip. The pain sometimes radiates into his legs. Walking and standing for a prolonged period aggravates his symptoms.

**140**  In cross-examination, Dr. O'Connor testified that buttock pain can emanate from either the back or the hip. His explanation was as follows:

Patients with back pain can have buttock pain and patients with hip pain can have buttock pain, so the buttock to me means that either one of those things are on the list of possibilities as far as the possible cause of buttock pain.

**141**  It is uncontroversial that the medical evidence establishes that, as of 2011, Mr. Midgley had a torn labrum in his right hip.

**142**  Since the 2004 Accident, Mr. Midgley has also experienced persistent low back pain and tenderness with intermittent spasms. He routinely wears a back brace and belt for support. It is the right side of his back that bothers him more. He continues to experience discomfort and stiffness on a daily basis in his lumbar spine and paralumbar spine.

**143**  Since the 2004 Accident, Mr. Midgley described having a pattern of "good days" and "bad days". On a good day, he is able to perform his routine activities, but on his bad days, which are at least twice a week, his daily activities are severely restricted by his symptoms.

**144**  The evidence also shows that since the 2004 Accident, about six or seven times a year, Mr. Midgley has experienced an aggravation of symptoms in his right buttock and lumbosacral junction and paraspinal muscles. I accept Mr. Midgley's evidence that two to three episodic aggravations per year cause him to experience severe pain, which is debilitating. These episodic aggravations usually last two to three days. His symptoms are more intense in the colder months of the year.

**145**  I find that, after the 2004 Accident, Mr. Midgley took reasonable steps to try to improve his condition. After the 2004 Accident, Mr. Midgley used, on the recommendation of his doctor, anti-inflammatories and muscle-relaxant prescription medication. Mr. Midgley also attended physiotherapy, chiropractic and acupuncture treatments and prolotherapy and massage therapy. Having found that none of these modalities resulted in any significant improvement in his condition, he now follows a regime of homeopathic medication and hormone therapy. For the most part, he now eschews prescription pain medication.

**146**  There is no cogent evidence that the symptoms of Mr. Midgley's injuries and, in particular, the labral tear in his hip, would have improved if he had continued to pursue the traditional modalities of treatment.

**147**  Mr. Midgley also followed his doctor's recommendation to perform light gym workouts. His workouts continue to be focussed at maintaining his fitness level but not aggravating his back and hip injuries. He is clearly motivated to maintain his fitness level as high as possible. The intensity of his current workout regime varies with his symptoms, but I find that the intensity and duration of his sessions are considerably less than those workouts and activities that he enjoyed prior to the 2004 Accident. His wife summarized the changes in his workout regime with her candid observation that he no longer "sweats" at the gym.

**148**  I accept that Mr. Midgley suffers from chronic pain symptoms that Dr. Miller, the psychiatrist for the defence, stated would be "sufficient for a diagnosis of chronic pain disorder." He also has suffered from depression and anxiety symptoms since the 2004 Accident. Dr. O'Breasail and Dr. Miller agree that in 2006, Mr. Midgley likely suffered a Major Depression, although his depressive symptoms have remitted to a significant extent.

**149**  In the years following the 2004 Accident, Mr. Midgley experienced severe mood difficulties and suffered bouts of irritability and anxiety. As a result, the relationship with his family deteriorated and his marriage was strained. Notably, Mr. Midgley's then teen-age son moved out of his home during this period. Mr. Midgley's social life has diminished because of his limitations.

**150**  Mr. Midgley also began consuming alcohol and, on his own admission, he drank daily and to excess, in order to alleviate his physical and mental distress and his frustration with his level of function. He did stop drinking alcohol for approximately six months, but he has resumed consuming alcohol in an effort to alleviate his symptoms.

**151**  My best assessment is that Mr. Midgley currently continues to suffer from chronic pain, anxiety and depression symptoms, as well as some mood disturbance. He also continues to suffer from sleep disturbances.

**152**  I am fortified in my conclusions regarding Mr. Midgley's current condition by the evidence of the witnesses called by Mr. Midgley. Without exception, I found them to be credible witnesses and I found their evidence reliable regarding their respective observations about the changes in Mr. Midgley after the 2004 Accident.

**153**  Ms. Midgley candidly testified regarding her observations about the changes in her husband after the 2004 Accident. She noted his mood changes and irritability and the difficulties he encounters with his episodic flare-ups. She has also observed his sleeping difficulties and his problems with standing and sitting for any prolonged periods of time. She corroborated that he sometimes is required to rely on his disability sticker when parking his car, which causes him some embarrassment. This is to ensure that he has sufficient room to ingress and egress his vehicle. Her distress over Mr. Midgley's self-medication with alcohol after the 2004 Accident was palpable in her testimony.

**154**  Mr. Yates, a Chilliwack businessman, who has known Mr. Midgley since approximately 1986, also gave credible testimony about his observations of the significant changes in Mr. Midgley following the 2004 Accident. In the years prior to the 2004 Accident, Mr. Yates played golf and baseball with Mr. Midgley and worked out at the same gym. He never observed Mr. Midgley having any physical limitations with regard to any activities. He described Mr. Midgley prior to the 2004 Accident as "vibrant and tough". Since the 2004 Accident, he has never seen Mr. Midgley without his back support. He has observed that Mr. Midgley's gym workouts are significantly restricted. According to Mr. Yates, Mr. Midgley is "broken" and "not the same guy".

**155**  In 2007, Mr. Yates hired Mr. Midgley to work at one of the private liquor stores he owns in Sardis. After approximately six weeks, Mr. Yates and Mr. Midgley mutually agreed that was not suitable employment for Mr. Midgley, because he could not perform the repetitive lifting of the heavy cases.

**156**  Mr. Bill Miller, another Chilliwack businessman and former neighbour and employer of Mr. Midgley, also testified about the changes in Mr. Midgley after the 2004 Accident. Prior to the 2004 Accident, he described Mr. Midgley as very strong, active and driven. Subsequent to the 2004 Accident, he observed that Mr. Midgley appeared to be in a lot of discomfort because he was walking and sitting differently.

**157**  In 2006, Mr. Miller had offered Mr. Midgley a desk job in his steel brokerage business, but found after a month or so that Mr. Midgley was not able to focus nor endure the sitting requirements. He then hired Mr. Midgley to provide personal training instruction to his staff and family members. They too, mutually decided to part ways in 2007, because Mr. Midgley was routinely cancelling the scheduled training sessions on account of his pain symptoms.

**158**  Andy Sylvester has known Mr. Midgley since approximately 1987 and has seen him regularly since 1993, both socially and at the gym. He described Mr. Midgley as a "grin and bear it" type of individual. Prior to the 2004 Accident, he described Mr. Midgley as being in top physical shape and that he was a very outgoing, charismatic and positive individual. Mr. Sylvester observed significant negative changes in both Mr. Midgley's physical abilities and mood following the 2004 Accident. In his testimony, he described Mr. Midgley, who was then wearing a back brace, encountering difficulties getting in and out of a motor vehicle. According to Mr. Sylvester, Mr. Midgley's exercise routine at the gym has changed substantially and it appears that he has engaged in more of a "rehabilitation type" program.

**159**  A careful review of the videos of surveillance submitted by the defence does not demonstrate any inconsistencies with my findings. Moreover, there was no evidence that any of the medical experts were asked to comment on what the videos may have indicated about Mr. Midgley's condition.

**160**  In summary on this issue, I find Mr. Midgley's symptoms are genuine. He has endured significant and chronic pain, notwithstanding his efforts to minimize his symptoms. He regularly experiences varying degrees of pain and discomfort in his hip, back and buttock and he suffers from episodic flare-ups of his symptoms. He also suffers from depressive and anxiety symptoms.

**161**  In the end, the question of Mr. Midgley's prognosis is difficult because, as of the date of trial, although Dr. O'Connor had recommended a referral to a surgeon for consideration of labral hip repair/resection and removal of the cam-type boney impingement, Mr. Midgley had not yet seen a surgeon.

**162**  I accept Dr. O'Connor's opinion that without surgery, Mr. Midgley is unlikely to experience any measurable improvement in his condition. There is a possibility that with surgery, Mr. Midgley will experience a decrease in the frequency and severity of his episodic aggravations of his hip, buttock and back pain. The preponderance of the psychiatric evidence, along with the lay evidence that I accept, supports a finding that if Mr. Midgley continues to suffer chronic pain, he will likely continue to experience mood difficulties and depressive and anxiety symptoms. The cognitive therapy recommended by the psychiatrists may bring him some relief of his psychological symptoms.

**163**  In my view, on balance, it is more likely than not that Mr. Midgley's symptoms will persist and limit his functions indefinitely.

**164**  I will address the functional capacity evaluations and whether Mr. Midgley's injures have impacted his income-earning capacity in the section on damages.

**CAUSATION**

**165**  In order to justify any compensation for his condition, Mr. Midgley must establish a causal connection between the defendants' unlawful acts and his condition.

**166**  Causation is a central issue in this case. Mr. Midgley submits he has met the burden of proving that the defendants' ***negligence*** caused the constellation of symptoms from which he now suffers. The defence forcefully submits that Mr. Midgley has not discharged his burden.

**Legal Framework**

**167**  Whether a defendant is liable to a plaintiff for an injury is a matter of causation. It is crucial to keep in mind the analytical distinction between determining causation and assessing damages, since different principles govern the two questions: *T.W.N.A. v. Canada (Ministry of Indian Affairs),* [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=) at para. 16; *Drodge v. Kozak,* [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=) at para. 79; *Moore v. Kyba,* [*2012 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2HF-00000-00&context=) at paras. 35-36. I will return to the principles which govern the assessment of damages later in these reasons in the section on damages.

**168**  The primary test to be applied in determining causation is commonly articulated as the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred.

**169**  The "but for" test need not be determined with scientific precision. Rather, causation is a practical question of fact which can be best answered by ordinary common sense: *Snell v. Farrell,* [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=) at 328.

**170**  A plaintiff need not establish that a defendant's tortious conduct is the sole cause of the injury. A defendant will be fully liable for the harm suffered by a plaintiff, even if other causal factors for which he is not responsible were at play in producing the harm, as long as the plaintiff establishes a substantial connection between the injuries and the defendant's ***negligence*** beyond the "*de minimus*" range: *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at paras. 9 and 11; *Athey v. Leonati,* [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=); *Resurfice Corp v. Hanke,* [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=); *Clements v. Clements,* [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=); *Hunt v. Ugre*, [*2012 BCSC 1704*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2MS-00000-00&context=) at para. 120.

**171**  The court must be cautious when inferring causation from a temporal sequence; that is, from a consideration of pre-accident versus post-accident condition. In cases where causation is asserted primarily on a temporal relationship between the negligent conduct and injury in question, the authorities mandate that a "close scrutiny of the evidence is required because the inference from a temporal sequence to a causal connection is not always reliable": *Hardychuk* at para. 130. See also: *Madill v. Sithivong,* [*2012 BCCA 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1T2-00000-00&context=) at para. 20; *White v. Stonestreet,* [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=) at paras. 74-75. However, the authorities recognise that temporal reasoning is not an illegitimate analysis if invoked in the appropriate circumstances: *Erickson v. Sibble*, [*2012 BCSC 1880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X31K-00000-00&context=) at para. 223.

**172**  When assessing medical evidence, the court must be mindful that in the legal context the "but for test" need only be established on a balance of probabilities; a plaintiff must show that it is more likely than not that, without the tort, the injury or medical condition would not have occurred. This is to be contrasted with the more exacting standard that approaches scientific certainty in the medical context. The court in *Tsalamandris v. MacDonald*, [*2011 BCSC 1138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6201-00000-00&context=) at paras. 145-146 (var'd on other grounds, [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=)), provides the following instructive formulation of the governing principles:

In determining causation in the legal context, courts must be mindful to assess the import and substance of the expert opinion evidence, and to be cautious about the wording used by the experts so as to not unduly discount or over-weigh the expert's choice of language when describing medical causation. Ultimately causation is a question for the court, taking into account the evidence.

It is important for the court to keep in mind that all that is required to determine these complex medical issues in the context of causation is for the plaintiff to prove what is more likely than not. This is what is meant by the "but for" test: it is more likely than not, that without the tort, the injury or medical condition would not have happened.

(Emphasis added.)

**Discussion**

**173**  The primary contention of the defendants is that Mr. Midgley has failed to prove that he sustained anything other than a minimal injury in the 2004 Accident.

**174**  The overarching submission of the defence was that "this was a nothing accident". The tenor of the defence submission was that, since there was no damage to Mr. Midgley's motor vehicle, he could not have sustained the damage he alleges in the 2004 Accident.

**175**  There is no legal principle that holds that if a collision is not severely violent or if there is no significant damage to a motor vehicle, the individual seated within that vehicle at the time of the impact cannot have sustained injuries. The authorities clearly establish that, while the lack of vehicle damage may be a relevant consideration, the extent of the injuries suffered by a plaintiff is not to be measured by the severity of the force in a collision or the degree of the vehicle's damage. Rather, the existence and extent of a plaintiff's injuries is to be determined on the basis of the evidentiary record at trial: see *Gordon v. Palmer* [*(1993), 78 B.C.L.R. (2d) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-230Y-00000-00&context=).

**176**  As I referred to earlier, the defence led no opinion evidence to support the assertion that the force of the impact in this case was incapable of producing the injury alleged by Mr. Midgley. I accept Mr. Midgley's evidence regarding his body position at the time of impact and that, as far as he was concerned, the collision was jarring. In any case, there is expert medical evidence, which I find persuasive, that supports the relationship between the 2004 Accident - and, in particular, Mr. Midgley's body position at the time of impact - and the existence of his injuries.

**177**  On the totality of the evidence, I am persuaded that Mr. Midgley sustained an injury in the 2004 Accident, in spite of the fact that his vehicle apparently was not damaged.

**(i) Was the hip labral tear and low back injury caused by the 2004 Accident?**

**178**  A right hip MRI arthrogram performed on Mr. Midgley on July 27, 2011, showed femoral acetabular impingement and a labral tear.

**179**  Mr. Midgley's submissions are grounded in Dr. O'Connor's opinion that Mr. Midgley's labral tear was caused by the 2004 Accident. He opines in his report dated August 10, 2011 as follows:

This MRI confirms my clinical findings of femoral acetabular impingement and my suspicion of a labral tear. The labral tear was caused by the accident. The tear is what is causing the flares of pain he gets 6-7 times a year. Once he gets into these flares, back pain also flares. This is a typical finding in patients with labral problems.

**180**  For the reasons set out earlier, I do not accept the defence contention that Dr. O'Connor was "misled" by Mr. Midgley about his body position at the time of impact and his difficulties returning to work on the green chain after the 2004 Accident. In cross-examination, Dr. O'Connor demonstrated a sufficiently accurate understanding of Mr. Midgley's work history after the 2004 Accident. I also find that Mr. Midgley accurately reported to Dr. O'Connor regarding the onset and severity of his symptoms.

**181**  The medical evidence shows that the symptoms of labral tears often do not present in a straightforward fashion and are often difficult to diagnose. I accept Dr. O'Connor's evidence that patients with hip labral tears often poorly or vaguely describe a variety of non-specific symptoms, such as an ache or burning in the knees or sacroiliac joint, or as low back pain.

**182**  According to Dr. O'Connor the link between Mr. Midgley's deep buttock pain and the aggravation of his back pain was a key factor. Dr. O'Connor explained that patients who have a significant hip labral injury often describe back and buttock pain that develops as the hip gets aggravated. Frequently, as in Mr. Midgley's case, the back pain becomes the main focus. I found his testimony compelling.

**183**  Mr. Midgley's testimony regarding his symptoms is consistent with Dr. O'Connor's observation that patients who have a significant hip labral injury often imprecisely describe pain in the hip, back and buttock, particularly when the hip injury is aggravated. Dr. McKenzie also affirmed that some individuals may not identify pain in the correct anatomical structure and that pain in the hip and back is often difficult to distinguish. Notably, Ms. Zinck, an expert witness who was called by the defence, affirmed that many patients cannot distinguish between hip pain and back pain.

**184**  Dr. O'Connor points out that the mechanism of the injury in the 2004 Accident, despite it being a low velocity impact, was an important factor in his analysis. According to Dr. O'Connor, Mr. Midgley's position of being twisted to the right put his right hip into a hyperflexed, internally rotated, and relatively adducted position to his trunk, which placed him at "prime risk for injury to his labrum on the right side and injury to his low back."

**185**  Dr. O'Connor described Mr. Midgley's particular injury as a separation or pulling away of the labrum or cartilage rim around the socket on the lateral side of the right hip, as well as a complex tear of the anterior aspect of the labrum.

**186**  Although Dr. O'Connor initially suspected a posterolateral tear, the arthrogram confirmed a labral tear of the anterior margin. In cross-examination Dr. O'Connor persuasively discounted the defence postulation that pain from this type of labral tear would be more to the anterior than the posterior of the body. He reiterated that symptoms from a labral tear often do not present in a straightforward fashion and that patients who describe vague, non-descriptive hip pain sometimes describe that pain "as front, sometimes lateral, sometimes posterior or buttock and sometimes all the way up quite close to the back or low back."

**187**  I found Dr. O'Connor to be a very careful and objective witness. It was clear from his testimony, that he had thoroughly reviewed Mr. Midgley's records. His opinion was not weakened in the face of a thorough cross-examination.

**188**  For the reasons that follow, I do not accept the defence submission that Mr. Midgley's complaints of hip pain did not "really come forward until he was diagnosed with a labral tear in the summer of 2011".

**189**  I find Mr. Midgley's evidence on the onset of his symptoms persuasive. I accept his testimony that, immediately after the 2004 Accident, he knew "something was wrong" and he felt pain down to his knees. He described his hips and lower back "aching like a toothache". He attended the emergency room immediately after the Accident.

**190**  As was referred to by Dr. O'Connor in his cross-examination, in his first clinical entry, on March 29, 2004, following the 2004 Accident, Dr. Klassen referred to pain with "right hip flexion". It was the right hip in which the MRI arthrogram showed Mr. Midgley had sustained a labral tear. On April 6, 2004, Dr. Klassen notes right "SI" or buttock pain, right leg pain and pain in both hips.

**191**  In August 2006, Mr. Midgley reported to Ms. Fischer tightness in his groin muscles and a "burning" sensation in his hips.

**192**  It is also noteworthy that Dr. Shuckett, when she examined Mr. Midgley in 2007, noted that flexion of his right hip elicited groin pain. She pointed out that soon after the Accident, he complained of right hip pain and there is no indication that he had those complaints before the 2004 Accident. She testified in cross-examination that the acetabular labral tear in Mr. Midgley's right hip revealed by the MRI arthrogram in 2011, was "most likely causally due" to the 2004 Accident.

**193**  Neither Dr. Klassen, Dr. Hamm nor Dr. McKenzie diagnosed the labral tear. However, as I mentioned earlier, the medical evidence supports a finding that labral tears are notoriously difficult to diagnose. Dr. Hamm, who diagnosed Mr. Midgley with chronic mechanical low back pain, testified that on the examination, Mr. Midgley reported hip and buttock pain. He also testified that Mr. Midgley's body position was more important in assessing his injury than the damage to the vehicle. Dr. McKenzie, who diagnosed Mr. Midgley as suffering from "non-specific low back pain" as a result of the 2004 Accident, noted that Mr. Midgley had anterior hip pain when he adducted his hips during his assessment. Notably, the arthrogram showed a labral tear in the anterior margin. He also noted that Mr. Midgley reported hip pain which he described as a burning sensation and that on examination he was tender over the sacroiliac joints.

**194**  The defence has not suggested a plausible alternate event which would explain the development of Mr. Midgley's symptomatology in this case .The defence submission that the labral tear was a function of Mr. Midgley's long-standing history of kickboxing is based upon speculation and is not supported by the evidence. Dr. O'Connor discounted this theory in cross-examination, pointing to Mr. Midgley's pre-2004 Accident level of functioning. I accept Dr. O'Connor's evidence that labral tears are rarely asymptomatic.

**195**  I turn to address the opinion of the defence expert, Dr. Schweigel. Dr. Schweigel did not diagnose a labral tear, although it clearly existed when he examined Mr. Midgley.

**196**  He opined that Mr. Midgley's current low back symptoms are mechanical in nature and are caused by his pre-existing condition - the degenerative changes shown on his imaging results. He says that Mr. Midgley's current symptoms are not due to any injuries he sustained in the 2004 Accident. He also stated in his report that Mr. Midgley's pain in his right buttock was "probably from the degenerative disc disease in his lumbar spine".

**197**  In cross-examination, Dr. Schweigel conceded that, based on degenerative changes on imaging, he is not able to predict when an individual will develop back pain. He also acknowledged that it is normal for individuals to develop degenerative changes in their spine as they age and that not all of those individuals with degenerative changes will develop back pain.

**198**  Dr. Schweigel, in cross-examination, also conceded that if Mr. Midgley's hip was in a flex position at the time of the impact, it could "potentially cause a labral tear" but that it would be more suspicious if his knee struck the dash. He also testified that Mr. Midgley's description of pain was atypical and that, usually with a labral problem, patients complain of groin pain that goes through to the buttock. However, in cross-examination, Dr. Schweigel conceded that hip problems do not always manifest themselves as groin pain. This is consistent with the evidence of Dr. O'Connor on this point.

**199**  In my view Dr. O'Connor, as well as Dr. McKenzie, persuasively discounted Dr. Schweigel's opinion regarding Mr. Midgley's current complaints.

**200**  In his report dated September 9, 2011, Dr. O'Connor sets out why he disagrees with Dr. Schweigel. In discounting Dr. Schweigel's postulation, Dr. O'Connor points to the fact that Mr. Midgley was relatively asymptomatic and functioning at a high level prior to the 2004 Accident. Dr. O'Connor also affirmed in his testimony that medical professionals cannot predict the manifestation of back pain from degenerative changes shown on imaging.

**201**  In cross-examination, Dr. McKenzie also disagreed with the notion that degenerative changes are causing Mr. Midgley's back pain. He testified as follows:

I explained, that the fact that he has pre-existing areas of degenerative changes do not translate into pain now, or even pain in the future. (Emphasis added.)

**202**  I accept Dr. McKenzie's evidence on this point.

**203**  Based on the foregoing and the significant concessions Dr. Schweigel made in cross-examination, I do not consider it safe for the court to rely on Dr. Schweigel's opinion. The preponderance of the evidence does not support his conclusions regarding causation. I have far greater confidence in the opinion of Dr. O'Connor as to causation, which I prefer to the opinion of Dr. Schweigel on all fronts where their opinions diverge.

**204**  In determining causation, I have not overlooked the defence assertion that Mr. Midgley had pre-existing problems with his low back and hips. He had on occasion visited a chiropractor for what Mr. Midgley had described as "tune-ups" for his back, primarily in the period he was training as a body-builder. There were no visits recorded between 1997 and July 2003. There is one visit in 2003 and one visit in March 2004, prior to the 2004 Accident. Notably, Dr. O'Connor was aware of Mr. Midgley's prior chiropractic treatments when formulating his opinion.

**205**  In support of their assertion, the defence primarily relies on a note taken by a chiropractor, Dr. Maier, regarding a visit from Mr. Midgley on August 17, 2004, some five months after the 2004 Accident. The notation refers to "back and hip pain for four to five years". In my view, it would be inappropriate to attach much significance to this single clinical entry. We do not know the questions Dr. Maier asked Mr. Midgley. The defence, although having subpoenaed him, chose not to call Dr. Maier.

**206**  The context of this notation must be considered. Mr. Midgley explained in cross-examination, that since it was the first time he had seen Dr. Maier, he gave him a full medical history. Mr. Midgley's testimony on this point, which I accept, was as follows:

That I had just another motor vehicle accident four or five months ago and how that was affecting my lower back and hips and then once in a while I would have, over the last four to five years, I would have a tweak in my lower back. But nothing that I felt needed or warranted a doctor visit or chiropractor visit. So I just told him about everything that I had.

**207**  Nor am I persuaded that one entry in the clinical records in 2002, wherein Dr. Klassen's locum notes back pain is significant in the context of the evidence as a whole. Notably, Dr. Schweigel comments in his report that prior to the 2004 Accident, Mr. Midgley was "relatively asymptomatic in his family physician's notes with respect to the lumbar spine".

**208**  The preponderance of the evidence supports a finding that prior to the 2004 Accident, Mr. Midgley was very physically active recreationally and performing a manual labour job. I do not find persuasive the fact that an individual such as Mr. Midgley, who was engaged in physically rigorous activities, on occasion sought chiropractic treatment for his back and very infrequently his left hip. In the years prior to the 2004 Accident, his back symptoms bothered him only very occasionally. The preponderance of the evidence and the probabilities in this case do not demonstrate that prior to the 2004 Accident Mr. Midgley's back symptoms were significant or seriously interfered with his lifestyle, his employment, or recreational pursuits. In contrast, after the 2004 Accident, his back symptoms were much more persistent and severe.

**209**  In short, I have concluded that the defence position is not supported by the whole of the evidence. I am not persuaded that prior to the 2004 Accident, Mr. Midgley experienced significant symptoms with either his back or hips.

**210**  I recognize the dangers inherent in applying temporal reasoning in determining legal causation. However, when the timeline of the pertinent events is scrutinized in the context of the totality of the evidence, the inference of causation is compelling.

**211**  Based on the opinion of Dr. O'Connor and Dr. Shuckett's testimony, in conjunction with the preponderance of the lay evidence material to the issue of causation that I accept, I conclude that Mr. Midgley sustained a labral tear in his right hip in the 2004 Accident. Based on the opinions of Dr. O'Connor, Dr. Shuckett, Dr. McKenzie, Dr. Hamm and Dr. Klassen, in conjunction with the lay evidence material to causation that I accept, I also conclude that Mr. Midgley sustained an injury to his low back in the 2004 Accident, which has caused him to experience chronic low back pain. For the purposes of causation, it is not necessary for the court to determine, as a matter of medical diagnosis, a precise description for the lumbar spine injury he sustained.

**212**  In summary on this issue, I have concluded that Mr. Midgley has met the "but for" test mandated in the authorities. I am satisfied that it is more likely than not that Mr. Midgley sustained injuries to his hip and back in the 2004 Accident. Mr. Midgley would not have sustained these injuries and the constellation of symptoms in his hips, back and buttocks I have described earlier in these reasons, but for the ***negligence*** of the defendants.

**(ii) Did the 2004 Accident cause psychological injury?**

**213**  The principles which inform the analysis of causation of physical injury apply to causation of psychological injury: *Hunt* at para. 123.

**214**  The psychiatric evidence clearly establishes that Mr. Midgley suffers from a chronic pain disorder; he also suffers from some mood disturbance, and he continues to experience depression and anxiety symptoms.

**215**  Mr. Midgley did not have any psychiatric history prior to the 2004 Accident.

**216**  Mr. Midgley has resumed taking anabolic steroids in 2009, under the direction of Dr. Coppin. Mr. Midgley had taken steroids previously but had ceased doing so some years prior to the 2004 Accident. His mood disturbance, sleep disturbance and anxiety symptoms pre-dated his resumption of steroid use. While both psychiatrists who testified at trial were in agreement that Mr. Midgley's emotional lability is likely detrimentally influenced by his continued usage of anabolic steroids, I am not persuaded that in the absence of the 2004 Accident, Mr. Midgley would have developed the constellation of psychological symptoms and sleep disturbance from which he now suffers.

**217**  Based on the psychiatric evidence, in conjunction with the preponderance of the lay evidence material to the issue of causation, I conclude that Mr. Midgley has satisfied the "but for" test mandated by the authorities. On balance, I find that absent the 2004 Accident, Mr. Midgley would not have developed his current constellation of psychological symptoms.

**DAMAGES**

**218**  I next address Mr. Midgley's claim for damages under the following headings:

1. non-pecuniary damages;
2. loss of past and future earning capacity;
3. cost of future care;
4. loss of housekeeping capacity;
5. special damages.

**Non-Pecuniary Damages**

**219**  Mr. Midgley seeks an award of $125,000 for non-pecuniary damages. The defence submits that non-pecuniary damages should be assessed in the range of $20,000 to $70,000 and that if Mr. Midgley's evidence is accepted his injuries could attract damages in the range of $100,000.

**220**  Non-pecuniary damages are intended to compensate a plaintiff's pain, suffering, and loss of enjoyment of life. While recognizing that the loss of good health cannot be valued in monetary terms, the "functional approach" attempts to assess the compensation required to provide a plaintiff with reasonable solace for his injuries. The award should compensate a plaintiff for the non-pecuniary loss he has suffered up to the date of the trial and for that loss he will suffer in the future. An award for non-pecuniary damages must be fair and reasonable to both parties: *Lindal v. Lindal*, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 637; *Hmaied v. Wilkinson*, [*2010 BCSC 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20XW-00000-00&context=) at para. 55; *Farand v. Seidel*, [*2013 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1Y4-00000-00&context=) at para. 69.

**221**  While fairness is assessed by reference to awards made in comparable cases because of the requirement for an individualized assessment, it is impossible to develop a "tariff". Each case must be decided on its own unique facts because no two individual plaintiffs' personal experiences in dealing with their injuries and the adverse consequences of those injuries are identical: *Lindal* at 637; *Kuskis v. Hon Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) at para. 136; *Kapelus v. Hu*, [*2013 BCCA 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M3GS-00000-00&context=) at para. 15; *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**222**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46, Kirkpatrick J.A. enumerated the factors to be considered in awarding non-pecuniary damages. The non-exhaustive list includes: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; emotional suffering; the impairment of family, marital, and social relationships; impairment of physical and mental abilities; loss of lifestyle and the plaintiff's stoicism.

**223**  The essential principle in the assessment of damages is that the plaintiff must be placed in the position he or she would have been in absent the defendants' ***negligence***. It is also fundamental to the assessment of damages that a defendant must take the plaintiff as he is, even where because of a unique susceptibility or vulnerability, the injury was more dramatic or unexpectedly severe than one would expect an average person to sustain: *Athey*; *Erickson* at para. 250.

**224**  I have concluded that the injuries Mr. Midgley sustained in the 2004 Accident have caused him years of significant pain, suffering and loss of enjoyment in life. Earlier in these reasons, I have set out my findings on the progression of his symptoms.

**225**  As a result of the injuries he sustained in the 2004 Accident, and the persistent pain he experiences, Mr. Midgley's level of participation in his recreational activities and sports has been significantly curtailed. He is no longer able to enjoy his previously active lifestyle. He is no longer capable of performing strenuous manual labour.

**226**  Prior to the 2004 Accident, Mr. Midgley, a former professional athlete, took considerable pride in his superlative level of physical fitness and his ability to engage in an active lifestyle. He was a robust and energetic individual with a positive outlook on life. He has lost much of the joy he associated with work, socializing and physical pursuits. The impact of his injuries has dramatically and adversely impacted the quality and enjoyment of his life. As a consequence of his physical limitations, he has developed self-image problems and associated psychological symptoms. He experiences mood disturbances, depression and anxiety symptoms.

**227**  Mr. Midgley's marriage is strained. Mr. Midgley has experienced difficulties with physical intimacy since the 2004 Accident and the pain and discomfort from his injuries has contributed to those problems. His distress over the limitations caused by his injuries and its adverse impact on his marriage was palpable in his testimony.

**228**  As of the trial, it was not certain whether Mr. Midgley would have surgery to repair his hip. If Mr. Midgley has surgery, the likelihood for any improvement in his condition is uncertain. Without surgery, it is unlikely that he will ever be pain-free. There is a real and substantial possibility he will be left with a permanent partial disability.

**229**  If there was a measurable risk that Mr. Midgley's pre-existing but formerly largely asymptomatic degenerative condition in his spine would have resulted in a loss absent the 2004 Accident, then that pre-existing risk of loss must be taken into account in assessing damages: *Moore* at para. 43. This is pertinent because Mr. Midgley must be restored to the position he would have been in absent the 2004 Accident, and not a better position: *Athey* at para. 35.

**230**  In my assessment of damages, the evidence I accept does not establish any measurable risk that Mr. Midgley's low back symptoms would have manifested themselves as they have, absent the injuries he sustained in the 2004 Accident. Accordingly, there is no principled basis on which to reduce the award for damages.

**231**  I have reviewed all of the authorities provided by both counsel. Although the cases are instructive, I do not propose to review them in detail as they only provide general guidelines. Considering Mr. Midgley's unique circumstances, I conclude a fair and reasonable award for non-pecuniary damages is $110,000.

**Loss of Past Earning Capacity and Loss of Future Earning Capacity**

**232**  The parties are significantly far apart on this head of damages. This head of damages constitutes the most significant and complex aspect of Mr. Midgley's claim.

**233**  Mr. Midgley seeks compensation of $380,120 gross or $266,084 (net of taxes) for loss of past earning capacity and $700,000 for loss of future earning capacity. He is also seeking compensation of $100,000 for the business loss he alleges he has incurred as a result of his injuries.

**234**  The defence disputes Mr. Midgley's assertion that his income earning capacity was impaired as a result of the injuries he sustained in the 2004 Accident. The defendants argue that Mr. Midgley did not suffer any wage loss, except for the few weeks of work he missed following the 2004 Accident and that his loss should be assessed as $2,500. The essential contention of the defence is that Mr. Midgley ceased working and went on short-term disability benefits in October 2004, because he was tired of working at Weyerhaeuser and "this was his ticket out."

**Legal Framework**

**235**  The legal principle that governs the assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendants' ***negligence***: *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185. It is well-settled that an award for future loss of earning capacity represents compensation for a pecuniary loss: *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32. Compensation must be made for the loss of earning capacity and not for the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=); *X. v. Y*, [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at para. 188.

**236**  The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=) at para. 19; *X. v. Y.* at para. 183.

**237**  As enumerated by the court in *Falati v. Smith*, [*2010 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62PC-00000-00&context=) at para. 41, aff'd [*2011 BCCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KT-00000-00&context=), the principles which inform the assessment of loss of earning capacity include the following:

1. The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
2. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 79 (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* [*(1990), 75 O.R. (2d) 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) at 636 (C.A.).
3. The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11.

**238**  Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at paras. 31-32; *X. v. Y.* at para. 185.

**239**  While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

**240**  This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

[40] ... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. ... As stated by Rowles J.A. in *Smith v. Knudsen*, [*2004 BCCA 613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=), at para. 29,

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

**Functional Capacity Evaluations**

**241**  Before turning to the analysis of this head of damages, it is necessary to summarize the key aspects of various functional capacity evaluations of Mr. Midgley.

1. **Jodi Fischer**

**242**  Ms. Fischer, who is an experienced occupational therapist, assessed Mr. Midgley on August 3, 2006; she prepared a report dated March 23, 2007.

**243**  She concludes that as of the date of her assessment, Mr. Midgley was not physically capable of returning to his pre-injury occupation of green end/veneer dryer operator. She states in her report that "he did not demonstrate the ability to tolerate the prolonged static standing, forwarding reaching or static trunk bending required" for that occupation.

**244**  In her opinion, Mr. Midgley did not present with any "non-organic findings and his reported level of pain enduring testing was consistent with the objective test findings." In her view, his subjective reports suggest that he has become "over-protective of his lower back, thus avoiding activities and particular movements in fear of symptom exacerbation and re-injury."

**245**  Ms. Fischer opined that Mr. Midgley was capable of work activity in Sedentary (limited), Light, and Medium strength categories in the National Occupation Classification (NCC), Dictionary of Occupations Titles (DCT), and that he was capable of occasional lifting only in the entry level of Heavy Strength ranges. In cross-examination, she acknowledged that there were probably many jobs Mr. Midgley could do based on the physical abilities he demonstrated during his assessment.

1. **Louise Craig**

**246**  Ms. Craig, who is a qualified physiotherapist, performed a functional capacity evaluation on Mr. Midgley on June 11, 2010. Her report is dated June 28, 2010.

**247**  She also concluded that Mr. Midgley did not meet the functional demands of a mill worker or veneer/dryer operator.

**248**  She found Mr. Midgley is limited for prolonged sitting, sustained and repetitive walking, heavy lifting and carrying and that he has difficulty working at low levels, crouching and sustained overhead reaching.

**249**  In her view, he met the majority of occupational demands of a personal trainer and gym owner, except that he had reduced tolerance for working at low levels. He could not tolerate a sedentary occupation due to sustained sitting requirements.

**250**  Ms. Craig observed that Mr. Midgley demonstrated instability in his right hip. She found that, although Mr. Midgley may have underestimated his physical abilities at times, he used high effort and exhibited competitive test behaviour, and that her assessment findings generally supported his subjective reports of pain.

**251**  Ms. Craig concluded that Mr. Midgley's competitive employability had been reduced by his demonstrated functional limitations.

1. **Kim Zinck**

**252**  Ms. Zinck is not a functional capacity evaluator; she is a registered kinesiologist. She performed an assessment of Mr. Midgley on April 10 and 12, 2007, on behalf of his long-term disability insurer. The defence relied on her April 19, 2007, report at trial.

**253**  In her opinion, Mr. Midgley functioned at a "medium physical demand capacity." Based on her assessment, Mr. Midgley was primarily limited with activities "involving forward bending/squatting to the ground", frequent walking and static standing. She concluded that Mr. Midgley would be suited for work that allowed him flexibility to rotate between standing and sitting positions and that limited the amount of walking to an occasional basis.

**254**  She observed an increased altered gait at the end of both testing days and she observed Mr. Midgley to demonstrate limitations with movements involving right hip rotation.

**255**  She concluded that Mr. Midgley's reports of pain were magnified. She found pain behaviours throughout testing and commented on his poor "psychodynamics." He appeared cautious and fearful of re-injuring himself.

1. **Rajni Dhiman**

**256**  Ms. Dhiman is an occupational therapist who conducted a functional capacity evaluation of Mr. Midgley on June 8, 2005, at the request of Weyerhaeuser. She was called by the defence to address her observations of Mr. Midgley at his assessment. Her opinion was not tendered in evidence.

**257**  Notably Mr. Midgley terminated the dryer outfeed tasks during the evaluation, reporting increased "pulling" in his low back and a "raw" feeling in his buttocks, and commenting that he should have ceased the activity earlier.

**258**  She found no signs of exaggerated pain behaviour.

**Was Mr. Midgley able to return to his former position at Weyerhaeuser?**

**259**  Mr. Midgley was off work from October 2004 through to August 2005. Although I find that Mr. Midgley was very motivated to return to Weyerhaeuser, his graduated return to work was unsuccessful and he ceased working at Weyerhaeuser on October 26, 2005. I reject the defence characterization of his efforts to return to his former position at Weyerhaeuser as unreasonable. The weight of the evidence, both lay and expert, amply supports a finding that because of the pain and physical restrictions occasioned by the injuries he sustained in the 2004 Accident, Mr. Midgley was incapable of fulfilling, on any sustained basis, the repetitive job demands of a green end/veneer operator.

**260**  The evidence of Dr. O'Connor, Dr. Hamm, Dr. Klassen, Ms. Fischer and Ms. Craig, all support this finding. The consistency of findings in the four functional capacity evaluations conducted over a five-year period fortifies my conclusion.

**What is Mr. Midgley's residual earning capacity?**

**261**  For the reasons set out below, I conclude that the preponderance of the evidence overwhelmingly shows that Mr. Midgley's competitive employability has been reduced by his functional limitations.

**262**  Dr. McKenzie, Dr. O'Connor, Dr. Hamm, Ms. Fischer, Ms. Craig, Dr. Schweigel and Ms. Dhiman did not find pain behaviour during their assessments of Mr. Midgley - however, Ms. Zinck did. I prefer their evidence on this point to that of Ms. Zinck. While I accept that, on occasion, Mr. Midgley may underestimate his physical capabilities, I am not persuaded that, in view of his chronic pain, that is surprising. He was and is protective of his injury because, on his own admission, he was "afraid" of aggravating his injuries which he described as a "stabbing" sensation in his right buttock/back. Moreover, there was no cogent evidence that he could engage in activities at a more intense level without suffering additional pain and discomfort.

**263**  Dr. Hamm who, as I referred to earlier, is an occupational medicine specialist, opined that Mr. Midgley was and is restricted from performing heavy strength, physically demanding jobs. In his opinion, Mr. Midgley, because of his low back pain, must avoid occupations demanding overexertion, "prolonged postures or forceful repetitive bending and lifting activities." While he stated in cross-examination that Mr. Midgley, subject to skills, training and experience, could do light and medium strength and sedentary jobs, he emphasized that he would require ergonomic devices, and the ability to change his postures as needed. He described Mr. Midgley as needing a sympathetic and accommodating employer.

**264**  Dr. O'Connor's opinion is that Mr. Midgley is capable of moderate-level work but not on a full-time basis. Accordingly, he did not recommend a return to full-time employment but rather recommended that Mr. Midgley continue with his entrepreneurial type of work.

**265**  Dr. O'Breasail opined that Mr. Midgley has a permanent partial vocational disability because of the injuries he sustained in the 2004 Accident. Dr. Miller, the defence psychiatrist, opined that in his assessment, Mr. Midgley was capable of limited work of "relatively low stress."

**266**  The functional capacity evaluation reports show that Mr. Midgley is capable of performing light and medium-strength work. However, I accept Dr. O'Connor's opinion that performing at an evaluation does not necessarily equate with a durable return to full-time employment. Mr. Midgley's performance in a single day of testing does not necessarily equate with his ability to repeat that performance day in and day out for an extended period: *Scoates v. Dermott*, [*2012 BCSC 485*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62J1-00000-00&context=) at para. 193.

**267**  Moreover, Mr. Midgley has limitations insofar as prolonged sitting, static standing and sustained and repetitive walking. I also recognize that the episodic aggravations Mr. Midgley experiences would detrimentally impact his attendance at his employment with set hours. It can reasonably be inferred that Mr. Midgley will be required to request some accommodation which permits him some flexibility in whatever occupation he pursues.

**268**  In summary on this issue, Mr. Midgley has proven that the injuries he sustained in the 2004 Accident have impaired his earning capacity. However, that is only the first step in the analysis. I must next consider whether or not there is a real and substantial possibility that this impairment will generate a pecuniary loss.

**Loss of Earning Capacity to the Date of Trial**

**269**  I turn to address whether the impairment in Mr. Midgley's capacity generated a pecuniary loss in the post-Accident, pre-trial period.

**270**  After the 2004 Accident, Mr. Midgley worked for an investment office as a stock consultant for approximately two months but he found he could not tolerate the prolonged sitting. He also worked for his friend, Mr. Miller, in a steel company, for approximately one month and as a personal trainer for Mr. Miller's staff and family, for about eight months. He also worked for his friend, Mr. Yates, in a private Sardis liquor store for about six weeks. However, he could not perform the heavy lifting required for the job. He also worked briefly as a tree-topper.

**271**  In January 2009, Mr. Midgley established his own business by opening a gym and personal training studio in Chilliwack ("the Gym"). The essential contention of Mr. Midgley is that, having failed in his efforts to return to his Weyerhaeuser job and having failed at working in a number of sedentary to moderate physically demanding jobs provided by sympathetic employers, it was reasonable for him to open the Gym.

**272**  If the court accepts that Mr. Midgley suffered a loss of income earning capacity because of the 2004 Accident, the defendants are not seeking to deduct from the wage loss claim any of the short-term and long-term disability payments received by Mr. Midgley. They assert, however, that even if the 2004 Accident had not occurred, he would likely have lost his job in December 2007 at Weyerhaeuser, due to the lay-offs. Alternatively, they argue that he would have likely lost his job in February /March 2009, when there was a further downsizing at Weyerhaeuser.

**273**  Further, the defence contends that Mr. Midgley has failed to mitigate his loss. They say he made minimal, if any, effort to find alternate suitable employment that would provide him with replacement income, other than short-term employment from friends. They contend that Mr. Midgley, because of his lack of experience, was bound to fail in the employment endeavours he did pursue.

**274**  I will address each of these submissions in turn.

**Likelihood of Lay-off from Weyerhaeuser**

**275**  Mr. Paul's evidence established that there was a series of lay-offs and terminations at Weyerhaeuser in December 2007. He explained that in 2007, there was a downturn in the demand for Weyerhaeuser lumber products. Eighteen on-call list associates and six on-shift associates were let go. Four of the six associates who were terminated opted to take severance packages as they were near retirement age. In February 2009, there were further lay-offs and by March 2009, 42 production associates were terminated.

**276**  Mr. Paul explained that, because the Weyerhaeuser mill is non-union, the lay-offs and ultimately the terminations were not determined by virtue of seniority alone. Weyerhaeuser considered performance-related criteria which look at critical skills, attendance, as well as a seniority or service component which made up 20 percent of the overall assessment.

**277**  The uncontroverted evidence shows that when Mr. Midgley was working at Weyerhaeuser, the mill operated with 220 associates, salaried and hourly, and that those associates worked seven days a week, 24-hours a day. By March 2009, there were only two shifts, with a total of 110 employees. Mr. Paul explained that in March 2009, all but four of the 42 associates who were terminated had more service than Mr. Midgley. He also pointed out that 20 of the terminations were voluntary, presumably to benefit from the severance package.

**278**  In my view, the preponderance of the evidence supports a finding that there was a real and substantial possibility that absent the 2004 Accident, Mr. Midgley likely would have continued to work at Weyerhaeuser. I find, however, that there is a real and substantial possibility that Mr. Midgley's employment with Weyerhaeuser would have been terminated in December 2007 and a greater possibility of such a termination occurring by March 2009. This is a significant negative contingency in assessing Mr. Midgley's claim for his future loss of earning capacity, as well as his claim for loss of earning capacity in the post-Accident, pre-trial period.

**Alternate Replacement Employment in the Pre-Trial Period**

**279**  The recent jurisprudence from the Court of Appeal in *Bradley* has clarified that a claim that is often described as "past loss of income" is actually a claim for loss of earning capacity.

**280**  In *Parypa v. Wickware*, [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=) at para. 67, the court stated that there is a duty on a plaintiff to mitigate his damages by seeking, if at all possible, a line of work that can be pursued in spite of his injuries: See also *Graham v. Rogers*, [*2001 BCCA 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63NT-00000-00&context=) (leave to appeal to S.C.C. refused, [*[2001] S.C.C.A. No. 467*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-JXG3-X2CR-00000-00&context=)).

**281**  In *Mazzuca v. Alexakis*, [*[1994] B.C.J. No. 2128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S3D3-00000-00&context=) (S.C.) (appeal dismissed, [*[1997] B.C.J. No. 2178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24CV-00000-00&context=)) in assessing future income loss, the trial judge cited Southin J.A.'s comments in *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.), and observed that a plaintiff must prove that the earnings from the vocation which he has lost the capacity to perform cannot be replaced by a substituted vocation.

**282**  After the 2004 Accident, Mr. Midgley was obliged to take reasonable steps to find employment at a level he reasonably could have been expected to achieve in light of his injuries. Doctrinally, whether this postulation is articulated and analyzed as mitigation of losses or an assessment of Mr. Midgley's residual earning capacity, in this case, the result is the same.

**283**  In assessing Mr. Midgley's pre-trial loss of his earning capacity, I must consider:

1. what Mr. Midgley would have earned in the pre-trial period had he not been injured in the Accident,
2. what, in light of his injuries, Mr. Midgley could have reasonably earned in the pre-trial period; and
3. what in fact Mr. Midgley earned in this period.
4. **Earnings in pre-trial period with no injury**

**284**  This assessment must begin with a consideration of what Mr. Midgley would have earned during the loss period, had he not been injured by the defendants' negligent conduct.

**285**  In the absence of the 2004 Accident Mr. Midgley likely would have continued to work at Weyerhaeuser as a mill worker, and would have earned the 2005 base salary of $60,060.00 plus 15 percent for a "shift premium", which equates to $69,069.00 per year. He would also have been entitled to benefits. The evidence shows that in 2005, his benefits were approximately $2,800.

**286**  I note parenthetically that there was no evidence to show if the 2004 Accident had not occurred Mr. Midgley would have suffered any income loss as a result of the 2006 Accident.

**287**  Given my findings that there was a real and substantial possibility that Mr. Midgley would have been laid-off from Weyerhaeuser in December 2007, and a more substantial possibility he would have been laid-off by March 2009, I must consider, in the absence of the 2004 Accident, what work Mr. Midgley would have performed if he was no longer working at Weyerhaeuser.

**288**  The evidence does support a finding that Mr. Midgley has some history of failed entrepreneurial endeavours. However, I reject the defence submission that Mr. Midgley was not a hard-working individual. The fact that two apparently successful businessmen in the Chilliwack community offered him employment and loaned him monies for the Gym stands a testament to his work ethic. The testimony of the personnel from Weyerhaeuser clearly establishes that he was a well-regarded and hard-working team member. Mr. Paul confirmed that his work-performance reviews were stellar.

**289**  Mr. Midgley's employment, for the most part, except for his failed entrepreneurial pursuits and his work at the oil companies in Alberta, has been largely physical in nature, including employment as a delivery man, sprinkler installer, and security doorman. There is a real and substantial possibility that he would have continued to do physical work if he had been laid off from Weyerhaeuser. However, the totality of the evidence supports a finding that Weyerhaeuser paid high wages for a labour job. The evidence as a whole supports a reasonable inference that absent the 2004 Accident, there was a real and substantial possibility that Mr. Midgley would have found an equivalent vocation, but it was unlikely that Mr. Midgley would have earned as much as he was earning at Weyerhaeuser.

**290**  The evidence does not support a finding that absent the 2004 Accident, Mr. Midgley would have opened the Gym.

**291**  On my best assessment, there is a real and substantial possibility that absent the 2004 Accident, Mr. Midgley, if he had ceased employment with Weyerhaeuser by 2009, would have earned thereafter in the range of $50,000-$55,000 per annum.

**(b) In light of his injuries, what could Mr. Midgley have reasonably earned in the pre-trial period?**

**292**  Given Mr. Midgley's age, work history and injuries, there was a real and substantial possibility that, had he not pursued employment opportunities through his friends, Mr. Midgley would have experienced difficulties re-entering the labour force after the termination of his employment with Weyerhaeuser in October 2005. The evidence shows that in 2006, he was suffering from significant depressive symptoms. Mr. Midgley's reasonable prospects for employment must be viewed through the lens of his physical limitations, psychological issues, chronic pain and episodic flare-ups of his symptoms. He clearly required some flexibility in his occupational endeavours.

**293**  I find nonetheless that the preponderance of the evidence shows that Mr. Midgley had some residual earning capacity from 2006 to the date of trial.

**294**  Neither party led any expert evidence to establish what particular occupations Mr. Midgley, given the circumstances I have summarized above, could have otherwise reasonably pursued in the post-accident pre-trial period. I have given limited weight to the 2005 census data provided by the defence. The listing of NOC occupations does not provide any information as to what training or experience would be required for those positions, nor the potential for flexibility associated with each position. The wages only refer to income in 2005 for full-time work. It is difficult to extrapolate from this information in any meaningful way.

**295**  Mr. Midgley testified about the possibility of selling cars and offered that, working six days a week, six hours per day, one could earn $30,000 per year.

**296**  On my best assessment, I conclude that there was a real and substantial possibility that Mr. Midgley, after he left Weyerhaeuser -- with his limitations and if he had not pursued the employment he did -- would have been realistically able to earn $25,000 to $35,000 annually. This reflects slightly more than the approximate income that he would have earned from either full-time work at minimum wage in British Columbia or some part-time work at a higher wage.

**297**  In my assessment, I have taken into account that Mr. Midgley may have had some difficulty in immediately finding employment after his termination from Weyerhaeuser.

**(c) What did Mr. Midgley earn in the post-Accident, pre-trial period?**

**298**  The next step in my assessment is to consider what Mr. Midgley did in fact earn in the post-Accident, pre-trial period.

**299**  Although the evidence on this point was somewhat thin, it supports a finding that Mr. Midgley did in fact earn the following amounts in the following years:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | 2005: | $19,762.00 |  | plus $11,275-gross business income before deduction for expenses |  |

2006: $98.00

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | 2007: | $571.00 |  | plus $22,932.00- gross business income before deduction for expenses |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | 2008: | $1,687.00 |  | plus $27,080.00- gross business income before deduction for expenses |  |

**300**  Mr. Midgley testified that he earned $10,000 when he worked for Blue Chip, a friend's investment company. It is difficult to determine from Mr. Midgley's 2005 income tax return whether this income was reported. The defence submits that the $10,000 he apparently earned in 2005 must be taken into account in my assessment. I agree.

**301**  Commencing in January 2009, Mr. Midgley commenced the Gym business. This has permitted him flexibility in his work hours and, it can reasonably be inferred, the ability to delegate the heavier tasks to his staff members. The evidence shows that while Mr. Midgley has paid his staff and equipment lease payments, he has remained in arrears for the rent. Although he has withdrawn up to $6,000 per year, and paid his car expenses he says that he has never earned enough to pay himself a regular salary. As I referred to earlier in these reasons, the monthly lease payments of $5,200 for the equipment were to be paid off in January 2012. It can reasonably be inferred that the business has the potential to pay rent and generate some profit, assuming that the membership numbers are sustained and no new capital expenditures are required.

**302**  In all the circumstances I am satisfied that it was not unreasonable for Mr. Midgley to have pursued his own Gym business. The field of physical fitness and training is a suitable vocational option for him. He acted reasonably in pursuing an endeavour which could yield a potentially higher income than alternate entry-level or part-time positions that he may have otherwise pursued. However, by January 2012 it is reasonable to assume that he could earn in the range of $25,000 - $35,000 either in the gym business or some other competitive employment.

**303**  I have also factored into my assessment what Mr. Midgley did in fact earn during this period and what he could have reasonably earned in the period prior to opening the Gym.

**304**  Given the various contingencies and the substantial negative contingency that his employment at Weyerhaeuser would have been terminated by 2009, I exercise my discretion based on the principles articulated in *Lines* as follows: I assess his loss as $12,500 in 2004; as $40,000 for 2005, as $105,000 for 2006-2008 and $115,000 from 2009 to date of trial.

**305**  In summary on this issue, I conclude that the 2004 Accident has resulted in a total past loss of income of $272,500 to Mr. Midgley for the period from the date of 2004 Accident to trial.

**306**  As Mr. Midgley is only entitled to recover his net income losses, I direct counsel to carry out the necessary calculations in order to determine the appropriate net loss. Counsel have liberty to apply if they are unable to agree as to this amount.

**Business Losses**

**307**  Mr. Midgley asserts that, in his attempts to mitigate his loss of earnings by operating the Gym, he suffered significant financial losses.

**308**  Mr. Midgley claims compensation of $100,000 for his losses which is comprised of the $70,000 Mr. Yates and Mr. Miller loaned to Mr. Midgley for his business start-up and the $30,000 in rental arrears, owing to Mr. Yates for the last two years of operation of the Gym. The $100,000 business loss claim does not include any claim for the $72,000 in rental arrears arising from the Gym's first year of operation, since Mr. Yates testified he was prepared to waive recovery of that amount from Mr. Midgley.

**309**  For the reasons set out below, I am not persuaded that this amount should be assessed against the defendants.

**310**  At its core, this claim engages an inquiry of reasonable foreseeability and remoteness in the recovery of damages.

**311**  The Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=), clarified the principles of foreseeability in tort damages. Chief Justice McLachlin clarified that the key to the remoteness inquiry is whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable". She also affirmed at para. 12 that since the *Wagon Mound (No. 1)*, "it is the foresight of the reasonable man which alone can determine responsibility." Reasonable foreseeability is determined at the time of the tort and the question of what harm the plaintiff or a person of ordinary fortitude would suffer, is to be determined objectively; *Milliken v. Rowe*, [*2012 BCCA 490*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2WS-00000-00&context=).

**312**  The Court's comments at para. 16 are instructive:

... the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of ***negligence*** seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. [Emphasis in original.]

**313**  It follows that in order to succeed in this claim , Mr. Midgley must show that it was foreseeable that a person of ordinary fortitude would suffer the business loss he alleges as a result of his injuries. In my view, he has failed to do so. This possibility was not a "real risk" in the mind of a reasonable man in the position of the defendant; *Milliken* at para. 10.

**314**  In short, the loss claimed is too remote to be reasonably foreseeable and consequently is not recoverable from the defendant. It follows that Mr. Midgley's claim for $100,000 business loss must fail.

**315**  I also note that, while the business in 2009 through 2011, in its start-up phase, was showing an operating loss, it appears that by 2012 - with the equipment having been paid off - it had the potential to become a profitable business.

**Loss of Future Earning Capacity**

**316**  As I have referenced earlier, Mr. Midgley submits that he is entitled to an award of $700,000 for loss of future earning capacity. The defence forcefully submits that Mr. Midgley has not met the burden of proof in establishing that he has suffered a diminishment of his future earning capacity attributable to the 2004 Accident.

**317**  The essential task of this Court is to compare the likely future of Mr. Midgley's working life if the 2004 Accident had not happened with Mr. Midgley's likely future working life after the 2004 Accident: *Hunt* at para. 204.

**318**  I have concluded earlier in these reasons that Mr. Midgley's 2004 Accident-related injuries have impaired his earning capacity. The limitations caused by his injuries in the 2004 Accident have rendered him less capable overall from earning income, have rendered him a less marketable and attractive employee, and have taken from him the ability to take advantage of all job opportunities that might otherwise have been open to him. The preponderance of the evidence demonstrates that this impairment will likely harm Mr. Midgley's earning capacity in the future. For the reasons that follow, I have also concluded that, on account of his 2004 Accident-related injuries and consequent impairment of his earning capacity, there is a real and substantial possibility that Mr. Midgley will suffer some future pecuniary loss.

**319**  Mr. Midgley was 46-years old as of the date of trial.

**320**  Earlier in these reasons, I have found that absent the 2004 Accident there was a real and substantial possibility that Mr. Midgley would have been laid off from Weyerhaeuser somewhere in the period between 2007 and 2009. Absent the 2004 Accident and if his employment with Weyerhaeuser had been terminated by 2009, I find a real and substantial possibility that he would have found alternate employment albeit at a lower wage and that he would have continued to earn in that range up until age 65.

**321**  I am satisfied on the evidence that at his age, his future prospects for attracting and holding employment that he can perform with his physical limitations, chronic pain and episodic flare-ups has been diminished. There is a real and substantial possibility that this impairment will impact his future earnings.

**322**  On my best assessment of the evidence, there is also a real and substantial possibility that Mr. Midgley will now retire earlier than age 65. There is a real chance that his chronic pain will take a toll and, over time, will detrimentally impact his ability to work, regardless of what accommodations any future employer is prepared to make: *Morlan v. Barrett*, [*2012 BCCA 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1TW-00000-00&context=) at para. 41.

**323**  From 2009 up until the end of 2011, I found it reasonable to permit Mr. Midgley the opportunity to continue to operate his business in anticipation that it would eventually generate a better level of income for him. I recognize that it remains uncertain whether Mr. Midgley, with the Gym equipment now having been paid off, will be able to earn more money operating his gym or whether he would be better served trying to secure employment in the marketplace.

**324**  Whatever occupational endeavour he pursues, for purposes of assessing his future loss, I find that that there is a real and substantial possibility that Mr. Midgley is capable of earning $25,000 to $35,000 per annum.

**325**  Having found that Mr. Midgley's future earning capacity is diminished and that there is a real and substantial possibility that the impairment of his capacity will generate a pecuniary loss over time, I must now decide the companion issue of what, in all the circumstances, he should be awarded as compensation.

**326**  Each party provided future income loss multipliers from their respective economists which were intended to assist the court in the evaluation of Mr. Midgley's future income loss. The future income loss multipliers included an adjustment for survival and discount rates, as well as labour market contingencies for average BC males with a high school diploma.

**327**  The economists' evidence is of limited assistance in this case because I accept the defence submission that the assessment of Mr. Midgley's impairment of earning capacity must be done on the basis of a loss of capital asset. This approach is appropriate given the uncertainty associated with Mr. Midgley, in the absence of the 2004 Accident, having continued to work at Weyerhaeuser after the significant layoffs and terminations in 2007 and 2009.

**328**  In this case, I must forecast Mr. Midgley's future losses. It is well-recognized that unknown contingencies and uncertain factors make it impossible to calculate future earning capacity with any precision. Damages must be assessed, not calculated and must be fair to both parties: *Power v. Carswell*, [*2011 BCSC 1672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22TH-00000-00&context=) at para. 211. The evidence in this case mandates that in my assessment I take into account the following contingencies which reflect the likelihood of the future loss occurring:

1. Mr. Midgley, absent the 2004 Accident, may not have maintained full-time employment with Weyerhaeuser and may not have continued to earn as high wages as he was earning as of the date of the 2004 Accident. This is a significant negative contingency.
2. Mr. Midgley would have withdrawn from employment before age 65 or had reduced earnings because of illness, injury or disability, unrelated to the 2004 Accident.
3. In the future, Mr. Midgley may earn a higher wage from the Gym business or competitive employment than is reflected in the range of wages I have discussed above.

**329**  Taking into account all of the evidence and relevant negative and positive contingencies, I assess Mr. Midgley's loss of future earning capacity from the date of trial as $160,000. I am satisfied that in all the circumstances this is a fair and reasonable award.

**Pension Loss**

**330**  Mr. Midgley's counsel submits that, but for the 2004 Accident, Mr. Midgley stood to be able to benefit from one of "the most attractive pension benefits protection available to workers in the forest products industry." He asserts that the present value of Mr. Midgley's pension loss flowing from the 2004 Accident is $240,000. The pertinent calculations are set out in his written submissions.

**331**  Mr. Midgley testified that during the time he was employed by Weyerhaeuser, the company contributed to the employee pension plan on his behalf as part of his compensation and benefits package and that he was periodically provided with credits to purchase or maximize his benefits under the plan. However, he could not recall any particulars as to whether he made any such contributions.

**332**  Mr. Paul explained that the Weyerhaeuser pension was a defined pension plan but could provide no information on Mr. Midgley's potential entitlement. There was no evidence led as to when Mr. Midgley's pension may have vested. There was no pertinent documentation regarding the Weyerhaeuser pension plan or any calculations from an economist advanced at trial.

**333**  Counsel applied to re-open his case after the conclusion of closing submissions but prior to judgment, for the purpose of deducing further evidence - namely an economist's report - to address Mr. Midgley's claim for loss of pension benefits. I concluded that he had not established the likelihood of a miscarriage of justice if he was not permitted to open his case and I dismissed the application.

**334**  In the end, in light of the deficiencies in the evidence, I am unable to make any award for loss of pension benefits.

**Cost of Future Care**

**335**  Mr. Midgley seeks compensation of $29,000 for the cost of anti-depressant medication and the cost for counselling treatment. The defence submits that the evidence does not support any future care award because they assert Mr. Midgley likely would not use the medication or access counselling treatment.

**336**  The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Milina* at para. 78; *Gigmac v. Insurance Corporation of British Columbia ,* [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at para. 30. The items or services claims must be medically justified and the claims must be reasonable: *Milina* at p. 84. In assessing what is reasonably necessary to promote the plaintiff's health, the court should also consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, [*2011 BCCA 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1R6-00000-00&context=) at paras. 12-14; *Drodge* at para. 194.

**337**  The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise; adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle (Guardian ad litem of) v. Brisco,* [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=) at para. 21; *Prempeh v. Boisvert*, [*2012 BCSC 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6247-00000-00&context=) at para. 108.

**338**  Mr. Midgley submits that $20,000 is appropriate compensation for the future cost of medication. He relies on Dr. O'Breasail's recommendations that he, in the long term, would benefit from daily anti-depressant medication. Dr. Miller, the psychiatrist for the defence, disagrees with Dr. O'Breasail's recommendation regarding anti-depressant medications. Dr. O'Breasail estimated the monthly cost for this medication to be in the range of $60 to $80. On counsel's calculation, the present value of the medication costs to be incurred over 30 years (to age 76) is $20,000.

**339**  Insofar as the medication, Mr. Midgley has expressed some reservation with respect to using prescription medication. Whether a plaintiff would accept a recommendation is a relevant consideration; *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at para. 60. On the evidence, I am not persuaded that Mr. Midgley would use anti-depressant medication and I decline to make any award for this item.

**340**  Dr. O'Breasail also recommended counselling or psychotherapy to assist Mr. Midgley in coping with his chronic pain. He suggested weekly sessions for three to six months, decreasing in frequency to once every two to four weeks over the following 18 months. Dr. O'Connor also recommended psychological counselling for Mr. Midgley, as well as Dr. Miller, who was of the view that Mr. Midgley would benefit from cognitive behavioural treatment.

**341**  Mr. Midgley has undergone counselling when it was available to him through his employment at Weyerhaeuser. I am satisfied that counselling is reasonably necessary on the medical evidence and that with the elimination of any obvious financial impediment Mr. Midgley would access such treatment.

**342**  In the result, and on the totality of the evidence and taking into account the relevant contingencies, I assess an award for the cost of counselling in the amount of $7,500.

**Loss of Housekeeping Capacity**

**343**  I next turn to address whether Mr. Midgley is entitled to compensation for impaired housekeeping capacity. The defence submits the evidence does not support such a claim.

**344**  In *Dykeman v. Porohowski,* [*2010 BCCA 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-2018-00000-00&context=) at para. 28, Newbury J.A. summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. She affirmed that damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense, because housekeeping services were gratuitously replaced by a family member. Moreover, since the award recognizes the impairment of housekeeping capacity, whether a plaintiff is likely to hire such assistance in the future, does not inform the analysis; *X. v. Y.* at para. 256; *O'Connell* at para. 67. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29; *X. v. Y.* at para. 246.

**345**  In assessing damages under this head, the authorities mandate that the court must carefully scrutinize the gratuitous services provided by the family member. A relatively minor adjustment of duties within a family will not justify a discrete assessment of damages: *Campbell v. Banman*, [*2009 BCCA 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24R0-00000-00&context=) at para. 19. In *Dykeman* at para. 29, Newbury J.A. cautioned that:

Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services - were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? - and with respect to causation - were the services necessitated by the plaintiff's injuries or would they have been provided in any event? [Emphasis in original]

**346**  Mr. Midgley's counsel asserts that the expert evidence identifies permanent limitations in Mr. Midgley's ability to carry out the heavier aspects of his household duties. He seeks $30,000 compensation calculated at approximately $1,500 per year to age 75, when they say some of the needs may have arisen even in the absence of the 2004 Accident.

**347**  Dr. Hamm was of the view that Mr. Midgley will require some occasional assistance with respect to heavier and/or seasonal household and yard work. Ms. Craig, the occupational therapist who conducted a functional capacity evaluation of Mr. Midgley on June 28, 2010, suggested that he may require help for some maintenance and heavier chores, as long as his symptoms persist.

**348**  I find that Mr. Midgley has resumed mowing the lawn and performing lighter household maintenance. He and his wife provided only the most general evidence as to what household service she now performs that would have been performed by Mr. Midgley prior to the 2004 Accident. Mr. Midgley referred to his inability to shovel the driveway. Ms. Midgley testified that she now takes out the garbage and performs the lifting and yard work including the weeding. There was no cogent evidence of them hiring outside help to perform these services.

**349**  While I accept that, because of Mr. Midgley's physical limitations there has been some adjustment of household duties between he and his wife since the 2004 Accident, I am not persuaded on the evidence that it justifies a discrete award of damages. Moreover, there was no evidence tendered as to the market value of the provision of those household services that Mr. Midgley can no longer perform.

**350**  In all the circumstances, I have concluded that Mr. Midgley's loss is properly considered as a factor in the assessment of his non-pecuniary damages; this is reflected in the non-pecuniary damages award I have assessed.

**351**  In the result, I make no award for loss of housekeeping capacity.

**Management Fee**

**352**  The parties have agreed that determination of whether the management fee is appropriate and a quantification of the management fee will be the subject of further submissions once these reasons have been released.

**Special Damages**

**353**  Mr. Midgley seeks special damages totalling $5,861.07 plus $4,042.50 for services provided by Rosaroma Therapy.

**354**  It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *Milina* at 78; *X. v. Y.* at para. 281.

**355**  I accept the defendants' submission that the $4,042.50 for therapy treatments claimed by Mr. Midgley for the services provided by Rosaroma Therapy for the period October 12, 2005, to November 21, 2008, are not properly recoverable, as there is no indication such treatments were provided by a registered massage therapist or were medically approved treatments.

**356**  Mr. Midgley has also submitted prescriptions in the amount of $2,184.34 and $556.39 for Pregnenolone, Daga, and 7-Keto-DHEA and unspecified compound prescription from Dr. James Copp. It is not established on the evidence that this medication was reasonably necessary to treat the injuries Mr. Midgley sustained in the 2004 Accident.

**357**  Mr. Midgley is awarded the balance of the items claimed. In the result, I find that Mr. Midgley is entitled to re-imbursement for special damages of $3,120.38.

**CONCLUSION**

**358**  Mr. Midgley's damages are assessed at $553,120.38 consisting of the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non pecuniary | $110,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage loss (less | $272,500.00 |  |
|  | income taxes to be |  |  |
|  | calculated by counsel) |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future loss of income | $160,000.00 |  |

Cost of Future Care:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages | $7,500.00 |  |

|  |  |
| --- | --- |
| $3,120.38 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $553,120.38 |  |

**359**  I find that the injuries Mr. Midgley sustained in the 2006 Accident are indivisible. I have assessed damages globally. Any damages arising from the 2006 Accident should be deducted from my award.

**COSTS**

**360**  Mr. Midgley is entitled to his costs at Scale B unless there are any pertinent circumstances that should be brought to the court's attention. If a hearing is required, I request that counsel make attempts to schedule a hearing date within six months from the date of the release of these reasons.

D.J. DARDI J.

**End of Document**

[***Moon v. Golden Bear Mining Ltd., [2012] B.C.J. No. 1150***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-2499-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D.C. Harris J.

Heard: March 12-16, 19-23 and April 10-12, 2012.

Judgment: June 5, 2012.

Docket: S107260

Registry: Vancouver

**[2012] B.C.J. No. 1150** | 2012 BCSC 829

Between Jung J. Moon and SMG Canada Gold Corp., Plaintiffs, and Golden Bear Mining Ltd., Ernest McLean, Golden Bear Exploration Inc., Frances Grace McLean and Shawn McGroarty, Defendants

(361 paras.)

**Case Summary**

**Contracts — Misrepresentation — What constitutes — Negligent misrepresentation — Fraudulent misrepresentation — Action by plaintiffs for damages for negligent and fraudulent misrepresentation, breach of contract, and remedies for oppressive conduct by principal shareholder McLean that arose out of funding agreement that invested in Golden Bear Mining allowed — McLean had knowingly not disclosed regulatory conditions that limited ability to mine according to funding agreement and had breached contract as had not used funds as agreed — McLean was personally liable for oppressive conduct and was removed as director and officer of Golden Bear — Plaintiffs were entitled to return of investment.**

**Contracts — Remedies — Damages — Remedies in tort — Misrepresentation — Negligent misrepresentation — Fraudulent misrepresentation — Action by plaintiffs for damages for negligent and fraudulent misrepresentation, breach of contract, and remedies for oppressive conduct by principal shareholder McLean that arose out of funding agreement that invested in Golden Bear Mining allowed — McLean had knowingly not disclosed regulatory conditions that limited ability to mine according to funding agreement and had breached contract as had not used funds as agreed — McLean was personally liable for oppressive conduct and was removed as director and officer of Golden Bear — Plaintiffs were entitled to return of investment.**

**Corporations, partnerships and associations law — Corporations — Directors and officers — Personal liability of directors to persons other than the corporation — Oppression remedy — Grounds — Oppressive or unfairly prejudicial conduct — Action by plaintiffs for damages for negligent and fraudulent misrepresentation, breach of contract, and remedies for oppressive conduct by principal shareholder McLean that arose out of funding agreement that invested in Golden Bear Mining allowed — McLean had knowingly not disclosed regulatory conditions that limited ability to mine according to funding agreement and had breached contract as had not used funds as agreed — McLean was personally liable for oppressive conduct and was removed as director and officer of Golden Bear — Plaintiffs were entitled to return of investment.**

|  |
| --- |
| Action by plaintiffs for damages for negligent and fraudulent misrepresentation, breach of contract, orders to enforce the right of first refusal to purchase shares and remedies for oppressive conduct by principal shareholder McLean, which arose out of a funding agreement in which the plaintiffs invested in Golden Bear Mining in return for a 30 per cent shareholding. The plaintiffs alleged the money invested was not used for the agreed purpose, mining for gold in the Settea Valley, but instead to cleanup an old worksite near Atlin. The plaintiffs further alleged it was not disclosed that regulators had stipulated the Atlin worksite be cleaned up before any permit would be issued to Golden Bear or McLean to mine in the Settea Valley. The plaintiffs argued that McLean failed in his duties as an officer and director of Golden Bear. McLean denied any misrepresentations or bad faith and claimed that the priority of the Atlin cleanup was known to all, and he had simply miscalculated the time and cost required. McLean also stated that he had staked the claims personally and they did not belong to Golden Bear, which had a right to only one later claim.  HELD: Action allowed.  The funding agreement was a contract between the plaintiffs and McLean and Golden Bear. McLean was capable of attracting personal liability. All of the claims staked personally by McLean in 2009 in the Settea Valley were held in trust for the benefit of Golden Bear. Neither McLean nor Golden Bear disclosed conditions that limited their ability to mine in the Settea Valley in 2010, or any element relating to the priority cleanup of Atlin. McLean had full knowledge of the regulatory conditions. However, McLean's evidence that he underestimated what was involved was accepted and McLean was not knowingly, deliberately or subjectively dishonest in that regard. The information that was not disclosed was material to the ability of Golden Bear to carry out the funding agreement. McLean' knowledge took him beyond ***negligence*** in misrepresenting facts. The plaintiffs had reasonably relied on the representations and had the misrepresentations (and non-disclosures) not been made, they would not have invested. The plaintiffs had made out a case in negligent and fraudulent misrepresentation. Golden Bear breached its contractual obligation to use funds designated for a particular purpose and McLean was also personally liable. Further, the obligation to transfer all the Settea mineral claims was breached and the plaintiff's nominee was not appointed as agreed. It could not be concluded, however, that in issuing shares to McLean, Golden Bear breached the right of first refusal. The shares were issued as a part of giving the plaintiffs their 30 per cent interest. Reasonable expectations concerning the management and control of Golden Bear, the use of funds and rights to claims were defeated in a manner that supported an oppression claim. McLean was personally liable for the oppressive conduct and was removed as director and an officer of Golden Bear. Damages were available in tort and contract. The plaintiffs were entitled to the return of their investment. An award of punitive damages was justified against McLean. |

**Statutes, Regulations and Rules Cited:**

Business Corporations Act, [*SBC 2002, CHAPTER 57, s. 142*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-606Y-00000-00&context=), s. 227(3)(e)

**Counsel**

Counsel for the Plaintiffs: M.J. Hewitt.

Defendant Shawn McGroarty: Self-Represented.

Defendant Ernest McLean: Self-Represented and appearing for Golden Bear Mining Ltd., Golden Bear Exploration Inc. and Frances Grace McLean.

**Reasons for Judgment**

|  |
| --- |
| **D.C. HARRIS J.** |

**Introduction**

**1**  This case arises out of an agreement of December 12, 2009, between the plaintiffs, Mr. Moon and SMG Canada Gold Corp., and the defendants, Golden Bear Mining Ltd. and Mr. McLean. The agreement, referred to as the "funding agreement", involved the plaintiffs investing $800,000 in Golden Bear Mining in return for a 30% shareholding in that company. The funding agreement stipulated the uses to which the money could be put, provided a right of first refusal for the plaintiffs to buy any additional shares issued by Golden Bear Mining, specified how certain mining claims would be held, and contemplated that Mr. Moon or his nominee would become a director of the company.

**2**  The plaintiffs allege that the money invested by them was not used in 2010 for the agreed purpose, namely, to finance mining for gold on claims staked in the Settea Valley in northern British Columbia. No mining or exploration occurred in the Settea Valley in 2010, although some preparatory work was done. Instead, the money was used primarily to fund cleanup operations at an old worksite at Davenport Creek, near Atlin, British Columbia. This worksite was not Golden Bear Mining's, but it was a worksite where another company (Four Crown Mining), associated with the principal shareholder of Golden Bear Mining, Mr. McLean, had conducted operations in years past.

**3**  The plaintiffs allege that they did not know, and it had not been disclosed to them by Golden Bear Mining or Mr. McLean, that the regulators had stipulated that before any permit would be issued to Golden Bear Mining or Mr. McLean to explore or mine in the Settea Valley, the worksite near Atlin would have to be cleaned up to their satisfaction. The plaintiffs say that this was a material (negligent or fraudulent) non-disclosure and they would not have invested their money in Golden Bear Mining if they had known of this condition. Furthermore, Mr. McLean, knowing the scope and cost of work for the Atlin cleanup, negligently or fraudulently misrepresented what the investment would be used for.

**4**  The plaintiffs did receive their 30% shareholding in Golden Bear, but neither Mr. Moon nor his nominee has been made a director of the company, contrary to the funding agreement and contrary to an earlier court order that Mr. Moon be appointed a director. Moreover, the plaintiffs allege, they were not offered their right of first refusal to purchase shares in Golden Bear Mining when additional shares were issued to Mr. McLean, contrary to the terms of the funding agreement.

**5**  The plaintiffs argue that Mr. McLean failed in his duties as an officer and director of Golden Bear Mining. He must have known the size of the task of the Atlin cleanup and that neither he nor Golden Bear Mining had the funds available to pay for that job. He approved the use of funds dedicated to exploration and mining in Settea Valley for the cleanup at Atlin instead. He also employed the defendant Mr. McGroarty as Chief Executive Officer of Golden Bear Mining. Mr. McGroarty, it is alleged, is an unsuitable person to employ in that role and proved to be as he converted to himself substantial funds invested by the plaintiffs from Golden Bear Mining.

**6**  Finally, the plaintiffs argue that the pattern of wrongdoing that started in late 2009 with misrepresentations and non-disclosure before the funding agreement and which continued in 2010 has continued in 2011. In late 2010 and following, when this action started, a number of orders were made appointing an inspector and granting injunctions, including freezing the use of assets, staked claims and the disposition of shares. At the very least, the defendants have flirted with breaching these orders, most seriously by taking steps to prepare to explore or mine in the Settea Valley using a company, also a defendant, known as Golden Bear Exploration Inc. As well, orders have been made respecting document production that were not complied with and the order directing that Mr. Moon be made a director has been breached.

**7**  The plaintiffs pitch their case somewhat higher than my description of it might suggest. In their opening they say the defendants failed to disclose, before and after the investment was made, that they intended to use the investment for a variety of personal gains, and that the money would not be used for mining in the Settea Valley.

**8**  Indeed, it has become apparent through this litigation, they say, that the majority of those funds were diverted as part of a scheme intended to benefit only Mr. McLean and the defendant, Mr. McGroarty. That scheme was designed to enable them to pursue the Golden Bear Mining's claims in a separate company, Golden Bear Exploration Inc., controlled by Mr. McLean and Mr. McGroarty.

**9**  In summary, the particular acts in furthering this scheme the plaintiffs set out to prove include:

1. In soliciting the plaintiffs' investment in 2009, Mr. McLean failed to reveal his intention to use it for a variety of improper purposes;
2. Having secured the plaintiffs' investment, in January 2010, Mr. McLean gave control of the corporation over to Mr. McGroarty, a man convicted of serious commercial crimes in the United States, and investigated for other commercial crimes in Canada, notwithstanding his commitments to the shareholders not to allow Mr. McGroarty to be involved in the corporation;
3. Mr. McLean refused to honour his contractual obligation to appoint Mr. Moon as a director of Golden Bear Mining;
4. In March 2010, Mr. McGroarty and Mr. McLean established Golden Bear Exploration Inc., in an effort to strip Golden Bear Mining Ltd. of its primary assets, its mining claims;
5. In May 2010, Mr. McLean and Mr. McGroarty together unlawfully caused Golden Bear Mining to give Mr. McLean majority control of the corporation by issuing 549 shares to him for $0.01 each, and without honouring the plaintiffs' right of first refusal when issuing those shares;
6. Mr. McLean and Mr. McGroarty spent the summer of 2010 using the Plaintiffs' investment, not for the agreed purposes, but to clear Mr. McLean's name with the B.C. Ministry of Mines;
7. Both Mr. McLean and Mr. McGroarty unlawfully removed and converted other funds, and attempted to convert and remove other assets, from Golden Bear Mining Ltd. for personal use;
8. In the fall of 2010, Mr. McLean and Mr. McGroarty unlawfully conspired to defraud the plaintiffs of more than $10 million by communicating a non-existent offer to purchase Mr. McLean's shares under the first right of refusal contained in the funding agreement; and
9. Following the commencement of the action, Mr. McLean and Mr. McGroarty have carried on a further fraudulent attempt to harm the company by concocting a scheme by which they sought, and continue to seek, to strip the company of all but one of its mineral claims.

**10**  In the result, the plaintiffs seek a wide variety of relief. They seek damages for misrepresentation and breach of contract. As well, they seek orders to enforce the right of first refusal under the funding agreement; remedies to relieve the consequences of the oppressive exercise of powers over Golden Bear Mining by its only director and officer, Mr. McLean; and orders that will enable the company to carry on business without any further involvement in it by Mr. McLean or Mr. McGroarty. It should be noted here, that Golden Bear Mining is a defendant in these proceedings and not a plaintiff. There has been no application by the plaintiffs to bring a derivative action in the name of Golden Bear Mining for what might be wrongs, if proven, to it by the personal defendants.

**11**  Mr. McLean, for his part, denies that any misrepresentations induced the plaintiffs to invest in Golden Bear Mining. It was known and understood by all that before Golden Bear Mining could begin its work in Settea Valley, Mr. McLean would need to do work at Atlin and transfer equipment from there to a staging ground near the Settea Valley. Money was set aside in the funding agreement for this purpose, but by mistake Atlin was referred to in the agreement as Highland. Unfortunately, it took longer to do the work at Atlin than he anticipated and was much more expensive. Although he was committed to getting into the Settea Valley in 2010, events conspired against him, the cleanup took longer and was more expensive than expected, and this litigation disrupted his plans to get into the valley and start work. Money spent to cleanup Atlin, he argues, does not breach the funding agreement because it was for the benefit of the planned mining operation in Settea.

**12**  In broad terms, Mr. McLean says he acted throughout in good faith. He is first and foremost a miner, not an administrator. He believed he could "do the job" with the money he had, but understood that if more money was needed the plaintiffs would lend it to the company. Throughout 2010, he was bending all his efforts to get into the Settea Valley. He had little idea what was happening back in Vancouver, having delegated authority to administer and run the company to others.

**13**  He had little, if anything, to do with Golden Bear Mining's corporate affairs in 2010, leaving it to others to organise the share structure of the company to give the plaintiffs their 30% shareholding interest. He says he was always willing to have Mr. Moon or his nominee become a director, and gave the necessary instructions to bring that about. However, he thought that should only happen if a third director, familiar with the company, was appointed to avoid potential deadlock. His suggestion was that his wife should become a director at the same time as Mr. Moon. Neither appointment was ever made.

**14**  Mr. McLean repudiates the allegation that he and Mr. McGroarty embarked on a scheme to benefit themselves by stripping Golden Bear Mining of its assets, most particularly its mining claims. His position is that he had staked the claims in the Settea Valley in his own and his wife's name using his credit card to pay for them. The claims, then, did not belong to Golden Bear Mining. They were his property. Golden Bear Mining had a right to only one claim (claim 672403) that had been acquired after testing in late September 2009 and was staked on November, 20, 2009, as reflected by an agreement of about that date.

**15**  Mr. McLean denies bleeding the company of its funds for personal benefit.

**16**  Mr. McGroarty, for his part, says that any money he received from Golden Bear Mining was, with some minor inadvertent exceptions, for legitimate corporate purposes. He was not participating in a scheme to defraud Golden Bear Mining or the plaintiffs. Both he and Mr. McLean offer an explanation of the alleged conspiracy to defraud the plaintiffs of $10 million that draws the sting of the allegation.

**17**  Mr. McLean says, in responding to the allegations about financial irregularities, that he was not handling the financial affairs of Golden Bear Mining when he was in Atlin throughout the summer of 2010. He is unable to comment directly or completely on the cost of the cleanup activities. Nor is he in a position to explain in detail what the plaintiffs' investment was used for. He had arranged that a Mr. Williams would administer the financial affairs of Golden Bear Mining when he was away and Mr. Williams was responsible for approving the expenditure. He too would like to know where the money went and he looks to Mr. Williams for answers.

**18**  Finally, Mr. McLean defends his and Golden Bear Mining's association with Mr. McGroarty, who, he says, brought useful skills to the company and provided important help in dealing with day-to-day operations and resolving issues with the regulators. Mr. McLean did not know of Mr. McGroarty's criminal convictions when he hired him, but says they are well in the past and no longer relevant. Evidently, Mr. McLean grew to trust Mr. McGroarty and only relieved him of his duties late in 2010 under pressure from his erstwhile associates in Golden Bear Mining.

**19**  It follows from all of this that there are a number of distinct questions to address. First, at the time of the funding agreement did Golden Bear Mining own the claims that had been staked by Mr. McLean in the Settea Valley? Secondly, what was disclosed or represented to the plaintiffs before they entered the funding agreement about the Atlin cleanup and the regulator's conditions for granting a permit to mine in the Settea Valley? Thirdly, has the funding agreement been breached and, if so, how? This last question raises a number of more specific questions since it is alleged that the funding agreement has been breached in a number of different ways. Fourthly, have the affairs of Golden Bear Mining been conducted in a manner that is unfairly prejudicial or oppressive to its shareholders, including the plaintiffs? Answering this question involves a factual analysis that overlaps to some considerable degree with the issues engaged by other questions. Finally, it will be necessary to analyse the remedies that should be granted, if any, to the plaintiffs.

**20**  Before embarking on answering these questions it is necessary to provide a little more background about Golden Bear Mining and the people associated with it to set the context out of which these issues arise. This background is essential to an analysis of the reasonable expectations of the participants in Golden Bear Mining, most of whom who are not parties to these proceedings. The analysis of those reasonable expectations is a necessary step in deciding whether the affairs of the company have been conducted in a manner that is unfairly prejudicial or oppressive to the interests of the plaintiffs.

**Background**

**21**  Mr. McLean is now in his late seventies. He is a well known figure in British Columbia through his longtime involvement in hockey. For the past 30 years he has been a placer miner, exploring and mining for gold. It appears that over the years he has worked through a number of different corporate vehicles, including Four Crown Mining, a company he used when mining at Davenport Creek near Atlin, British Columbia.

**22**  His participation in the mining industry has not been free from difficulty. At various times he has been charged with, and convicted of, environmental offences and has fallen foul of securities regulation leading to orders being made against him restricting his involvement for five years in issuing securities.

**23**  In 2003, Mr. McLean formed Golden Bear Mining. He was its president and sole director. Originally, he was also its only shareholder.

**24**  It seems to be acknowledged by Mr. McLean, and everyone associated with him, that his strength lies in the day-to-day activities of exploration and mining, not the niceties of corporate administration, governance, financial administration or record keeping. Hence, arrangements were made in 2008 to have individuals assist Mr. McLean with certain tasks and to put systems in place that would compensate for his weaknesses and allow him to concentrate on his strengths. Those individuals variously drew a salary from Golden Bear Mining and/or were given a shareholding position in the company. They were Mr. Williams, who committed to help with company administration and the management of its finances; Mr. Stuart Moir, who committed to assist in raising capital and provided some legal services; and Mr. Jonn Morrisonn, who had mining expertise and offered strategic advice. Each of these individuals received a shareholding interest in Golden Bear Mining. The extent and terms of those shareholdings is in issue in these proceedings, in particular whether each individual received five shares or 5% of the company and whether that shareholding interest could be diluted. At the time the shareholding was given or promised, Golden Bear Mining had either 100 or 101 shares issued and outstanding. The shares were not issued directly to the individuals (except for one share to Jeff Williams, it appears), but were (and are) held in trust by Mr. Stuart Moir.

**25**  Mr. Jeff Williams accepted the responsibility of managing some of the day-to-day operations of Golden Bear Mining, in particular monitoring and approving its use of money. Mr. Williams initiated, with Mr. McLean's concurrence, moving the company's bank account to Coast Capital. A principal advantage of doing so was that Golden Bear Mining could have a sub-account that Mr. McLean could access with a debit card, thereby ensuring that Mr. McLean could gain access to funds for corporate purposes as needed while simultaneously allowing the company to maintain a record of those transactions for accounting purposes. Mr. Williams arranged for Golden Bear Mining to have access to office space and the bookkeeping services of Ms. Coombs. In 2009, Mr. Williams also undertook the primary responsibility of managing a flow-through funding investment, put in place with the assistance of Stuart Moir, with which Mr. Moon was involved. Mr. Williams was involved in managing the investment to ensure that funds were properly used for purposes which CRA would recognise as eligible expenses to support the tax benefits associated with the flow through funding.

**26**  In return for these services, in addition to direct financial remuneration to his company, Mr. Williams received a shareholding position in Golden Bear Mining. Mr. Williams says that he received a 5% interest, not to be diluted. Mr. McLean says he gave five shares to Mr. Williams, without any commitment that they would not be diluted.

**27**  Mr. Stuart Moir also holds shares in Golden Bear Mining. Mr. Moir is a lawyer and at times, it appears, acted as counsel to Golden Bear Mining. He also played a role in raising finance for the company. Mr. Moir introduced Mr. Moon to Golden Bear Mining and put in place the flow-through funding arrangement with Mr. Moon's spouse which funded Golden Bear Mining's operations in 2009. Mr. Moir was also instrumental in bringing the plaintiffs to the table to negotiate the funding agreement at the end of 2009.

**28**  Mr. Moir also says that he was promised and received 5% of Golden Bear, not to be diluted. In early 2010, in light both of his status as a shareholder and a "broker" involved in raising capital for Golden Bear Mining, Mr. Moir decided he ought not to continue to provide legal services to the company and recommended other counsel be retained. This indeed occurred.

**29**  In late 2009, Mr. David Moir, Stuart Moir's brother, also became involved with Golden Bear Mining. I will return to the circumstances surrounding David Moir's involvement shortly. Here, it is sufficient to record that Mr. David Moir is a certified general accountant and an experienced outdoorsman. In late 2009, as part of a collective decision among the interested parties, Mr. David Moir was asked to undertake several different tasks. First, to accompany Mr. McLean to the Settea Valley in late September to so some prospecting. Secondly, to examine the books and records of Golden Bear Mining. Thirdly, to become the company's accountant. These latter two tasks never came to fruition, although Mr. David Moir was involved, along with Mr. Williams, in the preparation of a budget for Golden Bear Mining setting out the anticipated costs of the 2010 operations.

**30**  Mr. David Moir again says he was offered 5% of Golden Bear Mining to undertake these activities, but is unclear whether he actually received that interest.

**31**  Several other individuals were also associated with the company. Mr. Norm Lobb also says he was promised 5% of Golden Bear Mining's shares in return for services to be provided. In 2010, Mr. Lobb was one of the individuals who went with Mr. McLean to Davenport Creek near Atlin and worked on the cleanup there. Mr. Lobb also knew Mr. McGroarty and introduced him to Mr. McLean in the fall of 2009. Mr. Lobb introduced Mr. McGroarty as someone who could help the company, both in an executive capacity and, either directly or indirectly, as a source of capital. Mr. Brent Koop is also said to have been offered 5% of the company for his work in September 2009 in exploring the claims in the Settea Valley with Mr. McLean and Mr. David Moir.

**32**  The last person associated with Golden Bear Mining as a shareholder is Mr. Jonn Morrisonn. Mr. Morrisonn did not give evidence at trial. His role in Golden Bear Mining is unclear, but important, nonetheless. He is, it seems, an old friend of Mr. McLean's. It is not clear what specific role he played in Golden Bear Mining's affairs beyond offering strategic advice on the approach to take to exploration and mining. He may also have brought goodwill to the company. He is reported to have held the view that if business arrangements had to be written down, they were not worth entering; hence the paucity of documentation evidencing the relationships between the parties. He is also said to have taken against the involvement of Mr. McGroarty in Golden Bear Mining and joined with others in suggesting, requesting, or demanding that Mr. McGroarty be removed from any further involvement with the company. Mr. Morrisonn received five shares or 5% of the company, which he held in trust for his son, Shaone.

**33**  Finally, Mr. McGroarty was introduced to Golden Bear Mining by Mr. Lobb, likely sometime in October or early November 2009. By his own account, Mr. McGroarty had extensive involvement in working with and turning around companies. He says he was skilled in running companies, in managing their operations, and in developing ideas about how they might structure their affairs to achieve their goals. Although he had some success in raising capital for companies, he did not regard doing so as his forte.

**34**  Mr. McGroarty attended at least two significant meetings with the group of individuals associated with Golden Bear Mining before he was involved in any meetings with Mr. Moon and the investment the plaintiffs would ultimately make in the company. The witnesses disagree about the subject matter of those meetings. Several say that Mr. McGroarty held out that he was able to and was contemplating investing $1.5 million in Golden Bear Mining, directly or perhaps indirectly. In return for that investment he expected to receive 30% of the company or a related company and some management role in it. There appears also to have been discussion of restructuring the business of Golden Bear Mining to spin off the mining activities from a holding company (Golden Bear Exploration). Mr. McGroarty suggests that he had not committed to providing funds so unequivocally as others suggest.

**35**  In any event, what is clear is that Mr. McGroarty did not come up with $1.5 million himself, or investors who were willing to contribute that money. Nonetheless, he appears to have impressed Mr. McLean, and to a lesser extent Mr. Williams who believed Mr. McGroarty offered the company management experience. Despite the contrary view of the remaining shareholders, Mr. McGroarty remained involved with Golden Bear Mining in some capacity.

**36**  Mr. McGroarty regards himself as becoming the CEO of Golden Bear Mining before the funding agreement of December, 12, 2009, although whether that is accurate is unclear. Other evidence suggests he did not assume that role until January 2010.

**37**  What does not appear to have been known to anyone at that time was that Mr. McGroarty had been twice convicted in the United States of commercial crimes, including forgery, and had been incarcerated for those offences in the late 1980s. Moreover, Mr. McGroarty had been released from his position as CEO of a company called MagPower in 2008 amid allegations that he had misappropriated corporate funds; allegations that led to a criminal investigation. It is only fair to point out that Mr. McGroarty strenuously disputed the allegations about his conduct at MagPower. Furthermore, he made it clear that he thought he was unfairly blamed for problems elsewhere in that company and was prepared to defend his years there as marked by significant success.

**38**  These then, with the exception of Mr. Moon and his company, SMG, are the principal individuals associated with Golden Bear Mining. It is necessary to turn now to the events leading up to the funding agreement and Golden Bear Mining's need for funds.

**39**  In 2008, Mr. McLean came to learn of two geological reports that suggested it would be worthwhile to prospect for gold in the Settea Valley. The area had been explored and mined in earlier years. In 2008, Mr. McLean staked a number of claims in his own and his wife's name. I will return later to the question whether Mr. McLean owned the claims personally or in trust for Golden Bear Mining. At this stage it is sufficient to observe that Mr. McLean was able to hold a free miner's licence (at no cost) and could stake claims online.

**40**  Those claims were allowed to lapse in May 2009. They were then immediately re-staked. Apparently, it is cheaper to forfeit claims and immediately re-stake them than to do the work on them necessary to keep them in good standing.

**41**  In late 2008, Mr. Moon, through his spouse, made an investment in Golden Bear Mining through a flow-through funding arrangement which provides tax benefits to an investor for eligible expenses incurred in exploration and mining. The investment funding was for $300,000, not all of which it seems, for various reasons, found its way to the company as money able to be spent on the ground in 2009. Nonetheless, it seems reasonably clear that the flow-through funding was substantially the only money Golden Bear Mining had to use for exploration in the Settea Valley.

**42**  Golden Bear Mining, through Mr. McLean, made one aborted effort to get into the Settea Valley in August 2009. This involved "walking an excavator" along an old, but existing road, over "Two Mile Mountain". Had it been successful, this route would have brought Mr. McLean and his workers into the north end of the Settea Valley and to a number of claims staked by him.

**43**  This first foray was not a success. The route in to the Settea Valley is rough and the going arduous. Whether by accident or design, the excavator left the old, existing road, and, as a result, destroyed forest, scarring the mountainside and causing environmental damage. Worse was yet to happen. Mr. McLean slipped and fell while hiking and flagging a route. He became disoriented. He lost his way. He could not find his way back to his co-workers. For five days he was lost in the bush without food, surviving on water and dodging bears. There is no question that this must have been an exhausting, indeed a frightening, ordeal. But after five days, Mr. McLean was found by a helicopter searching for him and he was rescued.

**44**  After recuperating in Vancouver, Mr. McLean set off again for the Settea Valley. This time, as the season was closing in, Mr. McLean and Golden Bear Mining were given a four day permit to explore. It was on this occasion that Mr. McLean was joined by Mr. David Moir. The decision to have Mr. Moir accompany Mr. McLean appears to have been a collective decision of the shareholders.

**45**  This second venture to the Settea Valley occurred in late September 2009. The group took a different route into the valley and entered a different part of it than would have been the case if the first effort had proved successful. Accordingly, their exploration was in different part of the valley to what would have been explored under the first plan.

**46**  The group took two samples when they were in the valley. At least one sample was taken in an area that was not staked at the time. The samples were returned to Vancouver, analysed at the Chemex labs, and returned results that were at the very least promising. Although not definitive, they suggested that it would be well worthwhile prospecting further and devoting resources to exploration and mining the next year.

**47**  On November 20, 2009, Mr. McLean staked the area that had not been previously staked. It bears the number 672403. In evidence is a "mining agreement" dated November 21, 2009, between Mr. McLean and Golden Bear Mining giving Golden Bear Mining the right to mine that claim. The authenticity and validity of that document is contentious.

**48**  There were, however, obstacles to the business plan for the next year. First, Golden Bear Mining was out of funds. Secondly, the intention had been to produce a so-called "43-101" report which could be used to assist in financing, but that report could not be produced and the company was forced to rely on the Chemex report. Thirdly, it appeared that the company needed to raise $1.5 million, at least according to a budget prepared by Mr. David Moir and Mr. Williams, to achieve production in 2010, but there were no obvious sources of financing. Mr. McGroarty had not come up with the money or investors with the money, if he had ever held out the prospect that he would or could. At this stage, Mr. Moon re-enters the scene.

**49**  Mr. Stuart Moir's evidence was that he had asked Mr. McLean for a bottom line number of what he needed to get into production in the Settea Valley in 2010. Mr. McLean's answer was that he could do the job for $650,000. Shortly thereafter, Mr. Stuart Moir reported back that he had the $650,000. The source was Mr. Moon.

**50**  Around about December 9-12, 2009, Mr. Moon had some discussions with the group of shareholders and with Mr. McLean. The deal was finally struck, or at least confirmed, at a meeting in a restaurant on December 12, 2009, attended by the principal individuals interested in Golden Bear Mining. Some revisions needed to be made to the proposal presented by Mr. Moon. As a result, it was signed later that evening. As we know, the amount invested was $800,000. The agreement was drafted by Mr. Moon. It was signed by Mr. McLean, on his own behalf and for Golden Bear Mining. When the agreement was signed, Mr. Moon handed Mr. McLean $60,000 in cash. The rest of the money came in instalments over the next several months. The material portions of the funding agreement provided as follows:

1. The number (or %) of shares to be acquired: 30% of Golden Bear

...

1. Consideration in exchange of the shares:
2. $800,000 CAD cash - funding schedule as below:

...

1. Other conditions and procedures:
2. For each $100,000 received, Golden Bear will transfer 3.75% of its shares either to Jung (JJ) Moon (up to 5%) or to SMG (up to 25%).

...

1. Golden Bear shall have 2 or 3 directors of which one shall be the nominee of SMG. SMG shall have the right to nominate one signatory for the banking and for general signing authority and the banking and the general signing authority shall both require a minimum of two signatures.
2. SMG shall receive a right of first refusal from both Mr. McLean and Golden Bear for any subsequent share sale or issuance by either.
3. Golden Bear shall not borrow money in excess of $25,000 per quarter without SMG's written consent.
4. All Seattea mineral claims will be transferred to a holding company or a lawyer to hold in trust on the behalf of a holding company. The holding company shall be held by the shareholders of Golden Bear in the same proportion as their shares in Golden Bear and the same directors and signing authority. The shareholders may choose to restructure the Golden Bear so that the holding company becomes the parent company of Golden Bear if they so choose by special resolution.
5. If the shareholders choose to so restructure Golden Bear, SMG and JJ Moon share receive the same equity ownership as held in Golden Bear.
6. Out of $800,000 investment by SMG, a minimum of $650,000 shall be allocated towards the Settea mining operation and up to $150,000 may be allocated towards the Highland River Mining venture. Any monies that are advanced for the benefit of Golden Plateau Mining Inc. must be secured by a general security agreement with a first charge ... duly registered in accordance with the PPSA Act.

...

**51**  The agreement is written in the form of an offer directed to Ernie McLean and Golden Bear Mining. It is signed as accepted by Ernie McLean "on behalf of Golden Bear Mining Ltd. by Ernie McLean, President and for himself".

**52**  In my view, the funding agreement is a contract between the plaintiffs on the one hand and both Mr. McLean and Golden Bear Mining on the other. Mr. McLean, accordingly, assumed personal contractual obligations by entering the funding agreement. His conduct is, therefore, capable, in principle, of attracting personal liability if it amounts to a breach of the contract.

**Did Golden Bear Mining own all of the claims staked in the Settea Valley?**

**53**  The funding agreement expressly refers to "all Settea mineral claims" and stipulates that those claims will be:

... transferred to a holding company or lawyer to hold in trust on behalf of a holding company. The holding company shall be held by the shareholders of Golden Bear in the same proportion as their shares in Golden Bear ...

**54**  This term of the funding agreement was not complied with. In addition, the plaintiffs say that their investment was induced by representations made by Mr. McLean that Golden Bear Mining owned all of the claims that have been staked in the Settea Valley. If that had not been the case, they would not have invested their money. Moreover, there is evidence suggesting that in the spring of 2010 all but one of the Settea mineral claims was transferred to the defendant Golden Bear Exploration Inc., a company owned by Mr. McGroarty and Mr. McLean. Quite apart from being a breach of contract, this transfer, if it occurred, may have been a conversion of assets belonging to Golden Bear Mining and may constitute oppression.

**55**  It is necessary, therefore, to decide what mineral claims belong to Golden Bear Mining.

**56**  The defendants take the position that Golden Bear Mining only has a claim to one claim staked in the Settea Valley. This is claim number 672403. This is the claim that was staked in November 2009, after samples had been taken from it in September 2009 and after the results were received analysing the sample from the Chemex Laboratory.

**57**  In support of this position, the defendants say the following. First, each of the claims first staked in the Settea Valley in 2008 and then subsequently renewed in 2009 was staked personally online in the name of either Mr. or Mrs. McLean. Secondly, the claims were paid for using Mr. McLean's credit card. Mr. McLean says the claims were paid for by him and he was not reimbursed for them by Golden Bear Mining. Thirdly, it was standard mining practice to hold a claim personally until it had been tested and determined to have value. Only then would consideration be given to entering an agreement that it would be treated as an asset of a company. Fourthly, there are no written agreements evidencing that the Settea Valley mining claims were held by either Mr. or Mrs. McLean in trust for Golden Bear Mining. The only exception is the "mining agreement", dated November 21, 2009, establishing Golden Bear Mining's right to claim the 672403. This demonstrates that the other claims were not beneficially owned by Golden Bear Mining. Finally, Mr. McLean denies ever representing to anyone that the Settea Valley mining claims were beneficially owned by the company.

**58**  The plaintiffs submit to the contrary that the evidence establishes that Golden Bear Mining beneficially owned all of the claims in the Settea Valley. The only reason that the claims were staked in the personal names of Mr. and Mrs. McLean was cost related. Mr. McLean was entitled to hold a free miner's licence at no cost. The plaintiffs' witnesses understood erroneously, but likely on information derived from Mr. McLean, that Golden Bear Mining could not hold such a licence. From 2008, when Mr. McLean first reviewed the geological reports suggesting that exploration in the Settea Valley would be worthwhile, it was understood by all stakeholders in Golden Bear Mining that any staking of the claims and all exploration of them would be for the benefit of Golden Bear Mining. Golden Bear Mining reimbursed Mr. McLean the cost of staking the claims online.

**59**  Indeed, Mr. McLean represented repeatedly in 2008 and 2009 that all of the claims belonged to Golden Bear Mining. That was the premise upon which efforts were made to raise capital to finance exploration in both 2009 and 2010. Each of Mr. Williams, Mr. Stuart Moir, Mr. David Moir and Mr. Moon gave evidence that Mr. McLean showed them maps of the claims that had been staked in the Settea Valley and identified them as belonging to the company. Mr. Moon, in particular, says that it was on the strength of those representations that he entered the agreement funding and wrote it so that it referred to "all Settea mineral claims" and provided that those claims would be transferred to a holding company or a lawyer to hold in trust for Golden Bear Mining.

**60**  I find as a fact that all of the claims staked personally by Mr. and Mrs. McLean in 2009 in the Settea Valley were held in trust for the benefit of Golden Bear Mining. I reach that conclusion for the following reasons.

**61**  First, I accept that there were administrative and cost advantages to having any claims that were staked, staked in the personal name of Mr. or Mrs. McLean. Claims could be staked online using a credit card, without the need to undertake work on the ground. Mr. McLean could hold a free miner's licence at no cost. Golden Bear Mining could have held a free miner's licence at a modest cost, although that does not appear to have been the understanding of the participants in Golden Bear Mining at the time. The source of this misunderstanding was, I find, information provided by Mr. McLean.

**62**  Secondly, I accept on a balance of probabilities that Golden Bear Mining reimbursed Mr. McLean for the cost of staking the claims. The financial records of Golden Bear Mining are incomplete and it is not always clear what Golden Bear Mining's funds were used for. It is clear, however, that Mr. McLean did receive funds from Golden Bear Mining at the material time and I am satisfied that they were to reimburse him for the use of his credit card. In May of 2009, Mr. McLean staked the first of the mineral claims that are the subject of this action (603581, 603866, 603903, 604899 and 605209). According to Mr. Williams, whose evidence is supported by bank records, Golden Bear Mining provided funds to Mr. McLean for that purpose. Further, Golden Bear Mining cheques were paid directly to the government in 2010 to stake claims.

**63**  During the trial, Mr. McLean attempted to introduce some credit card accounts, presumably in an effort to show that this was the credit card used to pay for the claims and that he had not been reimbursed for those payments. I refused to permit Mr. McLean to introduce those documents. He has been subject to a variety of court orders requiring production of all relevant documents, both to the inspector and to the plaintiffs. He has not respected those orders. In any event, the account summary provided did not demonstrate that he had not been reimbursed for the payments.

**64**  The company banking records and government records show that payments were made to maintain the claims in 2010 using payments directly from the company's bank account to the Minister of Finance. In my view, the fact that the company paid for the claims directly in 2010 confirms that they were always understood to belong to the company.

**65**  Thirdly, I do not accept that all of the stakeholders would have been involved in Golden Bear Mining if Golden Bear Mining did not have the right to the benefit of the claims. Why would anyone invest their time, effort and money in a company if they did not have some assurance that the benefit of that time effort and money would accrue to the company? It makes no sense that it would be left to Mr. McLean's discretion to decide whether, having tested a particular claim using Golden Bear Mining's resources, he was prepared to fold it into the company.

**66**  Fourthly, it was clearly contemplated in 2009 and again in 2010 that exploration would take place in the Settea Valley. The only source of funds available to Mr. McLean was from Golden Bear Mining. The evidence is clear that Golden Bear Mining was paying for the costs associated with exploration on the claims. These costs included licence fees, advances on consulting contracts, letters of credit, transport, fuel and so forth. It does not make any sense that it would be paying for that exploration on claims that it did not own and would have no assurance of owning.

**67**  Fifthly, the 2009 plan was to go in to the northern part of the Settea Valley and explore the claims that have been staked in that area. The plan was to explore claims other than 627403, which had, in any event, not yet been staked. Golden Bear Mining money was being used for that purpose. It was only because of the difficulties getting in to the Settea Valley over Two Mile Mountain that the plans changed and in September Mr. McLean entered the valley from the south.

**68**  In considering Mr. McLean's theory that the only claim to which Golden Bear Mining had any entitlement was 672403, it is worth reiterating that this claim had not yet been staked in May 2009. Yet, several of the other claims in the valley had been staked by that time. Golden Bear Mining was funding all of the efforts by Mr. McLean and Golden Bear Mining's workers to get there and to explore those claims.

**69**  Sixthly, I accept the evidence that Mr. McLean did in fact show the maps to the various stakeholders and represent that the claims belonged to Golden Bear Mining. Doing so is consistent with a desire to raise funds to be able to go into the area to explore in 2009 and again in 2010.

**70**  Both Mr. McLean and Mr. McGroarty suggested that it makes commercial sense that only claim 627403 would belong to the company because it would take a number of years to mine it. The other claims in the Settea Valley were effectively worthless until they have been proven and there was no reason for Mr. McLean to consider agreeing that Golden Bear Mining had the right to explore or mine them. Exploration of those claims and any mining on them would be deferred many years until claim 627403 had been exhausted.

**71**  I do not find this reasoning compelling. If claim 627403 returned positive results, there was every reason to explore the other staked claims to determine whether they offered equal or better prospects for mining. The evidence did not satisfy me that any final decision had been made to limit mining to claim 627403, without any further exploration of the other claims having been made first. Even if claim 627403 was the best claim in the Settea Valley and Golden Bear Mining's activities would be limited to mining it, there was a clear incentive to explore the other claims and, possibly, enter agreements with other companies to mine those claims if they were worthwhile. All of the claims in the Settea Valley have a value to Golden Bear Mining and, I find, that the plan always was that Mr. McLean would explore those claims for the benefit of the company.

**72**  The fact that the claims were for Golden Bear Mining is the only rational inference to be drawn from the circumstances. The company was funding all of Mr. McLean's activities respecting the Settea Valley claims throughout 2009. He had staked a continuous chain of claims through the valley. There was no purpose for any of those activities except to enhance the ability of the company to extract gold from the valley on whatever mineral title it might be found.

**73**  Seventhly, I accept Mr. Moon's evidence that he was told by Mr. McLean that all of the claims belonged to Golden Bear Mining and that he would not have invested unless he believed that to be the case. The only assets Golden Bear Mining had that were capable of providing any return on investment were whatever claims it had the right to explore and mine in the Settea Valley. It would be of critical importance for Mr. Moon to understand what those assets were. It would make no sense for him to fund, without any restriction, exploration and mining in the Settea Valley if Mr. McLean and his wife owned the claims personally for their own benefit and if they controlled, in their discretion, whether to make them available to Golden Bear Mining.

**74**  It is no accident, in my view, that the funding agreement was drafted to refer to "all Settea mineral claims". It would not have been written to capture "all Settea mineral claims" if Golden Bear Mining only had a right to mine one claim.

**75**  In asserting that Golden Bear Mining Ltd. has rights to only one claim, Mr. McLean at times relied on, and other at times denied knowledge of, the "mining agreement" dated November 21, 2009, that was drafted by Mr. McGroarty, but produced for the first time in this litigation. As noted, the "mining agreement" gave Golden Bear Mining the right to claim 672403.

**76**  There is no evidence from any witness that this mining agreement was seen by Mr. Moon or any of the other shareholders before this litigation. The only witness who claims unequivocally that it existed in 2009, before the funding agreement was entered, is Mr. McGroarty.

**77**  When shown the "mining agreement" in discovery, Mr. McLean insisted that he had not seen it before.

**78**  All of the witnesses that Mr. McGroarty swore saw the mining agreement testified that they did not.

**79**  To support his assertion that Golden Bear Mining is entitled to only one claim, Mr. McLean insisted in discovery that he personally had paid to stake and extend the claims in the Settea Valley. He maintained that position until presented with the banking and government records which show the payments directly from the company's bank account to the Minister of Finance for the claims during 2010.

**80**  The evidence of Mr. Moon, Jeff Williams and David and Stuart Moir was that Mr. McLean never indicated to any of the shareholders, as he does now, that claim 672403 was the only claim belonging to Golden Bear Mining Ltd. I accept that evidence.

**81**  Although I consider the appearance of the November 21, 2009, agreement during the litigation to be suspicious, I do not need to decide that it was a fabrication to conclude that it does not, by its terms, prove that claim 627403 is the only claim to which Golden Bear Mining is entitled. I am satisfied, and I so find, that Golden Bear Mining beneficially owned all of the claims staked in the Settea Valley in 2009/2010.

**82**  I will return to the relevance of the purported transfer of those claims to Golden Bear Exploration Inc. later in these reasons. What is clear, however, and I so find, is that it was not in either Mr. McLean's or Mr. McGroarty's power to transfer the beneficial interest in those claims from Golden Bear Mining to Golden Bear Exploration in spring 2010. Any such transfer would require the participation of Golden Bear Mining, which did not occur. The purported transfer is without any legal effect. I find and declare that none of Golden Bear Exploration, Mr. McLean or Mrs. McLean has any beneficial interest in any of the claims. Those claims are all beneficially owned by Golden Bear Mining. I am prepared to receive submissions on the form of order necessary to transfer legal title to the claims to Golden Bear Mining.

**Did any misrepresentations or material non-disclosures induce the plaintiffs to enter the funding agreement?**

**83**  I have already concluded that Mr. McLean represented to the plaintiffs that Golden Bear Mining owned all of the mineral claims that had been staked in the Settea Valley. That representation was true.

**84**  I will return to the elements of a claim sounding in fraudulent and negligent misrepresentation after analysing the evidence and making certain findings of fact. Suffice to say here that a misrepresentation requires a false statement of existing fact. Statements of intention about future conduct (unless the statement about the intention is false) and estimates are not generally viewed as statements of fact. Equally, a failure to disclose a known fact is not generally treated as equivalent to a positive misstatement of fact. Although again this is subject to qualification. There are occasions where there is a duty to disclose a fact, if it is known. There are also occasions where the failure to disclose a known fact, when viewed in the context of statements of fact that are made whether expressly or by implication, is treated as if a positive representation had been made that the fact does not exist. Given the extent to which this case turns on failures to disclose certain facts in the context of discussion about what would happen and what money would be used for, it is important to keep these general principles in mind.

**85**  The plaintiffs plead misrepresentations, whether express or by implication, that Golden Bear Mining was in a position to conduct exploration in the Settea Valley in 2010, when impediments to being able to do so existed, but were not disclosed and a misrepresentation that the money to be invested would be used to explore and mine in the Settea Valley (except that money authorised to be used at Highland) when it was known as a fact that some of the money would be used for another purpose; the Atlin cleanup.

**86**  More specifically, first, Mr. McLean knew, but did not accurately disclose, that the regulators had imposed conditions on both him and Golden Bear Mining before they would issue permits for either to undertake work in the Settea Valley. Those conditions related to cleaning up the worksite at Davenport Creek near Atlin. Secondly, Mr. McLean knew or ought to have known the amount of work required to cleanup Davenport Creek (Atlin), and that it would be an expensive task. Accordingly, he knew or ought to have known that the money being invested in Golden Bear Mining by the plaintiff would not be used for the purpose stipulated in the funding agreement, but did not disclose that fact.

**87**  Depending on how they are analysed, the plaintiffs case can be cast as failures to disclose material facts or positive misrepresentations based on statements about what the money would be used for and the ability or intention of Golden Bear Mining to use the funds for a particular purpose.

**88**  I find the following facts for the reasons that follow. Before they entered the funding agreement with Mr. Moon or SMG, neither Mr. McLean nor Golden Bear Mining disclosed: (1) the existence of any regulatory conditions that would limit their ability to secure permits to conduct mining operations in the Setttea Valley in 2010; (2) the fact that neither would be able to mine in the Settea Valley until Atlin had been cleaned up; (3) the cost or scale of cleaning up Atlin and the time it would take to do so; (4) the lack of any resources other than Golden Bear Mining's to complete any necessary work; and (5) the intention to divert resources from Golden Bear Mining to pay for the Atlin cleanup.

**89**  Whether these facts are sufficient to establish fraudulent or negligent misrepresentations will be separately analysed. I turn first to consider Mr. McLean's knowledge of the regulatory conditions imposed on him and Golden Bear Mining.

**What did Mr. McLean know about regulatory conditions before the funding agreement?**

**90**  There is no doubt that by the middle of September 2009, at the very latest, Mr. McLean knew, and I so find, that the position of the then Ministry of Energy, Mines and Petroleum Resources, was that no permit for placer mining activities in the Settea Valley would be issued until the disturbance existing at Davenport Creek had been addressed to the satisfaction of the district inspector. Moreover, before work could be done at Atlin, a plan for its cleanup had to be submitted to the district inspector for review and acceptance. These conditions were expressly set out in a permit issued September 10, 2009, addressed to Mr. McLean, approving work on two claims (613723 and 613744) in the Settea Valley to be conducted before the end of that calendar year. The contents of that permit, I note, only became known to the plaintiffs during the litigation as a result of an application for production of documents in the possession of a third party.

**91**  Mr. McLean had many problems with B.C. mining regulators over the years. The particular problems affecting this case started in 2009 when Mr. McLean attempted entry into the Settea Valley.

**92**  In March 2009, Mr. McLean applied to the government with a "Notice of Work" for two mineral claims in the Settea Valley. Problems arose during the spring and summer of 2009, when Mr. McLean engaged in efforts to gain entry to the Settea Valley, but could not obtain permits for that purpose. There were a series of *ad hoc* meetings between Mr. McLean and different government officials from the interested Ministries - Forests, Mines and Water. Those various officials explained to Mr. McLean the regulatory requirements for entry into and exploration at the Settea Valley.

**93**  In May 2009, faced with these regulatory challenges, Mr. McLean changed his intended route to the Settea Valley to a difficult but shorter route over "Two Mile Mountain". As will be seen, this choice would result in a great deal of wasted time and effort, no entry to the Settea Valley, and considerable environmental damage.

**94**  On May 21, 2009, Golden Bear Mining Ltd., provided a $10,000 letter of credit from its credit union to the Minister of Finance, the necessary deposit in relation to the Settea Valley Notice of Work tendered by Mr. McLean.

**95**  Mr. McLean's regulatory challenges, associated with his efforts to reach the Settea Valley, escalated in about July 2009. At that time, Inspector Flynn from the Ministry of Mines spoke with Mr. McLean about the substantial mess left behind at the mining location at Davenport Creek, near Atlin. That location was the site of many years of past mining efforts by Mr. McLean through a different company, Four Crown Mining. There was no historical connection between Mr. McLean's work near Atlin and the efforts of Golden Bear Mining in the Settea Valley. However, the link made by the government was to prevent Mr. McLean himself from obtaining a work permit for the Settea Valley until cleanup efforts were satisfactorily completed at Atlin.

**96**  Mr. McLean met with a Conservation Officer on July 8, 2009, and told him that he was going into the Settea Valley about a week later and that all of his permits were approved.

**97**  Later that same month, sometime between July 17th and 26th, Mr. McLean caused substantial environmental damage during his attempts to reach the Settea Valley over Two Mile Mountain. The damage was witnessed by a local outfitter and reported to the government on or around July 20, 2009, further impairing Mr. McLean's ability to obtain any work permits.

**98**  Mr. McLean continued staking Settea Valley mineral claims (613723 and 613744) during that same summer of 2009, still with Golden Bear Mining's corporate funds, and, I find, for a corporate purpose.

**99**  On August 12, 2009, Mr. McLean's associate, Chris Haight, contacted the Ministry of Mines about the Settea work permit application. At that time, the Ministry's Inspector responded to Mr. Haight saying that he was prepared to issue a permit for the Settea Valley on two conditions, one of which was that "no further Notices of Work will be approved until Davenport is reclaimed".

**100**  Further e-mail communications continued between Mr. Haight and Inspector Flynn on August 13th. Mr. Haight was then in the company of Mr. McLean at a location near Settea Valley where Mr. Haight had access to e-mail. I find that Mr. Haight was the conduit through which Mr. McLean was in contact with ministry officials and that Mr. McLean was aware of anything communicated to Mr. Haight.

**101**  On August 25, 2009, the Inspector of Mines communicated to Mr. Haight that, as a result of the disturbances to the environment near Two Mile Mountain, he was ordering Mr. McLean and any other member of his group to remain off the placer titles, that no equipment was to be moved or disturbed until further notice and that no attempt was to be made to access Settea Creek.

**102**  On September 4, 2009, Inspector Flynn wrote to Mr. McLean and rejected his July 31st Notice of Work. He indicated a requirement that Mr. McLean engage the services of a suitably qualified professional to review and determine the extent of damage to the environment at Two Mile Mountain. However, on September 10, 2009, the Chief Inspector of Mines issued an "Approval of Work System and Permit Approving Reclamation Program" document to Mr. McLean in respect of claim numbers 613723 and 613744 in the Settea Valley. Those are not the same claims where Mr. McLean would conduct testing later that month, and not the claim that would be staked as 627403.

**103**  The permit issued contained important conditions including the following:

No further permits for placer mining activities would be issued until the disturbance at Davenport Creek had been addressed to the satisfaction of the district inspector. A plan for the clean-up of Davenport Creek should be submitted to the Chief Inspector of Mines for review and acceptance prior to any work being conducted.

**104**  I am satisfied, and I find, that the regulators' concerns about the environmental damage at Davenport Creek and at Two Mile Mountain, and the need to resolve those issues, were known to Mr. McLean in the summer of 2009. Mr. McLean also knew at that time that those concerns were an obstacle to the granting of a permit to him and Golden Bear Mining to conduct work in the Settea Valley in 2010.

**Did Mr. McLean appreciate the cost and time involved in complying with the regulatory requirements for a permit before the funding agreement?**

**105**  I find, also, that Mr. McLean knew the condition of the site at Davenport Creek. He had been involved in working there. He knew what equipment was there. He must have known in what condition the site had been left. He also knew about access to the site (a 75 mile drive into the bush on an old mining road) and any difficulties involved in gaining access or removing material or equipment.

**106**  By this time, Mr. McLean knew, for reasons I will return to, that substantial capital investment and time would be needed to repair the damage he had caused in Atlin and near Settea if he was to receive a permit to be able to mine in the Settea Valley. Moreover, there is no evidence that he had any resources available to him to conduct this work, except any money that might be accessed from Golden Bear Mining.

**107**  Moreover, I am satisfied, and I find as a fact, that Mr. McLean did not disclose these critical facts to anybody. Depending on who he spoke to, he either concealed the entire problem, or insisted that the Atlin problem was a small thing to resolve. He was the only one who knew the extent of the damage because he had caused it. He never disclosed to anyone the magnitude of the mess left to be cleaned up at Atlin, or the damage caused in the Settea Valley, all of which would stymie his efforts to mine in the Settea Valley.

**108**  Mr. David Moir was made aware of the need to cleanup Atlin because he was with Mr. McLean in Settea when the conditions were imposed. As no geological report had been generated from all of the money spent during 2009, in September 2009 the shareholders insisted that David Moir travel with Mr. McLean back to the Settea Valley in order to perform some testing. The purpose of that trip was to ensure that the year's work was not a complete waste, and to have Mr. Moir present as an objective observer. While in the Settea Valley at that time, Mr. McLean told David Moir that the Atlin cleanup was no big deal and there was just some equipment to move to Settea and Highland River.

**109**  Mr. McLean did tell Mr. Williams about the cleanup obligation, but he told him it was a small thing and no barrier to proceeding with work at Settea. He said it was necessary to "start some cleanup work".

**110**  Mr. McLean did not explain the need to cleanup at Atlin to Mr. Moon or Mr. McGroarty when they were being brought into the project in late 2009.

**111**  What is not clear is what Mr. McLean subjectively understood or believed would be involved in the cleanup at Atlin to satisfy the condition of a permit being granted to enter and work at Settea Valley. Mr. McLean said in his discovery that he thought it would be a "small job". When in April 2010 he invited Mr. Lobb to join the cleanup crew and work with him at Davenport Creek, he told him that the work would take about three weeks, and it would start and finish in June 2010.

**112**  It is apparent, however, that at a minimum Mr. McLean grossly under estimated how long it would take to do the work and what would be involved in cleaning up the mine site. Mr. Lobb gave evidence that when he arrived at Davenport Creek in June 2010, it was obvious that the cleanup job would take a lot more than three weeks to complete. There was a massive amount of equipment, junk and garbage to be cleaned out. The road in and out of the site was difficult.

**113**  Equipment littered the site, including several excavators, a mine truck, two trailers, a big Caterpillar tractor, pipes, unloaders, pumps, a silver truck, hydraulic oil, a broken down engine, hoses, pipe and tires. Much of the equipment needed to be cut up so that they could be transported out of the site on a flatbed truck. Dismantling or taking apart certain items took several days each. In addition to the visible items, other equipment, junk and garbage were found buried or hidden in the bush. Altogether, a crew of about four people appear to have worked on the cleanup almost full-time.

**114**  The work on cleaning up the mine site took three months and was likely not fully complete even at the end of that time. The photographs of the cleanup site corroborate Mr. Lobb's conclusion that the job was a major one that would take much longer than three weeks to complete.

**115**  Mr. McLean accepts that he under estimated the amount of work involved in cleaning up at Davenport Creek. He expresses his frustration that the work took so long. To some extent he blames the inadequacy of his work crew, but does acknowledge that it turned out to be a bigger job than he anticipated.

**116**  Objectively, it must have been obvious that cleaning up the old mine site at Davenport Creek was a major undertaking that would require significant time, and consume significant resources both in terms of equipment and manpower. Objectively, the costs of the cleanup would require Mr. McLean to devote significant resources to the task. Mr. McLean agreed to pay the cleanup crew $5,000 a month each. The crew included one or two cooks. The monthly cost of labour alone is $30,000.

**117**  In late 2009 when Mr. McLean was negotiating with Mr. Moon for the investment into Golden Bear Mining, he knew that no mining could occur until the regulators were satisfied with the cleanup at Atlin. He knew that he had no other resources available to him to conduct that cleanup except for any money invested in Golden Bear Mining.

**118**  I am not prepared to find, however, that Mr. McLean was knowingly, deliberately or subjectively dishonest in not disclosing the size or cost of the undertaking in cleaning up the mine site at Davenport Creek. I accept his evidence that he did underestimate what was involved. In discovery, he suggested that he thought it would cost $50,000 to do the work. But, nonetheless, at the very least Mr. McLean ought to have known that the cleanup would take a significant time and be expensive. He certainly knew that it would take time and money. He also knew that the only source of money to conduct the cleanup was Golden Bear Mining using funds provided by the plaintiffs and that the plaintiffs' offer of funding was to support mining in the Settea Valley and Highland, nothing else.

**119**  Mr. McLean was an experienced miner. He knew what conditions he had left behind at Davenport Creek. Had he turned his mind with any focus to the size of the task that would confront him at Davenport Creek, he would have immediately realized that it was not a "small job" and could not be completed in a few weeks. He would also immediately have recognised that the cost of remediating Davenport Creek would be considerable and would require a very significant proportion of all of the funds Mr. Moon was willing to invest in Golden Bear Mining and, correspondingly, reduce any funds available to mine in Settea Valley.

**120**  Mr. McLean submits that, although he underestimated the Atlin cleanup, he did not deliberately conceal the need to conduct the cleanup. He suggests that the fact of a cleanup at Atlin must have been discussed because the funding agreement reflects the fact that $150,000 was earmarked for that purpose. He points to the following language:

1. Out of $800,000 investment by SMG, a minimum of $650,000 shall be allocated towards the Settea mining operation and up to $150,000 may be allocated towards the Highland River mining venture. ...

**121**  Mr. McLean says the reference to Highland River is a mistake. It was agreed at the restaurant meeting that the funding agreement would be corrected to replace the reference to Highland River with Atlin, but, presumably through oversight, that did not occur.

**122**  I reject Mr. McLean's evidence on this point. There is no persuasive evidence that the need to cleanup Atlin was discussed at the restaurant meeting when the terms of the agreement were settled. Mr. McGroarty confirmed that the subject was not discussed; there were no "red flags" about the need to deal with Atlin. Mr. Moon's evidence is that he knew nothing about Atlin or the need to spend money there. He denies that the reference of Highland was a mistake that was not corrected. Mr. McLean admits that in the December 2009 meetings there was no discussion about what needed to be done at Atlin. The evidence of the other witnesses supports the view that Atlin was not discussed.

**123**  It is also clear in the evidence that Mr. McLean had an interest in Golden Plateau Mining which was connected to a venture in Highland River. Other individuals were aware of the venture and its relationship to and possible synergy with Golden Bear Mining. When David Moir was challenged on cross-examination about the allocation of moneys under the funding agreement, he disagreed with Mr. McLean's characterization of it. He was, in fact, told that the agreement was that $650,000 was to be spent in Settea and $150,000 was to be used to move equipment from Atlin to Highland and "do some quick sluicing" at that location. Mr. David Moir explained that Highland River had claims staked by Golden Plateau Mining and was easy to access. I accept that evidence.

**124**  Mr. Moon is explicit in rejecting the suggestion that the reference to Highland was a mistaken reference that should have been to Atlin. He says in one affidavit:

1. The Funding Agreement provided that $150,000 could be allocated towards the Highland River mining venture and that any monies advanced for the benefit of Golden Plateau Mining Inc., must be secured by a general security agreement. This term resulted from discussions between myself, Stuart Moir and Mr. McLean. It was included in order to facilitate a potential future target acquisition of Golden Plateau Mining Inc., a company that Mr. McLean had explained to me had operated the mine at the Highland River location.
2. The Highland (or Hyland) River venture is in the Yukon and, as far as I am aware, not related in any way to Mr. McLean's Atlin venture.
3. I understand that Mr. McLean now says that the reference to Highland River in the Funding Agreement was an error. It was not an error. It was the result of my detailed discussions of Golden Plateau Mining Inc. with Ernest McLean. He told me that the Golden Plateau company might also be able to produce gold, and he provided reasons for that belief. I certainly never agreed to change that reference to Atlin or to fund any work at Atlin. I never discussed Atlin with Mr. McLean until long after I funded Golden Bear Mining Ltd.

**125**  I note that the sentence in the funding agreement immediately following that quoted above reads:

Any monies that are advanced for the benefit of Golden Plateau Mining Inc. must be secured by a general security agreement with a first charge which general security agreement is duly registered in accordance with the PPSA Act.

**126**  In my view, this language is inconsistent with Mr. McLean's position that the reference to Highland is a mistake. The clause as a whole is an explicit recognition of another mining venture that Golden Bear Mining could support, provided proper security was given, with funds invested by the plaintiff. The sentence refers to Golden Plateau which did have claims staked at Highland River. There is no evidence Golden Plateau was connected to Atlin. I conclude that the reference to the right to spend up to $150,000 on the Highland River mining venture was not a mistaken reference to Atlin.

**127**  The funding agreement does not lend any support to the suggestion that the cleanup at Atlin must have been discussed and the use of funds for it authorized before the agreement was entered. Moreover, it is a telling example that raises serious doubts about whether Mr. McLean made any serious effort to attempt to give honest evidence in respect of this and other matters. I find that Mr. McLean could never have been under any doubt that the reference to Highland River was not a mistaken reference to Atlin. His attempt to suggest that it was, is at best, an after the fact effort to reconstruct the facts in a way that mitigates his conduct.

**128**  Against this background of Mr. McLean's knowledge or beliefs that I now turn to consider what was discussed with Mr. Moon in the negotiations over his proposed investment.

**What was said to Mr. Moon about mining in the Settea Valley in 2010?**

**129**  It is clear that the premise of Mr. McLean's discussions with Mr. Moon was that mining would take place in the Settea Valley in 2010. Quite apart from the failure to disclose any impediment to doing so, Mr. Moon's evidence, which I accept, was that in their discussions Mr. McLean indicated that he intended to start mining exploration, and operations for Golden Bear Mining as soon as possible. This clearly contemplated mining in 2010. Mr. McLean may well have intended to begin mining in 2010, but it is clear that doing so was never realistic given the impediments he and Golden Bear Mining faced to his knowledge.

**130**  The meetings to discuss the funding agreement also canvassed how much money was needed. Mr. David Moir recalled Mr. McLean quoting to Mr. Moon a $600,000 cost for the Settea operation. Mr. Moon testified that Mr. McLean gave him an estimate in the $600,000 range "to get gold". When asked by Mr. Williams why he had not negotiated for $1.5m, Mr. McLean told him "I can do it with $800,000". The context of all of these discussions was that the mining for gold would occur in 2010.

**131**  I find that Mr. McLean and Golden Bear Mining stated expressly or by implication that they would be able to explore and mine in the Settea Valley during the 2010 season and that Mr. McLean intended to use of the plaintiffs' investment for that particular purpose. Mr. McLean also stated that $650,000 would be sufficient to get gold in 2010. Mr. Moon was not told anything about any regulatory impediments to mining or exploration, the need to cleanup Atlin, or the intention to use Golden Bear Mining's funds (that is, the proposed investment) to fund the cleanup.

**Summary**

**132**  I find that Mr. McLean did not disclose to Mr. Moon the fact that neither he nor Golden Bear Mining would be able to get a permit to work in the Settea Valley unless a cleanup was conducted at Davenport Creek to the satisfaction of the regulators. I find further that Mr. McLean did not disclose to Mr. Moon that a cleanup of Davenport Creek was a significant task that would require a very substantial commitment of time, effort and money or that the only resources available to complete that task would be the resources of Golden Bear Mining. I find that Mr. McLean asserted, at least by implication, that he and Golden Bear Mining would be able to conduct mining operations in the Settea Valley in 2010 and estimated that about $600,000 to $650,000 would be sufficient for the task. For reasons I will canvass in the section dealing with the oppression claim, I find also that Mr. McLean represented to Mr. Moon a shareholding structure in Golden Bear Mining the effect of which was that, as a consequence of the investment, he would be a minority shareholder in the corporation. All of this was material to Mr. Moon in deciding whether to invest.

**133**  I am satisfied that Mr. Moon relied on what he was told when he and SMG agreed to invest $800,000 in Golden Bear Mining. I am satisfied and I so find that what Mr. Moon was not told would have been material to his decision to invest and if the plaintiffs had known the true state of affairs they would not have invested their funds.

**134**  I turn now to consider whether these facts are actionable as either fraudulent or negligent misrepresentations.

**Fraudulent and Negligent Misrepresentation**

**135**  Both fraudulent and negligent misrepresentation require a false statement of existing fact. As a general rule, statements of opinion, estimates, advice or promises are not statements of existing fact and are not, therefore, actionable as misrepresentations.

**136**  A false statement which the speaker knows is false, made with the intent and having the effect of inducing the listener to enter into a contract, amounts to fraudulent misrepresentation: *Derry v. Peek* (1889), LR [*14 App. Cas. 337*](https://iclr.co.uk/pubrefLookup/redirectTo?ref=14+App.+Cas.+337) (H.L. (Eng.)); see also *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [*[1993] 1 S.C.R. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609F-00000-00&context=) at 74-75. As those cases make clear, knowledge may exist if the speaker has actual knowledge, is without belief in the statement's truth, or if the speaker is reckless about their falsity: *Derry*, at 374. I will return to the question whether any representations were made with the requisite knowledge to reach the level of fraud.



**137**  The requirements for a successful claim for the tort of negligent misrepresentation, as laid out in *Queen v. Cognos Inc.*, [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) at 110 [*Cognos*], are well-known:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;
2. the representation of fact in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making the misrepresentation;
4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
5. the reliance must have been detrimental to the representee in the sense that damages resulted.

**138**  A duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said that:

1. the defendant ought reasonably to have foreseen that the plaintiff would rely on his or her representation; and
2. reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.

(*Hercules Management Ltd. v. Ernst & Young*, [*[1997] 2 S.C.R. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VR-00000-00&context=) at para. 24.)

**139**  In *Hercules*, La Forest J. sets out five general indicia of reasonable reliance by the plaintiff at para. 43:

1. The defendant had a direct or indirect financial interest in the transaction in respect of which his representation was made.
2. The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
3. The advice or information was provided in the course of the defendant's business.
4. The information or advice was given deliberately, and not on a social occasion.
5. The information or advice was given in response to a specific enquiry or request.

**140**  In this case, it is clear that if there were misrepresentations, reliance on them was reasonable and to the detriment of the plaintiffs. Moreover, in the context of the discussions a duty of care not to misrepresent facts clearly existed.

**141**  The next question to be answered is then: Was the representation of fact in question untrue, inaccurate, or misleading? In this case, the representations of fact in question were not a positive representation, but, as mentioned above at para. 156, a non-disclosure of the fact that neither Mr. McLean nor Golden Bear Mining would be able to get a permit to work in the Settea Valley unless a cleanup was conducted at Davenport Creek to the satisfaction of the regulators and that some part of the investment would be used to fund that cleanup.

**142**  Viewed properly, expressly or by implication, Mr. McLean represented that there were no existing impediments to prevent him or Golden Bear Mining from mining or exploring in the Settea Valley in 2010 and that it was, as a matter of existing fact, his intention to use moneys invested either for operations in the Settea Valley or Highland. Neither of these facts was true.

**143**  A "failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made": *Cognos*, at 123. Non-disclosure amounts to a misrepresentation when, considering all the relevant circumstances, there is failure to divulge material information: at 124.

**144**  Here it is clear to me that the information that was not disclosed was material. It was clearly highly relevant information bearing on the ability of Golden Bear Mining to carry out the obligations it was undertaking through the funding agreement.

**145**  There is no doubt in my view that Mr. McLean was at least negligent in misrepresenting facts on his own and Golden Bear Mining's behalf to the plaintiffs. He knew about the conditions for receiving a permit to mine in the Settea Valley. More importantly he knew what would need to be done to satisfy those conditions. He knew what the conditions were at Davenport Creek and how much needed to be cleaned up. He was experienced in conducting mining operations. Any reasonable miner, with his knowledge and experience, knowing what needed to be done, would have known that the job could not be done in a few weeks and would require a very large expenditure of time and money to accomplish. He knew that the only source of funds available to conduct any cleanup were those the plaintiffs' were proposing to invest in Golden Bear Mining. Mr. McLean breached the standard of care to be expected of a reasonable person in his situation with the skills, knowledge and experience to be expected of a miner with 30 years experience in the business.

**146**  There is no doubt that Mr. McLean said what he said (or failed to say) with the intent of inducing the plaintiffs to make an investment in Golden Bear Mining. That was the whole purpose of his discussions and negotiations with Mr. Moon. Similarly, Mr. Moon was exploring whether he wanted to continue his involvement with Golden Bear Mining in 2010. To say that Mr. McLean ought to have reasonably foreseen that Mr. Moon would rely on his representations is an understatement.

**147**  It is also clear that the plaintiffs relied on the representations made by Mr. McLean on his own and Golden Bear Mining's behalf. The information was provided in the context of negotiations, it was material and it was reasonable for the plaintiffs to rely on it. Had the misrepresentations (and non-disclosures) not been made, the plaintiffs would not have made their investment. I will return to the question of remedies at the conclusion of these reasons.

**148**  I am satisfied that the plaintiffs have made out a case in negligent misrepresentation. The next question is whether they have also made out an action in fraudulent misrepresentation.

**149**  As is well known, the knowledge component sufficient to make out a case in fraud, in addition to actual knowledge, encompasses reckless, carelessly made statements and statements made without belief in their truth: *Derry*, at 374.

**150**  I have already concluded that Mr. McLean grossly underestimated the time and cost of the Atlin cleanup, but I accept that he did not knowingly and dishonestly do so. He may also have believed he could talk his way past those conditions to get a permit without fully complying with them. He did, however, have actual knowledge of the stipulated conditions for receiving a permit, the fact that cleanup was required, the lack of resources from any source other than Golden Bear Mining to pay for that cleanup (however much it might cost) and the need, therefore, to divert Golden Bear Mining's resources to the cleanup, contrary to the intended purposes of the investment.

**151**  The question is, therefore, whether this state of knowledge is sufficient to make out a case in deceit or fraud. Answering this question requires some analysis of the law relating to the mental element in the proof of fraud.

**152**  The portion of *Derry* most often quoted in relation to the test for the mental element for deceit is at 374 where Lord Herschell states:

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

**153**  Lord Herschell makes it clear that while an unreasonably held belief is evidence of fraud, on its own it does not amount to fraud at 369:

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley v. Freeman*, 100 E.R. 450, down to that with which I am now dealing. ...

**154**  However, I note that Lord Herschell does say later in the judgment at 375-376:

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. ...

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell*, [*5 App. Cas. 925*](https://iclr.co.uk/pubrefLookup/redirectTo?ref=5+App.+Cas.+925) , a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.



[Emphasis added.]

**155**  Here, I am satisfied that Mr. McLean's knowledge does take him beyond ***negligence***, even if it falls short of actual knowledge. Mr. McLean was not merely careless about what he said or failed to say. I have already referred to Mr. McLean's knowledge of the circumstances existing at Davenport Creek and his involvement in creating them. I have described those conditions in some detail. It was immediately apparent to Mr. Lobb on arriving at Davenport Creek that the cleanup was going to be a major undertaking. In my view, that must also have been apparent to Mr. McLean who arranged a crew of about five people, complete with a cook, each of whom he had agreed to pay $5,000 per month for their work.

**156**  If Mr. McLean believed that Atlin was a "small job" that could be done in a few weeks or that it was only necessary to start work there before securing the permits to go into the Settea Valley, he was at a minimum reckless to what was really involved. It appears most likely that Mr. McLean had, "shut his eyes to the facts, or purposely abstained from inquiring into them". In my view, Mr. McLean's overriding concern was to get money, any money, into the company and hope that things would work out alright in the end, either because he could talk his way into the Settea Valley over the objections of the regulators or that he could turn once again to Mr. Moon if Golden Bear Mining ran out of funds before it got there. To that end, he was prepared to suggest he could get the job done in Settea for less than had been budgeted, even without taking into account the cleanup costs. He was prepared not to reveal, or recklessly closed his mind to, any impediments that might make mining in the Settea Valley an unrealistic prospect in 2010. At a minimum, given his knowledge, Mr. McLean was reckless to the facts in failing to disclose material information not only to the plaintiffs, but also to the other stakeholders in Golden Bear Mining. I am satisfied that Mr. McLean lacked an honest belief in facts such that his failures to disclose amounts to fraudulent misrepresentations that materially mislead the plaintiffs.

**157**  In reaching this conclusion, I wish to emphasize that I accept that Mr. McLean's estimates of anticipated costs, including for the Atlin cleanup, are not themselves actionable misrepresentations. The relevant facts constituting the misrepresentations are (1) the absence of specific regulatory impediments to starting work, (2) an existing obligation to undertake cleanup at Atlin (whatever that might involve (1), and (3) an existing intention to use invested funds to discharge the Atlin cleanup obligation (whatever that might cost).

**158**  I conclude that the plaintiffs have made out their case in both fraudulent and negligent misrepresentation.

**Did Golden Bear Mining and Mr. McLean breach the funding agreement?**

**159**  In sum, the plaintiffs allege the following breaches of the funding agreement:

1. Mr. McLean and Golden Bear Mining failed to allocate a minimum of $650,000 toward the Settea mining operation;
2. Mr. McLean and Golden Bear Mining failed to transfer all of the Settea mining claims to a holding company owned proportionately by the shareholders of Golden Bear Mining;
3. Mr. McLean and Golden Bear Mining failed, and continue to fail, to appoint Mr. Moon as a director of Golden Bear Mining Ltd;
4. Mr. McLean and Golden Bear Mining failed to honour the right of first refusal, to which the plaintiffs were entitled, in respect of the issuance of shares of Golden Bear Mining; and
5. Golden Bear Mining borrowed in excess of $25,000 without SMG's written consent.

**160**  There is no practical dispute on the evidence that most of these breaches occurred. Briefly, the admissions are as follows:

1. the failure to allocate $650,000 toward the Settea mining operation is admitted. Mr. McLean admitted in discovery that more than $400,000 out of the $800,000 investment was spent cleaning up the Atlin mining site. The evidence with respect to expenditures over the spring and summer of 2010, along with evidence of use of funds to pay for 2009 operations, and improper "expense" payments to Mr. McLean and Mr. McGroarty, established that little of the investment went toward the Settea mining operation. Indeed it is admitted that there was no actual Settea mining operation, merely some preparation for one;
2. it is admitted that the Seattea mining claims were never transferred to a holding company. In fact, within this action, Mr. McLean claims that only one of them (claim 672403) is available for that purpose in any event; and
3. neither Mr. Moon nor his nominee has ever been appointed a director, despite the funding agreement and, more recently, this Court's order.

**161**  The alleged breach of the right of first refusal will need to be examined in the context of the expectations of the parties and the claims to oppression. As will be seen, I am not satisfied that this term of the funding agreement was breached. Finally, the breach of the prohibition of borrowing is clearly established, but is of little independent relevance in this litigation and I will consider it no further.

**Did Golden Bear and Mr. McLean breach the funding**

**agreement conditions on the allocation of funds?**

**162**  The plaintiff invested $800,000 in Golden Bear Mining as required by the funding agreement. These moneys represented substantially all the funds available to Golden Bear Mining in 2010, although some additional modest funds were received from an unrelated party.

**163**  By late summer 2010 all of the funds were spent. It is apparent that some of Golden Bear Mining's money was used for purposes contemplated by the funding agreement. Some equipment was bought for use ultimately in Settea and some equipment was salvaged from Davenport Creek and taken to a staging area near the Settea Valley; no actual work was done on the Settea claims. Items purchased by Golden Bear Mining using the plaintiffs' investment, although intended ultimately for use in the Settea Valley, in fact were in Atlin and were used to work there. These purchases included, for example, an excavator, a camper, a CAT, a trailer, a truck, a low bed truck and a Terex truck.

**164**  It does not appear possible to quantify with any precision how much of the $800,000 was used for the "Settea mining operation". What is clear is that most of the money was used to cleanup Atlin. Other money is unaccounted for or was used by Mr. McGroarty in suspicious circumstances (to which I will return).

**165**  This Court appointed an inspector to investigate the financial affairs of Golden Bear Mining in an effort to identify the uses to which the plaintiffs' investment was put.

**166**  On January 14, 2011, the inspector issued a detailed and lengthy report confirming many of the plaintiff's allegations of the misuse of funds by Mr. McLean and Mr. McGroarty. In particular, the inspector found:

1. the plaintiffs met their $800,000 financial obligations under the funding agreement;
2. Golden Bear Mining accounting records were maintained in a shoddy and haphazard manner with no management oversight of the use of funds;
3. Mr. McLean is unable to explain his use of the $60,000 cash deposit provided to him by the plaintiff at the outset of the funding agreement;
4. Mr. McLean and Mr. McGroarty had not provided documentation to support $109,254.42 in unsupported disbursements;
5. Mr. McLean understated his family's income from Golden Bear Mining in an affidavit in these proceedings;
6. Mr. McGroarty received $122,786.30 from Golden Bear Mining, much of which is unexplained. He supplied expense reports for $11,600.43 in personal and other activities not related to Golden Bear Mining's business;
7. Mr. McGroarty claimed legal fees for Golden Bear Exploration Inc. on his Golden Bear Mining Ltd. expense report;
8. Mr. McGroarty supported one claimed expense with a "basic internet scam" document; and
9. in January 2010, the first thing Mr. McLean did was use some of the plaintiffs' 2010 investment to pay off bills totaling at least $25,224.48 from 2009.

**167**  Mr. McLean admits that he put personal charges through the company bank accounts during 2010. As noted earlier, Mr. McLean takes the position that he neither knows nor can explain where the money went. He says that authority over handling the money was delegated to Mr. Williams, who approved company expenditures. Mr. McLean says he would like answers too, and looks to Mr. Williams to provide them. He presents himself as another innocent victim in an operation gone wrong.

**168**  I do not agree with Mr. McLean's characterization of these events. First, he knew that the funding agreement required the investment funds to be spent in the mining operation in Settea, not to cleanup Atlin, or he ought to have known as much. Secondly, much of the money was spent by him or under his direction using his debit card accessing Golden Bear Mining money directly. In any event, he knew that Golden Bear Mining's activities were devoted to the Atlin cleanup and that cost money. Thirdly, most of the money that was spent on Atlin was spent after Mr. Williams had left the company near the end of June.

**169**  Mr. Moon understood that in June 2010 Mr. McLean left for the north of British Columbia to mine. In fact, at the start of June Mr. McLean headed to Atlin with a crew to start the Atlin cleanup. There is no dispute that Mr. McLean was in the Atlin area and incurring expenses for the Atlin cleanup throughout June, July, August and September 2010, i.e. the entire 2010 work season, although he did make some trips to the Settea area to take equipment in that period.

**170**  Mr. McLean's work at Atlin involved hauling everything out, some of which was destined for Settea Valley. Golden Bear Mining's crew removed old junk that was there since 1995, broken pieces, scrap iron, old repair parts. Almost all of them went to Atlin. The workers removed about 12 truckloads of miscellaneous items, in addition to the major equipment. The workers were paid for by Golden Bear Mining. Mr. McLean did not explain that to the plaintiffs.

**171**  The vast majority of the materials removed from Atlin, representing more than 90% of the work, consisted of unusable items that were taken away and stored at another location near Atlin. Very few of those materials were transported to Settea.

**172**  It is admitted by Mr. McLean that the Atlin cleanup used up more than $400,000 of the plaintiffs' investment and the entire 2010 mining season.

**173**  To place an exact number on the cost of the cleanup would be impossible. There is no doubt, however, that the vast majority of the plaintiffs' investment was put to uses not contemplated by the funding agreement. That agreement requires a minimum allocation of $650,000 to the "Settea mining operation". Whatever room for argument might exist at the margins about whether an expenditure properly was made in relation to the "Settea mining operation", it is apparent that spending money to cleanup Davenport Creek is not an allocation of funds for the Settea mining operation.

**174**  Accordingly, it is clear that Golden Bear Mining breached its contractual obligation to use funds designated for a particular purpose by using them for an unapproved purpose. Mr. McLean is, in my view, also personally liable for this breach of the funding agreement. He is party to the contract. The funds were used to cleanup Davenport Creek at his direction. Much of the money was spent by him using his debit card access to Golden Bear Mining's bank account. He was the directing mind spending the money contrary to the terms of the funding agreement, even if the expenditure of some of that money was administered in Vancouver and approved by others. It was done to facilitate the completion of the cleanup project he was orchestrating.

**175**  It should be recalled that I have rejected the suggestion that the funding agreement contemplated the use of money at Atlin by mistakenly referring to spending up to $150,000 for the Highland River mining venture. I also reject any argument that spending money to cleanup Atlin falls within the Settea mining operation because it was a necessary step to make it possible for Mr. McLean and Golden Bear Mining to acquire permits to work in the Settea Valley.

**176**  I conclude, therefore, that both Golden Bear Mining and Mr. McLean were in breach of their contractual obligations under the funding agreement. I will return to remedies later.

**Was there a failure to transfer the mining claims to a holding company or have them held in trust?**

**177**  The obligation to transfer all the "Settea mineral claims" was breached. I have already held both that the phrase "all Settea mineral claims" captures all of the claims staked by Mr. McLean and held personally by him and his wife and that any purported transfer of them to Golden Bear Exploration is invalid.

**178**  As Mr. McLean was the sole director and officer of Golden Bear Mining and its principal shareholder, he had the authority or capacity to effect or initiate the steps necessary to transfer the Settea mineral claims. In my view, he was obliged, under the funding agreement, to set the machinery in operation to fulfill his and Golden Bear Mining's obligations. Instead he did nothing. Both Golden Bear Mining and Mr. McLean are in breach of the agreement.

**Did Mr. McLean fail to appoint Mr. Moon or his nominee a director of Golden Bear Mining?**

**179**  I am satisfied, and so find, that quite apart from the commitment made in the funding agreement, Mr. McLean agreed, in discussions with Mr. Moon, to appoint Mr. David Moir, a director of Golden Bear Mining as SMG's nominee. That did not occur.

**180**  Later, in July 2010, Mr. Moon went to Atlin with the necessary resolutions to have himself appointed as a director. He says that again Mr. McLean agreed to honour the funding agreement and return to Vancouver to make it happen. Once again, the appointment was not made. Mr. McLean says he was not refusing to make Mr. Moon a director, but thought that if he did so there should be a third director familiar with the company to avoid possible deadlock. He, therefore, arranged for Mr. Moon to be provided with documents that would simultaneously make both Mr. Moon and Mrs. McLean directors. Mr. Moon refused to sign the documents, taking the position that the appointment of Mrs. McLean required the agreement of other shareholders.

**181**  There matters stood until I ordered that Mr. Moon be appointed a director. That did not occur either, in breach of an express order of this Court.

**182**  I find that Mr. McLean is in breach of the funding agreement in failing to take the steps necessary to appoint a nominee of SMG as a director of Golden Bear Mining. Although the agreement contemplates that Golden Bear Mining shall have "2 or 3" directors, nothing gives Mr. McLean the right unilaterally to appoint the third director or to make the appointment of SMG's nominee conditional on the appointment of a third director, let alone one nominated by him.

**Did Mr. McLean and Golden Bear Mining breach the right of first refusal when 549 additional shares were issued to Mr. McLean?**

**183**  Mr. McLean remains in control of the company, the plaintiffs say, as a result of an unlawful issuance of shares to himself, as well as the breach of this Court's order regarding Mr. Moon's directorship.

**184**  Soon after the plaintiffs' investment moneys arrived, Golden Bear Mining issued 549 shares to Mr. McLean for $0.01 per share or $5.49, without offering those shares to the plaintiff, SMG. That issuance occurred either in February or May 2010, depending on which of two versions of the share register is correct.

**185**  The plaintiffs submit that this transaction breaches the following term of the funding agreement:

1. SMG shall receive a right of first refusal from both Mr. McLean and Golden Bear for any subsequent share sale or issuance by either.

**186**  Before the shares were issued, it appears that 101 Golden Bear Mining shares were issued and outstanding. The exact shareholdings are unclear, but, as discussed above, Mr. Stuart Moir, Mr. Williams, Mr. Morrisson (or his son), Mr. Koop and Mr. David Moir each held or had been promised 5% of the company. Mr. Lobb would later also be promised 5% for his assistance in the Atlin cleanup.

**187**  Mr. Stuart Moir held 49 shares in trust for himself, certain of those individuals and some of Mr. McLean's family. Mr. Williams held one of his shares personally, hence 101 shares rather than 100.

**188**  Based on what had been given or promised before any shares were issued to the plaintiffs, 25% of the company was held by persons other than Mr. McLean or in trust for his family. That is 75% of the company was held by Mr. McLean or his family. The effect of providing 30% of the shares in the company to the plaintiffs is, if there is no proportional dilution of all existing shareholders, that Mr. McLean's direct or indirect interest would fall to 45%. This is clearly the end point that most participants expected to come about. It appears to have been agreed to in discussions with Mr. McLean both at the December 12, 2009, restaurant meeting, when the plaintiffs' offer was discussed and approved, and at the early January 2010 meeting at the same restaurant.

**189**  After the 549 shares were issued to Mr. McLean, the share register suggests the following shareholdings:

1. Ernest McLean - 600 shares.
2. JJ Moon - 50 shares.
3. SMG Canada Gold Corp. - 250 shares.
4. Jeff Williams - 1 share.
5. Stuart Moir, in Trust, - 49 shares.
6. Shaone Morrisonn - 50 shares.

**190**  The effect, therefore, of the issuance of the shares is that Mr. McLean owns 60% of the shares of Golden Bear Mining and controls the company.

**191**  The directors' resolution for the issuance of 549 shares to Mr. McLean is signed by Mr. McLean and Mr. McGroarty. Mr. McGroarty is not and was not a director of Golden Bear Mining.

**192**  By virtue of the issuance of 549 shares to Mr. McLean, the shares of Stuart Moir and Jeff Williams were diluted tenfold. The shareholding interest of Mr. David Moir and Mr. Koop is not recognised. Only Shaone Morrisonn retained an undiluted interest.

**193**  While this share issuance granted Mr. McLean control of the company that he had arguably just previously given away for consideration, he claims to have no idea as to how or why the 549 shares were issued to him. I find that I cannot accept that evidence. In my view, Mr. McLean must have participated in the share issuance, either directly or indirectly. It could not have occurred without his concurrence and most likely it required his instructions. In any event, he signed the director's resolution authorizing the transaction and must have known what was happening.

**194**  Mr. McLean went further, initially denying any knowledge that the share issuance diluted the shareholdings of the other shareholders. He acknowledged in discovery that the dilution that occurred was not intended and does not seem fair to him.

**195**  Only days before the shares were issued, the plaintiffs were recorded by Golden Bear Mining as acquiring their identical shares for $2,666.66 per share, as compared to $0.01 per share price paid by Mr. McLean.

**196**  Mr. McLean did not inform the plaintiffs of the 549 shares issued to him. They learned of the share issuance only as a result of an examination of the Golden Bear Mining records by another shareholder.

**197**  I am unable to conclude, however, that in issuing shares to Mr. McLean, Golden Bear Mining breached the right of first refusal. Indeed, I have reservations that the clause set out above sets out an enforceable right. It is vague and uncertain. It does not set out any of the provisions normally included in a right of first refusal dealing clearly with when it is triggered, how notice is to be provided and when and on what terms it is to be exercised.

**198**  To the extent that the clause can be given a commercially certain meaning, as one ought to do if possible, it seems to me that the clause would be triggered typically in circumstances where Golden Bear Mining was seeking to raise capital in return for a shareholding position or if Mr. McLean was proposing to sell his own shares, thereby affecting the ownership structure of the company.

**199**  Here I am satisfied the shares were issued as part and parcel of the process of giving the plaintiffs their 30% interest in Golden Bear Mining. The funding agreement is silent on how they were to receive their shareholding interest or from whom. Nothing indicates whether the shares were to be issued from treasury or transferred from Mr. McLean. There is evidence, even before the funding agreement was signed, that there was a discussion that the plaintiffs' shares would come from Mr. McLean, but that did not find its way into the funding agreement. I am not persuaded that it would be permissible to read into the contract a term requiring the shares to be transferred from Mr. McLean's shareholding based on the evidence of pre-contractual discussions.

**200**  The plaintiffs did receive shares in return for their investment. They did end up with 30% of the shares of the company as a result of the shares issued to them and those issued to Mr. McLean. The losers were the individuals who each held five shares (out of 100 or 101) and who saw their proportionate interest diluted many times by the combined effect of the shares issued to the plaintiffs and to Mr. McLean.

**201**  I accept, however, that some reorganization of the share structure was a permissible means of providing 30% of the shares of Golden Bear Mining to the plaintiffs and of recognizing the interest of Mr. David Moir and Mr. Koop. Issuing additional shares to accomplish that object does not defeat the reasonable expectations of any of the participants as long as no dilution of the 5% shareholders occurred. There is nothing in the evidence that establishes that the expectation of the participants limited the absolute number of shares issued and outstanding.

**202**  When set in this matrix of facts and interpreting the language of the funding agreement objectively to give it commercial efficacy, I cannot conclude that the issuance of 549 shares to Mr. McLean triggered the right of first refusal found in the funding agreement. These transactions were a permissible way of giving the plaintiffs their 30% interest and did not engage the right of first refusal that exists to allow the plaintiffs to protect their position subsequently, if new investors are found or if Mr. McLean looked to sell his interest in the company. If these circumstances triggered the right of first refusal a commercially absurd result would occur. The plaintiffs would have acquired majority control of the company by acquiring an additional 549 shares for $5.49 as a result of shares being issued to accommodate their purchase of 30% of the company for $800,000.

**203**  Accordingly, I reject the plaintiffs claim that their right of first refusal was breached and refuse to grant a remedy of specific performance.

**Summary on breach of the funding agreement**

**204**  In conclusion, Mr. McLean and Golden Bear Mining breached the following terms of the funding agreement: the obligation to spend a minimum of $650,000 on mining operations in the Settea Valley; the obligation to transfer all Settea mineral claims to a holding company or into a trust; and the obligation to make a nominee of SMG a director. They did not breach the right of first refusal.

**Other legal claims arising out of the breach of the funding agreement**

**205**  The plaintiffs do not limit their claim to breach of contract. They argue that the misuse of the plaintiffs' investment and other breaches sounds also as a breach of fiduciary duty, a breach of trust, constitutes conspiracy, led to unjust enrichment, amounts to conversion and supports the oppression claim. I will deal with each of these claims briefly, except for the oppression claim which I will deal with at greater length.

***Fiduciary Duty***

**206**  The plaintiffs allege that, as a consequence of the relationship of trust and vulnerability established under the funding agreement, Mr. McLean and Golden Bear Mining owed fiduciary duties to the plaintiffs with respect to the funding agreement proceeds and their use. Accordingly, the diversion of virtually all of the plaintiffs' investment to a cleanup project in Atlin constituted a breach of the fiduciary duties of both Mr. McLean and the company. Moreover, in breach of their fiduciary duties, these defendants allowed or enabled Mr. McGroarty to unlawfully divert assets to himself. Finally, Mr. McLean and Golden Bear Mining breached their fiduciary duty to the plaintiffs by failing or refusing to issue shares according to earlier promises and failing to appoint Mr. Moon as a director of the company, matters that were solely within their control.

**207**  I accept that a fiduciary duty may arise in a commercial context and, on the right facts, may be owed by a director to a shareholder. A fiduciary duty does not arise between a director and a shareholder by virtue of the directorship alone however, but there are exceptions to the rule: *Dusik v. Newton et al.* [*(1985), 62 B.C.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-FBFS-S15S-00000-00&context=) at 20-23 (C.A.).

**208**  The issue whether fiduciary obligations are owed will depend upon the facts of the particular case and will not be dependent solely upon the formal classification of the parties as majority and minority shareholders, or director and shareholder. In the context of a privately closely held company, a fiduciary duty owed to the corporation may be extended to shareholders when the director has been dishonest with or misled the shareholder: *Vladi Private Islands Ltd. v. Haase et al.* [*(1990), 96 N.S.R. (2d) 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPT1-FFMK-M1S0-00000-00&context=) (S.C. (A.D.)); see also Dr. Ronald Davis, *Directors' Liability in Canada*, loose-leaf ed. North Vancouver: Specialty Technical Publishers (updated 2010, rel. 161) at 1-13 to 1-16.

**209**  In *Goldex Mines Ltd. v. Revill et al*. [*(1974), 54 D.L.R. (3d) 672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-FC6N-X2XH-00000-00&context=), an Ontario Court of Appeal case dealing with the duties owed by directors, personally, to shareholders, the Court held that it is not necessary to strain to fit the facts into a well-established category of fiduciary obligations to find the existence of a fiduciary relationship; it is permissible to look at a relationship which has developed as a matter of business exigency and determine whether it is appropriate that fiduciary obligations attach given the attendant factual circumstances.

**210**  The British Columbia Court of Appeal endorsed this approach in *Dusik*: at 22.

**211**  A fiduciary duty can be found to exist where "one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue": *Hodgkinson v. Simms*, [*[1994] 3 S.C.R. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=) at 409. That is, the Court should consider the relationship of the parties with particular attention to the parties' expectations: at 412.

**212**  The Supreme Court of Canada in *Hodgkinson* defined the term fiduciary at 409:

I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. ...

As I noted in *Lac Minerals*, [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=), however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination. [Emphasis in original.]

The Court also noted that the legal incidents of many contracts may give rise to a fiduciary duty: at 407.

**213**  The Supreme Court of Canada recently articulated the basis for finding a fiduciary relationship in a commercial context. In *Galambos v. Perez*, [*2009 SCC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GF-00000-00&context=), Cromwell J., writing for the Court, explained that it is fundamental to all fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party in accordance with the duty of loyalty reposed on him or her: at paras. 66, 75, 77.

**214**  Cromwell J. went on to outline the following features of fiduciary relationships at paras. 77, 79, 83:

1. The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way;
2. The critical point is that in fiduciary relationships there will be some undertaking on the part of the fiduciary to act with loyalty;
3. Relevant to the enquiry of whether there is such an undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty; and
4. The fiduciary's power to affect the other party's legal or important practical interests is a crucial factor in finding a fiduciary relationship. In fiduciary law, it is the discretionary power that results from the relationship that gives rise to the fiduciary duty that is the important concern rather than the parities' positions before they entered into the relationship.

**215**  Even though I accept that fiduciary duties may arise in the commercial context, I am not persuaded that fiduciary duties arose in this case. First, it is not clear to me that Golden Bear Mining, as a distinct legal entity, could owe fiduciary duties to the plaintiffs. If any fiduciary duties arose, they would be between Mr. McLean and the plaintiffs arising from Mr. McLean's control of Golden Bear Mining and from the obligations he undertook under the funding agreement.

**216**  More importantly, in this commercial context I cannot see how either Mr. McLean or Golden Bear Mining undertook, either expressly or by implication, to act in Mr. Moon's or SMG's best interests in accordance with a duty of loyalty reposed in them. It is true that by breaching the funding agreement they could damage the plaintiffs' interests and the plaintiffs were vulnerable to be damaged by those breaches, but that is true in any situation where one party to an agreement can unilaterally breach it to the detriment of the other.

**217**  Indeed, it is not obvious to me that the plaintiffs reposed loyalty in either Golden Bear Mining or Mr. McLean to protect their best interests. The funding agreement itself belies that conclusion. The funding agreement provides for mechanisms by which the plaintiffs would be involved in the affairs of Golden Bear Mining. They were to receive shares that would provide a measure of control. A nominee of SMG was to be a director. The agreement gave SMG the right to nominate one signatory for banking and general signing authority; a right that SMG has never asserted. The right of first refusal protected the plaintiffs in the event the company sought to raise funds by issuing shares. All of this points away from the existence of a fiduciary relationship; I cannot see how the breach of the terms of the funding agreement converted the relationship into a fiduciary one.

**218**  In the result, I reject the plaintiffs' claims in breach of fiduciary duty.

***Breach of trust, participation in breach of trust, unjust enrichment, conversion and conspiracy***

**219**  I am not persuaded that the facts in this case ground a claim for breach of trust, participation in a breach of trust, unjust enrichment, conversion or conspiracy.

**220**  First, it is not clear that the conspiracy claim in particular has any independent utility given my conclusion that the plaintiffs have made out their case in fraudulent and negligent misrepresentation and breach of contract. It adds nothing to consider conspiracy as an independent tort in these circumstances.

**221**  Secondly, I do not think that trust principles apply in these circumstances. This matter is one that involves negotiations for a contract and the resulting contract. Under that contract, the plaintiffs transferred money to Golden Bear Mining in return for some of its shares. The fact that the contract identified the purpose to which the funds can be put does not, standing alone, impress those funds with a trust. I am not persuaded that trust principles have any application. In any event, it is not clear that in advancing the funds to the company, even for purposes stipulated by contract, the plaintiffs retained any beneficial interest in the moneys. Arguably, all of the interest in the funds was transferred to Golden Bear Mining, subject only to the contractual and other corporate limitations on their use. If any party has a claim sounding in equity it may be Golden Bear Mining against Mr. McLean and Mr. McGroarty. But of course Golden Bear Mining is a defendant, not a plaintiff in these proceedings.

**222**  These considerations undermine the claim for participating in a breach of trust, unjust enrichment and conversion. Each of these claims presupposes that the invested moneys are impressed with a trust so that the plaintiffs retain a beneficial title in the moneys invested. But if the moneys, once invested, belong to Golden Bear Mining and not the plaintiffs, the plaintiffs have no interest that can be converted. Only Golden Bear Mining can make a claim in unjust enrichment. The claim for participating in a breach of trust likewise falls away.

**223**  Finally, I observe that the defendants in these proceedings were not represented. The points in issue here were not fully argued. The plaintiffs did not provide me, moreover, with any authority, let alone binding authority, that makes clear that these general equitable principles would apply in these circumstances.

**224**  Before turning to the issue of oppression, I will consider the allegation that Mr. McGroarty misappropriated the assets of Golden Bear Mining in breach of his obligations to the plaintiffs.

**The plaintiffs allegations involving Mr. McGroarty**

**225**  Mr. McGroarty, it will be recalled, became involved with Golden Bear Mining in or about November 2009. He regarded himself as having been appointed CEO of Golden Bear Mining by the time the funding agreement was entered. Mr. McGroarty's involvement with Golden Bear Mining was opposed by the Moirs, Mr. Morrisson (apparently), Mr. Moon and less emphatically, at least at first, by Mr. Williams. The basis of their opposition to Mr. McGroarty appears to have been rooted in his failure to deliver investment funds to Golden Bear Mining and what was seen as the unsuitability of some of his ideas to restructure or reorganise Golden Bear Mining's affairs. Nonetheless, and despite promises to the contrary, Mr. McLean involved Mr. McGroarty in the affairs of the company. The other interested parties acquiesced to this.

**226**  The plaintiffs, in summary, complain about the following:

1. contrary to promises made to Mr. Moon and other shareholders, Mr. McLean gave *de facto* control of the corporation over to Mr. McGroarty;
2. in March 2010, Mr. McGroarty and Mr. McLean established a new company, Golden Bear Exploration Inc. While the original purpose of that incorporation was something different, Mr. McGroarty attempted to use the company in an effort to strip Golden Bear Mining of its primary assets, its mining claims;
3. in May 2010, Mr. McLean and Mr. McGroarty together unlawfully caused Golden Bear Mining to give Mr. McLean majority control of the corporation by issuing 549 shares to himself for $0.01 each, without honouring the plaintiffs' right of first refusal when issuing those shares. They also diluted the holdings of all shareholders other than the plaintiffs;
4. Mr. McLean and Mr. McGroarty spent the summer of 2010 using the plaintiffs' investment, not for the agreed purposes, but to clear Mr. McLean's name with the B.C. Ministry of Mines, through the cleanup at Davenport Creek (Atlin);
5. during 2010, Mr. McGroarty unlawfully removed and converted other funds, and attempted to convert and remove other assets, from Golden Bear Mining for personal use. The evidence discloses at least $60,244.47 in funds converted by Mr. McGroarty personally ($30,000 for Dubai, $25,000 for Atlin, $3,390 for Bank of China and $1,314.12 for Golden Bear Exploration incorporation); and
6. in the fall of 2010, Mr. McLean and Mr. McGroarty unlawfully conspired to defraud the plaintiffs of more than $10 million by communicating a non-existent offer to purchase Mr. McLean's shares under a first right of refusal contained in the funding agreement.

**227**  I have already dealt generally with the issue of the right of first refusal and the misuse of funds at Davenport Creek. I observe, however, that Mr. McGroarty signed the director's resolution authorizing the share issuance representing that he was a director when he was not.

**228**  The evidence clearly establishes points (1) and (2) set out above. Mr. David Moir's involvement as company accountant did not materialize in 2010. Mr. Williams was ejected from the company at the end of June 2010 by Mr. McGroarty (likely on Mr. McLean's instructions). This is important because for practical purposes Mr. Williams did not exercise control of the spending of Golden Bear Mining's money during the greater part of the time that Atlin was being cleaned up. That work began in June, but continued even into September. During those months, Mr. McGroarty was in control of Golden Bear Mining's affairs in Vancouver. I find that Mr. McLean did transfer *de facto* control of Golden Bear Mining's affairs to Mr. McGroarty, except to the extent that those affairs involved day to day operations at Atlin, which were conducted by Mr. McLean.

**229**  Furthermore, it is clear that Mr. McGroarty did establish (using Golden Bear Mining's funds) a company, Golden Bear Exploration Inc., in which he and Mr. McLean held shares. He purported to transfer all of the mining claims held in the name of Mr. and Mrs. McLean to this company. Mr. McLean disputed at trial that those claims were held by Golden Bear Exploration Inc., claiming that they still all belonged to him. Given my conclusion that the claims belonged to Golden Bear Mining the effect of the purported transfer, if valid, would be to strip Golden Bear Mining of its claims. I am satisfied that Mr. McLean knew of and participated in the purported transfer (although he repudiates it now), and knew that he was acting improperly. This is so because I am satisfied that he knew the claims belonged beneficially to Golden Bear Mining, despite his protestations to the contrary. Likewise, I cannot accept that Mr. McGroarty could have been under any legitimate misunderstanding about the fact that the claims belonged to Golden Bear Mining.

**230**  I turn now to focus on the alleged misappropriation of funds by Mr. McGroarty.

**231**  The plaintiffs particularize their claim that Mr. McGroarty diverted money from the plaintiffs' investment to himself. Some examples of those allegations are as follows:

1. in April 2010, Mr. McGroarty received in his personal bank account a $30,000 fee on the basis of a sham claim for payment for services, including to set up a company in Dubai. He used those funds to buy a car;
2. in July 2010, he received in his personal bank account $3,930.35 for a sham expense claim based on a Bank of China letter of June 24, 2010;
3. in July 2010, he received an untraceable $25,000 ($9,700 of which went into his bank account). He would later try to support that expense by submitting to the inspector a package of receipts, most of which had no relationship to those monies;
4. he used Golden Bear Mining money to incorporate Golden Bear Exploration Inc., in which he and Mr. McLean were shareholders and which was used by him to receive all of the staked claims (except 672403) as a result of an agreement in spring 2010 which Mr. McLean repudiated at trial;
5. he paid $1,314.12 for many home expenses, such as all of his internet services, his phone and many personal meals;
6. he funded all of his vehicle costs, including personal fuel and car washes; and
7. many of these inappropriate expenses were identified by the Inspector. Mr. McGroarty has not paid back the improper expenses he claimed from Golden Bear Mining, although he was asked to do so.

**232**  I turn to consider the primary allegations of misappropriation of the funds invested in Golden Bear Mining, setting to one side for the moment the issue whether the proper plaintiff in respect of these matters is Golden Bear Mining.

**The Bank of China Internet scam**

**233**  The first allegation involves an expense claim for just over $3,900, allegedly paid to the Bank of China. According to Mr. McGroarty, this money was paid by him as a means of securing $40 million in funding for Golden Bear Mining and other companies he was involved with. He acknowledges that the Bank of China transaction turned out to be an internet scam, although he maintains that he conducted due diligence in relation to the contemplated financing.

**234**  The plaintiffs say that Mr. McGroarty took the $3,900 personally and nothing was ever sent to the Bank of China as he maintains.

**235**  Mr. McGroarty says that the only record he has of the payment to the Bank of China is his handwritten note on the internet request for funds. His laptop on which he had his communications with the "financiers" was "fried" and is no longer available. He cannot remember how he forwarded the funds, but insists he did so. He does not know if he took the money from cash. He says he often keeps $5,000 to $10,000 or more in cash on hand, and he may have done a wire transfer or transferred the money through Western Union. He agreed that he has no record of the transfer of the money, has not been able to find any record of the transfer, and that his bank records do not show any withdrawal of the money corresponding to the amount provided to the Bank of China.

**236**  I am unable to accept Mr. McGroarty's evidence. The internet request for funds is an obvious and notorious "scam" of a kind familiar to almost everyone with email. Mr. McGroarty presents himself as a sophisticated businessman who has turned around numerous companies and who has raised finance in the past. Even though he said that he dislikes raising finance and is not good at it, I find it wholly implausible that Mr. McGroarty would not have recognised the e-mail solicitation of funds to be exactly what is was: a brazen hoax capable of enticing only the most naive or vulnerable to part with money. Moreover, the notion that in return for a few thousand dollars the company, among others, would receive $40 million is ludicrous. No sophisticated businessman could have failed to see through such a transparent ruse. Mr. McGroarty is certainly not unsophisticated or commercially unastute.

**237**  I find it most unlikely that if Mr. McGroarty had paid the money to the Bank of China using his own personal cash (for which he was then reimbursed), he would have forgotten having done so. I found his prevarication about not being able to remember the source of the funds unconvincing. I am confident that Mr. McGroarty understood the need to support his expense accounts with receipts. Indeed, he regularly provided receipts, including (apparently inadvertently) for cigarettes and lottery tickets, among other personal items. Although it may not be surprising to find that not every expense claim was backed by a receipt (after all receipts often do get mislaid) this was a sufficiently large sum of money. If he had used his personal cash, I am sure that he would have provided some kind of documentation to the company to prove the payment in the event he was challenged.

**238**  Mr. McGroarty relied on a general claim that all his expense claims were approved by Mr. Williams. Mr. Williams was not asked if he had approved this particular expense. In fact, Mr. Williams could not have approved it because he had been terminated at the end of June by Mr. McGroarty and was no longer involved in the company. The plaintiffs point to the fact that some of the suspect transactions occurred on the heels of Mr. Williams leaving the company as itself suspicious and as lending support to their claim that Mr. McGroarty took advantage of the lack of control over Golden Bear Mining's finances to benefit himself. I consider that assertion to be well-founded.

**239**  Finally, I find it implausible that if Golden Bear Mining were going to solicit $40 million in financing in return for an outlay of a few thousand dollars, there would not be some corporate record of that initiative, but there is none. It is equally implausible that Mr. McGroarty would use his own cash rather than requisition the funds from the company. Mr. McGroarty offered no explanation of why he paid the money using his own funds.

**240**  In summary, I find as a fact that Mr. McGroarty did not use his own funds to send money to the Bank of China and, therefore, his expense claim for $3,900 is improper. He took money from Golden Bear to which he was not entitled.

**The $25,000 cash payment**

**241**  The second transaction in dispute is the receipt by Mr. McGroarty of $25,000 in cash in early July 2010. Mr. McGroarty accepts that a payment of $9,700 cash into his bank account later that month probably was from that $25,000. Certainly, Mr. McGroarty suggested no other source of the $9,700. If I understood him correctly, Mr. McGroarty justified taking the $9,700 because Golden Bear Mining was and remains indebted to him for an even greater amount.

**242**  Mr. McGroarty says that the $25,000 was given to him by Golden Bear Mining on the approval of Mr. Williams in early July so that he could take the money with him on a trip to Atlin and buy a vehicle, a camper I recall, for the company on his way. No camper was ever purchased, according to Mr. McGroarty, because plans changed.

**243**  The plaintiffs challenged Mr. McGroarty's evidence. They say that Mr. Williams could not have approved the cash advance of $25,000 because he had been discharged by Mr. McGroarty in late June 2010. More significantly, they say that Mr. McGroarty is unable to explain the corporate purposes the money was used for. Mr. McGroarty provided a bundle of receipts to the inspector in support of his use of the money. It is unnecessary to descend to detail, but the clear fact is that most of the receipts do not properly support the use of the money. For example, Mr. McGroarty said that he used the cash to reimburse Mr. McLean and others in Atlin for expenses they incurred on their presentation of receipts to him. In fact the bulk of those receipts are in respect of matters that had already been paid for directly by Golden Bear Mining. Either Mr. McLean or the Atlin crew were cheating Mr. McGroarty or the cash was not used by him to reimburse those expenses. Further, other of the receipts were for expenses incurred at a time that does not correspond to the Atlin trip or were for clearly personal expenses. In brief, few or none of the receipts clearly support the use of Golden Bear Mining's cash for a corporate rather than a personal use.

**244**  Mr. McGroarty did not persuade me either that he used the $25,000 in cash for a legitimate corporate purpose, or that he is owed money by Golden Bear Mining in excess of any inadvertent mistaken expenses he may have claimed (and acknowledges). There is a complete lack of documentation validating his explanations. What documentation exists tends to undermine and not reinforce what he says. He must have known, for example, that the receipts he provided the inspector were in response to a request to justify what he had done with corporate money, but they do not support his position.

**245**  I also consider that the use of the cash for personal purposes appears consistent with a pattern of conduct of treating Golden Bear Mining as a repository of funds for personal use. There is force in the observation that Mr. McGroarty was in need of money at the time he received the cash. He was paying rent and the leasing costs of a car for a friend and his bank account shows that he was almost out of money. The money deposited in his account from Golden Bear Mining (not just the cash here, but other money too) relieved an apparent liquidity problem. Mr. McGroarty says that he was not close to running out of money because he always kept a large amount of cash on hand and could rely on that. I am unable to place any weight on that claim in light of all of the other difficulties in Mr. McGroarty's evidence.

**246**  I find as a fact that Mr. McGroarty took $25,000 in cash from Golden Bear Mining and used virtually all, if not all, of it for his personal use.

**The $30,000 payment of April 1, 2010**

**247**  The third transaction involves the payment of $30,000 to Mr. McGroarty on April 1, 2010. Mr. McGroarty says that this payment was a fee for services to be rendered by him to the benefit of Golden Bear Mining for two tasks. The first was to incorporate a company in Asia to pursue refining of "black sands" for trace elements in Dubai. The second was to pursue further financing for Golden Bear Mining.

**248**  Mr. Williams testified that he had never seen a letter dated April 1, 2010, between Mr. McGroarty and Mr. McLean on behalf of Golden Bear Mining, said to be the agreement for services in respect of which the $30,000 was paid. Moreover, he testified that he had not seen the cheque for $30,000, although it was signed by him as he acknowledged.

**249**  Mr. McGroarty says that he did the work contemplated by the agreement. He did make the arrangements to have the necessary incorporation carried out and, indeed, used $4,000 - $5,000 of the $30,000 to pay for the work.

**250**  Once again, Mr. McGroarty is unable to provide any documentation that supports what he says. There is no record of a transfer of money to Asia or of any work being done there to incorporate the company. There is no record in Golden Bear Mining of legal work being done to lay the foundation for some refining activity in Dubai, although the possibility of refining black sand was discussed. In discovery, Mr. McGroarty was not able to give any indication of how much time he spent providing the services he was being paid for and also gave no details of what he did beyond accomplishing the incorporation. In particular, he gave no details of what efforts he made to raise financing for Golden Bear Mining.

**251**  Deciding whether Golden Bear Mining Ltd. and Mr. McGroarty entered an agreement on April 1, 2010, to pay Mr. McGroarty $30,000 involves making findings involving the credibility of Mr. McGroarty and Mr. Williams. The following additional evidence bears on this question.

**252**  First, there is a letter bearing the date April 1, 2010, signed by both Mr. McGroarty and Mr. McLean evidencing an agreement to pay Mr. McGroarty for services. Secondly, refining black sands was indeed seen by Golden Bear Mining, and some of its interested parties, as a business opportunity for it. Thirdly, a cheque was written, signed by Mr. Williams and Mr. McLean apparently also on April 1, 2010, for $30,000 in favour of Mr. McGroarty. It shows the payment being in respect of a loan, not a fee for services, but there is evidence that for "tax purposes" payments by Golden Bear Mining to compensate for services would be shown on the books as a loan.

**253**  Mr. McGroarty insists that Mr. Williams was present when the April 1st agreement was made and signed the cheque on that day when all three men were together. Mr. Williams denies this. He says that it was common practice for each of the three individuals who were authorised to sign Golden Bear Mining cheques to pre-sign some blank cheques so that bills could be paid even if two of the three authorised signatories were not available to sign a cheque when necessary. Mr. McLean had to sign each cheque, but he was often away, so it was common to have him pre-sign a larger number of blank cheques than the other two. Nevertheless, both he and Mr. Pilkey (the third authorised signatory) would also sign some blank cheques in case they were unavailable. He says that he did not sign the cheque for $30,000 on April 1, 2010, and conjectures that Mr. MacLean must have used a blank cheque he had already signed.

**254**  Ms. Coombs was Golden Bear Mining's bookkeeper. She processed the financial transactions and recorded them for the company. In cross-examination by Mr. McGroarty she testified Mr. McLean was the only person who signed blank cheques because he was working out of town so much of the time. On re-examination, she qualified her answer and acknowledged that she was unclear whether Mr. Williams and Mr. Pilkey also pre-signed cheques. She was unable to go so far, however, as to confirm that either or both of them did.

**255**  The concept of creating a company in Dubai appears to have come originally from Mr. Williams. The theory was to establish a refinery company on the public Dubai Metals Exchange. However, there were never actually any steps taken, to Mr. Williams' knowledge, to establish that company. The April 1st letter to Mr. McGroarty on the subject does not fit the facts comfortably. The black sands referred to in the letter would have come from Highland River, not a Golden Bear property as the letter suggests, at least according to Mr. Williams. The refinery under consideration would have cost significantly more than $30,000 to start. There was no obvious reason in 2010 for Golden Bear Mining to expend resources in support of a Dubai venture.

**256**  Mr. McLeans' evidence on the subject is not helpful. He testified that he has no idea what was done with the money and has never asked. He had little to say that was probative of the existence of an agreement with Mr. McGroarty to set up a company to carry on refining black sands in Dubai or to pay Mr. McGroarty in advance, and independent of the result, for efforts to raise capital for Golden Bear Mining.

**257**  Mr. McLean was asked in discovery to provide any support for that $30,000 payment to Mr. McGroarty. He was unable to do so. In fact, once again, there is a complete absence of documentation (except the letter and the cheque) supporting a decision by Golden Bear Mining to begin setting up for operations in Dubai or authorising Mr. McGroarty to devote time to raising capital for a fee paid in advance and not contingent on success.

**258**  Mr. Williams specifically denied any conversation with Mr. McGroarty and Mr. McLean in which it was suggested that they should set up a company in Dubai anyway.

**259**  In an affidavit sworn March 9, 2012, Mr. McGroarty asserts that the funds paid to him were classified as a loan because at the time "we did not know how to classify" the payment of $30,000.

**260**  Mr. McGroarty explained that $4,000 - $5,000 of the $30,000 was spent for incorporation of companies in Dubai. He indicated that he did not issue a cheque, but would have wired the money. Mr. McGroarty agreed that there would be nothing in his bank records to show that he spent $4,000 - $5,000 for the Dubai matter.

**261**  Mr. McGroarty's evidence in cross-examination was that there is nothing in his bank account statements showing any funds going toward setting up a company in Dubai. He explained that he always kept cash in his house, which could be anywhere from $20,000 - $50,000.

**262**  Mr. McGroarty agreed that in April 2010, Golden Bear Mining was his only source of income, and that his account balance was low before the fee arrived. However, he insisted he had cash available and was not short of funds and so had no incentive or motive to misappropriate money.

**263**  In assessing credibility and, in effect, resolving the conflict between Mr. McGroarty and Mr. Williams, I have to have regard to, amongst other matters, the inherent probabilities of the situation and the consistency of the evidence with any objective and independent evidence or documentation. I am also entitled to take into account my view of the credibility of the witnesses generally, that is to say, how reliable their evidence has been proven to be on other matters. I have not found Mr. McGroarty to be, generally, a reliable witness, as is apparent from these reasons.

**264**  Approaching the matter in this way, I find it difficult to accept that if a decision had been made to (1) pursue a refinery in Dubai; (2) pay Mr. McGroarty a special fee to search out investors; and (3) to do so in advance of any results, there would be no documentation evidencing those decisions or steps taken in preparation for those activities or steps taken to accomplish them. Yet there is nothing of moment.

**265**  As noted, Mr. McGroarty could not explain what he did to earn the fee except to say that he sent money from his fee to Asia to pay for the legal work to incorporate a company to conduct business in Dubai. He could not even estimate in any meaningful way how much time he spent earning the fee. Moreover, I am not persuaded that any money was sent to Asia or that a company was incorporated. Not only are there no records of either event, it is improbable in my view that Mr. McGroarty would use a portion of his personal remuneration to fund the cost of work for Golden Bear Mining when the company could have paid for those funds directly.

**266**  In my view, it is doubtful that Golden Bear Mining would have decided at the beginning of April 2010 to undertake a venture in Dubai. At that time, it had no raw material to consider shipping to a refinery anywhere, let alone Dubai. The original concept developed by Mr. Williams and Mr. Morrisonn to use so-called black sands from Highland River had been abandoned. A Dubai refinery was a project without a purpose. Moreover, it is doubtful that Golden Bear Mining would have undertaken such a venture without the participation of all interested parties. There is nothing to suggest that others such as either Mr. Moir, for example, knew anything of the arrangement.

**267**  It is also improbable that Golden Bear Mining would agree to pay an advance fee, independent of results, to find additional investment funds. Certainly, that had not been Golden Bear Mining's historical practice. In the past, the company appears to have relied on some kind of commission or finder's fee to reward for new investments. Golden Bear Mining was in funds in April 2010, but it would have been extravagant and imprudent to enter the arrangement described by Mr. McGroarty.

**268**  Another telling factor is Mr. McLean's inability to offer a cogent account of the agreement and what services were provided for the money.

**269**  I find that I must reject Mr. McGroarty's evidence that he received $30,000 as a fee for services to be rendered. If that had been so, I doubt he would have had any difficulty in describing it as such in his affidavit. He would not have deposed that the payment was categorised as a loan on the cheque because the parties did not know how to classify it. I am skeptical of Mr. McGroarty's claim that he kept large amounts of cash on hand and that he had no pressing need for funds in April 2010 notwithstanding the state of his bank account and fact that he was paying a friend's rent and car payments. I do not accept the April 1, 2010, letter apparently evidencing an agreement for services as genuine.

**270**  In rejecting Mr. McGroarty's evidence, I have not overlooked Ms. Coomb's initial statement that only Mr. McLean pre-signed cheques. Later in her evidence she was much less confident about that. I find that it is probable that Mr. Williams also signed some cheques to ensure that company business would not be held up if two of the authorised signatories were not available when needed. I accept Mr. Williams' evidence that he had not seen the cheque paying Mr. McGroarty $30,000 and knew nothing of the alleged agreement for services.

**271**  I have also not overlooked the fact that Mr. Williams may not be an independent and impartial witness. I am aware that he has a 5% interest in Golden Bear Mining and potentially stands to gain if Mr. McLean is ousted from the company. Nonetheless, I prefer his evidence to Mr. McGroarty's for the reasons given and because of the other difficulties with Mr. McGroarty's evidence referred to in these reasons, which contribute generally to undermining his credibility as a witness.

**Summary**

**272**  I accept that Mr. McGroarty misappropriated funds, as set out in this section of the judgment, from Golden Bear Mining for his own benefit. It will be necessary to return to consider the legal position arising since, at first blush, the wrong is done to the company and, there being no derivative action, Golden Bear Mining is not a plaintiff. I have also concluded that principles of trust, participating in a breach of trust, unjust enrichment and conversion have no application. I will discuss the availability of a remedy later in these reasons.

**Were the affairs of Golden Bear Mining conducted in a manner that was oppressive or unfairly prejudicial to the interests of the plaintiffs?**

**273**  The plaintiffs allege that the affairs of Golden Bear Mining have been conducted in a manner that is oppressive or unfairly prejudicial to them in their capacity as shareholders. The conduct complained of duplicates in large measure that which underlies the causes of action already discussed. The oppression remedy is found in s. 227 of the British Columbia *Business Corporations Act*, *S.B.C. 2002, c. 57* [*BCA*] provides corporate shareholders with a process to seek redress for oppressive conduct:

Complaints by shareholder

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

1. A shareholder may apply to the court for an order under this section on the ground

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

1. On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
2. directing or prohibiting any act,
3. regulating the conduct of the company's affairs,
4. appointing a receiver or receiver manager,
5. directing an issue or conversion or exchange of shares,
6. appointing directors in place of or in addition to all or any of the directors then in office,
7. removing any director,
8. directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
9. directing a shareholder to purchase some or all of the shares of any other shareholder,
10. directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
11. varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,
12. varying or setting aside a resolution,
13. requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
14. directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
15. directing correction of the registers or other records of the company,
16. directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,
17. directing that an investigation be made under Division 3 of this Part,
18. requiring the trial of any issue, or
19. authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.
20. The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

...

[Emphasis added.]

**274**  As was made clear by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, [*2008 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DR-00000-00&context=), oppression is an equitable remedy: at para. 58. The oppression remedy gives a court "broad, equitable jurisdiction to enforce not just what is legal but what is fair": at para. 58. Oppression is also fact-specific. As the Court stated, "What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play": at para. 59. As outlined at para. 68, in assessing a claim of oppression a court must ask:

[68] ... (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

**275**  The claims to oppression centre principally around alleged expectations about share ownership resulting from the investment, the commitment to share control through appointing a plaintiffs' nominee as a director, the manner of Mr. McLean's exercise of control of Golden Bear Mining and the use to which funds would be put.

**276**  Before approaching the specific question whether any representations were made or agreements reached which are relevant to the reasonable expectations of the parties about the effect of the funding agreement on the shareholdings in Golden Bear Mining, it is necessary to set the context in which those discussions occurred. It is necessary, therefore, to examine what understandings existed when the funding agreement was under discussion.

**277**  The evidence of Mr. Stuart Moir and Mr. Williams is that Mr. McLean agreed to give them 5% of the company. Mr. Stuart Moir says that interest was not to be diluted. Mr. McLean says that when he gave a shareholding interest, he was giving five shares and there was no agreement that they not be diluted.

**278**  Mr. Stuart Moir's evidence is that a agreement was reached in 2008 with Mr. McLean that involved the following terms:

1. Following the meeting in the summer of 2008, Jonn Morrisonn, Jeff Williams and I expressly agreed with Mr. McLean to help him with his plans for Golden Bear Mining Ltd. if he would share management duties with us and if he would [run] the company in a shareholder friendly manner. We also expressly agreed that Mr. McLean's job would be to focus on buying equipment, deciding where and how to mine, and conducting the mining itself. We also required Mr. McLean to agree that compensation of the individuals involved in the project would be decided jointly and that the output would be used to pay the expenses, then the balance would be divided between the shareholders *pro rata* by shareholdings. The distribution of raw gold to shareholders was important because the shareholders do not have to pay taxes on such raw gold until it is refined and sold.
2. As part of the same agreement, Mr. McLean expressly agreed as follows:
3. Jonn Morrisonn, Jeff Williams and I, or our respective nominees, would each receive 5% of the equity and voting shares in the company, which shares would not be diluted, so that we each ended up with 5% of the shares after investment was obtained and all shares were issued.
4. Jonn Morrisonn, Jeff Williams and I would each receive a 1% net smelter royalty ("NSR") on all the Settea claims which were staked.
5. Mr. McLean would receive a maximum of a 5% NSR.
6. Anyone who raised monies for the company by loan, gold sale, share issuance or otherwise would receive a finders fee of 10% of the monies raised.
7. Those who worked for the company would receive reasonable compensation for their efforts.

...

1. Mr. McLean would remain sole director of the company but he would manage the company jointly with us.
2. We would try to limit the share issuance required to fund the mine so that our group (McLean, Morrisonn, Moir and Williams) retained control of more than 50% of the shares.

**279**  In my view, Mr. McLean did not effectively challenge the evidence that this agreement was reached. He simply asserted that he gave five shares and did not agree that they could not be diluted.

**280**  I am satisfied that Mr. Stuart Moir, Mr. Williams and Mr. Morrisson were given a shareholding interest that represented 5% of the company. It is most unlikely that the agreement was that they receive five shares and that Mr. McLean remained free to alter the number of issued and outstanding shares at will. The shares were not given to them as a gift. They were given to them because they each had a valuable contribution to make to the potential success of Golden Bear Mining and this interest gave them a real stake in the future success of the company and an incentive to bring about that success.

**281**  It accords with common sense that in receiving shares representing a percentage of the company there is some expectation or agreement limiting the dilution of that interest. Mr. Stuart Moir says there was an explicit agreement that future investment would not dilute their interest. Mr. McLean denies that agreement.

**282**  I accept that there was an agreement substantially in the terms described by Mr. Stuart Moir involving himself, Mr. Williams and Mr. Morrisonn. It appears to me unlikely that the subject matters covered by the agreement would not have been discussed with Mr. McLean, since they are matters of material importance to all of the parties, particularly the new shareholders.

**283**  I have to say too that where Mr. McLean's evidence conflicts with that of other witnesses on a question such as this, I prefer the evidence of the other witnesses. Mr. McLean's evidence, on many points, was contradicted by documents or changed over time.

**284**  I find, therefore, that Mr. McLean agreed that the percentage interest in Golden Bear Mining he gave to Mr. Williams, Mr. Stuart Moir and Mr. Morrisonn could not be diluted at will. When discussions were occurring with Mr. Moon and it was understood that the funding agreement contemplated the plaintiffs would receive an equity interest in Golden Bear Mining, Mr. McLean must have understood that the provision of that interest could not be achieved simply by diluting the interests of Mr. Moir, Mr. Williams and Mr. Morrisonn.

**285**  Finally, I also accept that when Mr. McLean offered shares to others, such as Mr. David Moir, Mr. Koop and later Mr. Lobb, his offer was of a percentage interest which implicitly at least created an expectation limiting the right to dilute that percentage interest. David Moir, for example, testified that:

1. On or about September 29, 2009, at Golden Bear's Boulder City camp, Brent Koop and I were promised by Ernie McLean that we would receive 5% each of the shares in the company, to be taken from his shares, for finding the gold. That promise was repeated many times in subsequent meetings in Vancouver, to me personally, and in the presence of other shareholders and Mr. Jung Moon. However, as far as I know, Ernie McLean has never acted on his promise by arranging for the issuance of those shares. Subsequent to this promise, I attended numerous meetings of the shareholders and administrators of Golden Bear Mining Ltd., in reliance on that promise. I believed I was a shareholder and was treated as such. I thought we were working as a team.

**286**  Mr. Williams confirmed in his evidence that Mr. McLean had told him in late 2009 that he had offered a 5% equity position in Golden Bear Mining to Mr. David Moir and Mr. Koop.

**287**  This then was the context in which any discussion with Mr. Moon about the effect of the funding agreement on the shareholding position would have occurred. The plaintiffs plead that when they were deciding to invest they relied on "representations by Mr. McLean that he had committed certain of his shares to other persons, ... and by implication the fact that Mr. McLean would be a minority (45%) shareholder in the corporation".

**288**  Mr. Moon is not explicit in his evidence in detailing his discussions before entering the funding agreement with Mr. McLean about his commitment of shares to other persons. I take it from the pleadings that he does not allege that Mr. McLean explicitly told him that as a result of the investment he (Mr. McLean) would be a minority shareholder. This was a conclusion he reached by inference from the facts he was told. However, the conclusion that Mr. McLean would be a minority shareholder was material to his decision to invest.

**289**  Mr. Moon said the following on this subject:

1. On December 12, 2009, a meeting of the shareholders of Golden Bear took place to consider my offer. The shareholders who attended the meeting were Ernest McLean, Jonn Morrisonn (on behalf of Shaone Morrisonn), David Moir and Jeff Williams.
2. My offer to Golden Bear and Ernest McLean dated December 12, 2009 was approved during the shareholders meeting ...
3. This offer was explained thoroughly in detail to the shareholders, including Ernest McLean, and there were several clarifying discussions between the shareholders and me[.] Ernest McLean and the other shareholders were given a clear understanding of the [terms] of the offer. The offer involved both Golden Bear and Ernest McLean personally.

**290**  Mr. Moon does, however, make reference to what had been discussed in December 2009 leading up to the signing of the funding agreement when he deposed:

1. In early January 2010, I attended Golden Bear's shareholders meeting in Vancouver. Jeff Williams, David Moir, Jonn Morrisonn (on behalf of Shaone Morrisonn) and Ernest McLean also attended the meeting. During the meeting, the paperwork for David Moir's new positions as a director and a signatory of the banking signing authority were discussed. 5% shares of Golden Bear that McLean had promised to each of Jeff Williams, Shaone Morrisonn, Stuart Moir, Brent Koop and David Moir were reconfirmed by Ernest McLean.
2. On February [1], 2010, I had a meeting with Ernest McLean at the Knight & Day restaurant on Boundary Road in Burnaby. I urged Ernest McLean to comply with the [terms] of the Funding Agreement since no paperwork for the SMG's directorship and the banking signatory in Golden Bear had been prepared until then.
3. At the same meeting, I confirmed with Ernest McLean that Shawn McGroarty would not be involved in the management of Golden Bear. I reconfirmed with him who the shareholders were namely: Ernest McLean & his family 45%, Shaone Morrisonn 5%, Jeff Williams 5%, Brent Koop 5%, David Moir 5%, Stuart Moir 5%, Jung Moon 5%, and SMG 25%.
4. The fact that Ernest McLean was a minority shareholder in Golden Bear was very important to my decision to invest. I would have considered the risk of the investment to be considerably higher if he controlled a majority of the shares and would not have invested on the terms that I did if I thought that he held more than 50% of the shares of the company.

[Emphasis added.]

**291**  When read in conjunction with the observation about the importance of Mr. McLean being a minority shareholder to the decision to invest, the references to reconfirming the shareholdings of the individuals are references to discussions with Mr. McLean before the funding agreement about the then existing distribution of shareholdings in the company.

**292**  David Moir said this about the December 12th meeting at which the proposed investment was discussed:

1. On December 12, 2009 the shareholders of Golden Bear Mining Ltd. - Jeff Williams, Ernie McLean, Jonn Morrisonn (for Shaone Morrisonn) and I - met with Jung Moon at a Vancouver restaurant. At the meeting, Mr. Moon presented a revised proposal for his investment into Golden Bear Mining Ltd. The proposal was discussed at length, shareholdings were discussed, money and budget questions arose. Jung Moon's proposal was accepted completely by Ernie McLean and the other shareholders present at the meeting. ...

[Emphasis added.]

**293**  Mr. Williams also provided a little more detail about the December 12th meeting:

1. On December 12, 2009 there was a meeting of the shareholders of Golden Bear Mining Ltd., including Mr. McLean. An offer from Mr. Moon was accepted and the eight hundred thousand dollar equity funding ($800,000) for a thirty (30%) percent stake in Golden Bear Mining Ltd. was agreed, along with the non-dilution of the minority shareholders and the appointment of Mr. David Moir as Mr. Moon's nominee Director in Golden Bear Mining Ltd. Mr. McLean agreed to provide the thirty (30%) percent of Golden Bear Mining Ltd. shares to Mr. Moon from his share holdings.

[Emphasis added.]

**294**  Mr. Stuart Moir also attended the meeting. He said:

1. The shareholders of record of Golden Bear Mining Ltd. at the time were Mr. McLean, Jeff Williams and myself, and we were all in attendance at the meeting. We all accepted the offer and Mr. Moon agreed to immediately pay the $100,000.00 initial payment. At the meeting, we discussed who the shareholders were and who the directors would be. Mr. McLean confirmed that he had agreed to give a 5% position from his shares to each of Brent Koop and David Moir for their efforts in September and October 2009. Mr. Moon and his company was to receive a 30% position. Mr. McLean confirmed that Jonn Morissonn, Jeff Williams and I each would hold a 5% interest in the company after all the shares were issued. Mr. McLean would remain as director.

[Emphasis added.]

**295**  None of this evidence was challenged in cross-examination. I do not accept that Mr. McLean only ever committed to providing each of the minority individuals with five shares. Moreover, I find as a fact that Mr. McLean did discuss the fact with Mr. Moon and represent to him that he had given or promised a 5% shareholding interest to each of the five individuals discussed and that that interest would not be diluted as a result of Mr. Moon's intended investment. The inference to be drawn from these representations is that Mr. McLean would be a minority shareholder after the investment was made. I accept also Mr. Moon's evidence that it was material to him that Mr. McLean be a minority shareholder and that he would not have entered the funding agreement if that were not the case.

**296**  I have no doubt that Mr. McLean understood the position clearly. It was important to all concerned. This conclusion is reinforced by the events of a follow up meeting in January 2010 to discuss the implementation of the funding agreement. Mr. David Moir had this to say about that meeting:

1. Another meeting of the Golden Bear Mining Ltd. shareholders took place at the same restaurant in early January 2010. In attendance was Ernie McLean, Jonn Morrisonn (who holds shares in trust for his son, Shaone Morrisonn), Jeff Williams, Jung Moon, and I. Brent Koop and Stuart Moir did not attend this meeting.
2. At that meeting, the written agreement of Jung Moon was again fully explained in detail to Ernie McLean. He said that he understood each and every point, including the effect to him personally of each point.
3. Also at that meeting, the shareholders made certain decisions. We decided to keep the business of Golden Bear Mining Ltd. in house, decided on how to issue shares to Jung Moon and [confirmed] who would be the nominee director for Jung Moon and SMG Canada Gold Corp. It was stated and agreed by those present that I was to be made a director, and I was to be the accountant and work for the company, as Mr. McLean needs help in many areas. We agreed that, to give effect to the new shareholdings, there would be no proportional dilution of shares for Shaone Morrisonn, Jeff Williams, Stuart Moir, Brent or myself. Ernie McLean would transfer 30% of his Golden Bear Mining Ltd. shares to Mr. Jung Moon, who would invest $800,000, as per their agreement. The share capital and shares outstanding were not to be changed. It was again reaffirmed at that meeting that Mr. McGroarty was not part of any aspect of the company. Ernie McLean expressed complete agreement with these matters and everyone else at the meeting agreed as well.

...

1. I remember, after the meeting, hearing Ernie McLean saying, under his breath, "I am going to lose control". It was barely audible. I believe I was the only one who heard this comment. I told Ernie McLean we are a team, we are good people.

**297**  Mr. Williams confirms the evidence of David Moir in its essentials:

1. In early January 2010, another shareholders meeting for Golden Bear Mining Ltd. ... was held and it was re-confirmed at this time that David Moir would be the nominee Director for Mr. Moon in Golden Bear Mining Ltd. ..., and in charge of the company accounting. Further it was re-confirmed by Mr. McLean that Stuart Moir, David Moir, Jonas Morrisonn, myself and Brent Koop each were to receive their 5% equity interests in Golden Bear Mining Ltd. ...

**298**  I conclude that Mr. McLean did make representations to Mr. Moon about commitments made to shareholders that would affect his own relative shareholding if the investment was made. Those representations were, however, true. Importantly, they establish certain critical reasonable expectations relevant to the claim for oppression.

**299**  I am satisfied that the evidence supports finding a number of other reasonable expectations about the way the affairs of Golden Bear Mining would be conducted. These expectations arose from the discussions and arrangements between Mr. McLean and the individual stakeholders, such as Mr. Williams, the Moirs, Mr. Morrisonn and Mr. Lobb, as well as the more specific discussions and arrangements entered into with Mr. Moon.

**300**  In particular, I find that there was a common understanding that those individuals who had, or had been promised, shares were holders of a 5% shareholding interest and that that interest would not be diluted by the plaintiffs' investment in Golden Bear Mining. I find that the plaintiffs' investment was induced by an understanding and an expectation that Mr. McLean would not be a controlling majority shareholder after the shares were issued to the plaintiffs. In other words, the expectation was that Mr. McLean's shareholding position would be diluted relative to the others by the investment and that he would be a minority shareholder. I find that the obligation in the funding agreement to appoint a nominee of SMG as a director created and reinforced a reasonable expectation that management and control of Golden Bear Mining would be shared and include a role for the plaintiffs. I find also that Mr. McLean did agree not to involve Mr. McGroarty in the management of Golden Bear Mining and defied the reasonable expectation so created by appointing him its CEO.

**301**  It was, moreover, reasonable for the plaintiffs to expect that the funds they invested would be used in accordance with the terms of the funding agreement. It was also reasonable for them to believe that because all of the claims in the Settea Valley belonged beneficially to the Golden Bear Mining, the company would not fail to assert its right to them in the face of any effort to divert them from the company to another person or entity.

**302**  I am satisfied that the evidence demonstrates, and I so find, that these reasonable expectations were defeated in a manner that supports an oppression claim: see *BCE*, at para. 89. In reaching this conclusion it is necessary to bear in mind the difference between oppression and wrongs done to the company. In the right circumstances, the same conduct can be both oppressive and a wrong to the company. For example, in *Furry Creek Timber Corp. v. Laad Ventures Ltd.* [*(1992), 75 B.C.L.R. (2d) 246*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-632H-00000-00&context=) (S.C.), the Court considered the difference between a shareholder's oppression claim and a derivative action claim. The Court concluded that a shareholder can bring an oppression claim in respect of the same breach for which a company could also claim "provided the complaining shareholder has been affected by the breach in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally": *Furry Creek*, at para. 16.

**303**  In that case, the respondents had, by indirect means, issued themselves additional shares in the company, thereby increasing the total number of their shares in proportion to the number of the complainant's shares. An application to dismiss the oppression claim was denied because the complainant, if its assertions were true, was the only shareholder injured by the respondents' actions: at para. 16. While the value of all the shares as a whole in the company did not change, the value of each share had been reduced and the total value of the complainant's shares therefore had decreased in relation to the total value of the respondent's shares.

**304**  In this case, it is important to keep in mind the totality of the conduct that supports the view that the affairs of Golden Bear Mining were conducted oppressively. The whole may be greater than the sum of the parts.

**305**  I find that the issuance of the 549 shares to Mr. McLean was oppressive to the plaintiffs. It is relevant that the effect of issuing those shares was to dilute tenfold the individual shareholding interests of the shareholders other than the plaintiffs. Although, the plaintiffs received their 30% of the company, the position of the plaintiffs relative to Mr. McLean was altered from what was reasonably expected by them. Instead of participating in a company which included Mr. McLean as the largest minority shareholder, they were in a company controlled by him. Mr. McLean had understood that the effect of the plaintiffs' investment was that he would lose control. The plaintiffs expected to have an ownership interest of 30% alongside a group of other independent shareholders who collectively owned some 25% of the company. By participating in issuing 549 shares to himself, Mr. McLean maintained a degree of control over the company's affairs he was not reasonably expected to enjoy.

**306**  I am satisfied that these shares could not have been issued to Mr. McLean without his participation and knowledge. Involving Mr. McGroarty in the transaction by having or permitting him to sign the resolution as a director, when he was not, is troubling. In my view, it evidences an effort by Mr. McLean to keep effective control of Golden Bear Mining by involving Mr. McGroarty in management and control in a way he had agreed not to do. This delegation of responsibility to Mr. McGroarty and Mr. McLean's apparent failure to control Mr. McGroarty's conduct also led to further oppression.

**307**  Courts have recognized that the exercise by directors of the power to issue shares without regard for shareholders' pre-emptive rights, or in a way that reduces a majority shareholder to a minority shareholder or gives a majority shareholder voting control of the company, may be oppressive: see, for example, *Otawara Co. v. Masuda*, [*[1992] B.C.J. No. 427*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61XG-00000-00&context=) (S.C.); *Starcom International Optics Corp. v. Macdonald*, [*[1994] B.C.J. No. 548*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0VT-00000-00&context=) at paras. 39-40 (S.C.), *var'd on other grounds* [*[1994] B.C.J. No. 842*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M17N-00000-00&context=) (S.C.); and *Re Peterson et al. and Kanata Investments Ltd. et al.* [*(1975), 60 D.L.R. (3d) 527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2DV-00000-00&context=) (B.C.S.C.).

**308**  I have previously concluded that Mr. Moon should be a director and made an order that he be appointed, although that has not occurred. Here it is necessary to say that I find that Mr. McLean's failure to appoint a nominee of SMG as a director is also part of a pattern of oppressive conduct because it maintained Mr. McLean's effective control (and Mr. McGroarty's *de facto* control) of the conduct of the affairs of Golden Bear Mining. It also diminished the opportunity of the plaintiffs to exercise the degree of management and control they reasonably expected and anticipated. I conclude that had the plaintiffs been able to exercise some degree of management and control, it is unlikely that their investment in Golden Bear Mining would have been squandered and their interest as shareholders would not have been damaged to the same degree.

**309**  I find, further, that the misuse of the plaintiffs' investment was oppressive. Certainly, the diversion of funds to the cleanup and the misappropriation of money from Golden Bear Mining were wrongs to the company and had an effect on the interests of all of the shareholders (including Mr. McLean) by affecting the value of their shares. However, in my view, the breaches did affect the complaining shareholders in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally. (I should say that I do not include here the misappropriation of funds by Mr. McGroarty because I view that simply as a wrong to the company, affecting all shareholder equally, and not, therefore, as oppressive.)

**310**  The rationale for the plaintiffs becoming shareholders in the first place was to support the mining operation in the Settea Valley. They provided funds for that purpose, but that purpose was defeated by the misuse of their investment. By contrast, Mr. McLean was using the resources to Golden Bear Mining to sort out his personal difficulties with the regulators. Obviously, there is a benefit to the company in resolving those issues, because if left unresolved Golden Bear Mining would not get a permit to mine in the Settea Valley. However, the difficulties were not Golden Bear Mining's, they were Mr. McLean's, and he was using the company as a personal asset to address them.

**311**  Again, courts have recognized that a shareholder using corporate cash and other assets for non-corporate purposes can constitute oppression: see, for example, *Mananquil v. Philippine Chronicle Newspaper Ltd. et al.*, [*2001 BCSC 1257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6103-00000-00&context=) at paras. 33-34, 37; *Mahood v. High Country Holdings et al.*, [*2000 BCSC 1755*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2JT-00000-00&context=); *Redekop v. Robco Construction Ltd.* [*(1978), 7 B.C.L.R. 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F60C-X0PP-00000-00&context=) (S.C.); *Re Little Billy's Restaurant (1977) Ltd.* [*(1983), 45 B.C.L.R. 388*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S0GH-00000-00&context=) at 393 (S.C.); and *Brokx v. Tattoo Technology Inc. and Prpic*, [*2004 BCSC 1723*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0PP-00000-00&context=).

**312**  Finally, I also conclude that the treatment of the claims staked in the Settea Valley is oppressive conduct. I have found that the beneficial interest in those claims belongs to Golden Bear Mining. I have found that Mr. McLean represented as much to the shareholders of the company, including the plaintiffs. Mr. McLean, in his capacity as a director and officer of Golden Bear Mining, should have asserted or recognized Golden Bear Mining's entitlement to those claims, but he did not. He has taken the position that they belong to him and his wife personally. He repudiates, at least in court, an agreement apparently of spring 2010 transferring all of those claims to Golden Bear Exploration. While this conduct is no doubt a wrong to the company, it is also part of a pattern of oppressive conduct for the same reasons as the misuse of funds is oppressive.

**313**  In result, I find that the affairs of Golden Bear Mining have been conducted in a manner oppressive or unfairly prejudicial to the plaintiffs.

**314**  I turn now to deal with remedies, beginning with the remedies for oppression.

**Remedies**

**Oppression**

**315**  Directors and others can be held personally liable for the oppressive or unfairly prejudicial acts of a corporation: *Budd v. Gentra Inc.* [*(1998), 43 B.L.R. (2d) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-JB2B-S04R-00000-00&context=) (Ont. C.A.) at paras. 44, 46. The Ontario Court of Appeal set out the factors to consider in determining whether such a person should be personally liable in *Budd*, at para. 52:

1. whether the director or officer gained a personal benefit from causing the corporation to act oppressively or unfairly prejudicially;
2. whether the director or officer furthered his or her control of the corporation through the oppression; and
3. whether the corporation is closely held, as that director or officer is more likely to have "total control" of the company.

**316**  I am satisfied that these factors all support holding Mr. McLean personally liable for the oppressive conduct. That personal liability may duplicate the monetary award to be discussed later, but it also bears on whether it is appropriate for Mr. McLean to continue as a director. In principle, personal liability could also attach to Mr. McGroarty for his participation in the oppression. Here, however, as noted, his misappropriation of funds for his personal use affected all shareholders equally and is exclusively a wrong to the company. I do not consider his conduct to be oppressive. He has not, in fact, benefited otherwise from his participation in the oppressive conduct I have outlined, despite his attempt to do so. I would not attach any personal liability to him arising out of his participation in the oppression.

**317**  In devising appropriate remedies it is also necessary to have regard for the obligations of directors where it is their conduct that is found to be oppressive. Section 142 of the *BCA* represents a codification of the case law, imposing express duties upon company directors and officers:

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

1. act honestly and in good faith with a view to the best interests of the company,
2. exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,
3. act in accordance with this Act and the regulations, and
4. subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.
5. This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company.
6. No provision in a contract, the memorandum or the articles relieves a director or officer from
7. the duty to act in accordance with this Act and the regulations, or
8. liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any ***negligence***, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

[Emphasis added.]

**318**  Section 227(3)(e) of the *BCA* gives the Court the explicit authority to remove and appoint directors. The plaintiffs seek the removal of Mr. McLean as a director of Golden Bear Mining. I agree that in the circumstances such an order must be made.

**319**  The removal of a director of a corporation is a rarely exercised, exceptional remedy. More is required than directors "running afoul of their obligations, more than anticipated misconduct, or more than an apprehension of bias": *Walker et al v. Betts et al*, [*2006 BCSC 1096*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G376-00000-00&context=) at para. 23. In cases where oppression is found, however, removal of a director may be appropriate to "alleviate the oppression": at para. 23.

**320**  Courts have ordered removal of the directors as oppression remedy relief where corporate funds have been appropriated for personal benefit in cases such as *Walker*; *Brokx*; and *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* [*(2004), 50 B.L.R. (3d) 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-JNCK-21KS-00000-00&context=) (Ont. Sup. Ct. J.), aff'd [*(2006), 15 B.L.R. (4th) 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1FS-00000-00&context=) (C.A.).

**321**  Mr. McLean has admitted that he does not have the interest or ability to lead a company. He has demonstrated his incapacity to administer the affairs of Golden Bear Mining. He needed the assistance of colleagues to try and put in place a management and administrative structure to assist him as early as 2008. He has described himself as President in name only. His skill set does not seem well suited to being a director or a key officer of a company.

**322**  Moreover, I find that Mr. McLean did not make a wise choice in involving Mr. McGroarty in the company. He ought to have made inquiries of Mr. McGroarty's background that would have revealed circumstances that should have led him to pause before hiring him. He did not do so. He ought to have respected the views of his colleagues that Mr. McGroarty should not be involved with the company. He did not do so.

**323**  The following factors illustrate Mr. McLean's inability to act in the interests of Golden Bear Mining:

1. his previous securities suspension in 1998;
2. his historical and unabated environmental misconduct;
3. his insistence on having and maintaining Mr. McGroarty as his CEO;
4. his disavowing of the responsibilities of President and sole director of the corporation;
5. his refusal to appoint Mr. Moon as a director according to his obligation and commitment to do so;
6. his inability to explain his own use of, and Mr. McGroarty's entitlement to, company funds;
7. his converting of Golden Bear Mining's assets, including his failure to protect its interest in all but one of the mining claims; and
8. his mismanagement of Golden Bear Mining's only financial asset, the plaintiffs' investment.

**324**  I have no doubt that Golden Bear Mining has no future with Mr. McLean in charge. His involvement with the company remains an impediment to securing regulatory approval to mine in the Settea Valley. It is doubtful that the company could raise any money to conduct any business if he is involved with it. It is doubtful that there is any prospect of Mr. McLean being able to work with the other stakeholders in the company in the future.

**325**  There is another factor that is, in my view, relevant to whether Mr. McLean should be permitted to continue as a director. In fall 2010, Mr. McLean attempted to rely on the right of first refusal to sell his shares to Mr. Moon for $10.5 million. Mr. McLean, with Mr. McGroarty's participation, represented that a group of investors were willing to buy his shares for $10.5 million and he demanded that Mr. Moon decide whether to exercise the right of first refusal under the funding agreement.

**326**  I do not intend to examine these events in any detail, except to say that the evidence is overwhelming that this was an attempted fraud. I am satisfied there were no investors willing to pay $10.5 million for Mr. McLean's shares. Mr. McLean admitted that fact. He said, in effect, it was a ruse to flush out Mr. Moon and find out where he was coming from. Remarkably, Mr. McGroarty took a different approach. He suggested either that there were investors, or he had good faith reasons to believe that there were potential investors. He admitted they were not Chinese investors who Mr. McLean and Mr. McGroarty claimed were making inquiries through a restaurant owner in Dease Lake, but Russian investors who were prepared to buy the shares. Once again, documents were supposed to have been created, but no longer exist.

**327**  I appreciate that in engaging in this admitted fraud, Mr. McLean was acting in his capacity as a shareholder and not as a director or officer of Golden Bear Mining, and strictly speaking this is not a matter of oppression. It is, however, revealing of the way Mr. McLean is willing to conduct business and does, therefore, bear on whether it is realistic to think that he could remain a director of Golden Bear Mining.

**328**  In the circumstances, I think there is no alternative but to order that Mr. McLean be removed as a director and an officer of Golden Bear Mining.

**329**  I turn to the question of Mr. McLean's shareholding in Golden Bear Mining. I include in his shareholding any shares of family members held in trust.

**330**  There are difficulties in approaching this question. Although I had doubts on the matter, I have been persuaded that the additional 549 shares issued to Mr. McLean were validly issued even though the effect of doing so was oppressive in defeating the reasonable expectations of other shareholders about the relative shareholdings of the various interested parties. Assuming that each of Mr. Williams, Mr. Morrisonn, Mr. Stuart Moir, Mr. David Moir, Mr. Koop and Mr. Lobb each have a 5% interest in the company and the plaintiffs have 30%, then Mr. McLean's interest ought to be 40%, even though on the register he is shown as having a 60% interest.

**331**  I intend to approach the issue of a remedy affecting Mr. McLean's shares on the basis that his shareholding should represent 40% of the company.

**332**  The plaintiffs had sought an order when they brought a petition for an oppression remedy compelling the sale of the 549 shares to them under the right of first refusal for the price of $5.49. I did not make that order then, instead referring this matter to the trial list. I would not make that order now, after trial, having concluded that, although oppressive, the share issuance did not trigger the right of first refusal.

**333**  Nonetheless, I have concluded that Mr. McLean cannot remain involved in an ownership position with Golden Bear Mining anymore than he can remain in its management. It must not be forgotten, however, that Mr. McLean does currently have a legitimate ownership position that must be acknowledged. He started the company. Other individuals became involved in Golden Bear Mining at his invitation and to compensate them for what they offered the company. It was Mr. McLean who unearthed the geological reports that suggested that the Settea Valley may be worth exploration and without his skill and expertise Golden Bear Mining would not have acquired the claims. Golden Bear Mining also has assets in the form of equipment. There is some prospect that the claims and other assets of Golden Bear Mining have some real value and that, therefore, the shares of the company may have value, even allowing for the effect on their value of any judgment against the company.

**334**  In my view, an appropriate order would require the plaintiffs to buy Mr. McLeans' shares at a fair market value. I do not know how that interest should be valued or what the mechanisms for the sale should involve. I invite submissions on the form of order that would accomplish this objective.

**335**  Finally, I invite submissions on the form of order necessary to have Mr. Moon appointed a director of Golden Bear Mining. No doubt this will involve some kind of direction to move the records of the company to a law firm able and willing to accept instructions to appoint Mr. Moon a director.

**Damages**

**336**  The Supreme Court of Canada made it clear in *BG Checo* that pre-contractual representations by an arm's length party in a commercial negotiation may be actionable as both a breach of contract and misrepresentation, unless there are clear exceptions arising from express terms of the contract, such as an express clause in the contract waiving the right to sue in tort: at 26. There are no express terms here and the plaintiffs have available to them remedies sounding in tort and contract.

**337**  It is well known law that damages in civil actions are intended to put the wronged party in the same position he or she would have been, to the extent that money can do so, had the wrong not occurred: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* [*(1988), 30 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1B1-00000-00&context=) (C.A.) at 305. In the case of damages for misrepresentation inducing contracts, the plaintiff can recover by the "contract" measure or the "tort" measure: at 304-305.

**338**  In discussing the tort measures of damages, the Court in *Rainbow Industrial Caterers Ltd.* cites Professor D.W. McLauchlan from his article "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6:3 Otago Law Review 370: *Rainbow Industrial*, at 305. At 374 of his article, Professor McLauchlan states:

The object of tort damages ... is *restitution in integrum,* because "the plaintiff is not complaining of failure to implement a promise but of failure to leave him alone". The plaintiff is entitled to be put in the position in which he would have been if the tort had not been committed and, in the case of a tortious misrepresentation inducing a contract, this is usually taken to be the position he would have been in if the contract had not been entered into. Generally speaking, therefore, the plaintiff recovers the difference between the value of what he received and amount he has outlaid -- his positive losses. In tort, the relevant question is "what loss flows from the entry into the contract induced by the misrepresentation?" ...

**339**  I accept that the plaintiffs would not have made their investment if they had known the truth. As a result of the misrepresentations they have lost their entire investment. On the face of it they are entitled to the return of their investment. There is, however, a potential difficulty with that remedy. In return for the investment, they received shares in Golden Bear Mining. Unless the plaintiffs were willing to return the shares to the company and accept a judgment representing the return of their investment, a judgment that did not recognize the potential value of their shares risks overcompensating them. If the plaintiffs intend to retain their shares, any judgment must be adjusted to reflect the value of their shares, if any. I assume that each share held by the plaintiff would carry the same value as each share held by Mr. McLean.

**340**  Although in principle the tort measure of damages may include consequential losses beyond the lost value of the investment, I have no evidence of any such losses here.

**341**  Damages for breach of contract should as much as possible be calculated in such a way as to put the injured party in the same position as he or she would have been had the contract been performed, subject to the principle that damages are limited to those losses which would have been in the reasonable contemplation of the contracting parties at the time of contracting. At 374 of his article, Professor McLauchlan states the contract measure of damages in this way:

Applied to actions for breach of contract, where "the wrong consists not in the making but in the breaking of the contract", the general rule becomes - the plaintiff is entitled to be put in the position he would have been in if the contract had been performed. He is to be compensated for the loss of his bargain, his lost expectation. In the case of a misrepresentation which is held to constitute a breach of contract, prima facie the measure of damages is the difference between the value of what the representee received and what he would have received if the representation had been true.

**342**  Here, if the contract had been performed, at least $650,000 would have been spent on mining Settea Valley, although to what effect is unknown. The obvious measure of damages is the amount of money not spent on mining in Settea or Highland. It is, however, impossible to quantify that sum with any precision. At least $400,000 was spent at Atlin on the cleanup and not for purposes directly referable to collecting equipment located there to bring to Settea. Some equipment was bought that could have been used in Settea, even if in the meantime it was used for the Atlin cleanup.

**343**  I have decided to defer awarding contract damages to give the plaintiffs the opportunity to consider whether they wish to request such an award in light of the tort award I have already made which, in all likelihood, exceeds a contract award. It may prove to be necessary to make a reference to the registrar to quantify damages. I am prepared to receive additional submissions on these matters.

**344**  The plaintiffs seek an award of punitive damages. Punitive damages may be awarded only where there has been conduct on the part of a defendant that is so outrageous as to deserve condemnation beyond his liability for compensatory damages, in order to achieve the objectives of retribution, deterrence and denunciation - objectives normally the preserve of the criminal law. Punitive damages are awarded for the commission of wrongful acts that were outrageous or reprehensible, and which offend the ordinary standards of decent conduct in the community. Any award of punitive damages must serve a rational purpose: see, *Whiten v. Pilot Insurance Co.*, [*2002 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=) at paras. 36 - 77, 100.

**345**  According to the Supreme Court of Canada in *Whiten*, at para. 94, the principles in considering an award of punitive damages are as follows:

94 ... (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

**346**  I am satisfied that an award of punitive damages is justified against Mr. McLean. I do not think that Mr. McLean set out with the subjective intention to mislead or cheat the plaintiffs or his other shareholders. I reject the plaintiffs' theory that the series of events described in this judgment represented the implementation of a scheme orchestrated from the outset with Mr. McGroarty to benefit himself at the expense of the plaintiffs. To the contrary, I think Mr. McLean did want to get into the Settea Valley and mine there, at least on claim 672403. He knew the plaintiffs were the best and most likely source of funds to help him do that. Both he and the plaintiffs stood to benefit if the venture would prove to be a success.

**347**  But things went wrong. Mr. McLean must have come to regret the bargain he had made. His problems in Atlin were substantial, as he was reckless in not recognising. Likely, he concluded that he had given up too much for the money he got. He had given up control of the company, but he did not have the money to begin mining in the Settea Valley. At some stage, perhaps early on, Mr. McLean began to look for ways to escape the implications of the deal he struck.

**348**  Whatever the motive, Mr. McLean did begin to act in ways I consider high-handed. He tried to frustrate sharing control of the company by refusing to make a nominee of SMG a director, unless the terms of the appointment limited the effective authority of the director. Later he failed to abide by a court order appointing Mr. Moon a director. He did decide either to strip Golden Bear Mining of its claims or refuse to acknowledge the company's claim to them. He did participate in a share restructuring, together with Mr. McGroarty whom he knew not to be a director, which gave him majority control he had agreed to give up in the context of the funding agreement and his commitment to the other shareholders. He did not disclose to anyone what he done. Finally, he participated in a fraudulent attempt to induce Mr. Moon to pay $10.5 million for his shares. In my view, although he did not set out to do so, Mr. McLean did act in highly reprehensible ways that arbitrarily disregarded the interests of those with whom he was associated.

**349**  I find that an award of punitive damages is warranted. I was not provided with authorities giving guidance on an appropriate award. I invite submissions to assist me on this issue in light of the findings of fact I have made.

**350**  For reasons to which I will refer, any consideration of an award of punitive damages against Mr. McGroarty should be deferred.

**351**  Several times I have referred to the fact that Golden Bear Mining is not a plaintiff, but is a defendant. There is no derivative action. I appreciate that when the plaintiffs applied by petition for relief from oppression one order they sought was that Mr. Moon may direct Golden Bear Mining to initiate a civil claim against Mr. McLean and Mr. McGroarty if he considered it in the best interests of the corporation to do so. That order was not granted because the entire matter of oppression, except the appointment of Mr. Moon, was referred to the trial list. No other attempt to bring a derivative action in the orthodox way was made.

**352**  Although it is probably now unnecessary, I make an order that Mr. Moon may, in his capacity, bring an action on behalf of Golden Bear Mining against either Mr. McLean or Mr. McGroarty or both in respect of any wrongs to the company.

**353**  I have concluded that Mr. McGroarty's misappropriation of funds is a wrong to the company and does not ground relief in these proceedings. Although he participated in the oppressive conduct, I have declined to make him personally liable for any misuse of the investment funds in breach of the funding agreement principally because he did not benefit personally from that oppressive conduct. Other aspect of the oppression did not in fact lead to pecuniary benefit to him.

**354**  Since, no money judgment goes against Mr. McGroarty in these proceedings, it is premature to award punitive damages against him.

**Conclusion**

**355**  The plaintiffs are entitled to the following orders canvassing the matters as described in more detail above:

1. judgment for negligent and fraudulent misrepresentation against Mr. McLean and Golden Bear Mining;
2. damages for negligent and fraudulent misrepresentation to be calculated as set out above;
3. judgment for breach of contract against both Mr. McLean and Golden Bear Mining for breach of the funding agreement;
4. damages for breach of contract, if requested, to be assessed or referred to the registrar;
5. a declaration that the affairs of Golden Bear Mining have been conducted in a manner oppressive to the plaintiffs;
6. consequential orders:
7. transferring the books and records of Golden Bear Mining to solicitors able to give effect to the necessary orders arising from these proceedings;
8. confirming Mr. Moon's appointment as a director of Golden Bear Mining;
9. removing Mr. McLean as a director;
10. cancelling the existing share structure and issuing shares representing 40% to Mr. McLean, 30% to the plaintiffs, and 5% each to Stuart Moir, David Moir, Shoane Morrisson, Jeff Williams, Brent Koop and Norman Lobb;
11. requiring the plaintiffs to buy Mr. McLean's shares at fair market value;
12. declaring that all mining claims in the Settea Valley are beneficially owned by Golden Bear Mining and transferring legal and beneficial title to those claims to Golden Bear Mining; and
13. Awarding punitive damages against Mr. McLean in an amount to be assessed.

**356**  Other claims advanced against the defendants are dismissed as set out in this judgment. I have concluded that the proper plaintiff in respect of certain claims against Mr. McGroarty is Golden Bear Mining which is not a plaintiff in these proceedings. No order will go against Mr. McGroarty personally in these proceedings in respect of those matters.

**357**  I understand that the form of order necessary to give effect to this judgment will likely need to be spoken to. There will, no doubt, be many technical requirements to be considered.

**358**  The effect of these orders will be binding on Mrs. McLean and Golden Bear Exploration Inc. to the extent necessary to give effect to this judgment. No evidence was led against Mrs. McLean that would make her personally liable for any money judgment. Golden Bear Exploration Inc. appears to be a defendant because it received the mineral claims under the spring 2010 mining agreement. It is bound by this judgment.

**359**  Counsel may make submissions on costs.

**Postscript**

**360**  The defendants sought at the outset to adjourn the trial. I dismissed that application. They then applied that I recuse myself on the grounds of actual or a reasonable apprehension of bias. The application was grounded on the suggestion that I had already made up my mind on a number of factual matters in issue in this trial. The evidence for that was some comments I made in previous reasons in which I dismissed the plaintiffs petition for relief from oppression and referred this matter to the trial list.

**361**  I gave very brief reasons dismissing the application. It is unnecessary to refer to the law on such a matter, but, in summary, I dismissed the application on the ground that I had not made up my mind about any facts in issue in the trial and that I had an open mind about what the evidence at trial would disclose. I refer to this matter here to acknowledge, as I think I should, that both Mr. McGroarty and Mr. McLean expressed their concern about my presiding at the trial of this matter.

D.C. HARRIS J.

**End of Document**

[***Moritz v. Schmitz, [2013] B.C.J. No. 771***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-204R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

J.M. Gropper J.

Heard: October 29-November 1, 2012.

Judgment: April 18, 2013.

Docket: 43902

Registry: Kamloops

**[2013] B.C.J. No. 771** | [*2013 BCSC 668*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1GT-00000-00&context=)

Between Clarissa Hope Moritz, Plaintiff, and Sheila Dawn Schmitz, Amanda Mercedez Murrell Hughes, Cody William Vieira and Kelly Lynn Sherwood, Defendants

(109 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Whiplash — Psychological injuries — Depression — Neuroses — Considerations impacting on award — Pre-existing injury — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Liability admitted — Plaintiff suffered whiplash injury to neck and chronic myofascial pain — Plaintiff had history of depression and anxiety — Symptoms worsened after accident — Graduation from high-school and entry into workforce as hairdresser delayed — Non-pecuniary damages of $80,000 awarded — $52,000 awarded for past loss of income — $160,000 awarded for lost future earning capacity as plaintiff would eventually have to reduce her hours — Income awards reflected discounts for psychiatric condition that would have impacted career in any event.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Contingencies — Considerations — Aggravation of pre-existing injury — Loss of earning capacity — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Liability admitted — Plaintiff suffered whiplash injury to neck and chronic myofascial pain — Plaintiff had history of depression and anxiety — Symptoms worsened after accident — Graduation from high-school and entry into workforce as hairdresser delayed — Non-pecuniary damages of $80,000 awarded — $52,000 awarded for past loss of income — $160,000 awarded for lost future earning capacity as plaintiff would eventually have to reduce her hours — Income awards reflected discounts for psychiatric condition that would have impacted career in any event.**

**Damages — Assessment of damages — Limiting factors — Pre-existing conditions — Action by plaintiff for damages for personal injuries suffered in motor vehicle accident allowed — Liability admitted — Plaintiff suffered whiplash injury to neck and chronic myofascial pain — Plaintiff had history of depression and anxiety — Symptoms worsened after accident — Graduation from high-school and entry into workforce as hairdresser delayed — Non-pecuniary damages of $80,000 awarded — $52,000 awarded for past loss of income — $160,000 awarded for lost future earning capacity as plaintiff would eventually have to reduce her hours — Income awards reflected discounts for psychiatric condition that would have impacted career in any event.**

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| Action by plaintiff for damages for personal injuries suffered in motor vehicle accident in 2007. The plaintiff, who was 17-years-old at the time and wearing her seatbelt, was the back-seat passenger in a vehicle that collided with another vehicle. The plaintiff's face hit the seat in front of her. Liability was admitted. The plaintiff suffered pain in her back and spine that was still ongoing. The plaintiff had a history of depression and anxiety. She claimed her anxiety attacks increased post-accident, causing her to abandon school. She no longer played sports or engaged in outdoor activities. From 2008 to 2012, she received long-term disability payments. Her graduation from high school was delayed from 2008 to 2010. She finished a hairstylist program and obtained full-time employment in August 2012. The plaintiff's family doctor diagnosed her with a Grade II whiplash injury of the cervical spine and upper back and chronic myofascial pain in the back. She determined the plaintiff might not be able to continue as a hairdresser because of her injuries. She concluded the plaintiff's mood and anxiety disorder were not related to the accident. The plaintiff claimed she had not discussed how she was feeling with her family doctor. Two psychiatrists differed on whether the accident had exacerbated her psychiatric symptoms. Her psychiatric symptoms had improved in the year before trial.  HELD: Action allowed.  While the family doctor's conclusion about the plaintiff's psychiatric injuries was superficially reasonable, given the plaintiff had not discussed her feelings with her, it was not based on any observations or examination of the plaintiff. The accident caused the plaintiff's physical injuries and chronic pain that continued to be symptomatic five-years post-accident. It also caused a worsening of her psychiatric illness for one year after the accident. There was no evidence that counselling or medication would have reduced her symptoms. The plaintiff had not failed to mitigate. Non-pecuniary damages of $80,000 were awarded. The plaintiff's wage loss started in May 2009, assuming she would have graduated in 2008 and immediately started the hairdressing program. It was assessed at $2,500 per month, based on her current rate of pay as a hairdresser. Her total lost earnings was $57,760. It was likely she would have taken days off because of her psychiatric illness, even without the accident. A 10 per cent negative contingency was applied to her past loss of income, resulting in an award of $52,000. It was not realistic that the plaintiff seek retraining and a job with lighter duties. She had proven the real and substantial possibility of being unable to continue working full-time because of her injuries. She would likely reduce her hours of work from 40-years-old to 50 per cent and would work part-time until 70-years-old. Her future loss was calculated at $15,000 per year for 30 years. However, her psychiatric condition would also affect her future income capacity. A 20 per cent negative contingency was applied to the assessment of her future income capacity, for an award of $160,000. Her cost of care for a rehabilitation program, massage therapy and chiropractic treatments was assessed at $30,000. Special damages of $3,361 were awarded for massage therapy, chiropractic work and mileage. |

**Counsel**

Counsel for the Plaintiff: M.J.W. Sutherland and M. Fras (Articling Student).

Counsel for the Defendants: J.A. Horne, Q.C.

**Reasons for Judgment**

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| **J.M. GROPPER J.** |

**Introduction**

**1**  The plaintiff Clarissa Moritz was the back-seat passenger in a motor vehicle, driven by defendant Amanda Hughes and owned by defendant Sheila Schmitz, on November 21, 2007 when it collided with a vehicle driven by the defendant Cody Vieira. Liability is admitted.

**2**  The remaining issue for determination is quantum of damages.

**Facts**

**Before the accident**

**3**  When the accident occurred on November 21, 2007, Ms. Moritz was 17 years old and in Grade 12.

**4**  From a physical perspective, the plaintiff was a healthy teenager. She was active in sports. She played volleyball, basketball and baseball. She also enjoyed hiking.

**5**  When she was sixteen, Ms. Moritz worked as a banquet server at the Days Inn Hotel for about a year, alongside her mother and sisters. She stopped when her mother stopped working there, which was just before the accident.

**6**  Ms. Moritz has suffered from mental health issues since she was 12 years old. She experienced depression, panic attacks, social anxiety and suicidal ideation. Ms. Moritz was prescribed medication for anxiety and depression. The medication did not help and she did not like the side effects.

**7**  Ms. Moritz suffered from overdoses on psychiatric medication. Her school attendance was irregular. Her family life was dysfunctional. She has a family history of psychiatric illness and behaviour disorders, such as substance abuse, suicide attempts and, in the case of her older sister, criminal behaviour.

**8**  Just before the accident, Ms. Moritz suffered a significant loss: the death of her father's best friend, who was like a father to her. Ms. Moritz says this event affected her mental stability. She was also affected by the conduct of her mother's boyfriend, who committed sexually intrusive acts upon her. She says this occurred around the time of the accident.

**The Accident**

**9**  The impact upon the vehicle in which Ms. Moritz was a passenger was significant. As a result of the force of the collision, she hit her face on the back of the driver seat in front of her. Ms. Moritz was wearing a seatbelt.

**10**  Ms. Moritz says that after the accident, her hip hurt and her face felt "a bit numb." She felt sore in her neck, back and "everything pretty much." She felt cramped up and stiff. She did not want to walk anywhere.

**11**  The numbness in her face lasted for about one or two hours and then it was fine. The pain in her neck and back continued.

**After the Accident**

***Physical and Mental Status***

**12**  Ms. Moritz stayed with Ms. Schmitz for a few days after the accident and then returned to her mother's home.

**13**  After two or three weeks, she went to see her family doctor, Dr. S. A. de Wet. Ms. Moritz says that her doctor is very busy and that it can take a few weeks to get an appointment. She told Dr. de Wet that her injuries included deep tissue damage through her back, two twists in her spine and jamming in her right hip every once in a while.

**14**  The pain in her back and spine has continued since the accident. Currently, Ms. Moritz says her upper back tends to be the sorest. Her spine and lower back also feel sore if she sits for too long. She suffers from headaches about once a day or more, three or four times per week.

**15**  Ms. Moritz says her anxiety attacks increased post-accident. They occurred throughout the day, as often as ten times. In these panic attacks, her heart races and she is unable to breathe. She feels "scared of everything." Ms. Moritz experienced panic and anxiety before the accident, but not to the same degree of intensity. She believes this decline in her anxiety and mood is caused by her stress and pain; her injuries have also intensified her thoughts of suicide.

**16**  Ms. Moritz believes the amplification of her depression and anxiety after the accident caused her to get "kicked out of school." She would not come to school or would leave class because of her anxiety attacks. She even overdosed a few times and had to go to the hospital.

**17**  Although Ms. Moritz saw Dr. de Wet on other occasions in 2008, she says she did not complain or keep her informed about the effects of the motor vehicle accident upon her anxiety or mood. Although her injuries "played a big part" in how she was feeling, Ms. Moritz considered that Dr. de Wet was too busy to listen to her complaints about her feelings.

**18**  Ms. Moritz describes a change in her physical activity after the accident. She no longer plays basketball, volleyball or baseball. She does not go hiking or boating or engage in outdoor activities. She goes to the gym every once in a while and uses the treadmill or the elliptical trainer for fifteen to twenty minutes. She may do circuit training for half an hour. She does not do anything that engages her core or back because it makes her back sore. She may go for a walk. She does not do any rough physical activity. Activities such as sitting through a movie or going for a long car ride cause soreness, particularly in her lower back. Ms. Moritz says, and her friend Brittani Dovauo confirms, there has been a significant change in her personal life: she cannot stay out late or go on long excursions by car. She does relaxed things now such as watching movies or going to the mall.

**19**  In September 2008, Ms. Moritz applied for income assistance as a person with a disability through the provincial Ministry of Employment and Assistance. She remained on that program until the summer of 2012.

***Employment***

**20**  Ms. Moritz did not finish high school in 2008. She finished Grade 12 through an online course and received her graduation diploma in February 2010. Her intention was to attend a professional hair stylist program right after high school, but she was unable to attend because of her physical injuries and mental status. In April 2011, she enrolled in a professional hair stylist program, which was a ten-month, full-time program. She finished in February 2012 and received very high marks, graduating with a final mark of 89%.

**21**  Ms. Moritz says that doing the course, particularly the bookwork, made her back sore. Styling hair while she was standing up and holding her arms up also made her back sore. Although she thought of quitting, she completed the course.

**22**  At the beginning of 2012, Ms. Moritz took a job at Cactus Jack's Cabaret, for two or three evenings a week, taking coats and checking patron's identification. The job ended when the company restructured in April 2012. She did not get rehired. Her former supervisor at Cactus Jack's claims he did not remember her after she was laid off because she was unreliable; he says she did not have the "drive" for her position. He acknowledged that she was in an entry level position. She was on-call, fifth in line. In other words, if none of the four individuals that were before her on the list were able to come to work, she would be the next person called.

**23**  After her graduation from the professional hair styling program, Ms. Moritz began looking for a job in hair-dressing and obtained a position at First Choice Haircutters in August 2012. The manager at the shop, Shawn Rielly, says Ms. Moritz is an excellent employee. She earns her commission regularly. No customer has complained about her or the services that she provides. She gets along well with the staff. She works five days a week, eight hours a day with a half hour lunch break. Ms. Moritz did not tell Ms. Rielly about the injuries that she sustained in the accident. Ms. Rielly only learned of them when Ms. Moritz's counsel asked her to come to the trial as a witness.

**24**  Ms. Moritz is paid a guaranteed base rate and commission. She also receives tips. Her average pay for a two week pay period is $760.00 and she earns about $40.00 per day in tips.

**Expert Reports**

**Physicians**

***Dr. S. A. de Wet***

**25**  Dr. de Wet prepared a report on December 19, 2008. This report describes the appointment Ms. Moritz had with her on December 5, 2007. Dr. de Wet notes: "[s]he noticed some memory loss problems as well as neck pain since the accident. She had some interscapular and trapezius (upper back) stiffness. Prior to this visit she attended to a chiropractor twice and has been using ibuprofen to no effect." Dr. de Wet referred her to a massage therapist and prescribed Flexeril 10mg at night time.

**26**  Dr. de Wet describes three other appointments with Ms. Moritz for unrelated medical concerns.

**27**  In her report, Dr. de Wet states: "[d]ue to some psychiatric concerns unrelated to the accident long term disability form was completed on September 03, 2008 and therefore she is not currently working."

**28**  Dr. de Wet provided an update of her earlier report on March 31, 2010. She describes a recent consultation with Ms. Moritz on March 26, 2010. She summarizes the interview as follows:

We reviewed her current symptoms. She was straight forward with her symptoms and explained her current situation.

She mentioned having ongoing issues with neck spasms and interscapular pain. She has been attending chiropractor appoints every two to three weeks and has not been using any regular pain medication. Her mood is stable but she still is experiencing anxiety in larger group settings. She is no longer attending a psychiatrist and is not on any psychiatric medication. Clarissa lives independently and is busy completing her high school diploma. She plans to pursue a career in hairdressing. She continues to be on long term disability for her mood and anxiety disorders.

**29**  Dr. de Wet diagnosed Ms. Moritz with a Grade II whiplash injury involving the cervical spine and upper back, which was caused by the accident, as well as persistent chronic myofascial pain in the upper and lower back regions.

**30**  Dr. de Wet concludes that Ms. Moritz's ongoing mood and anxiety disorder are not related to the accident.

**31**  She suggests that Ms. Moritz may have difficult pursuing a hairdressing career due to memory problems.

***Dr. Valerie A. Jones***

**32**  Dr. Valerie A. Jones, a psychiatrist, assessed Ms. Moritz at the request of plaintiff's counsel.

**33**  In her report of February 27, 2009, Dr. Jones reviewed Ms. Moritz's medical history, specifically, her psychiatric history. She notes that Ms. Moritz has suffered from psychiatric difficulties from the age of 12. Before the accident, she experienced depressed moods, panic attacks, social anxiety and suicidal ideation. She overdosed on psychiatric medication and had irregular school attendance. Dr. Jones also notes that Ms. Moritz has experienced "psychological turbulence in her family which has included sexual intrusiveness on the part of a step-father and both psychological and physical neglect of her needs." Dr. Jones says Ms. Moritz has a strong family history of psychiatric illness and behaviour disorders. She explains "severe family dysfunction is intergenerational".

**34**  Dr. Jones then notes the increase in Ms. Moritz's psychiatric symptoms and the impact it had upon her schooling:

Since the time of the motor vehicle accident, the Plaintiff has experienced panic attacks at a frequency of up to fifteen per day. This frequency of panic attacks, along with mood instability consisting of depressed moods and hypomanic episodes, has contributed to an inability to proceed with schooling and the abandonment of school attendance at some point in the 2008 calendar year.

**35**  In the section titled "Psychiatric Opinion", Dr. Jones refers to the severe psychiatric illnesses from which Ms. Moritz suffers, which includes Bipolar II Disorder, Panic Disorder without Agoraphobia and Societal Anxiety Disorder. She opines that these disorders impair Ms. Moritz's functioning to a clinically significant degree. She further opines these psychiatric illnesses will dominate through the course of Ms. Moritz's lifetime and will prove to be a "formidable challenge" for her.

**36**  Dr. Jones describes the escalation of Ms. Moritz's psychiatric symptoms since the accident and notes the increase in severity of Ms. Moritz's mood disorder. She concludes:

Her mood disorder progressed from a diagnosis of chronic, recurrent depressive moods to the more serious syndrome of depressed moods alternating with hypomanic episodes, known as Bipolar II Disorder. Her Panic Disorder increased in severity from a frequency of one panic attack every two months to a frequency of up to fifteen panic attacks per day in the immediate aftermath of the motor vehicle accident. Over time, the severity of these panic attacks has decreased to its current frequency of once to twice per day.

**37**  Dr. Jones also documents a trend of improvement in the severity of Ms. Moritz's psychiatric illnesses in the six months preceding the preparation of her report. As she describes it, Ms. Moritz has experienced a "growth spurt of psychological maturity" and that her attitude towards life was becoming more confident and positive. She also notes that Ms. Moritz was showing the formation of some positive and pro-social life values, priorities and ambitions.

**38**  In respect of causation, Dr. Jones states:

... it is my opinion that the motor vehicle accident of November 21, 2007 caused a worsening in psychiatric symptoms of panic anxiety and mood instability, resulting in a speeded rate of progression of the Plaintiff's psychiatric illnesses. However, it is my opinion that the motor vehicle accident in question did not cause the Plaintiff's psychiatric illnesses. Features of the Plaintiff's psychiatric illnesses were already present at the time of the motor vehicle accident in question and were already progressing in severity. In my opinion, the Plaintiff would have, even in the absence of the index motor vehicle accident, eventually qualified for the fully developed psychiatric syndromes with which she is currently diagnosed.

**39**  Dr. Jones concludes:

... the motor vehicle accident that occurred on November 21, 2007, has worsened for the Plaintiff the overall clinical burden of severe psychiatric illness and some recurrent musculoskeletal pain. If the accident of November 21, 2007 had never occurred, it is quite unlikely that the Plaintiff would currently be experiencing this chronic pain. As to the severity of her psychiatric illnesses, the impact of the index motor vehicle accident has been modest. It is very probable that, even in the absence of the index motor vehicle accident, the Plaintiff would have eventually manifested the psychiatric illnesses with which she is currently diagnosed. It is also quite possible that the severity of her psychiatric illnesses would be just as significant at this point in time even if the index motor vehicle accident had never occurred.

***Dr. Lynne C. MacKean***

**40**  Ms. Moritz was examined by Dr. Lynne C. MacKean, a specialist in physical medicine and rehabilitation, on April 16, 2012. Dr. MacKean considers that Ms. Moritz has suffered from a grade II whiplash-associated disorder involving the cervical spine and upper back, which was caused by the accident. Ms. Moritz was diagnosed with chronic myofascial pain involving the neck, upper back and shoulder girdle region as well as mechanical low back pain and cervicogenic headaches. Dr. MacKean finds the ongoing headaches and problems with her neck and back all relate to the injuries she sustained in the accident.

**41**  Dr. MacKean is also of the view that the plaintiff's pursuit of a career in hairdressing may not be feasible given the plaintiff's ongoing neck and back pain. Dr. MacKean states:

[Ms. Moritz] would have difficulty working in a job position that involved repetitive bending, twisting, lifting, and carrying with the spine. She would have difficulty working as a hairdresser because of holding a static position with her arms out in front of her which would be aggravating for her neck and back pain on an ongoing basis.

**42**  Dr. MacKean recommends a vocational assessment as well as an active rehabilitation program.

***Dr. Kevin Solomons***

**43**  Ms. Moritz was referred to Dr. Kevin Solomons, psychiatrist, at the request of the defence. His report is dated August 22, 2012.

**44**  Under the heading "Facts and Assumptions", Dr. Solomons refers to some of the reports he reviewed and his interview of Ms. Moritz. Dr. Solomons refers to Dr. de Wet's reports and her statement that Ms. Moritz's ongoing mood and anxiety problems were not related to the accident.

**45**  He refers to Dr. Jones' opinion that Ms. Moritz's psychiatric state affects her physical pain.

**46**  Dr. Solomons also notes that Ms. Moritz informed him in the interview that she felt depressed more often and that her depression and anxiety were worse for about three or four years after the accident. Since then, she reported improvement to him.

**47**  Dr. Solomons provides the following opinion:

Clarissa Moritz is a 22-year-old single woman who was on long term psychiatric disability at the time of the motor vehicle accident on November 21st, 2007.

...

In my opinion, Ms. Moritz does not qualify for a psychiatric diagnosis as a result of the injuries she sustained in this accident. This opinion is based on her significant psychiatric history and the fact that she was on psychiatric disability before and at the time of the accident. Her family doctor's records do not record significant symptom exacerbation following the accident and do not identify the accident as a cause of her psychiatric symptoms after the accident.

In my opinion, the injuries that Ms. Moritz sustained in the motor vehicle accident probably did not lead either to an exacerbation of her pre-existing psychiatric or to new psychiatric problems.

Her pre-accident psychiatric difficulties persisted after the accident. In my opinion, it is most likely that the course of her psychiatric difficulties after the accident was related to stressors unrelated to the accident, particularly to family dynamics, the lack of stable supports and alleged sexual interference from her mother's boyfriend; therefore, it is my opinion that the symptoms Ms. Moritz has experienced since the accident would have occurred even in the absence of the accident.

She was psychiatrically disabled before the accident and was not working at the time of the accident. The accident did not, in my opinion, compound her pre-existing psychiatric disability. She had no psychiatric requirement for time off work as a result of the accident since she was already on long-term psychiatric disability, was not working at the time of the accident and had no psychiatric disability arising from the accident. She has recently begun working.

**Occupational Therapist**

**48**  Ms. Moritz was referred to Carol Burden, an occupational therapist, for a functional capacity evaluation. In the section of her report entitled "ability to work as a hairdresser", Ms. Burden states that from a physical abilities perspective, Ms. Moritz meets the majority of the physical demands for work as a hairdresser, although she does not meet the full strength requirement of being able to lift 20 pounds through a full range on an occasional basis. Nor does she meet the upper limb coordination requirement.

**49**  In her summary, Ms. Burden states:

Ms. Moritz participated in 5.5 hours of testing on May 21, 2012. She demonstrated increased symptoms over the course of the day. From a functional perspective her work productivity was slowed. Baseline and repeat testing showed reduced function for upper extremity movements toward the end of testing. Ms. Moritz's reported pain symptoms did not fully resolve overnight, indicating potential for a cumulative effect if she were to work consecutive days. Based on assessment findings it is my opinion that Ms. Moritz is best suited for work in the Sedentary (DOT) or Limited (NOC) Demand at this time. As such, she is not well-suited for work as a hairdresser (Light Demand). If she were to pursue such work she would likely be more successful with part-time hours (i.e. 20 hours per week) and a sympathetic employer. Additional points of consideration are slowed work pace and the potential impact of previously diagnosed psychiatric difficulties.

**50**  Ms. Burden also provides recommendations in respect of an active rehabilitation program, which she estimates to be $60.00 per session, suggesting a "typical" number of sessions as six to ten. She estimates the cost of massage therapy averages $80.00 per session and suggests 11 sessions per year on an ongoing basis. She recommends ongoing chiropractic treatment at a cost of $35.00 per session.

**Vocational Rehabilitation**

**51**  Dr. Gordon Wallace, a clinical psychologist who specializes in rehabilitation, counselling and evaluation, assessed Ms. Moritz's pre-injury and residual employability potential in his report prepared on June 25, 2012.

**52**  Dr. Wallace is of the view that Ms. Moritz had many occupational options open to her before the accident. She did not exhibit any physical limitations and she demonstrated average abilities. Programs available to her would include two years of full time attendance in a college diploma program. She also could have considered direct entry occupational options that did not require post-secondary education, an apprenticeship training program or a college certificate level program.

**53**  Dr. Wallace considers that from a physical perspective, Ms. Moritz's ongoing functional limitations will have a negative impact on the range of occupational options available to her. Her reduced physical capabilities are not compatible with skilled trades. Ms. Moritz will have to inform prospective employers of her medical history, which could reduce her employment opportunities. Dr. Wallace concludes that Ms. Moritz's ongoing pain could negatively affect her ability to meet the basic foundational skills required for competitive employment.

**54**  Dr. Wallace says that Ms. Moritz's psychological functioning is of "likely of significance" and that its severity may negatively affect her ability to perform basic functional skills required for competitive employment. Dr. Wallace recommends further counselling as well as vocational counselling and perhaps more formal education.

**Causation**

**The "But-For" Test**

**55**  Before addressing the quantum of damages that ought to be awarded to Ms. Moritz, I must determine whether her injuries were caused by the motor vehicle accident. Ms. Moritz must demonstrate, on a balance of probabilities, that the defendants' ***negligence*** caused an injury or exacerbated a condition to justify compensation.

**56**  The test to be applied was explained most recently in *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=) at paras. 8 - 10:

The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's ***negligence*** was *necessary* to bring about the injury - in other words that the injury would not have occurred without the defendant's ***negligence***. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's ***negligence*** made to the injury: [citations omitted.]

A common sense inference of "but for" causation from proof of ***negligence*** usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's ***negligence*** probably caused the loss: [citations omitted.]

**The "Thin Skull" and "Crumbling Skull" Rules**

**57**  A basic principle of damages in tort cases is that "the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway." This is known as the "crumbling skull rule": *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at paras. 78 - 81 (*Blackwater*).

**58**  On the other hand, "the defendant takes his victim as he finds him": *Blackwater* at para. 79. This means that the defendant is liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. This is known as the "thin skull rule".

**Analysis**

**59**  There is no dispute between the parties that the physical injuries suffered by Ms. Moritz are attributable to the defendants' ***negligence***, although they disagree on the severity.

**60**  Ms. Moritz says that the physical injuries she sustained made her psychiatric condition worse: she has increased panic attacks, anxiety, depression and suicidal ideation because of the pain and the stress caused by her physical injuries. In other words, she relies on the "thin skull" principle. She asserts that her family doctor is wrong in her conclusion that her mood and anxiety disorder are not related to the accident. She relies on the evidence of Dr. Jones, who concludes in her report that the accident "worsened the Plaintiff for the overall clinical burden of severe psychiatric illness" and that the chronic pain that she now suffers from is more severe because of her psychiatric condition.

**61**  The defendants rely on the opinions of Dr. de Wet and Dr. Solomons.

**62**  In Dr. de Wet's report of December 19, 2008, she specifically notes "[d]ue to some psychiatric concerns unrelated to the accident long term disability form was completed on September 03, 2008 and therefore she is not currently working."

**63**  Dr. Solomons concludes the accident did not compound Ms. Moritz's pre-existing psychiatric disability. The defendants say the plaintiff was psychologically disabled before and after the accident.

**64**  In respect of Dr. Jones' report, the defendants focus upon her statement that it is "quite possible that the severity of her psychiatric illnesses would be just as significant" even if the accident had not occurred.

**65**  I do not accept the opinion of Dr. de Wet. Although Ms. Moritz continued to consult with Dr. de Wet every few months, there is no information or evidence from her family physician suggesting that her opinion regarding Ms. Moritz's psychiatric concerns as they related to the accident changed.

**66**  Ms. Moritz testified that she did not discuss her psychological difficulties with Dr. de Wet. She describes Dr. de Wet as a busy practitioner. She claims it is difficult to arrange an appointment with her. As a result, she did not complain to Dr. de Wet about how she was feeling during her consultations. I accept this evidence.

**67**  Dr. de Wet's opinion that there is no relation between the accident and Mr. Moritz's psychiatric complaints does not refer to any examination or observation that she undertook in respect of this opinion or any basis for her conclusion. While her conclusion may be superficially reasonable, given that Ms. Moritz did not discuss her feelings with her, it is equally clear that Dr. de Wet did not ask Ms. Moritz about how she was feeling and whether she suffered any change in her psychiatric function after the accident.

**68**  I am further supported in my conclusion by the opinion of Dr. Jones, who undertook a full psychiatric examination that included an extensive interview, a mental status evaluation and a DSM IV diagnosis. She also made treatment recommendations and reviewed the documentation, including the opinions of Dr. de Wet. I prefer her opinion to the opinion of Dr. de Wet.

**69**  I also prefer the evidence of Dr. Jones to that of Dr. Solomons. Dr. Solomons seems to place significant weight on Dr. de Wet's opinion, despite Dr. Solomons' opportunity to examine Ms. Moritz with the benefit of his psychiatric training. Dr. Solomons notes Dr. de Wet's report does not indicate any "significant exacerbation following the accident". He also observes that Dr. de Wet's records do not identify the accident as the cause of her psychiatric symptoms after the accident. He does not appear to rely upon Dr. Jones's opinion despite the thorough examination she conducted, and he does not provide a reason for that non-reliance.

**70**  Dr. Solomons goes on to suggest that, in his opinion, it is "most likely that the course of her psychiatric difficulties after the accident was related to stressors unrelated to the accident", referring to matters that occurred prior to the motor vehicle accident. He then concludes that the plaintiff would have experienced the same symptoms even if the accident had not occurred. Again, Dr. Solomons does not provide a foundation for his opinion that the problems Ms. Mortiz faced before the accident are of greater significance than those she faced because of the accident. He was aware that the plaintiff suffered from physical injuries but he does not turn his mind to whether those injuries may have affected her psychiatric functioning.

**71**  Dr. Solomons does not explain his emphasis on pre-accident events. This same observation in respect of Dr. Solomon's emphasis on pre-accident events was made by Mr. Justice Willcock in *Jokhadar v. Dehkhodaei*, [*2010 BCSC 1643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4B7-00000-00&context=) at para 135:

Further, there is no reason, in my view, to regard stressors other than the car accident as more compelling or predominant. Dr. Solomons, in reaching that conclusion, ignored clear evidence of the significance of the accident.

**72**  I also note that Dr. Solomons' final paragraph under the "Opinion" section of his report is based on "facts" that are wrong. He says Ms. Moritz was "psychiatrically disabled before the accident and was not working at the time of the accident." He fails to note that she was 17 years old and in grade 12 at the time of the accident. She was not psychiatrically disabled from working. He says that "[s]he had no psychiatric requirement for time off work as a result of the accident since she was already on long term psychiatric disability. ..." Again, she was not off work because of her psychiatric disability before the accident; nor was she on long-term psychiatric disability. In all of the circumstances, I am unable to accept Dr. Solomons' opinion.

**73**  The evidence clearly establishes that Ms. Moritz's psychiatric condition was improved. Dr. Jones notes that in late 2008 (six months before she prepared her report on February 27, 2009), Ms. Moritz experienced a "growth spurt of psychological maturity" that produced "a trend of improvement in the severity of her psychiatric illnesses."

**74**  My conclusion in respect of causation is that the motor vehicle accident caused Ms. Moritz's physical injuries and chronic pain. It also caused a worsening of the plaintiff's psychiatric illness for about a year after the accident and is likely a strong feature of her chronic pain. Since that time, the plaintiff has experienced a decrease in the symptoms related to her psychiatric condition. Nevertheless, as Dr. Jones points out, Ms. Moritz suffers from severe psychiatric illnesses that will "impair Ms. Moritz's functioning to a clinically significant degree". She also notes that these psychiatric illnesses will dominate through the course of Ms. Moritz's said lifetime, posing a "formidable challenge."

**75**  I find the worsening of Ms. Moritz's psychiatric illness after the accident must be reflected in the quantum of damages that I award in respect of non-pecuniary loss and past loss of wage.

**76**  As her psychiatric state improved in the year before the trial, I cannot find that her "formidable challenge" in the future is caused by the accident. I must take this into account in respect of the quantum of damages for future loss of income/capacity.

**Damages**

**Mitigation**

**77**  The defendants assert that Ms. Moritz has failed to mitigate her damages.

**78**  They rely on Dr. Jones' opinion that "the pathophysiology of the plaintiff's musculoskeletal pain has been highly influenced by the neurobiological deregulation of her psychiatric illnesses". The defendants argue that this has worsened her muscular spasms and tension, exaggerating her discomfort. The defendants suggest this problem is treatable. Despite this fact, Ms. Moritz has not sought counselling and has declined medication. Nor did she follow the rehabilitation suggestions made by Dr. MacKean, including counselling and active rehabilitation. If she had done more, she potentially could have reduced the impact of her injuries.

**79**  Once the plaintiff establishes that the defendants are liable for her injuries, the burden of proof shifts to the defendants. In order to prove the plaintiff did not meet her duty to mitigate, the defence must establish that she acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question.

**80**  The court in *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 53 affirmed the test for failure to mitigate set out in *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=) at para. 57, which provides:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. ...

**81**  The defendants have not proven that Ms. Moritz has acted unreasonably and that reasonable conduct would have reduced or eliminated her loss. Their position that she did not suffer any worsening of her psychiatric symptoms and their reliance on Dr. Solomons' opinion that she "does not qualify for a psychiatric diagnosis as a result of the injuries she sustained in this accident" contradicts the defendants' position in respect of mitigation, particularly with regard to their allegations that she failed to undertake counselling and medication. Further, the defendants have not provided evidence upon which I can conclude that counselling or medication would have reduced the symptoms of her psychiatric illness. While Dr. MacKean recommended a vocational assessment as well as an active rehabilitation program, the defendant has not called evidence that such an active rehabilitation program was available to her from a financial perspective.

**82**  I find the defendants have not proven the plaintiff failed to mitigate her loss.

**Non-Pecuniary Damages**

**83**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The list of factors to be considered by the court generally address the plaintiff's age, the nature of the injury, the severity and duration of the pain, the level of disability and loss of lifestyle or impairment of life. The compensation should be fair to all parties and fairness is measured against all awards made in comparable cases, which provide only general guidance: each case must be decided on its own facts.

**84**  Dr. MacKean describes Ms. Moritz's injuries as

1. Grade II whiplash associated disorder involving the cervical spine and upper back.
2. Chronic myofascial pain involving the neck, upper back, and shoulder girdle region.
3. Mechanical low back pain.
4. Cervicogenic headaches.

**85**  Dr. MacKean considers the neck and back symptoms to likely be chronic.

**86**  I find that Ms. Moritz suffered injuries that continue to be symptomatic five years after the accident in her neck, upper back, shoulders and low back. She also suffers from continuous headaches. These symptoms are chronic.

**87**  I find that Ms. Moritz's psychiatric illness worsened for approximately one year after the accident and has since improved, although it is likely a contributing factor for her chronic pain.

**88**  The plaintiff suggests an award of non-pecuniary damages of $100,000.00, relying on the decisions of *Johnstone v. Canada (Attorney General)*, [*2006 BCSC 1867*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61GW-00000-00&context=) ($100,000.00); *Wong v. Hemmings*, [*2012 BCSC 907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24FJ-00000-00&context=) ($100,000.00); and *Kasidoulis v. Russo*, [*2010 BCSC 978*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20RM-00000-00&context=) ($90,000.00).

**89**  The defendants assert the plaintiff's non-pecuniary damages should be in accordance with those assessed in *Sandher v. Hogg*, [*2010 BCSC 1152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-212D-00000-00&context=) ($40,000.00) and *Piper v. Hassan*, [*2012 BCSC 189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1V3-00000-00&context=) ($50,000.00).

**90**  In considering the authorities provided, I note the defendants' proposed award does not take into account the worsening of Ms. Moritz's psychological illness. Her psychiatric issues have apparently subsided with maturity.

**91**  I find that $80,000.00 is an appropriate award given that the accident significantly affected the plaintiff in respect of her physical and mental health. The symptoms of the physical injuries are chronic and are likely to have an impact upon her future health.

**Past Income Loss**

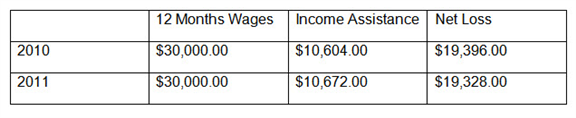
**92**  It is in this context, of delayed entry into the workforce, where the worsening of Ms. Moritz's psychiatric symptoms affects her the most. The accident occurred when she was in grade 12 and, as Ms. Moritz notes, the increase in her depression and anxiety after the accident required her to abandon high school. She finally completed school in February 2010. But for the accident, her intention was to attend a professional hairstylist program after she graduated from high school in June 2008. She was not able to do so because of her physical injuries and worsening psychiatric illness. Her ability to enroll in the course to qualify as a professional hairstylist and obtain a job was postponed.

**93**  I assess Ms. Moritz's wage loss to commence as of May 2009. This assumes she would have graduated from Grade 12 in June 2008, commencing the ten month course immediately after and beginning her work as a hairstylist in April 2009.

**94**  In determining her past wage loss, I refer to Ms. Moritz's net pay at First Choice Haircutters, which averages approximately $760.00 per pay period net after taxes and deductions. This amounts to a loss of wages of $19,760.00 per year. Ms. Moritz also receives approximately $40.00 in tips per shift, which equals $10,400.00 per year. I assess her past wage loss on the basis of $2,500.00 per month.

**95**  If one assumes that Ms. Moritz would have started work in May 2009, she would have earned eight months of income for 2009, which equals $20,000.00. Ms. Moritz received $10,464.64 in income assistance. Her net loss of income for 2009 is $9,535.00.

**96**  I apply the same principles for 2010 and 2011, based on a 12 month year. My assessment of the plaintiff's loss of wages for 2010 and 2011 is as follows:



**97**  In 2012, Ms. Moritz started her employment in the beginning of August. She therefore suffered a loss of 7 months of wages from her hairdressing profession, amounting to $17,500.00. She received social assistance benefits of $7,219.36 and $763.22 at the cabaret. Her loss for 2012 is therefore $9,500.00.

**98**  The plaintiff's total loss of earnings for the period of May 2009 to August 2012 is $57,760.00.

**99**  I must also consider that even without the motor vehicle accident causing Ms. Moritz's psychiatric illness to worsen, there is a reasonable likelihood that she would have missed work as a result of her psychiatric illness in any event. Further, she may have decided to take days off or a holiday during those years had she been working as a hairstylist. I therefore assess a 10% negative contingency to her past loss of income, which results in an award under this head of damage of $52,000.00.

**Loss of Capacity/Future Earnings**

**100**  The plaintiff argues that her mental health issues are under control now and do not affect her ability to work. However, the soft tissue injuries and chronic myofascial pain from which she suffers undermine her ability to perform her chosen profession and will do so for the long term. The plaintiff relies on the report of Dr. MacKean, who suggests that Ms. Moritz will have difficulty working as a hairdresser because of the requirement of holding a static position with her arms out in front of her. This position is aggravating for her neck and back.

**101**  Ms. Burden suggests that part-time hours, 20 hours per week, would be more tolerable. I have considered Dr. Wallace's suggestions in terms of retraining and achieving sedentary work, but as he points out, the physical limitations of a sedentary job would also reduce her employability. Ms. Moritz is happy with her work as hairstylist. She is accomplished at it and but for the pain it produces, it is appropriate for her. I do not consider it realistic that she would seek retraining and a job with lighter duties. I find her future loss of capacity must be based on her employment as a hairstylist.

**102**  In considering a loss of capacity claim, I refer to *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, [*[2007] B.C.J. No. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), by Bauman J. in *Chang*, [*[2008] B.C.J. No. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=), and by Tysoe J.A. in *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=), that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* [*[1990] B.C.J. No. 1158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=), or a capital asset approach, as in *Brown*, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos*, [*[1995] B.C.J. No. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*, [*[1999] B.C.J. No. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=). But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

**103**  I find the plaintiff has proved the real and substantial possibility of being unable to continue working on a full time basis because of the injuries that she sustained in the motor vehicle accident.

**104**  I conclude the plaintiff will begin to reduce her hours of work from age 40, in 2030 to 50% of her full time workload and that she will work part-time until the age of 70. Her future loss of capacity must also be adjusted to accommodate the formidable challenge she faces with regard to psychiatric illness. Referring to table 5 in the report of Robert Carson of Associated Economic Consultants Ltd. of August 3, 2010, I assess a loss of $15,000.00 (half of $30,000.00) per year from age 40 to 70. Based upon the multiplier provided, $13,339.00, the calculation of loss is $200,000.00.

**105**  Ms. Moritz's psychiatric conditions will also play a part in her future income capacity. This aspect of her loss is not to be borne by the defendants, as I have determined that her symptoms of psychiatric illness worsened after the motor vehicle accident but improved about a year before the trial. I attach a 20% negative contingency to my assessment of this loss. The plaintiff's loss under this head of damages is $160,000.00.

**Cost of Care**

**106**  Ms. Burden in her functional capacity evaluation recommends an active rehabilitation program with a kinesiologist for eight sessions at $60,000.00 and provides recommendations for massage therapy and chiropractic treatments. I assess Ms. Moritz's cost of care as $30,000.00.

**Special Damages**

**107**  The plaintiff claims special damages of $3,361.93 in massage therapy, chiropractic work and mileage. The special damages are awarded on that basis.

**Summary**

**108**  I award the plaintiff the following quantum of damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages | $80,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Loss of Income | $52,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Capacity/Future Earnings | $160,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Care | $30,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $3,361.93 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $325,361.93 |  |

**Costs**

**109**  The plaintiff is entitled to the costs of this action.

J.M. GROPPER J.

**End of Document**

[***Murphy v. Jagerhofer, [2009] B.C.J. No. 484***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.P. Warren J. (In Chambers)

Heard: December 8-10, 2008.

Judgment: March 12, 2009.

Docket: M98593

Registry: New Westminster

**[2009] B.C.J. No. 484** | 2009 BCSC 335 | 176 A.C.W.S. (3d) 136

Between Cory Murphy, Plaintiff, and Bradley Jagerhofer, and Gerlinda Jagerhofer, Defendants

(124 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries - Body injuries — Back and spine — Neck — Whiplash — Psychological injuries — Emotional and mental distress — Post-traumatic stress disorder (PTSD) — Considerations impacting on award — Pre-existing injury — On the defendant's application, for an assessment of the damages for injuries the plaintiff suffered in a motor vehicle accident, the plaintiff was awarded $100,000 in non-pecuniary damages, $55,000 for income loss, $68,000 for future earning loss, special damages of $10,240 and future care costs totalling $10,540 — The plaintiff had considerable neck and back pain, some hearing loss, tinnitus, episodes of dizziness and jaw pain — The plaintiff had previously injured his neck and back but was asymptomatic at the time of the accident — The plaintiff suffered from anxiety, depression and post-traumatic stress disorder.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Retroactive loss of income — Special damages — Expenses and expenditures — Medical — On the defendant's application, for an assessment of the damages for injuries the plaintiff suffered in a motor vehicle accident, the plaintiff was awarded $100,000 in non-pecuniary damages, $55,000 for income loss, $68,000 for future earning loss, special damages of $10,240 and future care costs totalling $10,540 — The plaintiff had considerable neck and back pain, some hearing loss, tinnitus, episodes of dizziness and jaw pain — The plaintiff had previously injured his neck and back but was asymptomatic at the time of the accident — The plaintiff suffered from anxiety, depression and post-traumatic stress disorder.**

|  |
| --- |
| The defendants applied to have damages assessed for the injuries suffered by the plaintiff in a September 7, 2004 motor vehicle accident. The defendants' pick- rear-ended the plaintiff's vehicle; the force of the collision pushed the plaintiff's vehicle approximately 150 feet. The plaintiff suffered soft-tissue injuries to his neck and back and experienced headaches, tinnitus, dizziness, anxiety, depression and post-traumatic stress disorder. The plaintiff, who was a financial advisor, did not return to work for four to five months after the accident. The plaintiff had an income of $42,021 in 2003, and had earned $55,703 in the almost nine months in 2004 prior to the accident. The plaintiff had previously injured his neck and back, after falling from a ladder in 1989 and as a result of another motor vehicle accident in 1992, but gave evidence he was asymptomatic at the time of the collision. There was evidence the plaintiff's injuries effected his relationship with his wife and children.  HELD: The plaintiff was awarded $100,000 in non-pecuniary damages, $55,000 for income loss, $68,000 for future earning loss, special damages of $10,240 and future care costs totalling $10,540.  The plaintiff's complaints were caused by the ***negligence*** of the defendant driver; the plaintiff was asymptomatic prior to the accident;. The plaintiff suffered a moderate to severe whiplash injury. The plaintiff had considerable neck and back pain and had experienced some hearing loss, tinnitus, episodes of dizziness and jaw pain. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Rules, Rule 18A

**Counsel**

Counsel for the Plaintiff: W. Cheung.

Counsel for the Defendants: M. Ross.

**Reasons for Judgment**

|  |
| --- |
| **T.P. WARREN J.** |

**Introduction:**

**1**  The defendants applied pursuant to Rule 18A to have damages assessed for the injuries suffered by the plaintiff in a motor vehicle accident. The defendants admit liability. Although I had concerns of the suitability of these issues for disposition by Rule 18A, both counsel agreed that the trial ought to proceed under the rule and by agreement, the plaintiff presented his case through the affidavits of the plaintiff, the plaintiff's wife and a number of medical experts.

**2**  The defendants supported their application by reading extracts from the transcript of the July 9, 2007 examination for discovery of the defendant and the medical reports of Dr. B. Bishop.

**Background based on the affidavits:**

**3**  On September 7, 2004, the plaintiff was driving a late model vehicle and had stopped at an intersection in Chilliwack preparatory to making a left-hand turn when his vehicle was struck from behind by the defendants' 1998 pick-up truck. The force of the collision was sufficient to push the plaintiff's vehicle approximately 150 feet. The defendant estimated that his speed at impact was 50 kph and the collision was sufficiently hard that his airbags deployed.

**4**  At the time of the accident, the plaintiff was 36 years of age, married with one child and employed full-time as a financial advisor for a financial services company. The plaintiff's affidavit evidence supports a finding that he suffered soft-tissue injuries to his neck and back with accompanying headaches and he later developed tinnitus, dizziness and jaw pain. Further, the plaintiff deposed he suffered psychological symptoms including anxiety, depression and post-traumatic stress disorder, all of which symptoms continued in varying degrees to the time of hearing. The affidavit of a medical expert, Mr. Koch, supported this evidence. Because of his injuries, and on his general practitioner's advice, the plaintiff took some time off work and did not return to employment until late 2004 or early 2005, approximately four or five months after the accident.

**5**  The plaintiff's relevant employment history shows that he had been employed as a financial advisor at Hansen Financial Services since 2001, initially on a salary basis but by mid-2002, his income structure altered so that his salary diminished and he started to receive commissions with the intention that by 2003 his income would be based solely upon commissions earned. The plaintiff deposed that the salary structure would mean that his first year of income, based solely on commission, would be difficult but that he expected to develop his clientele and increase his income.

**6**  The year of transition - 2002 - the plaintiff had a salary income of $26,212 and a gross business income/commission income of $35,449. In 2003, the plaintiff had no salary income but a gross business income of $42,021. For the almost nine months of 2004 prior to the accident, the plaintiff had a gross business income/commission income of $55,703.

**7**  The plaintiff had some relevant health issues prior to this motor vehicle accident. He had a fall from a ladder in 1989 and suffered broken bones in his foot and suffered injuries to his neck and back which were treated by his family physician and a chiropractor. In 1990, he had a minor injury of his neck and upper back playing rugby. He deposed that he had an uneventful recovery. That evidence is supported by his general practitioner. Later, in 1992, the plaintiff was involved in a motor vehicle accident and again suffered soft tissue injuries to his neck and upper back that took approximately one year to subside.

**8**  Further, beginning in 1998 and continuing into October 2006, the plaintiff had several knee surgeries to repair his anterior cruciate ligaments and meniscus. He deposed that he has not had any ongoing issues with his knees since 2006 and that his knees were not affected by the accident. He also deposed that in the two years prior to the accident, he had visited his family physician only for the knee problems. The plaintiff also had some pre-accident psychological problems arising out of marital issues with a former wife prior to and following their separation in March 2001.

**9**  The plaintiff's family physician, Dr. R.B.A. Porter, detailed the plaintiff's pre-accident medical circumstances in two reports, one dated July 27, 2006 and the other dated August 27, 2008. Additionally, both the plaintiff and his wife deposed that he was largely, if not entirely, asymptomatic before the accident and in good health.

**10**  With the accident, and certainly within a few days of the accident, the plaintiff developed the classic symptoms of soft tissue injury following a rear-end collision. These included neck stiffness, headaches, back pain, shoulder pain, chest pain, difficulty breathing, trouble sleeping, wrist pain, left groin pain and rib pain. The plaintiff treated his pain symptoms with prescribed Ibuprofen and Tylenol 3s. He also started physiotherapy and received massage therapy. In his affidavit of November 17, 2008, the plaintiff described his condition and complaints following the accident, deposing that his greatest concern was the continuous pain in his neck and back. In an attempt to overcome his difficulties, in mid-October 2004, the plaintiff started a five week Work Hardening Programme and he attended five days a week approximately four hours per day. Nevertheless, upon his return to work following the programme, he noticed an increase in the symptoms in his back complaints and began a course of chiropractic treatments.

**11**  The plaintiff's neck and back symptoms and complaints continued through 2005 and to the present. He deposed that he has made every effort to try everything recommended to him including the home-based rehabilitation programmes recommended by his physician, medications, chiropractic treatments and even facet-joint blocking injections into his cervical spine but even with these treatments, he says he continues to suffer pain in his neck and back.

**12**  Recently, upon the recommendation of his physician, the plaintiff attended a chronic back pain clinic operated by Dr. Frobb and he had neuro-acupuncture that involves injections of Lidocaine into his neck, upper shoulders, mid-back and low back in order to numb the nerve endings. By mid-November 2008, he had received six injections from Dr. Frobb and he has been informed that he will need them approximately once per week. He deposed that the injections are painful and the numbness from the injections only last the day. He continues to complain of headaches, neck and back pain on a daily basis and he describes the pain as constant and increasing as a day progresses.

**13**  One of the plaintiff's complaints shortly after the accident was noticeable difficulty hearing and a buzzing noise in his ears. Later he developed episodes of dizziness and lightheadness, which affected his balance, and as a result, he was referred to a Dr. Longridge, an Otolaryngologist whom he saw on March 11, 2005. Dr. Longridge, in his report of March 30, 2005, noted that tone testing showed a slight "notch at 4 kHz in both ears but it is much more marked on the left side". Apparently, the plaintiff had a Workers Compensation Board hearing test in the early 1990s and Dr. Longridge opined that it might be worth obtaining the test results to determine whether there was any evidence of hearing difference when measured at that time. He continued:

the fact that in the absence of a satisfactory explanation for a specific reduction on the left that this . . . is indicative that probably the accident is the cause of this asymmetry. Reduction of hearing of this sort is probably enough that he is aware that he is missing things in groups and crowds and in background noise. The recorded reduction at 4 kHz in the left ear is probably from the accident based on his awareness of hearing difficulty subsequent to the accident and no other obvious explanation. Head trauma can produce reduced hearing at 4 kHz and asymmetry is suggested that this is the cause in this type of hearing deficit in someone who did not have it previously would be enough to make him aware that he is having trouble hearing what is being said in noisy background. This patient suffers from tinnitus subsequent to his accident. Onset subsequent to the accident in its absence prior to the accident means that, in my opinion, the accident is the probable cause. ...

. . .

As there are no medications, the only method of controlling tinnitus is to hide it with more pleasant sounds than the sound that the patient suffers. If television or music is intrusive then innocuous noises such as rustling leaves, rain on the cabin roof, sound of a waterfall, the seashore can be used to hide the noise without putting an intrusive sound in. This can affect in removing silence where the noise is often loud because it is so quiet. My experience with tinnitus is that it is usually at its worst when it first comes on. It can be expected to improve for a period of approximately a year and at the end of that time whatever is present is likely to be present on a long term, permanent basis. Whether the tinnitus improves or the patient just becomes inured to it over that period, I do not know.

. . .

The patient is aware of difficulty with his tinnitus in quiet which is intrusive and a problem but he feels that its main effect is that it reduces his ability to hear satisfactory, particularly a noise. It is approximately 18 months since the accident.

**14**  As for Mr. Murphy's dizziness, Dr. Longridge wrote:

The patient was aware of lightheaded, wavy dizziness shortly after his accident which is persistent to date. It is a concern and bother to him. At the present time his work is as a financial planner so that he is not working physically in situations whereas if he was dizzy, he would put himself at hazard, for example, working on construction.

. . .

Onset of these complaints of dizziness subsequent to the accident, and their absence prior to the accident means that, in my opinion, the accident is the probable cause. During testing he undertook a test called Computerized Dynamic Posturogaphy. There were abnormalities on part of this test. In particular he was unable to complete sensory organization test six. This is characteristic of a disturbance involving the balance of system, probably of the inner ear. This indicates the probable site for his balance difficulty and his damage to his inner ear from the accident. My experience with dizziness is that it can be expected to improve for a period of approximately two years subsequent to onset. As it came on shortly after the accident and it is 18 months since the accident this report should be reported as interim.

I note that there has been no follow up examination by Dr. Longridge or any later report.

**15**  With reference to another complaint, the jaw pain or temporal mandibular joint problem, Dr. Bruce Blasberg examined the plaintiff on January 27, 2006. In his report dated June 11, 2006, Dr. Blasberg opined that the clinical findings "are consistent with temporal mandibular joint arthralgia (joint pain) and myofascial (muscle) pain of masticatory muscles. Temporalis muscle injuries were a cause of headaches Mr. Murphy was experiencing. Treatment of this temporal mandibular disorder is usually non-surgical using multiple therapies concurrently to reduce pain, improve pain-free jaw movements and decrease pain associated with chewing and yawning".

**16**  Dr. Blasberg suggested a number of methods to manage the problem including self-management, physiotherapy, medication, and "possible new oral appliances therapy for joint and muscle stability", a finding that these symptoms and tinnitus continued well into 2006.

**17**  Dr. Blasberg gave a guarded prognosis for the plaintiff, stating:

Mr. Murphy had experienced partial improvement in his jaw pain and headaches although they continue to serious and disrupted his daily activities. At the time of the examination, Mr. Murphy had been experiencing chronic pain for 1 1/2 years. The limited improvement in the length of time pain had been present indicates a guarded prognosis.

. . .

... based on the above comments, it is my opinion that the motor vehicle accident of September 7, 2004 is the probable cause of the temporal mandibular disorder described above.

**18**  The plaintiff has deposed that since the accident he has been fearful of driving or riding as a passenger. This is more troublesome for him than one would normally expect because his occupation requires that he drive an average of five hours a day four times a week. That complaint, and his complaint of depression and fatigue on a more or less a daily basis, resulted in his referral to a clinical psychologist, William J. Koch. Mr. Koch referred to the plaintiff's subjective reporting of this fear in driving and depression in his report dated January 18, 2007. Of note, is the fact that "psychological test results suggest that Mr. Murphy was defensive in responding to tests, so that the results may under represent the extent of his distress. Therefore, test results should be interpreted with caution. This is consistent with his presentation in interview where I believe he downplayed difficulties in his life". He continued:

Test results suggest an unusual degree of concern about physical functioning and health matters, including particular problems with frequent minor physical symptoms and vague complaints of ill health and fatigue.

Test results also suggests problems with psychological features of depression, such as a disturbance in sleep patterns, a decrease in energy and sexual interest and a loss of appetite and/or weight; he did not, however, report a significant degree of dysphoria or thoughts of worthless or hopelessness.

Mr. Murphy's test results also suggest that he is bothered by symptoms of post-traumatic stress disorder and some avoidance behaviour related to driving in certain weather conditions. ...

However, he did acknowledge a significant preoccupation with subjective cognitive processes. Additionally, he endorses some dissociative disturbance associated with absent-mindedness, consistent with mild cognitive difficulties found in anxious or depressed patients.

**19**  Mr. Koch was tentative in some aspects of his opinion because of the plaintiff's tendency to play down the extent of his psychological distress and disability. He was of the opinion that the plaintiff "is more distressed and disabled than indicated".

Currently, I believe that Mr. Murphy has a specific phobia of motor vehicle travel, a subsyndromal Post-traumatic stress disorder, and subclinical depressive symptoms. Although not evaluated as specifically, it is apparent that he also suffers from a chronic pain condition that is likely aggravated by his psychological distress.

Relationship to the Subject MVA

There is no evidence that Mr. Murphy suffered any similar mental health problems immediately before the subject motor vehicle accident. The reader should note, however, that he had previously episode of acute psychological distress in 2001, apparently associated with marital distress. The nature of that distress (feeling angry, stress), however, was dissimilar to his current PTSD and motor vehicle travel fears.

Thus, it seems likely to me that the subject MVA of September 7, 2004 was the primary precipitant of his current subsyndromal PTSD and Specific Phobia of motor vehicle travel. Similarly, I believe that his current depressive symptoms are best considered a consequence of his chronic pain experience and PTSD/phobia experiences. As the reader can appreciate, depression is a common secondary consequence of both PTSD and chronic pain.

This is not say that this pleasant man did not have some pre-existing vulnerability as his overdose secondary to marital unhappiness in 2001 would suggest. However, it is difficult for me to have a specific opinion about his particular coping weakness given his defensive response to psychological tests.

**20**  At the time of the report Mr. Koch felt that the plaintiff's prognosis for improving was positive, "should he be persuaded to attend psychological treatment, but guarded if he does not receive any psychological treatment". Because it was 20 months after the accident when Mr. Koch saw the plaintiff and wrote his report, he was of the opinion that research in the motor vehicle accident PTSD field suggests that little spontaneous remission occurs following 12-18 months post-MVA but that a great deal of remission occurs within the first several months. Thus, "from an actuarial perspective", Mr. Murphy was well past the window of time when he might improve without treatment.

**21**  Mr. Koch was of the opinion that the plaintiff did not appear to suffer any disability at work although it appeared obvious to him that the plaintiff undergoes a great deal of strain with respect to driving, particularly with his long commutes, a problem which has not improved over the past two years. Accordingly, Mr. Koch felt that the plaintiff was at risk of becoming demoralized by his chronic tension and distress and of suffering more significant work disability at some time in the future. Mr. Koch wrote:

It appears that he is much more disabled with respect to his home and personal life. According to his wife, he is impaired with respect to a variety of duties around the house and with respect to caring for their child (they are also expecting a second child soon). Thus, some combination of his chronic tension, physical pain, and demoralization likely impaired him in his marriage and family life, as well as in his household duties.

**22**  The plaintiff's family physician, Dr. Robin Porter, has treated the plaintiff since May 1991 and he had the plaintiff's medical records dating back to 1977. Dr. Porter noted the plaintiff's previous injuries which included the 30-foot fall from a ladder onto cement, where "remarkably only foot bone fractures were found" but the plaintiff had chiropractic treatments for neck and spine complaints "and recovered". Dr. Porter also noted the plaintiff's rugby injury which was reinjured in a motor vehicle accident in March 1992 which resulted in a Grade 2(1) soft tissue injury to his neck and upper thoracic spine. Dr. Porter noted the soft tissue injuries of the neck and back musculature as Grade 2, once again, and a "past medical history significant for prior neck and back injuries". Dr. Porter continued to see the plaintiff during the fall of 2004 and periodically through 2005, 2006 and 2007 with the last review on July 23, 2008.

**23**  Dr. Porter also did an update of his earlier medical legal opinion of July 27, 2006 and in the report of August 27, 2008, he noted a referral to a Dr. Mark Frobb who operates a Chronic Back Pain Clinic in White Rock. Although Dr. Porter wrote that the consultation letter of Dr. Frobb was appended to his report, I could not find it in the materials that counsel had filed as part of the Chambers record. Accordingly all I can go on is the following extract from Dr. Porter's letter:

Mr. Murphy was last seen in review in my office on July 23, 2008. Ongoing musculoskeletal lower, mid and upper back/neck pain and dysfunction prompted a referral to a Dr. Mark Frobb who operates a 'chronic back pain clinic' in White Rock which some of my patients have found helpful. His consultation letter is appended and describes his findings on August 26, 2008. He basically found evidence of a 'myofascial pain syndrome affecting the supporting musculature of the lumbar sacral junction and pelvic girdle, progressing severely to the upper dorsal and cervical segments'.

**24**  Dr. Porter relied upon a website from the Mayo Clinic network to provide a definition of myofascial pain. Counsel for the defendants strongly opposes the introduction of this expression of opinion on the grounds that it does not comply with the requirements necessary to support an expert's opinion. I agree and accordingly I disregard that evidence.

**25**  In that portion of his report entitled Diagnostic Impression, Prognosis and Summary, Dr. Porter wrote:

On September 7, 2004, Mr. Murphy suffers soft tissue injuries to his neck, upper and lower back musculature. His most significant problems since has included headaches, neck pain and stiffness, jaw (temporal mandibular joint) pain, tinnitus, reduced hearing, balance disturbance, mid-back pain, low-back pain, some phobia of motor vehicle travel, frustration with his chronic pain syndrome and the attentive concentration and functional disturbances associated with poor neck and back strain, mobility and endurance and depression. Most of these symptoms, to some degree, have carried on now for four years from the date he was first seen.

His past medical history is remarkable in the number and severity of prior neck and back injuries, and the presence of previously reported cervical spondylolisthetic changes. Each prior injury would have rendered him more susceptible to re-injury and to less complete post-injury recovery. Anatomically his spondylolisthesis would also predispose him to being more easily injured and a slower more painful rehabilitation course.

...

Myofascial pain syndrome can in turn markedly complicate the recovery and exacerbate the symptoms associated with soft tissue injuries. As symptoms are depended upon by diagnosticians and therapists, patients so affected may tend to get over-investigated and over-treated.

I would say his symptoms and overall physical condition today are related to his prior injuries and anatomical factors. He was weaker and more prone to injury because of them. The precipitation of a major depressive episode complicated recovery by intensifying his symptoms and contributing to the evolution of a myofascial pain syndrome.

It would be difficult to know how much his neck and lower soft tissues are structurally worse today because of this accident. Symptomatically he feels much worse than he was before the accident. I'd be inclined to think his neck and paraspinal soft tissues may be up to 50% weaker structurally today as compared to how much worse he would be expected to be based on his prior condition, and his previously accelerated rate of deterioration. He is now even more susceptible to neck, jaw and back re-injury and even closer to suffering spinal disc injury either in his neck or lower back. Either one of which might require neurosurgical intervention in the future. Also, unfortunately, this reduction in structural integrity has left his threshold to pain accessible to his previously normal levels of activity. [Emphasis mine]

...

At present his sport and physical work endurance is 50% to 75% reduced. He can do all his usual activities, just with pain. He will likely not require any permanent physical assistance with his regular or heavier household duties. His physique and strength is good, he is limited by dysfunctional muscular pain. If this pain doesn't settle, he will be limited in his sport and occupational pursuits by this pain by 50% to 75%.

**26**  Defendants' counsel opposes the introduction of this portion of Dr. Porter's opinion arguing that it is not within his area of expertise. In my view, it is appropriate for a general medical practitioner to express an opinion based upon his experience with this plaintiff and his review of the other medical opinions referred to in his report.

**27**  Dr. Nasif Yasin, a physical medicine and rehabilitation specialist, saw the plaintiff on April 5, 2006 and prepared a report dated April 28, 2006. In the report Dr. Yasin reviewed the plaintiff's clinical records and the medical reports of Dr. Longridge and Dr. Porter and as well examined the plaintiff and recorded the plaintiff's subjective complaints. Dr. Yasin offered the following opinion:

Diagnosis

I am of the opinion that based on the history and examination and the documents that have provided to me, that Mr. Murphy has the following problems.

**Neck Pain-**

Resulting from multiple factoral injuries (muscles, ligaments, tendons and fascia).

Musculoligamentous injures \* Clinically there is tenderness on the paracervical muscles with hyper tonicity which is a result of the muscle reaction of the muscles trying to under protect the underlying structures such as the facet joint and ligamentous injuries.

...

Facet joint dysfunction \* Facet joint injuries are common source of chronic pain following post-whiplash injuries.

...

Cervicogenic Headaches \* Headaches are a common symptom associated with whiplash injuries and are a result of ligamentous injuries, facet joint injuries and myofascial pain.

TMJ Problems \* Secondary to the myofascial pain of the jaw muscles.

Tinnitus \* Can occur with whiplash injuries and studies show that it can happen following a whiplash injury.

Back Pain \* This is a resulted (sic) from a combination of ligamentous and facet joint injury. Clinically, there is no neurological involvement.

Consequences of the Chronic Pain \* Mood suffering \* Sleep disturbances \* Fatigue/tiredness.

Causation \* Mr. Murphy chronic pain (sic) is related to the motor vehicle accident of September 7, 2004, however his past medical history showed previous motor vehicle accident injuries and a previous neck and back injuries and spondylolisthesis of the cervical spine.

However he does not recall any significant limitations to his neck and back prior to the motor vehicle accident of September 7, 2004.

His prior injuries rendered him more susceptible to re-injury especially in the presence of a spondylothitic changes of the cervical spine would make him easily injured and would take a longer duration to recover from an injury.

Prognosis:

Given the length of time since the time of the accident and until the present, Mr. Murphy has remained symptomatic in spite of conservative treatment.

...

Mr. Murphy has not been able to return to his level of recreational activities and I believe that he has plateaued. It is difficult to give a final prognosis.

His prognosis remains guarded.

Disability:

His existing chronic pain resulting from multiple factoral organic factors and I believe that will to interfere (sic) with social and occupational function.

Mr. Murphy will be limited from activities that require any heavy lifting, prolonged seating and activities that will require extension of the cervical spine. He will be disabled from his previous recreational activities.

**28**  The plaintiff's wife, Kim Murphy, in her affidavit of November 15, 2008, deposed of the many changes in the plaintiff since the accident. Mrs. Murphy has known the plaintiff since 1998 and they married in May 2003. She described the plaintiff prior to the accident, as a happy-go-lucky "laid back" individual who was always helpful with their child and around the house. She deposed that they had a very close relationship. She described the plaintiff post-accident as easily frustrated by the smallish nuances of daily life and with mood swings and difficulties in handling multiple tasks. He lacks motivation to do projects around the house whereas before he would be able to work all day at his occupation and then returned at night to renovate the home. Now the plaintiff is forgetful and constantly complaining of his pain.

**29**  Mrs. Murphy also deposed of the plaintiff's complaints of headaches and ringing in his ears on an almost daily basis and on occasion she has seen him lose his balance and fall. In all, Mrs. Murphy deposed of the number of changes in the plaintiff since the accident and how these changes have affected their family life. She described her husband as a man who now is very difficult to live with and this has put a strain on both their relationship and his relationship with their children, who have not developed a bond with him because Mr. Murphy does not participate in the children's lives.

**30**  The plaintiff filed the report of Kevin Turnbull, a consulting chartered accountant and economist, tendered as an expert in economics, taxation, business valuation and accounting. His qualifications were not disputed. Mr. Turnbull prepared a report addressing the claim for past loss of earnings which he set at $75,278. Because Mr. Murphy was changing from a salary to a pure commission form of employment, Mr. Turnbull was of the opinion, based in part upon the income tax returns of the plaintiff, that Mr. Murphy had lost a year in terms of career building. In his report of November 5, 2008, Mr. Turnbull wrote:

In point of fact, it would seem that he had nearly a year that was 'lost' in terms of career building. After this September 7, 2004 accident, Mr. Murphy was off work for over three months, and when he returned in late 2004 and early 2005, he found that it was difficult to perform his duties as a financial planner, with the result that he ultimately obtained new employment in June 2005. Therefore, the period between the date of the accident and June 2005 was probably lost in terms of career progression.

For the purpose of estimating the past loss of earnings in this report, I would assume that the accident resulted in a one year delay in Mr. Murphy obtaining the level of employment in gross commissions actually achieved. In other words, I would assume that in the absence of the accident, the 2006 level would have been achieved in 2005, the 2007 level in 2006, and so forth. It should be noted that I'm not necessary stating that this would have occurred (which is presumably in matter of evidence). Rather, I am providing an illustration of the past loss of earnings calculations that this assumption this found to be true. In this illustration, the loss is assumed to have continued to the end of 2007.

**31**  Mr. Turnbull erroneously increased the plaintiff's income for 2005 by inadvertently adding the plaintiff's T4 earnings twice thereby arriving at a higher income than the plaintiff actually earned. Mr. Turnbull swore a new affidavit correcting the error with the result he opined that the net annual loss was $71,069 or, if the tax is to be included (***Hudniuk v. Warkentin***, [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=)) the net loss would be $75,278. Mr. Turnbull rounded both figures to $71,000 and $75,000 respectively.

**32**  As for future loss of earnings, Mr. Turnbull wrote:

Mr. Murphy may also have suffered a future loss of earnings. He informed me that he has less time to spend on work as a result of the accident, since he now has to spend time receiving medical treatment. He also states that he has less energy for marketing and similar activities. Mr. Murphy was uncertain as to what his ongoing loss of revenue might be if these conditions persist, but he thought that $10,000 a year was a reasonable 'ballpark' estimate. **I do not possess any information (eg medical or vocational reports) that would allow me to express any opinion as to the existence or quantum of any annual future loss of earnings. For illustrative purposes, I have adopted the assumption that Mr. Murphy's estimate of $10,000 per year of loss will be found to be accurate for as long as he continues working.** [Emphasis mine]

**33**  Mr. Turnbull then provided an income loss multiplier table for the plaintiff with the result that if Mr. Murphy were found to have suffered a future loss then the present value of that loss would be $170,450.

**Defendants' Expert Evidence:**

**34**  The defendants' counsel, as noted earlier, refers and relies upon the opinion of Dr. Paul Bishop, an orthopaedic specialist. Dr. Bishop performed an independent medical examination on the plaintiff on April 21, 2006, approximately 18 months post-accident. After reviewing the subjective complaints of the plaintiff, Dr. Bishop performed a physical examination noting as he did so, some objective findings. These included:

1. a reduced but symmetrical range of motion in the temporal mandibular joint with moderate tenderness upon palpitations;
2. the cervical spine showed a range of motion which was mildly restrictive and there was moderate tenderness;
3. the thoracic spine also showed moderate tenderness with palpation along the spine;
4. the lumbar extension was mildly restrictive and provoked pain in the patient's lower back;
5. there were no signs or evidence of muscle wasting or abnormality in the right shoulder area; and,
6. the range of motion of the mid-trapezius area was full on all planes but with some discomfort.

**35**  Dr. Bishop reviewed the clinical records of the Chilliwack General Hospital; a radiologist's report of Mr. Murphy's cervical spine; the ICBC CL19 form completed by Dr. Porter in December 2004; the work hardening program discharge report; the consultation summary from Dr. Condon who operated a rehabilitation clinic; a consult mode from Dr. Lien, the dentist; and the clinical records of the plaintiff's family physician from September 1999 and May 17, 2005. Dr. Bishop drew particular attention to a note of stress/anger problems in September 1999 and stress headaches in November 2000.

**36**  Under **Impression**, Dr. Bishop noted tension headaches, neck pain not yet diagnosed, mechanical upper, mid and low back pain but with no objective evidence of any spinal nerve root deficit, and bilateral temporal mandibular joint injury. Dr. Bishop concluded as follows:

**Discussion**

In my clinical experience, it is reasonable that this patient would have experienced the spinal pain symptoms that he had described after being involved in a motor vehicle accident of the type that apparently occurred on September 7, 2004. However, again in my clinical experience, this patient's recovery from these injuries has been significantly prolonged beyond the typical 12-16 week period.

My physical examination of this patient today reviews subtle signs of a possible upper motor neuron lesions (e.g. spinal cord injury) in the form of hyper-reflexia and a unilaterally positive Hoffman's test. I would therefore recommend the patient undergo an MRI scan of his cervical spine and cord and as well flexion and extension views of his cervical spine to rule out the presence of any instability. Lastly, I would recommend that the patient have an x-ray of his thoracic and lumbar spine since he has reported no significant improvement in his symptoms over the last 18 months. When the results of these studies are known I would be in a better position to comment on the patient's long term prognosis.

If the proposed diagnostic imaging studies shows no significant abnormalities, then at this point as far as his spinal pain symptoms are concerned, I see no contra indication to him returning to or continuing on with all of his normal pre-accident work related and recreational activities. With an increase in activity level, the patient is indeed likely to experience an increase in the intensity of his symptoms, but this is part of a normal recovery pattern and does not represent re-injury. If the patient chooses to accept this advice, then his prognosis for full recovery from his spinal pain symptoms is good.

**37**  Dr. Bishop was not supportive of "passive based treatments" such as physiotherapy or massage therapy nor prolonged use of any medications. He based this opinion on a recently published Clinical Practice Guidelines and his knowledge that no studies validate the use of chiropractic spinal manipulative therapy. Accordingly, he recommended that the plaintiff avoid all use of these forms of treatments and a private exercised based treatment program. Dr. Bishop saw nothing to indicate that Mr. Murphy would require any surgical treatment or household help or assistance.

**38**  Mr. Murphy did have the MRI of his cervical spine and in a report of June 19, 2006, Dr. Robert Koopmans reported no disc protrusion at C2-3 and C3-4 but a small disc bulge at C4-5 but with no focal protrusion.

**39**  Dr. Bishop did an "addendum report" dated November 19, 2008, reporting on his review of the report of Dr. Koopmans. He wrote:

On the basis of the additional clinic information that has been provided (i.e. the radiologist report dated June 19, 2006) I would conclude that the patient's neck pain is mechanical in origin. The radiologist had also not reported any evidence of any cervical spinal cord impingement.

As stated on page 10 in the first paragraph of my report, as far as the patient's cervical spine symptoms are concerned, on the basis of the information that has been provided to me, I see no contraindication to him returning to all of his normal activities. In addition, under these circumstances his prognosis for a full recovery as far as his cervical spine area are concerned is good.

**Submissions on Behalf of the Plaintiff:**

**Non-pecuniary damages:**

**40**  Counsel submitted that the two issues to be determined are causation and quantum. Relying on the decision in ***Athey v. Leonati*** [*[1996] S.C.J. No. 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S0MR-00000-00&context=), counsel argued that it is not necessary to show that the defendant's ***negligence*** was the sole cause of his injury. As long as the act of the defendant "is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury". Counsel submitted that evidence of "causation" could be gleaned from his pre-accident health and the reports of the experts.

**41**  Mr. Cheung provided a number of authorities supporting an award for non-pecuniary damages of $85,000-$100,000 and submitted that on the facts of the case at bar, the award ought to be in the upper range.

**42**  As is common in these situations, I observe that each case turns upon its unique facts and circumstances and the particular circumstances of the plaintiff, but the decisions of other judges in somewhat similar cases offer a helpful guideline.

**43**  In ***Pett v. Pett*** [*[2008] B.C.J. No. 873*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62GF-00000-00&context=) the plaintiff was awarded $85,000 for general damages in circumstances similar to those suffered by Mr. Murphy although it should be noted there was a loss of consciousness, continuing deafness and the plaintiff was off work for more than three months. In ***Johnstone v. Canada (Attorney General)***, [*2006 BCSC 1867*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61GW-00000-00&context=), [*[2006] B.C.J. No. 3247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61GW-00000-00&context=) (S.C.B.C.) the plaintiff had been injured while riding his bicycle. The plaintiff had suffered from anxiety flashbacks, nightmares, and sleep disturbances which continued to some extent up to the time of the trial and although most of his most serious physical injuries have resolved, the plaintiff continued to suffer from disabling low back pain and restriction and movement of his neck. He has also been diagnosed with post-traumatic stress disorder. Brooke J. awarded $100,000 in non-pecuniary damages.

**44**  ***Thiessen v. Bissenden***, [*2007 BCSC 1809*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2227-00000-00&context=), [*[2007] B.C.J. No. 2689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2227-00000-00&context=) (S.C.B.C.), involved a 50-year-old female plaintiff (teaching assistant) who was in the second car in a four car rear-end collision. Her complaints consisted of headaches, dizziness, and blurred vision with right shoulder pain, low back pain, and jaw pain. She was diagnosed with fibromyalgia. Although the plaintiff was able to work, it was with difficulty. Williamson J. awarded $95,000 in damages.

**45**  Bruce J., in ***Pelkinen v. Unrau***, [*2008 BCSC 375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1DY-00000-00&context=), awarded $90,000 for non-pecuniary damages (reduced by ten percent for failure to mitigate) to a plaintiff who had been rear-ended in a motor vehicle accident. The damage to her car was extreme and she had chronic myofascial pain in her shoulders and neck which required cortisone and anaesthetic block injections. As well, she suffered from recurring headaches and sleep disturbance brought about by the pain and anxiety. Bruce J. found that the psychological impact was a contributing factor in the progression of her injuries to chronic myofascial pain.

**46**  ***Stone v. Ellerman***, [*2007 BCSC 969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21V7-00000-00&context=), [*[2007] B.C.J. No. 1464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21V7-00000-00&context=), was a case where the plaintiff was rear-ended by the defendant's vehicle which was travelling at 50 kph. At the time, the 19-year-old plaintiff was working as a sales associate and waitress. Steward J. awarded $100,000 for what was essentially a chronic pain case.

**47**  Finally, Wong J. in ***Edwards v. Marsden***, [*2004 BCSC 590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2GM-00000-00&context=), [*[2004] B.C.J. No. 870*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2GM-00000-00&context=) (S.C.B.C.), awarded $100,000 in damages for a 39-year-old female plaintiff who had developed a visual vestibular mismatch which had complicated her whiplash injuries and which subsequently evolved into chronic pain syndrome, an adjustment disorder, and depressed mood.

**48**  Relying upon the foregoing authorities and the circumstances of his client the plaintiff's counsel submits that the appropriate damages ought to be $100,000.

**Past Wage Loss and Past Loss of Opportunity:**

**49**  His counsel submits that the change in the plaintiff's salary structure in 2002, he shifted from a diminishing base salary to commissions with the intention that by 2003, he would be strictly on a commission-based income. By 2004, up to the date of the accident, the plaintiff had gross business income of $55,703 and his counsel submits that he was having a good year with his business. As a result of the accident and on the advice of his doctor, the plaintiff took some time off from work, went to the work conditioning program between October 13, 2004 and November 19, 2004 and as a result, he felt that he had lost the momentum which he had going into the accident.

**50**  The plaintiff's evidence was that he lost referrals and clients because he was not available for them and he felt that he had to start all over again in the new year. Based upon the calculations of Mr. Turnbull, the plaintiff submits that his lost opportunity to earn income from the time of the accident and until the end of 2004, together with the fact that when he returned to work, he only did so on a part-time basis and was delayed therefore by a year, ought to result in a net wage loss compensation of $56,000.

**Future Loss of Income/Diminished Earning Capacity:**

**51**  Under this heading, the plaintiff relies upon the classic decisions in this area: ***Andrews v. Grand & Toy Alberta Ltd.*** [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), ***Pallos v. Insurance Corp. of British Columbia*** [*[1995] B.C.J. No. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), ***Brown v. Golaiy*** [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=), and ***Palmer v. Goodall*** [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.). The test, as enunciated in ***Brown*** and approved by the Court of Appeal in ***Pallos*** is whether

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured; and,
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive market.

Using these tests, his counsel submits that the plaintiff's pre-accident ability to earn an income is to be compared with his post-accident ability. The court should then assessed the loss in order to make an award that reflects the fact that for the rest of the plaintiff's life some occupations would be closed to him and "it is impossible to say that over his working life, the impairment will not harm his income-earning ability" (***Palmer*** per Southin J.A.).

**52**  The plaintiff is entitled to compensation only for real and substantial possibilities of loss which are to be quantified by estimating the chance of the loss occurring. The valuation of a loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he would probably earn in his injured condition. However, the overall fairness and reasonableness of the award must be considered as well and the task of the court to assess the losses, not on a mathematical decision and with an allowance made for contingency: see ***Rosvold v. Dunlop***, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*[2001] B.C.J. No. 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) (B.C.C.A.)

**53**  The Court of Appeal has held in ***Sinnott v. Boggs***, [*2007 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=), [*[2007] B.C.J. No. 1023*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=), that even where the plaintiff is able to continue his particular occupation but at a reduced level compensation for loss of income earning capacity may still be appropriate. MacKenzie J.A., writing for the court, held that three of the four factors outlined in ***Brown*** were broad enough to support an award where there is a reduced ability to perform in the occupation "but the ability to perform and the earning capacity resulting from that ability are impaired by the injury".

**54**  Plaintiff's counsel submits that there is an abundance of evidence of the plaintiff's difficulty which might brings him fully within the factors enunciated in ***Brown***. He has chronic back and neck pain which are coupled with psychological symptoms and myofascial pain and chronic pain had been diagnosed with Dr. Porter. Throughout his employment career since 1994, the plaintiff has been working in the same field but decided to take the job with his present employer in July 2005 because he felt that he could not longer continue working strictly on commissions with his former employer. Thus, the plaintiff's injuries were preventing him from working to his full capacity and he required more security and stability. The evidence shows that the plaintiff no longer had the energy to continue networking and finding clients and the new employment with Canada Life offered him a guaranteed salary and bonuses as well as more flexibility in his hours worked.

**55**  The plaintiff has difficulty with prolonged sitting. He suffers from permanent tinnitus and hearing loss. In order to achieve the financial security and employment stability that Canada Life offered, it is now necessary for the plaintiff to drive from his residence in Chilliwack to Vancouver for meeting, and as Mr. Koch noted, this causes a great deal of strain and there is a heightened risk of the plaintiff becoming demoralized by chronic tension and distress.

**56**  Given the plaintiff's relative youth of 40 years and a history of working as a financial planner, his counsel submits that the plaintiff's current condition is limiting his working ability to the extent that he copes only on a day-to-day basis. The prognosis for his symptoms improving is not positive and accordingly two years income at the present gross amount is an appropriate award for compensation under this hearing. A claim then is for $215,000 for "loss of income earning capacity".

**Special Damages:**

**57**  The plaintiff's general practitioner, Dr. Porter, recommended initially that the plaintiff try chiropractic treatments and, because the plaintiff had some relief from pain following them, he continued with these. He claims $2,058 for the treatments up to August 25, 2008. Dr. Porter also recommended that he try massage therapy and physiotherapy and he did so and, as well, had further chiropractic treatments with another chiropractor. The claim for these treatments between September 15, 2004 and November 10, 2008 totalled $3,754.

**58**  The plaintiff also claims for $388 being the cost of six-acupuncture treatment and the therapy and injection treatments provided by the chronic back pain clinic in the amount of $1,398. There are prescription costs of $129.49 and mileage expenses attending at the various treatment centers of $2,917.46. Because of the tinnitus, the plaintiff had to have testing done on his ears as well as a consultation for retraining and a personal sound generator, all costing $4,340. The MRI scan of his cervical spine recommended by Dr. Yasin cost $975 and the assessment at Vancouver General Hospital for his dizziness cost $400. In total, the plaintiff's claim for special damages amount to $16,359.95.

**Future Care Cost:**

**59**  The continuing cost of injection treatments by Dr. Frobb are $150 per treatment which are to continue once a week until Dr. Frobb recommends that he stop. As well, the plaintiff continues to receive massage therapy once a month at a cost of $80 per hour long session and he would likely continue with chiropractic treatment at a cost of $30 per treatment.

**60**  The plaintiff also had an ontological and tinnitus assessment done by a speech language pathologist who recommended that he was a suitable candidate for Tinnitus Retraining Therapy costing $3,790.

**61**  The plaintiff has received a recommendation that he be treated with a central auditory processing disorder which requires that he be treated through a series of ten intensive training sessions at a cost of $1,950.

**62**  Finally, Mr. Koch had recommended the plaintiff attend psychologically oriented pain management clinic or that he be treated for his post-traumatic stress disorder and specific phobia, the cost of which would be $4,800.

**63**  Accordingly, the plaintiff claims $15,000 for future care costs.

**64**  In summary, the plaintiff claims damages totalling in excess of $400,000 for his non-pecuniary damages ($100,000), past loss of earnings ($56,000), future loss of earning capacity ($215,00), special damages ($16,359.95), and future care costs ($15,000).

**Submissions on Behalf of the Defendants:**

**65**  The defendants take issue with the evidence of the plaintiff that his vehicle was a total loss arguing that the only evidence of such a loss was that of the plaintiff who merely "provides photographs of his vehicle". Counsel submits that there is "no proper evidence before the court to define a 'total loss' or that the vehicle was in fact determined to be a total loss". It is my view that the plaintiff is certainly in a position to provide sufficient evidence for the court to establish on a balance of probabilities that the damage to his vehicle resulted in it being a "total loss".

**66**  Defendants' counsel agrees that the two issues to be determined by this court are causation of the plaintiff's complaints and the appropriate assessment of damages.

**67**  On the issue of causation, defendants' counsel agrees that ***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), sets out the general test but it is only a general and not the conclusive test for causation. Quoting from paragraph 35 of ***Athey***, counsel pointed out that the defendant need not put the plaintiff in a position better than his or her original position and although a defendant is liable for the injuries caused, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway. The defendants submit that the plaintiff was a "crumbling skull" rather than a "thin skull" and any injuries that may have been suffered as a result of the accident were additional to existing damage. In these circumstances, the defendants are only liable for any additional damage.

**68**  In support of this argument, counsel pointed to the pre-accident medical history of the plaintiff starting with his fall from a ladder in October 1989 onto cement. The plaintiff was involved in a single vehicle accident in 1989 but does not appear that he suffered any injuries although he was injured playing rugby in November 1990 and "re-injured his neck and upper back" which had been injured in the fall from the ladder. The plaintiff also re-injured his neck and upper back in another vehicle accident in March 1992 and was symptomatic for approximately one year because of a Grade 2(1) soft tissue injury to his neck and upper thoracic spine. The plaintiff was involved in yet another motor vehicle accident in either 1994 or 1996 and pre-motor vehicle accident x-rays of his cervical and thoracic spine taken in June 1992, reveal some hyper-mobility of his cervical spine at C4-5. Other x-rays of the plaintiff's spine in 1992 and September 2004 showed changes to his cervical spine and some facet joint arthritis at C6. These findings suggest a "long standing increased laxity of his cervical spine supporting ligaments and some predisposition to increased injury and protracted recovery", a fact noted by Dr. Porter in his medical legal report of July 27, 2006. Dr. Porter felt that the plaintiff's present symptoms and overall condition were perhaps as much to do with the earlier injuries and anatomical factors as to the current accident. Even Mr. Koch noted prior stress, anxiety and anger difficulties, marital difficulties and an overdose of Zoloft and alcohol resulting in the plaintiff being hospitalized in 2001.

**69**  Accordingly, the defendants submit that the plaintiff was a "crumbling skull"; a man who had a significant history of neck and back injuries with evidence of progressive disc slippage and arthritis which was not the result of the accident. These "pre-existing issues" would have continued notwithstanding the accident and the plaintiff can only recover from the defendant for any new injury.

**70**  The defendant relies upon the independent medical examination of Dr. Bishop to support the submissions that the plaintiff's complaints as of April 2006, roughly two years post-accident, although continuing, were substantial reduced from earlier; some of the pain was intermittent; the plaintiff reported physically demanding parts of the job were prolonged sitting and a lot of driving yet when he returned to work it was full-time and he has been able to maintain that level since although he complained that he became fatigued more easily and had difficulty concentrating.

**71**  Although the plaintiff said that he was not able to do any of his recreational activities, at his examination for discovery he reported coaching in soccer in 2005 for an hour at a time over three to four month period. Given the fact that the plaintiff had the ability to do this, the court ought to weigh that evidence with the complaint of the plaintiff that he cannot sit, drive, or hold his child.

**72**  Dr. Bishop noted no apparent distress on the part of the plaintiff during his interview and on examination, revealed only some moderate pain with crepitus and a reduced range of motion in the TMJ area.

**73**  Relying heavily upon the reports of the other doctors and particularly the opinion of Dr. Bishop, the defendants submit that the plaintiff's pre-existing condition should be taken into account on assessing the accident on the plaintiff's present condition and when assessing damages. Although Dr. Bishop noted the plaintiff had tension headaches and undiagnosed neck pain, mechanical upper, mid and lower back pain, and that his recovery had been prolonged, he could see no reason why the plaintiff could not return to normal pre-accident work and recreational activities. Although such activities will increase the plaintiff's symptoms, these are part of the normal recovery pattern. Dr. Bishop opined that the prospects of a full recovery were good and there was no requirement for surgical treatment.

**74**  Defendants' counsel submitted that the plaintiff's complaint of increased pain and discomfort upon his return to work was to be expected for, as noted by Dr. Bishop, increased activity would cause an increase in the symptoms and this was a normal part of the healing process.

**75**  Counsel was critical of the report of Dr. Yasin dated April 28, 2006 and October 27, 2006 which he submitted do not actually attribute any limitations on the part of the plaintiff to the accident. Although Dr. Yasin reported that the plaintiff described his pain as 10 with an average of 7 to 8 out of 10 and headaches of 6/10, nevertheless in considering with the pain medication taken by the plaintiff, these complaints make no sense. The plaintiff had provided evidence that shows he only ever used minor pain medications such as ibuprofen and Tylenol 3 to manage his pain and at the time of Dr. Yasin's report was taking only two tablets of ibuprofen every other day. If the plaintiff's pain is as severe as he reported then one would normally expect a much stronger prescription and with frequent use. The minimal need of medications is inconsistent with the plaintiff's of extreme pain.

**76**  I am inclined to agree with defendants' counsel's criticism of Dr. Yasin's report, much of which actually does not contain a diagnosis but quotes from other authority. Accordingly, I attribute little or no weight to Dr. Yasin's diagnosis or prognosis; it was not helpful.

**77**  Defendants' counsel was also critical of the reports of Dr. Porter of July 27, 2006 and August 27, 2008. With reference to the first report which was close in time to the reports of Dr. Bishop and Dr. Yasin, the plaintiff denied any dizziness or vertiginous sensation and did not mention any tinnitus. While this comment is true, it should be noted that Dr. Porter was reporting the symptoms at the first meeting but later, in October 7, 2005 the plaintiff did complain of symptoms.

**78**  Defendants submit that the opinion of Dr. Porter noting a Grade 2 soft tissue injury to the neck and back and the plaintiff's past medical history of significant prior neck and back injury should be taken into account in assessing any damage award or determining causation.

**79**  The report of Dr. Porter dated August 27, 2008 should be given little or no weight in the defendants' submission. Counsel submits that at times Dr. Porter became an advocate and stepped outside of his area of expertise and made improper comment. For example, Dr. Porter improperly referred to part of Dr. Bishop's report as "so called" remobilization pain and by doing so, Dr. Porter is attempting to discredit Dr. Bishop's opinion. Further, Dr. Porter, who is a general practitioner, was clearly outside his area of expertise when he attempted to provide a psychological opinion relying upon the report of Mr. Koch. In all of the circumstances, the plaintiff's expert, Dr. Porter, had lapsed into advocacy and had not remained objective and impartial: see ***Brough v. Richmond***, [*2003 BCSC 512*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2GK-00000-00&context=).

**80**  For these reasons, defendants' counsel submits that the offending paragraphs of Dr. Porter's August 27, 2008 report should be excised. Plaintiff's counsel agreed that Dr. Porter's criticism of Dr. Bishop found at page 6 of his report should be deleted. I agree and I will disregard it. As for the reference to Mr. Koch, I conclude that it is no more than Dr. Porter agreeing with the opinion of Mr. Koch and insofar as his report goes beyond his area of expertise, it has little impact; it is the report of Mr. Koch which is to be accorded weight. In any event, I conclude that this general practitioner, who has been treating a plaintiff for considerable period of time, is able to offer some comments upon his patient's medical and psychological condition. Further, I am alert to any area of an expert's report which goes beyond the bounds of objective opinion and I disregard any portions where the opinion amounts to advocacy for the patient.

**81**  Defendants' counsel submits that the court should be skeptical of the plaintiff's explanation why he initially did not report the tinnitus to Dr. Porter. He submits that the plaintiff was quick to point out all injuries throughout his attendance upon the doctors and the fact that the affidavit in support of his case was formed close to the trial as opposed to closer to the accident suggest a "post hoc" justification.

**82**  Dr. Longridge reported that the tinnitus is only a nuisance when it is quiet and when Mr. Murphy thinks about it. At his examination for discovery the plaintiff stated that he had not had to modify any of his work habits because of this "nuisance" and accordingly, the defendants submits that the tinnitus, or that portion of it which may have been caused by the accident, is minor in nature.

**83**  With reference to the letters of Carol Lau sent to plaintiff's counsel, the defendants say that they ought not to be admitted into evidence as they offend Rule 40A(5). Rule 40A(5) requires that opinions of an expert are admissible at trial provided they are accompanied by a statement of the qualifications of the expert, set out the facts and assumptions upon which the opinion is based, and the name of the person primarily responsible for the content of this statement.

**84**  The plaintiff's counsel says that the first letter of Ms. Lau dated December 6, 2005 is only filed as an exhibit to show the cost of the tinnitus retraining therapy recommended by Dr. Longridge. Ms. Lau is projecting a total cost of $3,790 for the counselling over 24 months, a sound generator or generators behind the ears, and the bedside sound generator. To that limited extent, the evidence is admissible in my view. With reference to the later letter of June 5, 2006, I agree with defendant's counsel that this report ought not to be admitted into evidence. This of course means that the defendants' submission that it reveals a failure to mitigate on the part of the plaintiff must also be disregarded.

**85**  A similar complaint is raised by defendants' counsel to the report of Dr. Lien of June 14, 2005. Again I am obliged to accede to counsel's submission. There has been ample time to cure any of the defects or missing portions supporting an opinion as required by Rule 40A(5). Nevertheless, that portion of Dr. Lien's letter describing the treatment simply adds to the opinion of Dr. Blasberg and the suggested management which included a possible oral appliance therapy for joint and muscle stability of the TMJ.

**86**  I was impressed with the opinion of Dr. Blasberg, particularly his prognosis that the plaintiff had experienced partial improvement of his jaw pain and headaches, a year-and-a-half after the accident and at that time, he noted that the plaintiff "had been experiencing chronic pain for 1 1/2 years. The limited improvement and the length of time pain had been present indicates a guarded prognosis". Although defendants' counsel submitted that this opinion is not evidenced of any "permanent TMJ injury", and he is quite correct in this, it is a significant feature in my view in determining the extent of the plaintiff's injury and complaints.

**87**  Defendants' counsel is also critical of the report of Mr. Koch of January 18, 2007, submitting that Mr. Koch at all times is partial and delves into advocacy on behalf of the plaintiff. I disagree with defendants' counsel who argued that it was inappropriate for Mr. Koch to note that the plaintiff appeared to "download his difficulty". It is well within the area of expertise of a psychologist to make these observations. Overall, I found that Mr. Koch's report to be thorough and reliable.

**88**  The defendant is skeptical of the plaintiff's complaints of limitations on his activities, arguing that he does not provide information as to what specific activities are limited, and how he is limited. Instead he simply states that certain activities caused "some discomfort". Even during his examination for discovery, the plaintiff was "hard pressed to provide any examples of his alleged limitation". Notwithstanding that defendants point to the fact that the plaintiff was involved in a long term period of coaching soccer which involved running and kicking.

**89**  With reference to the plaintiff's claim that he could no longer do housework and that it took longer and aggravated him, the defendants point to the transcripts of the examination for discovery where the plaintiff demonstrated just how little household chores he did prior to the accident and accordingly cannot claim realistically that this has been affected. In a phrase, any limitation goes to provide evidence of the plaintiff's pain and suffering and not of any loss of capacity.

**90**  The defendants vigorously dispute the plaintiff's claim for wage loss and loss of opportunity. The defendants dispute that the plaintiff has provided any evidence of lost clients or any examples of the lost opportunity and, when pressed at his examination for discovery to give an estimate of his losses, he was unable to give any substantial estimate. The burden is on the plaintiff to prove this loss and he has put no evidence before the court. In ***Shearsmith v. Houdek***, [*2008 BCSC 997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M30J-00000-00&context=), Romilly J. at paragraph 32 stated:

[32] In ***Schellak***, [*[2003] B.C.J. No. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3ST-00000-00&context=), at para. 47, the Court of Appeal made it clear that the court cannot base an assessment of past wage loss on the 'real possibility' of income being at a certain level. The plaintiff must prove his or her past wage loss on a balance of probabilities. [counsel's emphasis]

**91**  As for Mr. Turnbull's report, it should be given no weight. The defendants submit that the plaintiff has not provided details of actual lost clients, files or any other evidence of lost work. He says simply that he was off work for a certain period of time and should have lost income but has led no evidence to show how his income stream works. The plaintiff has provided no evidence to indicate whether he was immediately paid his base salary, commissions or bonuses or whether there some delay. Accordingly, if there is a delay, this would cause some commissions from a year prior to fall over to the following year and accordingly skew any loss estimate. Therefore, the defendants submit that he has not proven the amount claimed on the balance of probabilities and is not entitled to any award under this head of damages: ***Shearsmith***.

**92**  Alternatively, the defendants submit that if an award is to be made, it should be limited to the 16 weeks the plaintiff was off work in 2004 as detailed at page 3 of Mr. Turnbull's report with a total of $27,000.

**93**  Although the plaintiff provided evidence that he had returned to work in December 2004 but not at his full capacity, he has provided no evidence to support this claim. It could have been and should have been produced from either his employer or a co-workers. The court ought to draw an inference adverse to the plaintiff by his failure to call supporting and confirmatory evidence.

**94**  Further, the defendants point to the tax returns of the plaintiff as evidence demonstrating that the plaintiff continued to increase his level of income for each year since the accident and this, counsel submits, clearly demonstrates no wage loss or loss of opportunity. This is also demonstrated by the report of Mr. Turnbull which shows that for the years 2002 to 2007, the plaintiff's total employment and gross business income had actually increased.

**General Damages Submissions:**

**95**  On the issue of quantum of any damage award counsel relies upon the following authorities: ***Perrin v. Lalari***, [*2008 BCSC 1117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M364-00000-00&context=); ***Shearsmith***; and ***Amberiadis v. Groves***, [*2005 BCSC 1270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1G8-00000-00&context=).

**96**  ***Perrin*** was a case where the plaintiff, 44 months post-accident, was still suffering from cervical sprain and lower back pain caused by a severe rear-end collision. Her relationships were affected and she was at risk of premature arthritis, had chronic pain and was no longer able to participate in her pre-accident recreational and household activities. General damages of $50,000 were awarded.

**97**  ***Shearsmith*** was another soft issue injury claim arising out of a chain reaction rear-end collision four years before the trial. At the time of the accident the plaintiff was 44 and working part time as a cleaner. She was also in receipt of income assistance. Her injuries included severe neck and low back pain which were not resolved by the time of trial and she had developed chromic pain syndrome. She had given evidence that her pre-accident activities were now limited although there was evidence that she was working more since the accident. General damages of $60,000 were awarded. Defendants' counsel acknowledges that although there were "difficulties with her testimony" there was expert evidence supporting her claim of the extent and impact of her injuries.

**98**  Finally, in ***Amberiadis*** Burnyeat J. found there was chronic myofascial pain syndrome in her low and upper back and neck which was "likely to remain or worsen in the future"; pain around her ribs which had lasted for about six months post-accident; headaches which had lasted for three years but which recur on physical activity; stiffness and soreness from the seat belt; disturbed sleep caused by the pain; decreased back and stomach musculature; depression; and reduction of recreational activities, all brought about as a result of the pain from her injuries. Burnyeat J. held that the plaintiff had failed to properly mitigate or follow treatment courses and ultimately awarded $40,000 non-pecuniary damages.

**Past Income Loss:**

**99**  Defendants' counsel argues that Mr. Turnbull's calculations of past wage loss are based on assumptions, the first being that the plaintiff would have had a continuing income stream for the year 2004. Having assumed that, Mr. Turnbull then assumed that the plaintiff was delayed one year in obtaining the income he would have achieved in each of the successive years up to 2007 but Mr. Turnbull admitted that this assumption would not necessarily have occurred. Mr. Turnbull then made an arbitrary deduction for increased expense revenue but there is no solid proveable foundation for any of these numbers or even the choice of estimated losses. Accordingly, the defendants argue that the estimated past wage loss figure put forward is of no reliable value and should be given no weight.

**Future Income Loss and Lost Opportunity:**

**100**  As for the estimate of the plaintiff's future loss of earnings, counsel submits that the numbers relied upon by Mr. Turnbull are, as he described, "ballpark estimates" and were provided by the plaintiff. Mr. Turnbull admitted that he had no information to permit him to give the opinion on the quantum of loss. This submission is based upon Mr. Turnbull's statement at page 5 of his report:

Mr. Murphy may also have suffered a future loss of earnings. He informed me that he has less time to spend on work as a result of the accident, since he now has to spend time receiving medical treatment. He also states that he has less energy for marketing and similar activities. Mr. Murphy was uncertain as to what his ongoing loss of revenue might be if these conditions persist, but he thought that $10,000 per year was a reasonable 'ballpark' estimate. I do not possess any information (e.g. medical or vocational reports) that would allow me to express any opinion as to the existence or quantum of any annual future loss of earnings. [emphasis added]

**101**  Accordingly, counsel argues, there is a complete lack of a reliable evidentiary basis for Mr. Turner's future wage loss estimates or of his past wage loss estimates for that matter and no weight should be given to any past or future wage loss estimate provided by Mr. Turner.

**102**  As for the plaintiff's claim for loss of capacity, the defendants argue that he has not suffered any such loss. As Romilly J. noted in ***Shearsmith***:

[36] Accordingly, this Court can proceed with a comparison between the plaintiff's likely future if the accident had not occurred and the plaintiff's likely future after the accident occurred. Under this approach, which was described in ***Cash***, [*[1996] B.C.J. No. 1311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1S9-00000-00&context=), at para. 52 as the 'real possibility approach', the plaintiff must lead evidence that there is a likelihood of some future event leading to a loss of income.

[37] In my view, the plaintiff has not established an impairment in her earning capacity as a capital asset. She is now working at her job as a cleaner more than before the accident and is able to do her job, although with some difficulty. (emphasis added by counsel)

**103**  The defendants submit that there is no evidence that the plaintiff is incapable of performing any tasks and although he had some or may have some accompanying pain while performing this tasks, that is not a loss of capacity. He has worked in the past in the financial planning sector and he continues to do so. He deposed that he is studying his Certified Financial Planner certification and he has been working in his field full time since December 2004 with a continuing increase in his annual income. Defendants submit that on these facts there is simply no loss demonstrated.

**104**  In his last affidavit in support of his claims, the plaintiff stated that he lost referrals and clients but has failed to provide any supporting evidence of numbers or the names of such clients. The plaintiff has stated that he was able to meet his bonus in 2006 in his new job but said he could not meet it in any subsequent year. That only leaves 2007. Further, the plaintiff has not provided any evidence on how the bonus system works.

**105**  The plaintiff described the amount of work required to do his job in considerable detail. The defendants point to this as evidence of the fact that he is able to carry out so much work and demonstrates that he has suffered no loss of capacity. Further it contradicts any claim that he has a poor memory. Also the plaintiff now works full-time as a regional marketing consultant for Canada Life and is not required to perform any significant physical work.

**106**  In all of the circumstances of the case and the evidence before the court, the defendants submit that there has been no claim made out for loss of capacity and no award ought to be made under this head of damages.

**107**  If, however, the court finds that some award should be made, then the court should take into account the minimal nature of the alleged loss and other contingencies such as the evidence of long standing back problems (his arthritis, sacroilitis, and spondylothesis) which was shown to be progressing before the accident and which would likely have continued to progress and become problematic. In these circumstances, the defendants submit that if any award is made, it is not a mathematical calculation and it should be fair in all of the circumstances. On the evidence and the authorities relied upon any award should be in the range of $10,000-$20,000.

**Future Care Costs:**

**108**  As for the plaintiff's claim for future care costs, the defendants submit that there is no evidence that the plaintiff would require any home care assistance, and given the fact that he has provided evidence that he receives no or only limited relief from the acupuncture treatment, massage, or chiropractic theory, the defendant opposes further funding for any of it.

**109**  Given the defendants' position on the evidence of Ms. Lau and Mr. Koch, the defendants submit that there ought to be no award for the tinnitus treatment option or further psychological treatment.

**Special Damages:**

**110**  The defendant submits that they should not be responsible for the entire amount of the claim by the plaintiff for massage therapy treatments. The defendants submit that it was unreasonable for the plaintiff to continue with these treatments because of the limited result and because the treatment has not been medically determined as necessary. Nor for that matter, should the defendants be responsible for any amount of chiropractic treatment beyond what was actually suggested by his doctor; the plaintiff's personal decision to continue with that treatment has not been medically determined as necessary and in fact, there is evidence that it is not necessary. Further, because the report of Ms. Lau is inadmissible in the defendant's submission, no award for hearing or tinnitus-related expenses made pursuant to her opinion should be awarded. Lastly, the defendants submit that the claim for mileage should be reduced as there is no indication of how much distance was travelled by the plaintiff. Rather grudgingly the defendants do concede that some expenses should be allowed but it should be limited to roughly half of the claimed $2,917.46 or approximately $1,500.

**Findings, Conclusions and Awards:**

**111**  I do not propose to repeat the comments and conclusions I have earlier made in these reasons to various aspects of the evidence. I have found the submissions of both counsel on the evidence helpful but I confess to some remaining difficulty in determining the appropriate disposition of the principal issues because of the absence of *viva voce* evidence which is a preferable method for fully determining the weight to be given to various parts of the evidence.

**Non-pecuniary or General Damages:**

**112**  The issue of causation in this case is determined by applying the factors in ***Athey***. Here the defendants argue that there were pre-existing conditions that would have affected the plaintiff in any event. I disagree. I find on the evidence of both Dr. Porter and Dr. Bishop that the plaintiff was asymptomatic of the complaints he now has which have arisen from the injuries he suffered in this accident. Using the rather macabre terms found in other cases, this plaintiff had a "thin skull" rather than a "crumbling skull" and on my reading of those medical opinions I prefer, I find there was no "measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future . . . ." ***Athey***, per Major, J. at para. 35.

**113**  Accordingly, I find that the presenting complaints of the plaintiff were caused by the ***negligence*** of the defendant driver and I turn to address the issue of appropriate compensation. In this, I am strongly influenced by the opinions of Drs. Porter and Longridge and the opinion of Mr. Koch. The plaintiff suffered a moderate to severe whiplash type injury which had a significant physical and emotional effect upon him some of which have persisted to the day of trial and will continue into the future. The back and neck pain caused him considerable pain and caused sleeplessness, headaches and general body pain for which he was prescribed pain medication. Many of these symptoms continued well into 2005 despite his participation in a Work Hardening Programme in the fall of 2004. I accept that he has tried every mode in an effort to alleviate his symptoms. In his opinion, Dr. Bishop dismissed passive therapies, but I conclude it was understandable that the plaintiff would follow other professional advice and give these therapies every chance to help. I say that with the exception of the later cortisone injections, which are painful and of very limited result, and also the later chiropractic attention.

**114**  Added to his back and neck pain, the plaintiff has experienced some hearing loss, tinnitus and episodes of dizziness. These are frustrating and to some extent debilitating. He also has jaw, or temporal mandibular joint arthralgia and myofascial pain. He was given an oral appliance which he is to wear on a daily basis yet he continues to experience jaw stiffness and fatigue.

**115**  It is understandable that these conditions have affected him emotionally. The opinion of Mr. Koch corroborates the plaintiff's evidence. I accept the opinion of Mr. Koch that the plaintiff "downplays" the difficulties in his life and that the plaintiff has a phobia of motor vehicle travel, post-traumatic stress disorder and related repressive symptoms.

**116**  Although there is no evidence from fellow workers or his employer of the impact of his condition on his job, there is evidence from the plaintiff and his wife of the effect on their relationship and the plaintiff's relationship with his children. In the absence of any contradictory evidence I conclude that too has been established. The plaintiff is tired at the end of the day, lacks motivation at home, is forgetful and has not developed a full relationship (bond) with his children.

**117**  Given my findings above and the rather cautious outlook for future improvement I conclude that the plaintiff's injuries warrant an award at the higher end off the range and I fix his non-pecuniary damages at $100,000.

**Past Income Loss:**

**118**  With the exception of the first year to eighteen months post-accident, the evidence of actual loss causes me more difficulty. Here too, some supporting evidence from co-workers or management would have been helpful in supporting the plaintiff's claims and the opinion of Mr. Turnbull that the plaintiff had lost roughly a year "in terms of career progression". Mr. Turnbull placed a value on this loss at $71,000-$75,000 but in my view the evidence falls short of establishing on a balance of probabilities that there was a lost year. There was a loss however and I agree with plaintiff's counsel that it should be for the income lost from the time of the accident in early September until June 2005 which I set at $55,000.

**Future Income Loss/Diminished Earning Capacity:**

**119**  Mr. Turnbull values this future loss issue at $170,000 (rounded) but a finding of entitlement must be based upon a conclusion that the plaintiff falls within the factors set out in ***Andrews***, ***Pallos***, ***Brown*** and ***Palmer***. The test is that of a real and substantial possibility rather than the balance of probabilities that he has been rendered less capable overall from earning income from all types of employment; is less marketable or attractive as an employee; has lost the ability to take advantage of **all** job opportunities which might otherwise be open to him; and he is less valuable to himself as a person capable of earning an income in a competitive market. [my emphasis].

**120**  I am satisfied that the plaintiff fits within each of these tests and to paraphrase the judgment of MacKenzie J.A. in ***Sinnott*** his ability to perform and his capacity to earn have been injury impaired.

**121**  The future loss figure of Mr. Turnbull is based on rather thin evidence of the plaintiff's ongoing loss of revenue. As noted above at para. [32]

Mr. Murphy was uncertain as to what his ongoing loss of revenue might be if these conditions persist, but he thought that $10,000 a year was a reasonable 'ballpark' estimate. **I do not possess any information (e.g. medical or vocational reports) that would allow me to express any opinion as to the existence or quantum of any annual future loss of earnings. For illustrative purposes, I have adopted the assumption that Mr. Murphy's estimate of $10,000 per year of loss will be found to be accurate for as long as he continues working.** [my emphasis]

Nevertheless, I note that the plaintiff does have chronic pain in the neck and back as well as tinnitus and myofascial pain and accompanying psychological problems. He has been in the same field of employment for fifteen years and there are some real limitations as I have found above. Because of the absence of vocational reports or a more precise opinion on an actual annual loss ( and here the defendants' argument that the plaintiff's income has actually increased each year is compelling) I cannot do more than use a figure much lower than the plaintiff's estimate of $10,000 a year. I do recognize however, that the reality of the catalogue of the plaintiff's continuing complaints will realistically result in some diminished capacity. I set that reduction at $4,000 annually. Using Mr. Turnbull's multiplier this results in an award of $68,000.

**Special Damages:**

**122**  I accept that the plaintiff is entitled to only some of his special expenses and these include the prescription costs and passive treatments recommended by his general practitioner up to the summer of 2008 which I set at $4,000. I do not allow the acupuncture or injection treatments and I reduce the amount of mileage claims to $1,500 because of the absence of supporting evidence. I allow the claim for the expenses related to his tinnitus as presented at $4,340 as well as the assessment for his dizziness of $400. In total then the special damages are allowed at $10,240.

**Future Care Costs:**

**123**  I am not satisfied that the treatments by Dr. Frobb are either effective or necessary and they are not allowed. Similarly, the chiropractic treatments and massage therapy treatment even though the plaintiff believes they provide relief. I am satisfied that the claim for tinnitus assessment by a speech pathologist and the Tinnitus Retraining Therapy are proven and they are allowed at $3,790 as well as the intensive training sessions at $1,950. I also find that the counselling sessions for the post-traumatic stress disorder and specific phobia recommended by Mr. Koch are appropriate and necessary and they are allowed at the estimated $4,800. In total then, I allow the plaintiff's claims for future care costs at $10,540.

**Costs:**

**124**  In the absence of some factors of which I am not aware the plaintiff is entitled to his costs with liberty to apply should that be necessary.

T.P. WARREN J.

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[***Preston v. Kontzamanis, [2015] B.C.J. No. 2610***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HK3-JGT1-JPGX-S3V4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Quesnel, British Columbia

W.G. Parrett J.

Heard: November 5-9, 13, 14, 2012;

June 30, 2014 (ordered re-opened);

November 14, 2014 (re-opening abandoned).

Judgment: November 30, 2015.

Docket: 13260

Registry: Quesnel

**[2015] B.C.J. No. 2610** | 2015 BCSC 2219

Between David Preston, Plaintiff, and Panagiotis (Peter) Kontzamanis, Defendant

(203 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Fibromyalgia or chronic pain — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Age of claimant — Determination of damages for injuries arising from motor vehicle accident — Plaintiff was awarded $100,000 in non-pecuniary damages, $30,000 for past lost earning capacity and $75,000 for lost future earning capacity — Plaintiff's vehicle was struck from behind near intersection — At time of accident, he was 45, owned autobody business and enjoyed car racing — Plaintiff had ongoing back problems that had persisted since accident — He continued to suffer chronic back pain, which limited employment activities and recreational pursuits, and limitations were likely to continue.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Extent of incapacity — Loss of earning capacity — Non-pecuniary loss — Pain and suffering — Affecting recreational activities — Determination of damages for injuries arising from motor vehicle accident — Plaintiff was awarded $100,000 in non-pecuniary damages, $30,000 for past lost earning capacity and $75,000 for lost future earning capacity — Plaintiff's vehicle was struck from behind near intersection — At time of accident, he was 45, owned autobody business and enjoyed car racing — Plaintiff had ongoing back problems that had persisted since accident — He continued to suffer chronic back pain, which limited employment activities and recreational pursuits, and limitations were likely to continue.**

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| Determination of damages for injuries arising from a motor vehicle accident. The plaintiff's lower thoracic spine and lumbar spine were injured when his vehicle was struck from behind near an intersection. At the time of the accident, he was 45 and in very good health, owned an autobody business and enjoyed car racing and other outdoor activities. He had pre-existing degeneration in his spinal column, but it was not symptomatic. After the accident, he did less body work and more administrative work and his recreational activities were significantly curtailed.  HELD: The plaintiff was awarded $100,000 in non-pecuniary damages, $0 for past loss income, $30,000 for past lost earning capacity, $75,000 for lost future earning capacity, $70,172 for cost of future care and $14,740 in special damages.  The plaintiff had ongoing back problems that had persisted since the accident. He continued to suffer chronic back pain, which limited his employment activities and recreational pursuits, and the limitations were likely to continue. There was not a measurable risk that the pre-existing condition would have detrimentally affected him in the future regardless of the accident. He suffered a loss of capacity as a result of the accident, but not a loss of income. The award for past lost earning capacity was based on the approximate difference between his pre- and post-accident average line 150 incomes. The award for lost future earning capacity was based on his loss of capacity to age 65. The award for cost of future care included amounts for medication, treatment and exercise aimed at minimizing the pain. |

**Statutes, Regulations and Rules Cited:**

Rules, Rule 11-6

**Counsel**

Counsel for plaintiff: B.K.P. Chudiak.

Counsel for defendant: R.M. Stewart.

**Reasons for Judgment**

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| **W.G. PARRETT J.** |

**INTRODUCTION**

**1**  This action arises from a motor vehicle collision that occurred on May 1, 2005 in Vancouver. The plaintiff was driving a 1991 Toyota Tercel owned by his daughter on 12th Avenue near its intersection with Nanaimo Street when it was struck from behind by a vehicle driven by the defendant.

**2**  In his statement of defence the defendant admits that he was negligent and that his ***negligence*** caused the collision.

**3**  At issue in this action is the extent and nature of any injuries suffered by the plaintiff in the collision and the extent to which damage flows from those injuries.

**4**  The defence asserts that the plaintiff failed to mitigate damages he suffered, that he suffered no past wage loss, and no loss of capacity. The defence further asserts that the plaintiff's claim for the cost of future care is problematic both because of the plaintiff's failure to mitigate and because of overriding credibility issues it says flow from the plaintiff's evidence.

**BACKGROUND**

**5**  Over the course of this trial 22 witnesses testified. In addition seven of these witnesses provided expert reports which were admitted under Rule 11-6 and the terms of a document agreement agreed to by the parties and filed as Exhibit #1.

**6**  The plaintiff, David Gary Preston, was born on August 1, 1959 and is 56 years of age. On the day of the collision giving rise to this litigation he was 45 years of age.

**7**  the plaintiff from Grade 11 embarked on a career in the autobody business. He obtained an apprenticeship with Birks Autobody and attended Okanagan College for training in that field. He completed his apprenticeship in 1981 and obtained his interprovincial autobody and painting certifications.

**8**  The plaintiff worked in a number of autobody businesses and eventually took on a management role with one of them before beginning his own autobody businesss initially with a partner, David McLarry.

**9**  This business was carried on by means of a corporation, Preston & McLarry Ltd. and under the business name of New Technology Collision. The plaintiff bought out his partner's interest in 1993 and since that time he and his wife have been the sole shareholders of Preston & McLarry Ltd.

**THE COLLISION**

**10**  The plaintiff had driven down from Quesnel to Vancouver in a pick-up truck towing an enclosed trailer. The purpose of the trip was to help their daughter move back after completing her year at the University of British Columbia.

**11**  When they work up in the morning they discovered that the truck and trailer had been stolen.

**12**  While making arrangements to get a rental vehicle to complete the move, the plaintiff was driving his daughter's 1991 Toyota Tercel. The plaintiff was stopped at a red light behind two other vehicles. When the light changed the first two vehicles started up and as the plaintiff went to start through the light he was struck from behind by a white Chevrolet Astrovan driven by the defendant.

**13**  The defendant has admitted that his ***negligence*** caused the collision in question.

**SUBMISSIONS**

**14**  The plaintiff's counsel submits that the plaintiff did not embellish or exaggerate the nature or severity of his symptoms to his medical practitioners and aside from some minor errors he is a credible witness.

**15**  Despite his efforts to try various treatments he remains troubled by chronic back pain more than eight years after the collision.

**16**  The plaintiff it is submitted has suffered a major and continuing disruption of his life and his enjoyment of it which is not in any sense caused by pre-existing conditions or any failure on his part to mitigate his loss.

**17**  The plaintiff submits that he has suffered a major disruption of his capacity to work in the only profession he knows, one he began to pursue at the age of 17. This has resulted in both the loss of past income and his future earning capacity.

**18**  He also seeks compensation for the cost of future care and special damages.

**19**  The defendant submits that the plaintiff suffered soft tissue injuries that were very modest to his cervical, thoracic and lumbar spine. Those injuries he submits have resolved.

**20**  The defendant submits that there is no past wage loss, any increased labour cost or any decreased income of any kind.

**21**  The financial records they submit simply do not support any such losses.

**22**  The defendant submits that there is no continuing disability arising from the collision and that any continuing symptoms are a direct result of the progression, development and evolution of the pre-accident degeneration of his spine which has continued to progress.

**23**  These issues the defence submit arise not from injuries arising from the collision but from credibility issues within the plaintiff's evidence.

**24**  The defence relies on a failure to mitigate arising from the plaintiff's failure to follow the recommended weight loss and exercise program.

**THE PLAINTIFF - SYMPTOMS AND INJURIES**

**25**  At the time of the accident the plaintiff was 45 years of age and he was in very good health.

**26**  The plaintiff had left school in Grade 11 and gone into the autobody business where he has worked continuously until the date of trial.

**27**  He and his wife own and operate an autobody business called New Technology Collision and are the sole shareholders of Preston & McLarry Ltd., which owns and operates that business.

**28**  The plaintiff testified that he was unsure if he lost consciousness at time of collision but was dazed and "didn't know up from down for a little while."

**29**  Mr. Preston went on to say that the collision left the vehicles separated by about 10 feet and that although his back and neck hurt he was focused on getting his daughter's move completed.

**30**  He testified that they left Vancouver about 9:30 to 10:00 pm that night and drove back to Quesnel splitting the driving and arriving back home around 6:00 to 6:30 am the next day.

**31**  After getting a little sleep he went to work and that afternoon made an appointment with his family doctor.

**32**  He described his symptoms as including:

1. pain in the middle of the back of his neck;
2. pain in his lower back 3 - 5 inches above his beltline and up his spine;
3. he said his neck felt like a sprain;
4. he said his neck pain was, at that time, constant not throbbing and that it was worse when he rotated his neck to the left;
5. he described feeling like he had to rotate his whole body rather than turning his neck;
6. he described the pain in his back as throbbing like the pain was going in and out;
7. he went on to describe a tingling of his right leg that felt like his leg was falling asleep from his hip to the top of his foot.

**33**  Mr. Preston went on to describe his pain at trial as still persisting in his lower back and periodically still experiencing the leg problem.

**34**  After attending his family doctor and I.C.B.C., Mr. Preston returned to his autobody shop and removed the bumper of his daughter's car which had been scraped and marked. After the bumper was removed he discovered that the frame rails had been crushed in approximately 2 inches and pushed up.

**35**  Before the accident Mr. Preston testified that he did on average about six hours of body work a day as well as attending to the administrative side of his business.

**36**  Mr. Preston testified that he can no longer do the heavier, more physical, parts of his autobody work and has had to find others to do what he had previously done.

**37**  He described ordinary autobody work as being like a workout, including stooping, stretching and heaving lifting. He went on to describe the body movements as requiring all kinds of rotation and at times, laying on your back or twisting to reach into limited spaces.

**38**  Over the years since the accident Mr. Preston described trying to continue various aspects of his profession unsuccessfully and expressed the view that he now can only do the lighter aspects of the job he did before without difficulty.

**39**  Mr. Preston described the heavier aspects of his profession: twisting, stretching and stooping as aggravating the pain in his back. Over the years he has described his use of various pain medications up to and including 20 to 30 injections of Toradel.

**40**  He testified that although he has tried to return to the work he did prior to the accident those efforts have been unsuccessful and he now does mostly administrative work in his business.

**41**  Mr. Preston prior to the accident was involved in car racing and owned his own race car. He described this as being an important part of his recreational activities.

**42**  The racing activities Mr. Preston enjoyed involved at its basic level twisting and turning to get into the race car which he is no longer able to do.

**43**  Many of Mr. Preston's other recreational activities included outdoor activities and sports which involved physical activities or exertion. He has testified that he is unable to participate and enjoy skiing, snowmobiling or fishing activities that were a frequent activity prior to the accident.

**THE NATURE, EXTENT AND DURATION OF THE INJURIES**

**44**  Mr. Preston has described his ongoing symptoms and limitations which he asserts have significantly curtailed his ability to work in his chosen profession as well as curtailing his recreational activities and his enjoyment of life.

**45**  The defendant takes the position that Mr. Preston has exaggerated his injuries and their effect on him. They assert that Mr. Preston has suffered no long term injury or disability and that any such injury was modest and of limited duration. They further say that any continuing symptoms are the direct result of the progression, development and evolution of pre-accident degeneration of his spine.

**46**  These issues the defence asserts are credibility issues that impact directly Mr. Preston's evidence and must be considered in addressing that evidence.

**47**  In order to establish that his ongoing symptoms were caused by the accident, Mr. Preston, must prove on a balance of probabilities that, but for the accident, he would not have suffered the injury or the symptoms and limitations of which he complains.

**48**  One of the most recent formulations of the test can be found in the decision of the Supreme Court Canada in *Resurface Corp. v. Hanke* [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), where the court reaffirmed the "but for" test articulated in *Athey v. Leonati* [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The test articulates the principle that the plaintiff bears the burden of proving that but for the negligent act or omission of the defendant, the injury would not have occurred. At para. 23 of *Resurface,* McLachlin, CJC. concluded that:

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, per Sopinka J.

**49**  This test does not require the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury. The negligent party must take his or her victim as they found him, and is liable even if there are other causal factors, for which the defendant is not responsible. Those other factors may result in the victim's losses being more severe than they would be for the average person. At the same time, the negligent party need not put the victim in a better position than they would have been in, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=); *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=).

**50**  The defendant submits that Mr. Preston's evidence concerning the extent and ongoing nature of his injuries should not be accepted because he was not a forthright witness and there were several contradictions within his evidence which they suggest undermines that evidence.

**51**  The first of these they suggested was the fact that Mr. Preston believed that he had a thoracic compression fracture "...although he was told by his family doctor that he did not have a thoracic compression fracture," and that only on the fifth day of trial did he suddenly remember that he had been told this.

**52**  The defence asks, rhetorically, how does the plaintiff forget such good news?

**53**  I found Mr. Preston to be generally a credible and forthright witness, who was struggling to cope with ongoing pain and limitations on his activities that he did not fully understand or accept.

**54**  Over the course of time from the accident in 2005 until this trial, he tried to continue on at his professional activities while dealing with a seemingly endless parade of doctors, massage therapists, occupational therapists, physiotherapists, economists and other experts, including orthopaedic surgeons, experts in the fields of physical and rehabilitation medicine.

**55**  Over the course of various medical assessments a number of x-rays, C.T. scans and other types of imaging have resulted in a confusing series of reports which appear to find in at least one case "...evidence of acute or healed fracture..." The contents of a report prepared by Dr. Hawk for I.C.B.C. dated April 5, 2006, Exhibit #2 pg. 79 ff at pg. 85 refers to the earlier suspected fracture (Exhibit #2 p. 0070) and concludes that subsequent radiographic studies made it "clear" that there is no evidence "...to suggest a recent fracture..."

**56**  I simply do not accept given the apparent confusion in the medical evidence that a lay person struggling to deal with the pain and limitations should clearly separate in his mind the various opinions and apparently conflicting findings.

**MEDICAL EVIDENCE**

**57**  In his various reports Dr. J.J. Le Roux, a family doctor of considerable experience describes his observations and medical findings dating back to his first examination of Mr. Preston, days after the accident on May 1, 2005.

**58**  Dr. Le Roux in his reports of August 5, 2008 and February 7, 2011 sets out his clinical findings and his opinions.

**59**  I note in passing Dr. Le Roux was the only doctor to examine the plaintiff this close to the accident and his clinical records found in Exhibit #2 record and support the clinical findings summarized in his reports.

**60**  Dr. Le Roux's report of February 7, 2011 sets out perhaps the most detail his dealings with Mr. Preston his findings, his observations and his opinions.

**61**  His initial contact with Mr. Preston after the accident and his findings are as follows:

Mr. Preston suffered a motor vehicle accident on May the 1st of 2005. He indicated that he was driving a vehicle wearing a lap shoulder belt when he was rear-ended by another vehicle. He was in Vancouver at the time. Following the accident he had to help his daughter move furniture. He did experience soreness of his back, mid-back and left side of his neck with radiation into his left shoulder. There was also discomfort over the left trapezius muscle region and this all became worse after he drove back from Vancouver to Quesnel.

**62**  After setting out this initial history Dr. Le Roux set out the following which includes his clinical findings:

He was assessed in Quesnel which found tenderness over his left trapezius muscle with limited range of motion of his C-spine and tenderness in his lower back area. An x-ray was ordered. X-ray that was taken showed a questionable injury to the anterior body of the 11th thoracic vertebrae. A CT scan was taken later on showed degenerative changes to the L4 to S1 area with no disc lesions, no obvious T11 compression. He had persistent lower back as well as neck discomfort.

[Emphasis added]

**63**  Dr. Le Roux goes on to summarize his observations and dealings with Mr. Preston over the years up to February 7, 2011.

Mr. Preston has had ongoing problems that have been bothering him ever since his accident. He was diagnosed with a chronic myofascial pain syndrome that has unfortunately persisted causing problems for him.

Mr. Preston has been having difficulties due to the fact that he has pain associated with lifting anything over 20lbs. He experiences discomfort when he twists and he is unable to do any work above his shoulders. We have also found that he fatigues quickly and as a result has had to resort to doing non-laborious work at his body shop. He mostly does estimations and errands at his business.

Mr. Preston has been very limited in his ability to do any sport or recreational activities. He is capable of only walking and swimming. He finds that he is totally unable to do activities like skiing, race car driving, fishing which he previously enjoyed.

Due to the fatigue that he experiences at the end of the day he is less inclined to socialize and is finding that him and his wife are at home far more than before. He previously would like to go out at functions and dance which he is now currently completely incapable of doing. His personal life is also being significantly affected by his chronic pain. He is finding that he is not sleeping well and that he just needs to take two Advil and Gravol at night before going to bed. His intimate life has been limited due the discomfort that he has and the fatigue that he is experiencing.

**64**  Dr. Le Roux goes on to document various medication uses and various assessment and treatment attempts.

Mr. Preston has been treated with many medications including Toradol injections on a p.r.n basis, he uses Robaxacet, Ibuprofen, Tramacet, Flexural and has also been on Arthrotec and has been on Robaxissal C in the past.

He attended massage therapy as well as physiotherapy which has been associated with a lot of discomfort for him.

Recent assessment showed him to have tenderness over the lower lumbar area with tenderness over the muscles. His lumbar spine showed good flexion to 30cm from the ground, extensions of 30 degrees and a lateral flexion left and right to his knees. He had no cervical tenderness and that part of his injury has resolved completely.

Follow-up CT scans that were taken of his cervical spine in March of 2009 showed degeneration of his discs with significant advanced disc narrowing at the C5 - C6 area with severe foraminal stenosis on the right. He also had a CT scan of his lumbar spine on the 16th of December of 2009 which indicated significant disc space loss with boney spurring, specifically at the L4 - L5 with possible impingement of the L4 nerve root also as well as the L5 nerve root.

This gentleman was referred to multiple rehabilitation exercises as per physiotherapy as well as massage therapy. He was assessed by an orthopedic surgeon, a report is available. He also had a functional capacity affiliation done on in 2006 which suggested that he would be doing well with supervised exercise program for general body strengthening.

**65**  This portion of Dr. Le Roux's report corresponds with and confirms many of the details Mr. Preston provided in his evidence while providing the backdrop of clinical findings of tenderness over the lumbar area.

**66**  The report concludes with Dr. Le Roux's assessment and opinion concerning Mr. Preston's commitment to pursuing recommended treatment modalities before providing his diagnosis as of early 2011.

Mr. Preston has pursued all the suggested treatments with a lot of enthusiasm. He has been to the gymnasium and the pool to try to strengthen himself. He did use aqua exercises. He also saw a chiropractor in Prince George as well as received acupuncture as well as yoga during the treatment period.

He more recently was treated with chronic pain medications including Lyrica and Amitriptyline which unfortunately he could not tolerate.

Mr. Preston's injury is chronic in nature and has plateaued. He therefore has not seemed to improve over the past 24 months. He does seem to have episodes of worsening of his discomfort and certainly times that he is feeling better. However he is generally incapable of performing his social and professional duties as before. He is persisting in the workplace and is trying to make the most of his current abilities. I do not foresee Mr. Preston to have surgery related to his medical problem but I do not anticipate him to improve more than he has up until now. He will definitely benefit from future exercises including continued strengthening of core muscles, back and abdominal muscles and to stay exercising in the pool on a frequent basis.

**67**  In his oral testimony Dr. Le Roux testified that he could not recall Mr. Preston having similar symptoms prior to the accident.

**68**  Later in his evidence Dr. Le Roux testified that he did not believe that Mr. Preston's symptoms would improve if he lost weight. He went on to say that in his view losing weight would not solve his problems and would not affect the pain he is experiencing.

**69**  Dr. M.B. Erlank also provided reports concerning Mr. Preston.

**70**  Dr. Erlank came to Canada in April 2009 and met Mr. Preston for the first time in August 2009, more than four years after the accident.

**71**  While Dr. Erlank's evidence is useful overall it is of relatively little assistance on the issue of causation and the extent of the initial injuries.

**72**  In a report dated December 6, 2010, Dr. Erlank summarized his dealings with Mr. Preston on page 2 where he records Mr. Preston's "ongoing complaint of chronic back pain" in these word:

With regards to the prognosis of Mr. Preston's current condition. Since I have known him, since August 2009, he has had an ongoing complaint of chronic lower back pain. He has had numerous consultations with specialists including an orthopedic surgeon in April 2006 as well as most recently the neurosurgeon in September 2009 and in February 2010. He also had a functional capacity evaluation in December 2006. All of this has shown me that his condition would be chronic. He has underlying degenerative changes to the thoracic and lumbar spine. The opinion of the neurosurgeon Dr. Mutat was that he is not for operative treatment and that conservative measures should be undertaken currently.

**73**  In the following paragraphs Dr. Erlank gives his view of Mr. Preston's future treatment as well confirming limitations found to exist by the occupational therapist who assessed him in December 2006.

The future treatment would include analgesics, anti-inflammatories and various modes of stretching and strengthening exercises and treatment. One of the main aspects of controlling the ongoing lower back pain would be to prevent exacerbations and this will lead to the patient avoiding many activities. I will refer back to the report from Occupational Therapist from December 2006. On page 13 showing restrictions with regards to back flexion and bilateral/lateral flexion which was 50% of the normal. His general body dexterity and mobility showed he would not have a tolerance for prolonged or/and repetitive stooping. His upper extremity function showed that the tolerance for sustained above shoulder level reaching corrected in 2 minutes in duration limited by pain symptoms but he did not have any limitations with regards to forward and downward reaching; so mainly above level reaching. His strength capacity overall demonstrated limited light and some medium strength capacity. Lastly with regards to sitting and standing he did have decreased tolerance for sitting and standing but his walking tolerance and gait pattern was normal. Assessment showed that as an auto body repairman he would have difficulty meeting the full strength requirements to perform his job. The main difficulty would be with stooping and twisting and this is due to the chronic lower back pain.

[Emphasis added]

**74**  During his oral evidence and specifically during his cross-examination Dr. Erlank acknowledged that a sensible exercise program and a loss of weight could possibly lessen his pain but confirmed that, in his view, you could not expect that it would definitely do so.

**75**  Dr. G.H. Hirsch is a specialist in physical medicine and rehabilitation. Dr. Hirsch provided both a written report dated December 23, 2010 and was tendered for cross-examination.

**76**  Dr. Hirsch begins to summarize his opinions on page 8 of his report where he opines that:

Mr. Preston's reported back pain is probably mechanical in nature. That term refers to pain typically exacerbated by activities that stress or load the back. The onset and persistence of the mechanical low back pain is, in my opinion, causally related to the subject motor vehicle accident. This opinion is based on the fact the Mr. Preston had no pre-existing low back symptoms and the absence of any confounding or compounding factors on review of the forwarded post-motor vehicle accident clinical records to account for the reported persistence of his low back symptoms.

Regarding future management, Mr. Preston should carry out an exercise program regularly. This should consist of core truncal strengthening exercises, truncal and hip girdle stretching exercises, and an appropriate cardiovascular workout routine.

Mr. Preston should embark on a weight reducing diet. He may require the assistance of a dietician to be successful in this endeavour.

It is my opinion that Mr. Preston's abrupt decline in function and reported persistent vocational, social, and recreational activity limitations are causally related to the subject motor vehicle accident. According to today's assessment, it appears that his level of function has not significantly changed since he underwent a Functional Capacity Evaluation in the fall of 2006.

At present, I would consider Mr. Preston to be physically capable of performing tasks which are of sedentary, light, and entrance medium level physical demands with some limitations in place. These limitations would include low level activities or tasks requiring repetitive or sustained truncal twisting motions, bending, or stooping.

It is my opinion that at present and in the foreseeable future Mr .Preston will not be able to perform the full spectrum of his work as an auto body technician. He may be able to perform some of the physical aspects of his job temporarily, but probably could not carry out these tasks on a sustainable basis. Fortunately, he owns and operates an auto body shop and, therefore, is able to delegate the more physical strenuous work activities to his employees. At present, he continues to work 40 to 50 hours on average per week, but his work reportedly is more-or-less limited to the administrative and management aspects of his business.

[Emphasis added]

**77**  Dr. Hirsch sets out his concluding opinion on page 10 of his report:

Given the clinical course to date, I would consider it unlikely that Mr. Preston will make sufficient gains to allow him to perform the full spectrum of his pre-motor vehicle accident occupation as an auto body technician. He probably will be able to manage some of the work specific tasks which do not biomechanically stress his low back excessively. It is my opinion that he will probably not be gainfully employable in this capacity or a job of similar physical demands.

Mr. Preston should be capable of performing most domestic chores and some yard-related tasks. However, he probably will have to rely on a hired helper to carry out the more physically taxing activities in and around his home.

**78**  I have reviewed the Functional Capacity Evaluations conducted on the plaintiff by Theresa Wong, an occupational therapist, on October 7, 2006, and again on December 5, 2011. Ms. Wong's comprehensive reports are dated December 6, 2006 and January 13, 2012 respectively.

**79**  Ms. Wong's findings have been touched on in my summaries of the medical evidence and are accurately summarized in the final paragraph on page 17 of her second report:

**Vocational Implications**

According to the NOC, his pre-injury job of auto body repairman (NOC# 7322) requires Medium strength capacity, other body positions, and multiple limb coordination. Based upon findings of functional testing, Mr. Preston does not demonstrate the ability to meet the full demands of an auto body repairman. He did not demonstrate the ability to meet the critical physical demands of this work (i.e. bending, twisting, lifting).

Mr. Preston meets the critical physical demands of automotive body shop supervisor (NOC# 7216) that includes sitting, standing, walking, and limited strength capacity.

**80**  I accept generally the evidence of the plaintiff although, indeed, there were some errors within that evidence. I have already touched on the extent to which the defence relied on the plaintiff's statements that he had suffered "a thoracic compression fracture".

**81**  The fact is the initial report indicated the possible presence of such a fracture. It was not until some four months passed that a scan seemed to dispel that initial report.

**82**  I am wholly unable to afford this evidence the significance the defence urges upon the court.

**83**  When viewed in the context of events as a whole, there were in fact conflicting medical results. To a layperson struggling to deal with pain and disruption of his life as well as conflicting test results it is entirely understandable that he would be confused or uncertain of the situation he was facing.

**84**  I am completely unable to conclude that the plaintiff as a witness lacked credibility or attempted to deceive as the defence suggests.

**85**  I found the plaintiff to be both candid and forthright in his evidence. I also found it less than startling that in a rigorous cross-examination covering many details over a period of some eight years he got some things wrong. I found such errors to be largely inconsequential.

**86**  I accept the evidence of Dr. Le Roux and Dr. Hirsch and conclude that Mr. Preston has ongoing back problems that have persisted since his motor vehicle collision in 2005. He continues to suffer from chronic back pain which limits him both in his employment activities and in his recreational pursuits.

**87**  I accept Dr. Hirsch's opinion and find that the onset and persistence of the plaintiff's mechanical low back pain is causally related to the motor vehicle accident.

**88**  I find that the limitations on his employment, social and recreational activities have persisted to the date of trial, a period of 7 1/2 years, and are on a balance of probability likely to continue.

**FAILURE TO MITIGATE**

**89**  The defence submits that Mr. Preston failed to mitigate his injuries by combining and carrying on with a diet program and an increased and more frequent exercise program.

**90**  In paragraph 31 of their written submissions the defence summarizes the evidence in these words:

1. It is the position of the Defence that Mr. Preston has failed to mitigate his injuries. Drs. Le Roux and Hirsch, and Dr. Hawk and Dr. Boyle all agree that a weight loss program combined with a mix of exercises, core strengthening, etc., should be carried out. Dr. Hirsch was of the view that there was a small chance that this could reduce his pain. However, Dr. Erlank agreed that it was possible for some improvement in Mr. Preston's symptoms and functionality at work and at home was possible if he did these things. Dr. Le Roux felt it was possible that Mr. Preston's symptoms, ie., his pain could improve if he did all of these things.

**91**  In my view, this submission seriously overstates the evidence before the court. In advancing this submission the defence takes the evidence of Dr. Hirsch who "evaluated Mr. David Preston in my office ... on December 23, 2010 ..." and recites his evidence together with that of Dr. Hawk and Dr. Boyle and suggests that "they all agree that a weight loss program combined with a mix of exercises, core strengthening, etc. should be carried out."

**92**  This statement is the starting point for the defence submission on failure to mitigate.

**93**  While technically accurate the submission ignores the actual evidence given by the doctors in question.

**94**  In referring to his recommendations concerning weight loss and exercise on page 9 of his written report, Dr. Hirsch explained in his oral testimony at some length that being overweight did not explain the plaintiff's pain. He went on to testify that the correlation between getting into better physical shape and pain was possible, not probable. He went on to testify that such a program would at most reduce his pain but would not eliminate it.

**95**  When Dr. Hirsch was pressed by defence by putting the proposition to him that with weight reduction there was a better chance of some reduction of pain, Dr. Hirsch pointed to page 13 of his report and pointed out that Mr. Preston has done a wide variety of different kinds of therapy that had been recommended all with no significant improvement.

**96**  He concluded that while there might be a reasonable chance of some improvement in the level of pain, in his opinion, there was little chance of improved function.

**97**  This, in my view, accurately summarizes the opinion of Dr. Hirsch. The defence submission does not.

**98**  Relying on the report of Dr. Hawk is itself problematic. Dr. Hawk despite the request of the plaintiff was not produced for cross-examination. While admitting the report I directed that the issue of the weight to be afforded to it was to be addressed in argument.

**99**  As but one example of the problems that arise from Dr. Hawk not being produced for cross-examination, it is only necessary to refer to those portions of Dr. Hawk's report which deal with his apparent findings on range of motion.

**100**  When those findings were put to Dr. Hirsch by defence counsel in his cross-examination, Dr. Hirsch not only questioned what was recorded but severely criticized this aspect of the report itself.

**101**  The portion of Dr. Hawk's opinion that dramatically differs from that of either of the plaintiff's family doctors, Dr. Le Roux and Dr. Erlank and that of Dr. Hirsch is found on page 7 of his report where in a one sentence paragraph he writes:

On the basis of his present examination I believe that he has largely recovered from the soft tissue injuries he sustained in the motor vehicle accident.

**102**  Despite the fact that this opinion is expressed and directly bears on the central contested issue in this litigation Dr. Hawk was not produced for cross-examination.

**103**  These circumstances dictate that the opinion expressed be afforded little weight.

**104**  Dr. Hawk saw the plaintiff on one occasion on April 5, 2006 at a time when his family doctors had diagnosed him with chronic back pain. Dr. Hawk's conclusion is distinctly different in almost every respect from the other doctors who had assessed Mr. Preston. This is particularly so when viewed from the perspective of the treating physicians most familiar with him.

**105**  One of the leading decisions on the mitigation of damages is *Graham v. Rogers* 2001 B.C.C.A. 432. At para. 35 Rowles, J.A. set out the principle as it applies in personal injury cases:

Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue.

**106**  In *Power v. Carsell*, [*2011 BCSC 1672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22TH-00000-00&context=) at para. 220, Gray, J. had occasion to expand on the principle expressed earlier by our Court of Appeal:

The defence bears a heavy burden in establishing a reduction in damages on the basis of failure to mitigate. The applicable law is well-summarized in *Fox v. Danis*, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=) (CanLII), [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=) at paras. 35-37, aff'd [*2006 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1T2-00000-00&context=) (CanLII), [*2006 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1T2-00000-00&context=).

[35] There is no dispute that every plaintiff has a duty to mitigate his/her damages, and that the burden of proving a failure to fulfil that duty rests with the defendant, the standard of proof being the balance of probabilities: *Janiak v. Ippolito*, [*1985 CanLII 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=) (SCC), [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

[36] In this case, the Defendant submits that the Plaintiff failed to mitigate her loss in that she failed to exercise as recommended by her family doctor.

[37] To succeed in proving these submissions, the Defendants must establish, on the balance of probabilities, that the Plaintiff failed to undertake this recommended treatment; that by following the recommended treatment she could have overcome or could in the future overcome the problems; and that her refusal to take that treatment was unreasonable: *Janiak v. Ippolito, supra* and *Maslen v. Rubenstein* [*1993 CanLII 2465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (BCCA), [*(1993), 83 B.C.L.R. (2d) 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (C.A.).

**107**  I observe that in order to succeed on a failure to mitigate argument the defence must, on a balance of probabilities, meet three criteria:

1. that the plaintiff failed to take the recommended treatment;
2. that by following the recommended treatment he could have overcome the problems and avoided the loss, and;
3. that the refusal to take that treatment was unreasonable.

**108**  In my view, not only has the defendant failed to meet any of these and prove them on a balance of probabilities the reverse is true on the evidence.

**109**  Mr. Preston is viewed by those who know him best including Dr. Le Roux as being a very compliant patient who was willing to try any form of suggested treatment.

**110**  In his written report of February 7, 2011, Dr. Le Roux described Mr. Preston in these words in a paragraph at the bottom of page 2:

Mr. Preston has pursued all the suggested treatments with a lot of enthusiasm. He has been to the gymnasium and the pool to try to strengthen himself. He did use aqua exercises. He also saw a chiropractor in Prince George as well as received acupuncture as well as yoga during the treatment period.

**111**  The evidence articulated by the defence falls far short of meeting the test in this case.

**112**  I point out that the passage quoted above was written by Dr. Le Roux as indicated on February 7, 2011. This was approaching five full years after the accident and was written by the family doctor who had treated him from the date of the accident and prescribed the various treatments.

**113**  The defence argument concerning failure to mitigate must fail.

**PRE-EXISTING CONDITIONS**

**114**  The defendant also includes within their submissions an argument that "...any continuing symptoms of which he complains [are] a direct result of the progression, development and evolution of pre-accident degeneration in his spine which continues ..."

**115**  The issue of causation involves a consideration of whether an accident caused per-existing conditions to be activated or aggravated. The process by which the court assesses damages involves a consideration of whether there was a measurable risk of the pre-existing condition detrimentally affecting the plaintiff in the future, regardless of the defendant's ***negligence***. *Hosak v. Hirst*, [*2003 BCCA 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=).

**116**  In the *Hosak* decision Rowles, J.A. writing for the court, had to consider the issue of causation in a case where the tortious act materially contributed to a non-tortious condition. The principles to be applied in such circumstances were summarized by the Supreme Court of Canada in *Athey v. Leonati* [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) beginning at p. 466:

[13] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: ...

[14] The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the ***negligence*** of the defendant: ...

[5] The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's ***negligence*** "materially contributed" to the occurrence of the injury: ... A contributing factor is material if it falls outside the *de minimi*s range: ...

...

[17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their ***negligence***.

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

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

[19] The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: ... It is sufficient if the defendant's ***negligence*** was a cause of the harm: ...

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

[Emphasis of Major J.]

**117**  An explanation of the way in which a pre-existing condition may be relevant to the assessment of damages as opposed to the issue of causation can be found in *Athey v. Leonati, supra*, under the heading "The Thin Skull" and 'Crumbling Skull' Doctrines" at p. 473"

[34] ... The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: ... Likewise, if there is a measureable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award: ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis of Major J.]

**118**  In their written argument (paragraph 2) and in their oral submissions the defence conflated the issue of causation (whether the accident caused the pre-existing condition to be "activated or aggravated") with an issue relevant to the assessment of damages (whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***).

**119**  In conflating these issues the defence effectively asks the court to find that any and all continuing symptoms are a result of the pre-existing condition rather than the accident.

**120**  With respect on the issue of causation there is no evidence before the court that the degenerative state that existed in the plaintiff's spinal column prior to the accident was symptomatic in any way prior to the collision. Indeed the evidence is almost entirely to the contrary.

**121**  The evidence is that the plaintiff worked without restriction in his professional activities prior to the accident and enjoyed a full and active series of recreational activities.

**122**  Dr. Le Roux in his cross-examination testified that he could not recall Mr. Preston ever having similar symptoms prior to the accident.

**123**  I have no hesitation in finding on the whole of the evidence in this case that any pre-existing condition at the time of the accident was asymptomatic and the accident was the cause or at the very least materially contributed to the injuries and symptoms that followed.

**124**  Moving on the second issue I have reviewed all of the evidence placed before the court. On the basis of that evidence I am wholly unable to conclude that it establishes that there was a measurable risk that the pre-existing condition, such as it was, would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***.

**DR. BOYLE'S MEDICAL REPORT**

**125**  The defendant provided and relied upon what purported to be an independent medical report (IME) by Dr. Boyle.

**126**  Dr. Boyle readily acknowledged that he was not asked to and did not meet with, examine or interview the plaintiff.

**127**  Dr. Boyle reviewed documents and information provided by counsel and wrote his report.

**128**  These documents and that information included clinical records of various medical professionals.

**129**  This is a process that is unlikely to assist the court in any material way. The first concession is invariably, and was in this case, that interviewing, examining and getting a personal history is important to providing an accurate and complete assessment.

**130**  This is a trend that appears to have been of relatively recent origin.

**131**  It is also a trend which has drawn adverse comment from judges of this court. *Dhaliwal v. Bassi* [*2007 BCSC 549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2481-00000-00&context=) (Burnyeat, J. at paras. 2-3); *Ruscheinski v. Biln* [*2011 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6275-00000-00&context=) (Walker, J. at paras. 85-87); *Rizotti v. Doe* [*2012 BCSC 1330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2MR-00000-00&context=) (Tindale, J. at para. 35).

**132**  To these I would add my own comments. Where an expert chooses to prepare a report as he did here, expecting this court to accept and rely on it. He is presenting a report in which he effectively asserts that he accepts as true and accurate the factual base on which his opinions are based.

**133**  Where he does so without seeing, examining or taking a personal history he chooses to offer his opinion on the basis of hearsay. Worse still he chooses to offer it on the basis of his interpretation of hearsay recorded by others.

**134**  Another difficulty presents itself with respect to the report and evidence of Dr. Boyle and the report of Dr. Hawk.

**135**  The clinical records and other documents were admitted under the terms of a document agreement which was entered as Exhibit #1.

**136**  Under the terms of that agreement the use of documents in general, which includes clinical records, is limited. Paragraph 2 and 5 of that document are particularly notable.

**137**  In my view, Dr. Boyle's report should be afforded the weight it deserves and in this case where credibility and exaggeration are both asserted against the plaintiff by the defendant that is no weight at all.

**138**  It was not argued in this case that the report was inadmissible and Dr. Boyle's qualifications to give an expert opinion on this case and in these circumstances was not addressed. I leave it then to another day and for full argument for this court to consider whether the requirements are met to allow the report to be received at all in these circumstances.

**NON-PECUNIARY DAMAGES**

**139**  Non-pecuniary damages are intended to compensate a plaintiff for his or her pain, suffering and loss of enjoyment of life. The philosophical approach is that the damage award should compensate a plaintiff for those damages he or she has suffered up to the date of trial and for those they will suffer into the future.

**140**  The essential principle arising from the authorities is that an award for non-pecuniary damages must be fair and reasonable to all parties and should be measured by the adverse impact of the particular injuries on the particular plaintiff.

**141**  In *Stapley v. Hejslet* [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), Kirkpatrick. J.A. writing for the majority set out at paragraph 46 a list of common factors to be considered in arriving at a proper award for non-pecuniary damages. Although *Stapley* was a jury trial the list of factors is a useful checklist that is clearly not intended to be exhaustive.

**142**  The factors to be considered include:

1. the age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering;
6. loss of enjoyment of life;
7. impairment of family, marital and social relationships;
8. impairment of physical and mental abilities;
9. loss of lifestyle; and
10. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff) *Giang v. Clayton* [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=).

**143**  The plaintiff relies on a series of ten decisions where the non-pecuniary damages award ranged from $80,000 to $125,000.

**144**  The defence submits that non-pecuniary damages should be in the range of $30,000 to $50,000 with a further reduction of 20% for the plaintiff's failure to mitigate. This submission is based on the opinions of Dr. Hawk and Dr. Boyle being accepted. I have already indicated in these reasons my decision with respect to the defendant's submission that the plaintiff failed to mitigate his damages. I have also dealt earlier with the reports and evidence of Dr. Boyle and the report of Dr. Hawke.

**145**  So there is no doubt I prefer the evidence and opinions of Dr. Le Roux and Dr. Hirsch to those of Dr. Boyle and Dr. Hawk.

**146**  In approaching this set of facts I am mindful that although there are objective clinical findings that, in my view, support the plaintiff's evidence his complaints are to a significant extent subjective complaints of pain.

**147**  *Price v. Kostryba* [*(1982) 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) is a decision which is often considered to be an important reminder of the approach the court must take when assessing injuries which depend on subjective reports of pain.

**148**  In this decision, then Chief Justice McEachern wrote a pages 397 - 399:

The assessment of damages in a moderate or moderately severe whiplash injury is always difficult because plaintiffs, as in this case, are usually genuine, decent people who honestly try to be as objective and as factual as they can. Unfortunately, every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages.

...

Perhaps no injury has been the subject of so much judicial consideration as the whiplash. Human experience tells us that these injuries normally resolve themselves within six months to a year or so. Yet every physician knows some patients whose complaint continues for years, and some apparently never recover. For this reason, it is necessary for a court to exercise caution and to examine all the evidence carefully so as to arrive at a fair and reasonable compensation. Previously decided cases are some help (but not much, because obviously every case is different) ...

...

In *Butler v. Blaylock*, [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=) decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence, -- which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**149**  The cautions evident from this decision are equally applicable in the present case and they must be kept in mind throughout the consideration of the case.

**150**  In *Power v. Carswell* 2011 B.C.S.C. 1672, Gray, J. at paragraph 183 wrote:

[183] Non-pecuniary losses have no objective ascertainable value, because there is no market in health and happiness. It is generally not possible to put a claimant back in the position she would have been in had the injury not occurred, and this is especially true of non-pecuniary loss. The Court must fix a sum that is tailored to Ms. Power, and that is moderate but fair and reasonable for both parties, keeping in mind that Ms. Power will not be fully compensated for her future care needs and other pecuniary losses. The Court does not try to assess a sum for which Ms. Power would have voluntarily chosen to suffer such pain, inconvenience, and loss of enjoyment of life.

**151**  In approaching the quantum of non-pecuniary damages, I have considered each of the cases provided by counsel. In examining other awards from other decisions, it is necessary to keep uppermost in your mind the fact that although decisions in other cases can provide some assistance, each case, by the nature of the individual and their circumstances, varies depending on its own facts.

**152**  Keeping in mind the various factors listed by Kirkpatrick, J.A. in *Stapley v. Hejslet, supra*, I note the following:

1. Mr. Preston was 45 years of age at the time of the motor vehicle accident and 52 at trial;
2. Mr. Preston suffered a minor soft tissue injury to his neck which, on the evidence appears to have resolved within a week or two. The major injury was, however, to his lower thoracic spine and to his lumbar spine. These injuries involved damage to the structures including the muscles, tendons and ligaments attaching to his lower thoracic and lumbar spine. The exact mechanism of this injury is unclear as is the role of any pre-existing degeneration. What is clear, in my view, is that any such degeneration was, prior to the accident asymptomatic and may well have remained so but for the accident.

Mr. Preston's injuries have resulted in chronic pain and limitations which have persisted and appeared to plateau. His level of function has not significantly changed since he underwent a Functional Capacity Evaluation in 2006.

Mr. Preston, in my view, at trial and in the foreseeable future will remain unable to "perform the full spectrum of his work as an autobody technician";

1. Mr. Preston has suffered from ongoing pain which is variable and has required the use of pain medication up to, and including occasional injections of Toradal. The variability of the pain appears to be related directly to the activities he is engaged in. In the end his activities have been, for him, significantly restricted in areas which were important to him;
2. The plaintiff has been referred to and engaged in a wide variety of treatment modalities which have provided limited success. He continues to suffer from chronic pain and sleeping problems which leave him exhausted.

While regular exercise programs may provide, over time, some limited relief he will, in all probability, have to live with a level of pain indefinitely;

1. Mr. Preston's injuries and the limitations he now lives under have reduced a very busy and active individual to a more sedentary observer. This has been particularly difficult for Mr. Preston because of his seemingly natural inclination to the activities that are now restricted at best;
2. Mr. Preston's lifestyle both in his profession and in his choice of recreational activities has been significantly curtailed; and
3. For those who have not experienced the adrenaline rush of drag racing or the incredible beauty of a mountain peak in winter from a snow machine, these losses may be difficult to measure. For someone who has lived for them they are a very significant loss.

**153**  Mr. Chudiak referred to and relied upon the decisions in:

*Crane v. Lee*, [*2011 BCSC 898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22H1-00000-00&context=);

*Gosselin v. Neal*, [*2010 BCSC 456*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62NV-00000-00&context=);

*Poirier v. Aubrey*, [*2010 BCCA 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-2211-00000-00&context=);

*Morlan v. Barrett*, [*2012 BCCA 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1TW-00000-00&context=);

*Mohan v. Khan*, [*2012 BCSC 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62F0-00000-00&context=);

*Barnes v. Richardson*, [*2008 BCSC 1349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3MY-00000-00&context=);

*Hoskine v. Mahoney*, [*2009 BCSC 803*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1X0-00000-00&context=);

*Drodge v. Kozak*, [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=);

*MacKenzie v. Rogalasky*, [*2011 BCSC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2RP-00000-00&context=); and

*Hooper v. Nair*, [*2009 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S09W-00000-00&context=)

**154**  Mr. Stewart referred to and relied upon the decisions in:

*Chamberlain v. Profiet*, [*2010 BCSC 1598*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X47Y-00000-00&context=);

Rattenbury v. Samra, [*2009 BCSC 207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3MT-00000-00&context=);

*Smith v. Wirachowsky*, [*2009 BCSC 1434*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B23T-00000-00&context=); and

*Chan v. Lee*, [*2008 BCSC 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DS-00000-00&context=)

**155**  In all the circumstances an appropriate award for Mr. Preston's non-pecuniary losses is $100,000.

**PAST LOST INCOME AND LOSS OF CAPACITY**

**156**  The factors relevant to assessing the value of lost future earning capacity were set out in the decision in *Brown v. Gorlaiy* [*(1985) 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) at paragraph 8:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**157**  In *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at paragraphs 100 - 101 the majority summarized the approach to lost earning capacity:

[100] An award for loss earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in Andrews v. Grand & Toy Alberta Ltd., [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings,* [*[1966] S.C.R. 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22JX-00000-00&context=) *supra.* A capital asset has been lost: what was its value?

[101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood*: Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11; *Ryder v. Paquette*, [*[1995] B.C.J. NO. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79. In adjusting the contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd., supra*, at 253, are a useful guide:

First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ...

[Emphasis added by Low and Smith JJ.A.]

**158**  This present claim is complicated by a number of factors. Firstly Mr. Preston owned his own business, together with his wife. Their autobody shop operated with a number of other employees and with Mr. Preston both working as a body man for part of his time, as well as providing management and supervision to the business.

**159**  After the accident Mr. Preston attempted to continue doing those tasks, or rather discovered that if he did he would suffer pain and other difficulties from doing so.

**160**  The result of this was a transition to a role in his business that was predominately administrative.

**161**  Mr. Chudiak strove mightly to construct various scenarios and calculations to support a past loss while Mr. Preston continued to work in his business, albeit, doing tasks he did not enjoy as much, and that were not the same as those he had done before.

**162**  These hypotheticals were in my view, attempts to bring some logic and apparent certainty to situations that simply didn't exist. In essence, in the end Mr. Chudiak's submissions came down to what is set out in paragraphs 44 and 45 of his written submissions:

1. In respect of this portion of the claim dealing with Mr. Preston's past loss of capacity, or the value that Mr. Preston would have been able to contribute to the gross sales of New Tech, we submit the following:

$2,000 per month x 12 months x 6.5 years = $156,000

commencing in 2006.

1. In respect of Mr. Preston's future loss of capacity, we submit that a global award of $150,000 is reasonable.

**163**  In paragraph 44 Mr. Chudiak mixes the income of New Tech (presumably he means the company Preston & McLarry Ltd.) with "... the claim dealing with Mr. Preston's past loss of capacity ..."

**164**  In addition he suggests that "... the value Mr. Preston would have been able to contribute to the gross sales of New Tech ..." he goes on to present a calculation totalling $24,000 per year.

1. Neither the business New Tech nor the company Preston & McLarry Ltd. are parties to this litigation;
2. I am uncertain as to how the "contribution" of Mr. Preston to the gross sales of New Tech is a claim he can personally advance in this litigation;
3. I am even more uncertain how the claim outlined in paragraph 44 is in any way a loss of Mr. Preston's;
4. In Exhibit #4 are found what is categorized as the "Financials". These documents include the plaintiff's tax returns, the financial statements of Preston & McLarry Ltd. and other financial documents. Mr. Preston's tax returns show at line 150 his total income as:

|  |  |  |
| --- | --- | --- |
| 2000 | $9,098.00 |  |

|  |  |  |
| --- | --- | --- |
| 2001 | 7,726.00 |  |

|  |  |  |
| --- | --- | --- |
| 2002 | 7,918.00 |  |

|  |  |  |
| --- | --- | --- |
| 2003 | 8,872.00 |  |

|  |  |  |
| --- | --- | --- |
| 2004 | 8,362.00 |  |

|  |  |  |
| --- | --- | --- |
| 2005 | 9,582.00 |  |

|  |  |  |
| --- | --- | --- |
| 2006 | 1,654.00 |  |

|  |  |  |
| --- | --- | --- |
| 2007 | 2,280.00 |  |

|  |  |  |
| --- | --- | --- |
| 2008 | 2,358.00 |  |

|  |  |  |
| --- | --- | --- |
| 2009 | 2,438.12 |  |

|  |  |  |
| --- | --- | --- |
| 2010 | 2,888.00 |  |

|  |  |  |
| --- | --- | --- |
| 2011 | 5,025.00 |  |

**165**  These numbers in my respectful view make it clear that Mr. Chudiak's calculations in paragraph 44 of his written submissions are not based on Mr. Preston's declared income but something else.

**166**  In view of the conclusion I have reached the plaintiff, in my view, undoubtedly suffered a loss of capacity as a result of the accident of May 1, 2005. The evidence led by the plaintiff does not, however, establish a loss of income flowing from the accident.

**167**  The closest they approach doing so is by producing the plaintiff's tax returns which are summarized above. These tax returns show a drop in total income from a high of $9,582 in 2005 to $1,654 in 2006 and then the numbers indicated above.

**168**  The problem is that there is little or nothing in the way of explanation for these numbers.

**169**  I am unable to accept the basis presented by Mr. Chudiak for his calculations as they are neither supported by the plaintiff's tax returns nor by the financial statements of Preston & McLarry Ltd. itself.

**170**  Having reached the conclusions I have with respect to the plaintiff's loss of capacity, I am persuaded that there is a compensable loss of capacity that the plaintiff should be compensated for. There is, in my view no calculations presented which can be applied in the traditional way.

**171**  I do not accept that an increase of labour costs to a company who is not a party to this litigation, if it exists at all is compensable.

**172**  No data has been placed before this court which would allow it to draw reasonable inferences that would explain the difference in performance of this company pre and past accident.

**173**  In a very simple form of analysis in three years prior to the accident.

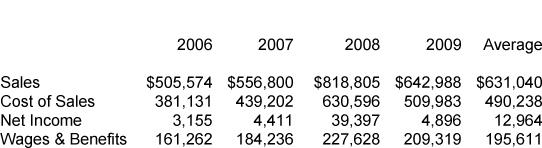
|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | 2002 | 2003 | 2004 |  | Average |  |
| Sales | $725,780 | $521,879 | $345,888 |  | $531,182 |  |
| Cost of Sales | 592.859 | 423,029 | 278,077 |  | 431,321 |  |
| Net Income | (29,965) | (49,788) | (50,146) |  | (43,299) |  |
| Wages & Benefits | 218,455 | 185,559 | 137,420 |  | 180,478 |  |

**174**  These figures in a form of simple analysis show the performance of the company before the accident occurred in 2005.

**175**  In 2005 the numbers during the year of the accident were:

|  |  |  |
| --- | --- | --- |
|  | 2005 |  |
| Sales | $543,945 |  |
| Cost of Sales | 420,444 |  |
| Net Income | (18,597) |  |
| Wages & Benefits | 170,321 |  |

**176**  In the four years since the year in which the accident occurred the same numbers the same numbers taken from the financial statements showed the following:



**177**  It is difficult to know what precisely is reflected in the changes in these numbers but in very general terms the company appears to be performing better after the accident then it was before.

**178**  What is nowhere evident is how these changes impacted the plaintiff or caused his loss.

**179**  In the circumstances and doing the best I can to arrive at a reasonable level of compensation for his past loss of capacity as at the date of trial.

**180**  The average line 150 income of the plaintiff in the five years prior to 2005 is an average declared income of approximately $8,395. In the year of the accident, 2005, his declared income exceeded that amount by roughly a thousand dollars. In the subsequent six years the plaintiff's average line 150 income was $2,773.83.

**181**  I award the plaintiff for past loss of capacity $30,000 representing the approximate difference from the average.

**182**  Turning to the future loss of capacity I am left with many of the same difficulties. Despite Mr. Chudiak's efforts to persuade this court that Mr. Preston would have completed his home shop that he had begun prior to the accident, retired at 55 and continued working on his car restorations of which he was so proud. Working for six months and travelling for the balance of the year. He has fallen short of persuading that this would occur.

**183**  Even Mr. Preston acknowledges that he didn't know if he would make that happen as he hoped at age 55.

**184**  Examining Mr. Carson's table of calculations and report, I have considered its use in the present case. In my view, once again, doing the best I can with an uncertain base from which to work and recognizing that Mr. Preston has a significant loss of capacity as a result of his inability to perform the full range of functions of his chosen profession. I have concluded that this is a case where it would be best served by a global award representing the plaintiff's loss of capacity to age 65 from the date of trial.

**185**  Under the category of Loss of Future Capacity, I award the plaintiff the sum of $75,000.

**COST OF FUTURE CARE**

**186**  Mr. Preston's claim for the cost of future care is based on the recommendations found in the Cost of Future Care Analysis prepared by an occupational therapist, Megan Stacey.

**187**  The detailed recommendations are found in her report beginning on page 6 and summarized in Appendix C.

**188**  The defence's submission with respect to these clams is evident from a couple of typical extracts from their written submissions. In paragraphs 79 and 80 under the heading Future Cost of Care, counsel for the defendant makes the following submissions:

1. The Defence asks the following questions in that why should the Defendant pay for an exercise program the Plaintiff has had the opportunity to do earlier and did not carry on with?
2. Why should the Defendant pay for pool attendances that the Plaintiff has carried out in a less than frequent manner?

**189**  The short answers to the questions posed is the defendant should pay for these items because of the findings this court has made with respect to Mr. Preston's injuries and the recommendations made by the medical professionals who have assessed his needs.

**190**  With the greatest of respect it seems disingenuous for a defendant to argue that a claim should be reduced by the plaintiff's failure to mitigate by pursuing the very recommended activities he now argues they should not pay for.

**191**  So it is clear I conclude and find that Mr. Preston did pursue "... all the suggested treatments with a lot of enthusiasm. He has been to the gymnasium and the pool to try to strengthen himself. He did use aqua exercises."

**192**  This assessment by his family doctor in my view is the opinion of the treating doctor most aware of Mr. Preston's efforts. It seems true that those efforts failed to cure the problems Mr. Preston was having but the medical recommendations suggest such a course of action and treatment may reduce, although it is unlikely to cure, the pain.

**193**  In 1985 in *Milina v. Bartsch* [*(1985) 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) McLachlin, J., as she then was, in addressing the purpose of providing awards for future care costs at paragraph 78 wrote:

The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

**194**  As Bennett, J.A. put it in *Gignac v. ICBC* [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) "... the object of this award is to treat with money, the medically untreatable residual disability."

**195**  Mr. Preston continues to experience lower back stiffness and pain more than seven years after the accident. His symptoms have been diagnosed as a chronic pain syndrome and he is expected to live with pain indefinitely. He must be compensated for the future costs of medication, treatment and exercise aimed at minimizing that pain or reducing it if possible.

**196**  He is also entitled to be compensated for the costs of required activities he can no longer do for himself.

**197**  The costs sought are set out as I have indicated in the report of Megan Stacey and are costed in the report of Robert Carson in Table 1.

**198**  I award the plaintiff under the category of Cost of Future Care $70,172.

**SPECIAL DAMAGES**

**199**  The plaintiff seeks reimbursement for special damages he incurred which total $14,740.07.

**200**  These special damages are detailed in Exhibit #6 together with the supporting documents.

**201**  A summary by category is found at Tab 1 and shows the following breakdown of this claim:

|  |  |  |  |
| --- | --- | --- | --- |
|  | House, Lawn & Yard Maintenance | $6,364.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Medical Treatments and Expenses | 7,154.29 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Over the Counter | 650.21 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Out of Town Expenses | 366.32 |  |

Quesnel & District Pool Passes 205.25

|  |  |
| --- | --- |
| $14,740.07 |  |

**SUMMARY**

**202**  In summary Mr. Preston is entitled to an award of $289,912.07, consisting of the following:

1. $100,000.00 for non-pecuniary damages;
2. $30,000.00 for past loss earning capacity;
3. $75,000.00 for lost future earning capacity;
4. $70,172.00 for the cost of future care; and
5. $14,740.07 for special damages.

**203**  The plaintiff has been largely successful and would ordinarily recover his costs. If counsel are unable to agree costs may be spoken to.

W.G. PARRETT J.

**End of Document**

[***Sauer v. Scales, [2009] B.C.J. No. 1829***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62DT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B.I. Cohen J.

Heard: May 12-16, 2008; January 19-23, April 21 and 22,

2009.

Judgment: September 14, 2009.

Docket: M053548

Registry: Vancouver

**[2009] B.C.J. No. 1829** | 2009 BCSC 1250 | 2009 CarswellBC 2466 | 181 A.C.W.S. (3d) 82

Between Douglas William Sauer, Plaintiff, and Kathleen Elizabeth Scales, Defendant

(313 paras.)

[Editor's note: Supplementary reasons for judgment were released September 28, 2009. See [*[2009] B.C.J. No. 1924*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62JS-00000-00&context=).]

**Case Summary**

**Damages — Types of damages — General damages — Categories of — Loss of enjoyment of life — Loss of opportunity — For personal injuries — Considerations — Duration of loss — Cost of future care — Special damages — Expenses and expenditures — Medical — Medications — Dental — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed in part — Defendant fully liable — Plaintiff suffered serious jaw dysfunction, thoracic outlet syndrome, floaters in eyes and multiple crush syndrome — Plaintiff had returned to physical pursuits to limited extent but injuries significantly impacted quality of life and full recovery unlikely — Plaintiff awarded $135,000 general damages — Special damages sought reduced to $83,586 as some treatments unnecessary or excessive — No loss of opportunity damages awarded as plaintiff misrepresented himself as unemployable to insurer before accident — $116,210 awarded for cost of future care.**

**Damages — Physical and psychological injuries — Physical injuries — Head injuries — Eyes — Impaired vision — Jaw — Action by plaintiff for damages for injuries suffered in motor vehicle accident allowed in part — Defendant fully liable — Plaintiff suffered serious jaw dysfunction, thoracic outlet syndrome, floaters in eyes and multiple crush syndrome — Plaintiff had returned to physical pursuits to limited extent but injuries significantly impacted quality of life and full recovery unlikely — Plaintiff awarded $135,000 general damages — Special damages sought reduced to $83,586 as some treatments unnecessary or excessive — No loss of opportunity damages awarded as plaintiff misrepresented himself as unemployable to insurer before accident — $116,210 awarded for cost of future care.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Contributory *negligence* — Proof of — Duty of care — Motor vehicles — Action by the plaintiff for damages for motor vehicle accident allowed in part — Plaintiff was driving south when defendant emerged from east/west lane and pulled directly in front of plaintiff — Defendant claimed plaintiff was speeding and hit her from behind, but evidence indicated plaintiff hit her vehicle on the driver's side, so she had not completed turn when struck — Defendant had duty to watch for hazards before proceeding onto road, particularly since it was dark and rainy — Defendant entirely liable for accident.**

|  |
| --- |
| Action by the plaintiff for damages for injuries suffered in a motor vehicle accident. Both liability and quantum of damages were at issue. The plaintiff had been travelling south on a dark, rainy night when the defendant pulled in front of him while she was turning right from an east/west lane that ran between commercial buildings. The plaintiff braked, but the pavement was slippery and his vehicle slid into the defendant's. The defendant argued that the plaintiff had been speeding and she had fully completed her turn when the plaintiff struck her from behind. She argued that the plaintiff was equally liable for the accident. The plaintiff testified that he spit out teeth following the crash and suffered injuries to his teeth, eyes, jaw, neck and multiple crush injuries. The plaintiff was only able to eat soft foods following the accident and visited numerous dentists to have his jaw repaired. He underwent two surgeries to his jaw, but still experienced jaw dysfunction and pain. The plaintiff testified that he had difficulty sleeping and had to resign from corporate boards he had been serving on because of pain and reactions to medication. The plaintiff had to have carpal tunnel surgery and his doctor's predicted he may have to have a rib removed to further alleviate suffering. The plaintiff also developed floaters in his eyes, impeding his vision and requiring laser surgery. The plaintiff had retired from his law practice prior to the accident because of a genetic heart condition, but testified that he had still maintained an active social life and participated in various fitness activities. The plaintiff sought $175,000 general damages, loss of opportunity damages for having to resign from boards, $93,509 special damages, cost of future care and special costs. The defendant argued that the plaintiff had mostly resumed his regular life and had a tendency to exaggerate his symptoms.  HELD: Action allowed in part.  The defendant was fully liable for the accident. She was turning onto the road the plaintiff was travelling on and had a duty to ensure it was safe to proceed before turning, particularly given the dark and rainy conditions. The vehicular damage indicated she was struck on the driver's side, not from behind, so had clearly turned in plaintiff's path. The plaintiff's medical experts were unshaken, even on rigorous cross-examination and their evidence was accepted. The evidence established that the plaintiff suffered severe jaw dysfunction, thoracic outlet syndrome and multiple crush syndrome. The plaintiff had resumed some of his physical pursuits, but the prognosis for a full recovery was very poor. The injuries had a significant impact on the plaintiff's quality of life and affected his sleeping, eating, fitness and social life. The plaintiff would require further surgeries and medications and was awarded $135,000 in general damages. The special damages sought were reduced, as some treatment costs were excessive and the plaintiff underwent some treatments not recommended by his physicians. $83,586 was awarded for special damages, and $116,210 for cost of future care, based on expected treatments necessary. No award was made for loss of opportunity as the board minutes clearly stated the plaintiff resigned for reasons other than medical. Furthermore, when the plaintiff resigned from his law practice prior to the accident, he misrepresented to his insurer that he would never be able to work again, in any capacity. The defendant did not behave at all reprehensibly, so there was no basis for special costs. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicles Act, RSBC 1996, CHAPTER 319, s. 144, s. 176

**Counsel**

Counsel for the plaintiff: D.C. Creighton.

Counsel for the defendant: R. Moen, M. Gibson.

**Reasons for Judgment**

1. The Plaintiff's Claim
2. Background
3. Liability
4. Damages
5. General Damages
6. The Plaintiff's injuries
7. The Plaintiff's Wife
8. The Plaintiff
9. The Medical Evidence
10. Eyes
11. TMJ
12. Left Side Symptoms -- Thoracic

Outlet Syndrome

1. Treatments
2. Quantum of General Damages
3. The Parties' Positions
4. Decision
5. Loss of Opportunity Claim
6. Special Damages
7. Cost of Future Care
8. Special Costs and Prejudgment Interest
9. Conclusion

|  |
| --- |
| **B.I. COHEN J.** |

**1. The Plaintiff's Claim**

**1**  The plaintiff alleges that on November 1, 2004, at approximately 5:00 p.m., he was driving his 2001 Jaguar vehicle south on Bayswater Street ("Bayswater"), in the City of Vancouver, proceeding towards the intersection of West Broadway ("Broadway") and Bayswater, when suddenly and without warning the defendant, who was driving a 1992 Chevrolet Cavalier vehicle in a negligent manner and travelling in an eastward direction out of a lane between Broadway and 8th Avenue, proceeded onto Bayswater into the path of the plaintiff's vehicle causing a collision ("the accident").

**2**  The plaintiff also alleges that as a result of the defendant's ***negligence*** he suffered serious physical injuries which have caused and continue to cause him pain, suffering, permanent physical disability, and loss of enjoyment of life, and that all of his injuries, loss and damage, including loss of opportunity, were solely caused or contributed to by the defendant.

**3**  Both liability and the quantum of damages are in issue.

**2. Background**

**4**  The plaintiff practiced law as a solicitor in Vancouver from 1976 until he had to retire for medical reasons in 1998. He suffers from a condition known as laryngeal dystonia, and he has a serious genetic heart condition. Both his heart condition and his laryngeal dystonia require that he avoid stress, and his laryngeal dystonia reduced his ability to speak for long durations, which made it impossible for him to continue in the practice of law or seek any other form of employment.

**5**  After he retired from practice, the plaintiff volunteered to sit on the boards of various organizations, including charitable organizations involved in providing aid to Third World countries. He also served as a director for Global Synfrac Inc. ("Global Synfrac"), a Calgary based company involved in the oil industry. During his term as a director of Global Synfrac, the plaintiff received share options for performing as a director and as Chairman of the Board. He claims that because he was unable to continue with the demands of his Board duties due to his accident related injuries, that he was unable to exercise his share options and did not receive share options worth a substantial sum of money.

**6**  The plaintiff remained physically active following his retirement from the practice of law. He participated in skiing, tennis and other sports activities. He travelled, spent time with his family, enjoyed good food and wine, and generally strove to live as normal a life as possible given his serious medical condition.

**7**  Returning to his accident related injuries, the plaintiff said that his injuries include damage to his eyes, injury to his teeth, jaw and neck, and, a "multiple crush" injury, and that these injuries have necessitated surgical procedures (two to his jaw joints and one to his eyes), as well as painful treatments, dental appliances and Botox injections. To treat his multiple crush injury, he has had surgery to his left wrist for carpal tunnel syndrome and, according to Dr. P. Fry, a vascular surgeon, he requires cubital tunnel surgery to his left elbow. He may also require surgery to remove the first rib on his left side, and to replace the right condryeal head of his jaw.

**8**  The plaintiff said that while he has experienced some improvement, he continues to have significant limitations, including pain, jaw dysfunction and myofascial pain syndrome. Much more worrisome to the plaintiff is the opinion of Dr. D. Karateew, a dentist, that the plaintiff's prognosis for his jaw is poor and that his future is uncertain, with likely continuing deterioration of his mandible, and ongoing pain and limitations.

**9**  The defendant asserted that the plaintiff should be held partially responsible for the accident. She also submitted that whether consciously or unconsciously, the plaintiff has a tendency to amplify the severity of his symptoms. She said that the plaintiff should be awarded an amount for general damages for his soft tissue injuries, for aggravation of his TMJ condition, and for his cracked teeth, but nothing more.

**10**  I turn, then, to the issues of liability and damages.

**3. Liability**

**11**  The plaintiff testified that he turned left onto Bayswater from 8th Avenue and was driving south proceeding to the intersection of Bayswater and Broadway, where he planned to turn right. He explained that there is a lane that runs east/west behind the commercial buildings on Broadway opening onto Bayswater. He said that the defendant's vehicle came out of the lane driving in an easterly direction, right in front of him. It was dark and raining heavily. The plaintiff hit his brakes, but it did not help because the pavement was so wet that his vehicle slid into the left driver's side of the defendant's vehicle.

**12**  The plaintiff said that the point of impact was principally the left side of the defendant's vehicle, on the bumper, around the wheels and on the driver's door. He said that the defendant's vehicle was moving at the time of impact. He said, "It looks like I hit [her vehicle] at the beginning and it carried on, scratching her car all the way."

**13**  The defendant claimed that the plaintiff's evidence about his speed was self-serving and inconsistent. She submitted that the plaintiff's statements to his doctors amplified or exaggerated the severity of the collision and the circumstances surrounding the accident. She pointed out that in his report, Dr. D. Zybutz, a chiropractor, noted that the plaintiff told him that he had T-boned another vehicle at approximately 50 km/h. In cross-examination, the plaintiff was referred to this note and denied that he said he was going 50 km/h, testifying that he meant he was going 30 km/h. When suggested to him that he never told any of his caregivers that he was going 50 km/h at the time of the accident, the plaintiff replied, "I can't say with any accuracy whether I did or did not state to them the speed at which I was going at time of the accident."

**14**  The plaintiff was shown a questionnaire that he filled out for Dr. S.A. Mehta, a dentist, wherein he wrote "T-bone collision at 50 km/h." When asked whether this document refreshed his memory as to whether or not the accident actually happened at 50 km/h and not 30 km/h as he testified, he replied that he was wrong when he filled in the questionnaire.

**15**  The defendant also pointed out that the plaintiff admitted that he knew the area where the accident happened; that he knew there was a lane that ran parallel with Broadway; that prior to the accident he would have seen traffic exiting the lane; that it was quite common to see pedestrians in the area; that he was less than 50 feet away from the defendant when he first saw her; that the defendant was not speeding; that she had her headlights on at the time of the accident; that he was not aware of whether the defendant stopped before she commenced her right-hand turn; that he hit his ABS brakes upon seeing the defendant; that his vehicle hit the defendant's vehicle just ahead of the left rear wheel (he noted that when he saw the photos of the two vehicles it looked to him like he hit her in the left front wheel); that he did not recall if there were any parked vehicles partially blocking the exit of the lane from which the defendant exited; and, that he did not notice the defendant until she was right in front of him.

**16**  The defendant testified, in chief, that as she proceeded down the lane she intended to turn right onto Bayswater to go to Broadway and then turn right again. When asked whether she recalled if she stopped at the end of the lane, she said her recollection is that she did.

**17**  The defendant also said that she had a clear recollection that there was a white car that was parked near the southwest opening of the lane. She said that she stopped in the lane long enough to look to her left and right and left again because she was conscious that the white car was impairing her view to the right. She said she would have automatically had her right turn signal on, and that her speed when she commenced her right hand turn onto Bayswater was slow, not fast. She said that at the time of collision she was fully into the intersection, facing Broadway, and was hit from behind. Her impression was that the plaintiff must have been going fast because she did not see his vehicle before the accident.

**18**  The defendant argued that the physical damage to the vehicles is consistent with her assertion that she had almost completed her right hand turn by the time of the impact. She said that the plaintiff's ***negligence*** consisted of driving too fast and not paying sufficient attention given the busy commercial area and weather conditions. She claimed that pedestrians in the vicinity and vehicles exiting the lane were known hazards for which the plaintiff was required to keep a lookout.

**19**  The defendant referred to sections 144 and 176 of the *Motor Vehicle Act*, [*R.S.B.C. 1996, c. 319*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5GBY-CM31-JYYX-633D-00000-00&context=):

144(1) A person must not drive a motor vehicle on a highway

1. without due care and attention,
2. without reasonable consideration for other persons using the highway, or
3. at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
4. A person who contravenes subsection (1) (a) or (b) is liable on conviction to a fine of not less than $100 and, subject to this minimum fine, section 4 of the Offence Act applies.

...

176(1) The driver of a vehicle in a business or residence district and emerging from an alley, driveway, building or private road must stop the vehicle immediately before driving onto the sidewalk or the sidewalk area extending across an alleyway or private driveway, and must yield the right of way to a pedestrian on the sidewalk or sidewalk area.

1. The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard.

**20**  The defendant contended that, given the close proximity of the lane to 8th Avenue, it was quite possible that she had arrived at the end of the lane and was negotiating around the obstructing vehicle just before the plaintiff made his quick left turn from 8th Avenue onto Bayswater and accelerated southbound. She claimed that she may not have seen the plaintiff on her first check to the left because he might not have turned the corner at that point. She said that if the plaintiff had not turned onto Bayswater by that point, he could not be considered an "immediate hazard" for the purposes of s. 176(2).

**21**  The defendant argued that the parties should bear equal responsibility for the accident because the defendant was exiting the lane and did not see the plaintiff, and the plaintiff was going too fast as he approached the stop sign at Broadway and Bayswater.

**22**  I disagree with the defence position that the Court should apportion liability equally.

**23**  The defendant said in cross-examination that when the accident took place it was getting dark and the weather was "miserable". At her discovery she said, "It was terribly dark, raining, it was horrible." She said that she was familiar with the area. She said that the collision occurred after she had made the turn onto Bayswater. She said that what she believed to be true is that she had completed the turn and was facing Broadway when she felt the impact. She agreed that she did not see the point of impact, but just felt it, and it felt as if it were behind her.

**24**  The defendant could not recall if her vehicle was pushed after the collision. She was certain that she made the turn slowly onto Bayswater. However, at her discovery, when she was asked whether she made the turn quickly or slowly she replied, "I think quite quickly as was safe and indicated by the conditions ... I don't have a recollection of it being exceptional." She said her answer was true, but went on to testify, "But I do have to say that when I say "quite quickly" I -- quickly or slowly, I guess I didn't see myself as creeping out but it wasn't like I was going too quickly, if I can clarify that."

**25**  The defendant was asked on re-examination about a question put to her on discovery about whether she had a specific recollection as to exactly the speed she was going in the turn. Counsel said, "Just seemed to be a normal turn out in the lane?", and she replied, "I think so". She said her answer was true.

**26**  In my opinion, the defendant must bear full responsibility for the accident. Her firm position that she was struck from behind is not borne out by the evidence. I find that the photograph exhibit of the two vehicles is consistent with the plaintiff's version of the collision. The damage to the plaintiff's vehicle as depicted in the exhibit is shown to be primarily to the front passenger side fender and bumper as well as along a portion of the hood. The damage to the defendant's vehicle shown in the exhibit stretches from the fender above the front wheel on the driver's side, with damage showing on the driver's side door, to just behind the driver's side door in front of the rear wheel and fender. There is no damage shown to the rear of the defendant's vehicle. Thus, I find that the defendant was completely mistaken when she testified that she was hit in the rear of her vehicle, and that she had completed her turn onto Bayswater and was facing Broadway when she was struck by the plaintiff's vehicle.

**27**  I also find that the defendant made the turn onto Bayswater quickly as she made her way around the white car that was parked on the southwest corner of Bayswater at the opening of the lane, and that she did not notice the plaintiff's vehicle, who was there to be seen, proceeding in a southbound direction on Bayswater.

**28**  The evidence is consistent that it was dark and raining on the night of the accident, circumstances which call for extra caution. I find that the defendant who was proceeding in an eastbound direction in the lane parallel to Broadway suddenly and without warning pulled out of the lane onto Bayswater in front of the plaintiff's vehicle; that his vehicle struck the defendant's vehicle's front fender on the driver's side; and, that the plaintiff's vehicle pushed the defendant's vehicle or moved along the side of the defendant's vehicle, leaving damage to the front right passenger side of the plaintiff's vehicle and to a large portion of the driver's side of the defendant's vehicle.

**29**  I find that the accident was not caused by the plaintiff driving too fast but rather entirely by reason of the fact that the defendant was not paying due care and attention. The defendant had a duty to yield the right of way to the plaintiff who in the circumstances constituted an "immediate hazard". She failed to yield the right of way and this, coupled with her failure to keep a proper lookout, was the sole cause of the accident.

**4. Damages**

**A. General Damages**

**30**  The plaintiff claimed that he became plagued with debilitating cluster headaches stemming directly from his neck and jaw injuries; that he has difficulty chewing and continues to avoid raw vegetables and salads; that he has experienced excruciatingly painful procedures to investigate damage to the disks in his jaw; that he has suffered interrupted sleep due to wearing dental appliances designed to realign his jaw; that he requires in excess of $50,000 of dental work to rebuild his teeth and reconstruct the site to accommodate his altered jaw mechanics to improve his bite; that he continues to have jaw, shoulder, arm and hand pain, as well as numbness, all of which affects his ability to exercise and play sports without pain; that his continuing injuries and chronic pain affect such basic day-to-day activities as driving a vehicle or using a computer; that his reduced ability to engage in any reasonable degree of cardiovascular exercise, and the considerable stress caused by dealing with this matter, are significantly altering his life expectancy and quality of life.

**I. The Plaintiff's injuries**

1. **The Plaintiff's Wife**

**31**  Mrs. Sauer testified that the plaintiff was devastated when he could no longer practice law due to laryngeal dystonia and his heart condition, and that he busied himself with a variety of volunteer positions. She said that, notwithstanding these issues, he could still type for long periods of time and was frequently on the telephone. She also testified about how the plaintiff began to "exercise with a vengeance", lost 30 pounds, became extremely active in tennis, took up rollerblading, hiking, skiing and running. Between 2001 and the accident, he did not complain of angina or chest pain, and was very active in the aforementioned activities. He was also involved in a number of hobbies, and performed repairs and errands around his own home and at their family cottage on Savary Island, in addition to doing the same for his children and in-laws.

**32**  She also testified about the plaintiff's serious shoulder injury, which occurred in 1990, and which required an eight hour surgical intervention as well as four subsequent surgeries. Since that time, and despite a very poor prognosis, the plaintiff, through extensive rehabilitation efforts, went on to play tennis at a very high level.

**33**  Mrs. Sauer said that she had never seen the plaintiff shake so uncontrollably as he did following the accident. Since he was fearful of remaining in an emergency ward corridor, he refused ambulance service and returned to his family doctor, Dr. J. Van Eeden, who was located just a short distance away from where the accident took place. The plaintiff was provided with medication to calm him down.

**34**  She testified that the plaintiff reported he had done something to his teeth and had spit pieces of his teeth out. He also reported in the weeks ahead that it felt funny when he chewed. He complained of increasing jaw problems and headaches.

**35**  She testified that during the Christmas holidays, it was necessary for the plaintiff to curtail all of his activities; as such, he could not attend Christmas parties or participate in any of his traditional holiday pursuits and, given his difficulties with eating, he was restricted to soft foods. She noted that his "lower and upper teeth were bleeding, and that's not the way it should be ... So, you know, I had to change how we -- changed our diet, and he had started the long, frustrating process of going from dentist to dentist."

**36**  She testified that the plaintiff suffered serious headaches where he would have to go to bed in pain and remain in a dark room. Prior to the accident he had never been treated for headaches. She tried compresses to relieve his headache pain. The plaintiff was taking some "pretty heavy medication", which "seemed to alter his personality when he was taking these drugs." Their family life was disrupted -- he was unable to participate in normal activities and had to leave family gatherings early because of his headaches or jaw pain.

**37**  She testified that the plaintiff continued to see dentists throughout 2005 and said, "It was a job almost. I mean, he was so busy going to dentists and doctors and trying to get to the bottom of this."

**38**  She said how the plaintiff would have bruising from neuromuscular massage and described how she would apply compresses afterwards. She said, "I put warm and alternating packs trying to relax the muscles. It was like living with a semi-invalid and after dinner he would go to bed."

**39**  She testified that following the accident, the plaintiff went through a variety of hard mouth guards, including a two-piece mouth guard that was a "rigid very, very painful thing for him." He wore this mouth guard during the day and then found it a very difficult process to extricate himself from the mouth guard at night, as he was using a CPAP machine for sleep apnea. He persevered, however, and used it for several months.

**40**  She testified that prior to the accident the plaintiff exercised a lot and slept well, but weeks or months after the accident, "he would be waking up, shaking his arms. He didn't have any feeling, and became extremely agitated about that. It was very disruptive; he wouldn't get a good night's sleep."

**41**  She also testified that purchasing a new bed, at the recommendation of Dr. R. O'Connor, a physiatrist, resulted in the plaintiff not fighting against the hard mattress and, "it seemed to help somewhat, yes, it helped."

**42**  She testified that the plaintiff's jaw injuries and headaches from 2004 through 2005 resulted in him not playing tennis or skiing, and he also had to stop running. The plaintiff's eyesight was affected, which restricted his ability to play tennis, read, and use the computer.

**43**  She also said that it was hard for him to eat raw vegetables and whole grains due to his restricted jaw opening. He started to gain weight. He became "crotchety", frequently stating that he was not feeling well, and that he could no longer perform the reading required for his involvement on boards. He reduced his involvement on some boards and stopped on others altogether. The TMJ pain was quite severe and affected his ability to concentrate, to think, and to speak.

**44**  She testified that traveling with the plaintiff after the accident was like traveling with an older person who required a lot of care. She mentioned that he had to use his left arm to carry items because of his right arm disability. Because of that he would have more numbness, and the frequency and intensity of his headaches increased. As well, standing in line-ups was very difficult, as he did not have tolerance or endurance, which also caused him additional stress. She went on to testify that while it was difficult for her, it was even harder for him.

**45**  She described the plaintiff going for many procedures and, in particular, the jaw surgery in 2006, after which his face "was all swollen up and under his eye and they were actually worried that the infection would affect the optic nerve. So there was that danger." The magnitude of the swelling was severe. To demonstrate she held her hand out several inches from her face indicating that, "it was big as I ever -- I mean, as it would go, basically". She also indicated that it was very painful and took several weeks for recovery.

**46**  She testified that the plaintiff's headaches had developed into cluster headaches and he was on very strong pain killers that made him very difficult to live with. He was "irritable a lot", and was unable to do much around the house. He continued to have significant jaw pain, which ultimately led to the April 2006 surgical intervention.

**47**  The plaintiff was involved in another motor vehicle accident in May 2006 (the "second accident"). She described the effects of the second accident, as follows:

... increased -- you know, his headaches continued, perhaps worsened. I would say his jaw pain worsened for a period of time. You know, it's hard to be specific now. Looking back, maybe a month, maybe a month and a half, something like that.

**48**  She also testified that their neighbours helped them open up the family cabin in the first year after the accident, as the plaintiff was unable to do "any of the lifting or working out at the cabin." Aside from some help from their son-in-law, they had to start hiring people to open up the cabin in the years 2005-2007.

**49**  While the plaintiff was previously diagnosed with diverticulitis and had polyps removed, these were done uneventfully. However, as a result of the accident, he was taking larger doses of Arthrotec. She said that this likely contributed to a serious haemorrhaging, which required him to attend at Powell River Hospital, where he was admitted and treated.

**50**  She testified that cluster headaches continued through 2006, with the worst being the first 3 months of 2006, and his headaches and numbness continued through the latter part of 2006. She noted, "I'm trying to be sympathetic ... so it's all kind of a bit of a blur because, yes, my focus in life was to look after him and make sure he's feeling well. You know it's been a constant struggle."

**51**  She testified about the financial challenges in paying for all of the plaintiff's serious and necessary treatments, and having to sell their family home so that they could better manage.

**52**  She described the uncertainty of going to different dentists and experimenting with different mouth appliances in attempts to get the plaintiff's bite restored. She noted that the plaintiff:

... was quite frightened, really literally, that, you know, if his teeth don't meet in the proper way, that is in opposition to one another, that they will loosen and they will fall out, you know, over time. This is not a good situation. So he was frantic to find some way of dealing with that.

1. **The Plaintiff**

**53**  The plaintiff testified that pain and stress produce angina pains and lightheadedness, and that he had experienced very little angina pain prior to the accident.

**54**  He testified that he was specifically instructed by his doctors to exercise at a moderate aerobic level for at least 45 minutes per day at a heart rate of approximately 120 beats per minute. He said that his physicians explained to him that the purpose of this exercise was to strengthen his heart muscle so that it could withstand the inevitable further heart attack to come.

**55**  He testified, as follows:

... in August and late August, I suffered another setback in terms of my heart condition. I do have a chronic atherosclerotic heart condition, which is hereditary and which is progressive. August 28th I was hospitalized at Vancouver General and had surgery, and I had another blockage of my left anterior descending artery in my heart, and it was discovered in that surgery that the earlier stent in that same artery, which was placed in January 2007, had not properly deployed, so that this -- this stent that was put in in 2007 was actually acting so as to block the artery. So I had a two and three-quarter hour surgery in August to properly put in place the one that was put in 18 months before, and then another stent was put in the same artery, so that my LAD artery now has two stents.

**56**  He further testified:

I was hospitalized again on December 23rd at Vancouver General for an atrial-sided heart arrhythmia, and fortunately my heart corrected itself and did not need special drugs or electric shock, but I now have an arrhythmia which is present pretty well all the time, and I get extra beats and missing beats and I feel quite unwell as a result.

**57**  He testified that he has had to wear a number of different dental appliances over the last four years:

Perhaps the worst one I ever had to endure was a nine-month period in 2005 where Dr. Mehta had fashioned an elaborate dental appliance which covered both my upper and my lower teeth and it was joined together by stainless steel wires so that when I put it in I could not speak. I couldn't move my jaw and I couldn't swallow either. I wasn't able to even drink water. And the purpose of that was to try and realign my jaw, and unfortunately it didn't work. But I had to wear that every night when I went to bed.

**58**  The dental appliance also exacerbated his inability to sleep well. He was already using a nasal CPAP machine and was wearing a nose mask for sleep apnea. The CPAP machine expanded his airway and assisted his ability to breathe properly.

**59**  He testified that he was instructed by his neurologist, Dr. M. Mezei, to wear splints on both of his wrists while he slept to address his hand numbness.

**60**  He testified about the negative side effects of Arthrotec, which Dr. Van Eeden had prescribed immediately after the accident. He also described the medication as being very effective as an anti-inflammatory. It allowed his jaw to move better. On every occasion over the past four years that he attempted to discontinue the medication, he found that his jaw was literally frozen.

**61**  He testified that the reason he attempted to discontinue the medication was due to the manufacturer's warning that it had been shown to increase the risk of heart attack by weakening the heart muscle. In addition, the drug is also known to contribute to digestive irritation, including bleeding of the colon. He testified that he does suffer from colorectal bleeding, and was hospitalized on an emergency basis in Powell River in 2006, where he spent two days in hospital and underwent two colonoscopy procedures. He had lost approximately four pints of blood.

**62**  Other medications prescribed by his various physicians have brought him problems as well. One such incident in 2004 involved a severe allergic reaction to an anti-inflammatory called Zanaflex prescribed by Dr. Mehta. His entire body was covered with hives.

**63**  He testified that after recovering from jaw surgery performed in September 2006 by oral surgeon Dr. M. Braverman, once the pain and swelling subsided, he returned to physiotherapy, chiropractic treatments, and neuromuscular massage with Mr. P. Roach. He said that Mr. Roach had treated him for his prior right arm injury and disability for years prior to the accident. However, because of the extensive bruising and excruciating pain as a result of the neuromuscular massage required to treat his jaw, he developed an aversion to attending with Mr. Roach. He said:

... I've seen him for many years because he would treat my right shoulder disability. So I looked forward to seeing him because -- and when I walked out of there, I had more mobility and less pain ... This was before the accident ... I find now that ... when I know I've got an appointment with him, I ... think about it the day before. I don't like going there. I dread it. I mean, you've seen photographs of what he does to my neck. I mean, nobody wants to go and have that done to them voluntarily, unless they have to.

**64**  Physiotherapy, with Ms. T.L. Fraser, consisted of treatment of both his jaw malfunction and his thoracic outlet syndrome. He underwent neck traction and trigger-point therapies for his jaw, among other things. He had to stop attending for treatments with her as of the fall-winter 2007/2008 because he could no longer afford the $100 per hour treatments, in addition to the other therapies and medications for which he was paying.

**65**  He described the jaw traction chiropractic treatments undertaken on a weekly basis throughout 2007 and 2008, as follows:

He does the jaw traction where I ... lie on my back on a table and I open my lower jaw into his hand with resistance, and then I ... close my jaw, resisting his force on it. He actually manages to make my jaw close in a normal way through this jaw manipulation. Unfortunately, it doesn't last very long, but it is a really helpful procedure ... it's painful.

**66**  He testified that he experiences "constant muscle spasms in [his] neck and [his] ... upper left shoulder".

**67**  Since 2005, he has attended Dr. Mehta for Botox injections every three months. These Botox injections continue to the present date. He personally pays for the injections, at a cost of $400 per vial, which is sufficient Botox for two treatments. Each Botox treatment consists of between 12 and 20 painful injections. He receives injections in four different areas of his head, his face and his neck. The most recent treatment, which is rendering him the best results so far, is injections into the digastric muscles, which are located underneath his jaw at his chin and near his carotid arteries. He also testified as to the very negative results from injections to the back of his neck, resulting in a "bobble-head" effect, with him being incapable of holding his neck upright.

**68**  He testified that Botox treatments do not render immediate results. The results are felt several days or as much as a week after the injection, and typically last for roughly six weeks. During this timeframe of relief, he has improved mobility in his jaw and his ability to have his teeth meet (or occlude) is improved, though it does not render a "normal bite", as his molars are still 3mm apart.

**69**  He testified that he is forced to chew his food with his front teeth, and therefore he is precluded from having the foods that are important to his heart health (because of an inability to properly chew the food). He said:

I'm often biting the inside of my lips, particularly my upper lip. In fact, in the last week I've bit it so hard twice it's bled, because my lower jaw is just out of alignment. It's farther forward than it should be and as a result when my teeth come together, they can -- I can pinch my upper lip, like this, and [it's] very painful.

**70**  He testified that if he tries to force chewing of food that is too difficult for him, it becomes increasingly painful and he eventually simply stops eating. He said the muscles in his jaw (and particularly the muscles in the area of his temple) become so sore that he develops excruciating headaches.

**71**  In addition to Botox injections, physiotherapy, and chiropractic treatments, in 2008 he retained Mr. E. Root, a structural medicine therapist practicing in Bellingham, Washington. He said that there is no equivalent medical service or designation in Canada at this time. Mr. Root incorporates physiotherapy techniques with massage therapy and myofascial therapy to work areas of his face, neck, jaw, shoulder and back in ways that seem to render better results than he has received thus far from other therapists.

**72**  In addition to the various painful and costly therapies, he testified that he continues to use costly prescription medications. Despite his active pursuit of remedies, he continues to be in daily pain. His bite is still abnormal, and the muscle pain associated with the jaw problems and the thoracic outlet syndrome has not been resolved.

**73**  He has undergone ten crown replacements for his molars, and the molars have been constructed slightly higher than the teeth used to be (so that when he closes his jaw there is a better chance of the teeth occluding properly). He is about halfway through the bite reconstruction work undertaken with Dr. Karateew, at a cost thus far of approximately $15,000, but his front teeth still need reconstruction.

**74**  Further problems exist with the reconstruction because of his heart condition. Any surgical procedure presents more risk and pain for him, because he is unable to receive general anaesthetic as would any other "normal" patient. Rather, he can only be administered a local anaesthetic (i.e., injections of Novocain into his gums). As well, the work must be performed in more than one session, with each session requiring an excruciatingly painful three to six hours. He testified that the pain, measured on a scale of one to 10, with 10 being the most painful, is a "10 out of 10." He stated the pain is in his teeth, jaw and head, adding, "It just doesn't get any worse." In addition to the actual work being performed, he is required to hold his jaw open for these 1-hour sessions, and said:

Just opening my mouth is difficult, but to hold it open for a matter of hours, it is -- it's so challenging it's hard for me to describe to you, because the muscle goes - - goes into a spasm and that creates a huge cycle of pain and headache. It took me four months to get over the pain from the last session.

**75**  The plaintiff was scheduled to return for another treatment with Dr. Karateew in March 2009, but was unsure as to whether he would be able to do so, as he feared the pain and could no longer financially afford further treatment.

**76**  As mentioned, the plaintiff underwent two separate jaw surgeries, the first being in April 2006 and the second in September 2006. The initial surgery was under sedation in the office of oral surgeon, Dr. Ian Matthew. Dr. Matthew inserted needles into his jaw to flush out debris and extract pieces of broken disks. In turn, this resulted in a bad facial and suborbital infection which took almost three weeks to subside. Dr. Mehta personally attended at the plaintiff's home and sent him to the hospital emergency ward when the post operative infection developed.

**77**  The second surgery performed by Dr. Braverman involved both sides of the plaintiff's jaw. This three hour procedure under general anaesthetic in the hospital involved drilling small holes through the jaw bone to access the inside of the maxillary space of the jaw. This procedure is quite risky because of the proximity of the facial nerves and the risk of damage to those nerves. Although this surgery did provide some temporary improvement, the plaintiff has been advised by Dr. Braverman that there was nothing further that he could do for him. According to the plaintiff, Dr. Braverman removed broken materials from the space, cleaned out infected matter and injected large amounts of steroids.

**78**  In addition to the jaw treatments, in May 2008 the plaintiff also underwent carpal tunnel surgery on his left wrist with Dr. J. Boyle, a plastic surgeon. This surgery was recommended by Dr. Mezei because his left hand would "go numb" at various times. He testified:

My left hand would go numb ... mostly to do with the position of my hand, but it would also go numb while I slept in bed at night, kept waking me from my sleep, so it made it very difficult for me to have a good sleep.

**79**  The carpal tunnel surgery rendered only minimal success, as he continues to experience hand numbness and his grip strength is weakened. He testified he has been advised that the next step is to have an operation on his left elbow (specifically called an "ulnar nerve release" surgery), which could relieve the nerve in the elbow, as it is suspected this is one of the reasons his hand and forearm go numb. He has been cautioned, however, that there is only a 50% chance of relief and that the step after that would be to undertake a further surgery with Dr. Fry, which would involve the removal of his first rib.

**80**  The plaintiff said that all of the above surgeries will require anesthetic which will place him at further risk due to his deteriorating heart condition. He testified that he is very concerned about how a general anesthetic and hospitalization for surgery such as this would impact his general health and recovery. He said:

I'm told that there would be many months of follow-up physiotherapy and that sort of thing to try to get my -- use of my left arm back after the surgery, because muscles will be cut and that sort of thing. But I'm ... increasingly concerned about being in a hospital where infection is rampant ... I've already had one infection from one surgical procedure ... and the consequence wasn't very nice ... I'm also concerned because I discussed this with my cardiologist.

**81**  He stated that following the discussion with his cardiologist the inherent risks were, "I could die. I mean it's pretty serious".

**82**  He further testified that he has an ongoing reduced mobility of his left arm. Merely driving a car or using a computer produces symptoms. Performing any over-the-head work (such as installing a light bulb) is sufficient to produce multiple symptoms, including pain in his neck which radiates down into his back.

**83**  To this day he can only use a computer for a limited period of time. When preparing for trial he spent more time at the computer, and paid a heavy price for it. He testified:

My neck and upper back goes into spasm and I get very bad headaches. It's difficult to work. My muscles are still quite damaged and I still have some sort of neurological problem that's not going away.

**84**  On cross-examination, he testified that he sustained a right arm injury years ago that left him permanently disabled in that arm and shoulder. As such, the lost mobility in his left arm as a result of the accident has greatly exacerbated that disability.

**85**  He testified, however, that before the accident he could still maintain the family cabin, including chopping wood and using a chain saw, despite his right arm disability. He was able to place heavy 4 x 8 plywood sheets over all windows to close the cabin for the winter. Although he has tried on numerous occasions to perform this same work following the accident, he has been unable to do so. He testified, "I've done some of it but, honestly, I just end up in such pain and it just wrecks me for days so it's just not worth it. So I pay people to do that stuff that I used to do."

**86**  In addition to excruciating pain with his jaw, inconvenient and painful therapies to treat same, surgery to his left wrist and more, the plaintiff also testified about the condition of "floaters" in his eyes following the accident. He said that these vitreous floaters were not present prior to the accident:

... after the accident I had literally hundreds of these black spots floating around, and the odd thing about it is they are present when your eyes are open or closed. But of course when your eyes are open and you're trying to read something or look at the computer screen, having these things go around it's very disturbing and difficult.

**87**  Following laser surgery recommended by Dr. C. Beattie, an ophthalmologist, and performed by Dr. D. Lin in September 2005, the plaintiff testified that the surgery took away most (but not all) of the floaters. In the second accident, however, the plaintiff sustained a concussion and the floaters returned. Although the vitreous floaters are greatly improved, the plaintiff testified that he "still [has] vitreous floaters more than four years later."

**88**  Following the second accident, the plaintiff experienced concussion and post-concussion syndrome for about three months, with no residual effects. He sustained injuries to his right shoulder, arm, elbow, wrist, and back muscles in the thoracic and lumbar areas, all primarily on the right side of his body. He testified that an ultrasound confirmed body bruising and internal abdominal bruising. He also suffered injuries to his abductor muscle on the inside upper leg, to his lower leg muscle near the shin bone, and to both knees. All soft-tissue injuries resolved in approximately three months.

**89**  He also testified to having suffered post-traumatic stress disorder. He was treated by Dr. R. Nader, a psychologist, starting in the summer of 2006. He said that he came to realize he had been behaving very strangely and was not able to control his emotions as he had previously always done. He testified that he was feeling very angry, sad, vulnerable, and fearful of driving his car. He attended Dr. Nader every three weeks, or once a month, and continued sessions for roughly one year. He testified that he "felt very, very disoriented, very sad, very -- very depressed". He added, "I mean, obviously the heart attack in 2001 was a big setback for me, but the -- you know, I felt that I was running a race and I was running it pretty well. Out of nowhere came this first accident, and then out of nowhere came the second accident ...".

**90**  The plaintiff testified that his marriage has suffered significantly as a result of events consequent to the two accidents. He elaborated as follows:

I'm not the man I used to be, and I realize I've disappointed my wife in a lot of ways. I feel like I'm a burden to her. You know, instead of being her helper and friend ... I sort of drag her down. I'm sure it's extremely hard for her to put up with a guy who's in pain all the time and who's always running off to doctors' appointments ... when we go on a vacation ... I phone ahead to find out where there's a massage therapist or a physiotherapist so that I can go to an appointment while we're on vacation. ... And I used to be just a normal guy and I'd go to bed at midnight, and now I go to bed at 9:30, because I'm just worn out from pain.

**91**  He said that prior to the accident he had been quite involved with his four grandchildren and two daughters that live nearby. He then testified:

I don't find that I either have the time or the inclination to do it anymore ... I find that, you know, I can't go over and paint a bedroom like I used to or, you know, fix a fence or something like that. It's just not something I can do. I feel like I disappoint them. I feel like I'm a burden to them, too, instead of being a help.

1. **The Medical Evidence**

**92**  The plaintiff saw Dr. Van Eeden one hour after the accident. Dr. Van Eeden addressed the plaintiff's injuries and treatment in his report dated April 16, 2007:

Examination revealed tenderness of M. trapezius (neck muscle) bilaterally, his range of motion was still normal, neurological examination was normal. He had three lower jaw teeth broken and tenderness of both his temporo-mandibular joints.

**93**  Dr. Van Eeden said that he saw the plaintiff again on November 29, 2004, and noted:

He reported that his headaches were severe and daily and complained again about pain in his eyes and difficulties with his vision; he said that he had difficulty looking at a computer screen and that his eyes fatigued easily and had excessive tearing. He reported black spots in his field of vision. He complained about a painful jaw and that he could not open or close his jaw normally. He said that he was very easily fatigued and needed to sleep during the day and go to sleep for the night by 9:30 p.m. which he said was about 2 hours before his normal bedtime. He reported a complete loss of sexual libido. He reported the cancellation of regular business trips to Calgary where he served on an Oil company Board of Directors because of difficulties he experienced with flying and sitting in day long meetings. He also stated that he had been forced by pain and fatigue not to attend other Board meetings in Vancouver during November for other corporations he served as a Board member.

**94**  Dr. Van Eeden attached a summary of the plaintiff's injuries from the accident and his diagnosis, which was based upon medical imaging studies and the information received from various medical specialists and therapists listed in his report, as well as from his own examinations of the plaintiff prior to the accident, immediately after the accident, and in the 29 months following:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Eyes |  | Posterior vitreous detachments in both eyes; vitreous floaters; acceleration/deceleration trauma |  |
|  | Cervical Spine |  | Facet degeneration of C2/C3; spondylosis of C5/C6 and C6/C7; foraminal stenosis of C5/C6; double crush syndrome; acceleration/deceleration injury |  |
|  | Thoracic outlet |  | Injury to posterior core of brachial plexus; neurogenic thoracic outlet syndrome; cervical sensory nerve root radiculopathy |  |
|  | (L) Arm, Elbow and Wrist |  | Carpal tunnel syndrome; cubital tunnel syndrome; ulnar nerve irritation and neuropathy, paresthesiae from shoulder down into left hand; multiple crush syndromes |  |
|  | Neck and Back |  | Muscle tension and spasm and chronic myofascial pain in scalenes, trapezius, teres major, teres minor, latisimus with referral down left arm, hyoids, suprahyoids, levators, erector spinae |  |
|  | Legs |  | Muscle tension and spasm, and pain in quadriceps and soleus |  |
|  | TMJS and Jaw |  | Internal derangement of disks bilaterally; joint effusion; degenerative changes to mandibular condyle; muscle tension and spasm and chronic myofascial pain in masseters, pterygoids, and temporalis |  |

**95**  Dr. Van Eeden opined, at p. 7 of his report, as follows:

In my opinion the injuries listed above **are** consistent with the MVA. Although suitably restrained by his shoulder belt, his airbags did not deploy and he was subjected to sudden acceleration forces of significant nature, as evident from the damage to his full-sized Jaguar XJR vehicle. It is therefore conceivable that Doug's body would also be significantly affected by these forces.

**96**  At p. 8 of his report Dr. Van Eeden said that the plaintiff showed the following limitations and improvements:

1. Visual defects: no change (still has vitreous floaters in visual field)
2. Dental malocclusion: ongoing and unchanged. Affecting his diet choices.
3. (L) Arm neurological sequelae: improving but he can still induce paresthesiae and neurological pain with certain neck motions
4. Lower back and legs: partially recovered
5. Headaches: improving but ongoing
6. Neck stiffness and pain: '50%' improved

**97**  Dr. Van Eeden stated that the plaintiff would need to continue with physiotherapy, neuromuscular massage therapy, and chiropractic treatments for at least another two years and perhaps as long as five years; that he may require further TMJ surgery; that he may require the removal of his first rib on his left side; that he will require oral appliances for the rest of his life; and, that he may suffer from tension-type headaches for an extended period.

1. **Eyes**

**98**  The plaintiff attended Dr. Beattie on February 17, 2005, reporting that he had experienced floaters and photopsias (light flashes) in both eyes subsequent to the accident. The photopsias improved spontaneously, but the floaters in both eyes persisted and interfered with his central vision.

**99**  Dr. Beattie stated in his April 4, 2007 report that upon examination the plaintiff "showed bilateral posterior vitreous detachment with vitreous floaters not seen on previous examinations." These floaters were consistent with his visual symptoms. Dr. Beattie had been the plaintiff's opthomologist for about 20 years prior to this accident, and well knew the condition of his eyes prior to this accident.

**100**  Dr. Beattie stated at p. 2 of his report:

*Floaters* are typically small particles of tissue suspended in the vitreous gel which fills the interior of the eye. Although all of us have floaters, they are usually not symptomatic unless they change position within the eye or if new floaters occur as a result of changes in the vitreous gel such as with posterior vitreous detachment.

**101**  Dr. Beattie also stated that posterior vitreous detachment can occur due to "dislocation or detachment of the vitreous gel from its attachments to the retina as a result of impact to the eye. This often happens in the context of sports injuries, MVAs and other forms of blunt trauma to the head."

**102**  Dr Beattie stated that floaters may be perceived "as discrete mobile dark spots in the field of vision, but may occur as less focused sheets or films in the visual field." He said that the plaintiff has experienced both types of floaters and had symptoms that significantly interfered with "vision critical" activities such as reading.

**103**  At trial, Dr. Beattie elaborated, as follows:

... this separation which normally occurs with aging is sometimes accentuated in circumstances where a sharp blow or deceleration of the eye occurs. Particularly if the deceleration is in a forward direction, what happens is that the process by which the gel separates from the back of the eye is, in fact, accelerated. In fact, it would be analogous to 20 or 30 years of aging occurring in an instant, as the gel is accelerated forward.

**104**  Dr. Beattie's prognosis is that the plaintiff's floaters are unlikely to ever disappear. He stated that there is no treatment for the type of vitreous floaters suffered by the plaintiff.

**105**  Dr. Beattie further testified that the plaintiff's condition had improved following corrective laser surgery, and said:

My assessment of Mr. Sauer's vitreous detachment was that he will probably continue to show objective findings of vitreous floaters for five to ten years.

1. **TMJ**

**106**  The plaintiff claimed to have suffered broken and cracked teeth, anterior displacement of ligaments and disks of the TMJ, and injury to his TMJ muscles. These injuries have resulted in restricted mouth opening and closing, malocclusions of teeth, cluster headaches (which have resulted in nausea, vomiting, and light sensitivity), and severe headaches from muscle spasms. He has been unable to eat many solid foods and has had to radically alter his diet, which has resulted in large fluctuations in his weight. He has suffered degenerative change to the right mandibular condyle and joint effusions.

**107**  Jaw surgery for prosthodontal reconstruction was performed in April and September 2006. According to the plaintiff and Dr. Karateew, much more work is still required.

**108**  In his report dated April 20, 2007, Dr. O'Connor said at pp. 2-3:

1. Temporomandibular joint dysfunction and facial pain -- This appears to be a combination of both temporomandibular joint abnormality that is best commented on by his ENT specialist, Dr. Metha. He has had a bone scan which showed mild inflammation of the TM joint on the right and eventually he was diagnosed with a loose body in the right TM joint and had surgery to remove this and Dr. Metha would be able to discuss this. Mr. Sauer noted that his bite and jaw pain and ability to open the jaw improved considerably after this surgery and steroid injections around the joint. He has had Botox treatments for facial pain and muscle spasm. As far as prognosis, I will leave this to his jaw specialist. He did appear to have suffered a dental injury and had immediate jaw pain after the accident.
2. Dental fractures (broken teeth) -- Deferred to his dentist and jaw specialist.
3. Headaches -- These appear to be multi-factorial. The facial and jaw pain and facial pain and the C2 and C3 facet joints (second and third joints in the cervical spine) are all contributing to his headaches. Mr. Sauer is documented to have significant degeneration of the facet joint at the C2-3 level on the right, as noted on the CT of his facial bones that was done on January 27, 2006. In addition, he has documented myofascial pain or muscle and ligament type tension and pain as a result of the muscles in the head and neck and shoulder region that quite frequently will cause headaches.

**Causation** -- It is my impression that this is a result of the motor vehicle accident, given that the symptoms occurred immediately after the accident and have persisted since.

**Prognosis** -- These headaches have improved to some extent but will continue to occur intermittently as a result of the above-mentioned problems and were initially severely limiting but gradually have improved to the point where on their own they only mildly affect his ability to function on a day to day basis.

**109**  Dr. O'Connor testified that he believed that the plaintiff is probably dealing with "both joint and muscle related pain" with respect to the problem in his jaw.

**110**  Dr. O'Connor described reactive muscle spasms where muscles react to a broken bone, causing reduced mobility in that area, and often times the muscle spasm "can be as uncomfortable as the actual thing that actually happened". In addition, injury to the muscle can also result in spasm of the muscle. He testified that:

The jaw pain can be from a strain to the joint, which I think probably had in Mr. Sauer's case. He definitely strained his jaw joints, or the temporal mandibular joints, and he's got evidence to that, I'm sure. In addition to that, those muscles will then tighten up or become stiff or what we call spastic or spasming and splinting the jaw or trying to keep reduced motion in the jaw, and that can actually become a secondary problem on its own, where those muscles then become painful for him.

...

... there's one other mechanism, I guess. The other mechanism is just an altered mechanics or alignment of the joint can cause muscle spasm or irregular muscle activity. Somebody who's got significant joint degeneration, that can actually contribute to muscle spasm, or abnormal alignment.

**111**  Dr. O'Connor described myofascial pain syndrome as a secondary muscle spasm condition, "where the muscle doesn't seem to want to turn off. It seems to be overactive, irritable and push on if it's tender and refers pain to other areas of the body."

**112**  Dr. O'Connor testified that myofascial pain, "seems to stick around longer than you'd expect for someone that just had, you know, a strain to their quad ... and it causes more chronic symptoms. Muscles seem to be more irritable, don't seem to respond as easily to therapy ... and often they're slower to recover than you'd like".

**113**  Dr. O'Connor noted that in individuals with jaw problems, the jaw needs to be immobilized to allow it to heal. He said that as "the vast majority are having to chew their food or eat and speak, and so if they have very mechanical or movement-related symptoms to the jaw, those symptoms can be aggravated just by the fact of day to day life, eating and talking."

**114**  Dr. O'Connor testified that, "Mr. Sauer had findings consistent with chronic myofascial pain, muscle and ligament tenderness, particularly muscle tenderness, with irritability of that muscle. Push on the muscle, it'll cause - - you can find a knot or trigger in that muscle. And when you push on it, it'll cause some referral symptoms based on that muscle."

**115**  Dr. O'Connor further testified about the limitations of CT and MRI scans, noting that the January 13, 2006 scan outlined changes in the TMJ consistent with rebottling or early osteoarthritis. He noted the anterior and inferior positioning of the mandibular condyles with the patient's mandibular condyle closed, and stated that it is "strongly suggestive of internal derangement and/or joint effusion." Alternatively, the later scan of January 27, 2006 showed mild right side TMJ degenerative changes. Dr. O'Connor noted that early in the degenerative process scans may look good, but it is key for the physician to carefully listen to the patient's recounting of the symptoms. He noted that imaging studies will not show myofascial pain and can be normal, even where there are obvious clinical signs of muscle strain.

**116**  On initial examination, Dr. Mehta noted in his report dated February 15, 2007 that the plaintiff reported concerns with pain in his right temple, upper and lower jaw, jaw joint, face, and ear, and bilateral pains to the lower teeth and eyes. He described to Dr. Mehta headaches with swelling, joint noises, changes to his bite, and persistent pain ranging in severity between six and eight out of ten, where zero was no pain and ten was the worst pain imaginable. He reported a worsening of jaw function in the form of chewing, speaking, coughing, smiling, kissing, and clenching or gritting the teeth, as well as tensing of the shoulders, which altogether had a serious impact on daily activities. He is not able to lower or eliminate the pain.

**117**  Dr. Mehta stated at p. 4 of his report that:

Myofascial examination revealed right masseter trigger point replicating the chief complaint. There was some pain also noted on the right and left temporomandibular joints. Additional painful trigger points were noted on the lateral neck and the upper trapezius. Dentition was noted missing third molars in all four quadrants. There were noted enamel fractures to teeth #42, 41, 32 and 31 with fracture into dentin to tooth #32. Mr. Sauer reported these tooth fractures were the result of the accident. Posterior dentition was noted restored with composite restorations.

...

Initial impression was that of myofascial pain with limited opening, temporomandibular joint arthralgia, further differentiation as to disk displacement without reduction or meniscal tear, chronic daily headaches. Problem list included laryngeal dystonia, hypertension and elevated cholesterol, hypothyroid, snoring versus sleep apnea.

**118**  At p. 16, Dr. Mehta said:

Mr. Sauer did not suffer from regular headaches or jaw and facial pains prior to this motor vehicle accident. Mr. Sauer was an active and healthy individual as a former rugby player, ski instructor and participated in regular exercise. It is my opinion that the motor vehicle accident of 1st November 2004 is directly responsible for the chronic daily headache pains, the orofacial pains consisting of masticatory muscle and temporo mandibular joint arthralgia, fractured mandibular incisor teeth and the protracted protrusion of the mandible preventing complete and adequate closure of the mouth to assist in mastication.

**119**  Dr. Mehta also said that the plaintiff's headaches may continue for an indeterminate period of time.

**120**  On cross-examination, Dr. Karateew testified that, due to chronic impact, the plaintiff had sustained a significant chip in tooth number 1-1 (the front right central incisor). This resulted in an inflamed nerve, requiring a root canal procedure before further dental work could be performed. The chronic impact was due to a displaced mandible sustained in the accident.

**121**  Dr. Karateew stated in his April 18, 2007 report that there continues to be a discrepancy between the opposing maxillary-mandibular occlusal surfaces. This has resulted in significant occlusal trauma to the plaintiff's teeth, which is clinically evidenced by the increased mobility patterns recorded in a full-mouth radiographic survey, a comprehensive periodontal examination, occlusal records, and face-blow registration of his maxillary-TMJ spatial relationship.

**122**  With respect to the issue of anterior displacement, Dr. Karateew testified:

... the mandible was shifted forward and he was only occluding on the anterior, essentially four teeth; almost like one would think of a rabbit biting. His posterior teeth were completely discluded approximately three millimeters. There was no inter-digitation of the back teeth or the -- the important teeth which are designed to support the relationship between the lower jaw and the upper jaw.

**123**  Dr. Karateew testified that this "altered bite" put undue vertical stress on the anterior teeth, for which these teeth are not designed; rather, these teeth normally take a translational course of sliding the jaw forward or from side to side.

**124**  As a result, Dr. Karateew stated that the plaintiff was unable to chew food properly, that he had an inability to grind/masticate food, because he was forced to chew with his front teeth rather than his molars, and that consequently his front teeth "were breaking down."

**125**  The plaintiff said that he has proceeded with conservative treatment, as advised by his medical practitioners, including administration of Botox into his jaw and neck muscles which required trial-and-error to determine the most effective location. Some injections created a bobble-head effect, resulting in the plaintiff being unable to control his head movements. These injections were not only painful but they were also potentially very dangerous. In his testimony, Dr. Karateew confirmed the risk of the Botox procedure as being "something that should [not] be taken lightly" due to the proximity of the carotid arteries:

The nature of the risk is [that it] involves the critical or the vital anatomy ... and considerable consideration was given to the carotid and the plexus in the area.

...

... It was hoped by Mr. Sauer that further Botox treatments would obviate or reduce the amount of prosthetic rehabilitation which I felt was necessary, as those prosthetic procedures are long, expensive and painful and not without certain risk to Mr. Sauer, given his heart condition.

**126**  Dr. Karateew testified regarding the results of the Botox treatments, as follows:

... When it was evaluated that we are getting significant resolution, but not complete resolution, we decided at that time perhaps the only way to achieve an absolute occlusion of the upper and lower teeth was to rebuild them for function and for strength.

**127**  Dr. Karateew went on to testify that if the teeth were not rebuilt they would break down further, due to the inherent fracture lines within the teeth relative to sustained trauma. He further testified that facilitation of the ideal occlusion would alleviate the muscles from any abnormal trigger points that would cause further stress and spasticity.

**128**  Dr. Karateew testified about the most recent cone beam scan taken in May 2008, which is "able to slice it in millimetre slices so we can see a true representation of the entire bony structure as we progress from front to back", giving a three-dimensional representation. He testified that the results of the cone beam scan showed a significant deterioration in the plaintiff's condition, noting:

Dealing with the images that were reviewed, it was discussed that the degeneration was mild, specifically on the right condylar head. Now the images I have here showed significant invagination of the bone of both the right and left condylar heads.

**129**  Dr. Karateew described that on the right condyle head there was invagination of the bone, so that a "portion of the head is missing or is reduced in its capacity", and went on to describe this as moderate to severe degeneration, stressing "severe degeneration of the condyle head".

**130**  Dr. Karateew discussed the changes from the previous reports, in which degeneration was described as being mild, noting, "the two years that have elapsed have also allowed this degeneration to occur to such a significant level." He also noted that reconstruction will allow an alleviation of some of the apparent forces, "hopefully slowing down the deterioration process."

**131**  He concluded, however, by suggesting "that this deterioration is going to be ongoing for the rest of Mr. Sauer's foreseeable life."

**132**  Dr. Karateew indicated that it was premature to assess what treatment would be needed, but it was important to assess each treatment step conservatively in a timely fashion as it arises. The option of removing the condyal head was described, as follows:

Carries significant risks. The history of that type of surgery is fraught with failure, surgical failure; not only product recall, but frank surgical failure; product recall meaning artificial replacements of the joint ... so they have to go back and surgically remove it. Also, there's a significant trauma to the nerves, specifically the cranial nerves ... in the area.

**133**  Dr. Karateew also noticed that the left joint shows similar deterioration and would have similar consequences down the road.

**134**  Dr. W. Regan, an orthopedic surgeon, in his report dated March 23, 2007, stated that the plaintiff has "soft tissue pain involving the muscles of mastication, and has had all the treatment that is reasonable for this condition. Unfortunately he continues to experience headaches as a result of temporal mandibular joint dysfunction."

**(c) Left Side Symptoms -- Thoracic Outlet Syndrome**

**135**  Dr. Regan stated, at p. 6 of his report, that the plaintiff's "left upper extremity and neck complaints are related to the November 1, 2004 motor vehicle accident." He said:

He has left-sided neck pain and cervico-genic headaches, plus spasm in the paraspinal muscles producing neck pain, headaches and likely contributing to his problem of paresthesia into his upper extremity. He has been assessed by neurologists, thoracic/vascular surgeon, and physiatrists, all for management of his left-sided pain and brachial plexus irritation.

After a thorough investigation, including MRI cervical spine brachial plexus region, there is no surgical intervention that will cure his neck pain and solve his left upper extremity paresthesia. The only objective evidence of neurologic involvement is on EMG studies done serially by Dr. Mezei, demonstrating carpal tunnel syndrome, which may be addressed with a carpal tunnel release. Surgical consideration of this is being garnished from Dr. Tom Goetz.

He does not have left shoulder involvement, fortunately, but does have referred pain across to his left and right shoulders. There is no intrinsic pathology referable to his left shoulder that will be helped with arthroscopic or open shoulder surgery at this time.

He has been helped with traction mobilization physiotherapy for his cervical spine, and should continue with this avenue of management. The only surgical procedure that I would advise would be left carpal tunnel release. That does not mean; however, that he will have a very prolonged recovery, and likely have some permanence of his disability referable to cervico-genic headaches, pain in his muscles of mastication, as well as irritation of his brachial plexus.

**136**  Dr. O'Connor stated in his report that the plaintiff suffers from thoracic outlet syndrome of the positional type. At p. 3 of his report he said:

This is a positional narrowing the thoracic outlet (a tract where the nerve, artery and vein exit the neck and pass over the 1st rib, down underneath the collarbone and down into the arm). This is classically worse with overhead activity and use of the arm and the symptoms described are neck, shoulder, arm, elbow and hand pain associated with numbness and tingling that is worse with exertion, particularly overhead activities and repetitive use of the arm. It is often worse lying flat. He has a double crush type phenomenon with irritation of the brachial plexus proximally at the neck and also both at the elbow for the ulnar nerve and at the wrist for the median nerve.

This appears to be one of the more disabling or limiting factors for him. It has restricted his ability to use the left arm and, to a lesser extent, the right arm with similar, albeit less dramatic symptoms. He has a reduced capacity for lifting, reaching and over head lifting as a result of the thoracic outlet. His ability to sleep through the night is affected ... He has evidence of reduced sensory function in a C8-T1 distribution in the ulnar nerves bilaterally in keeping with this, which could be both as a result of pinching of the ulnar nerve at the elbow or proximally at the head and neck region.

**137**  Dr. O'Connor testified that the plaintiff's thoracic outlet syndrome is largely positional and is significantly bothersome at night when lying down, "he would describe the symptoms, the numbness and tingling getting worse." He noted that he sees this in patients and believes that the "arm and shoulder girdle sloughing back on the chest wall, pulling the collarbone back and further narrowing the thoracic outlet that was already symptomatic ... that seems to set people off once they've been ... triggered or started for whatever reason."

**138**  Dr. O'Connor said that the plaintiff has had some benefits from Botox injections into his face and jaw muscles as well as his neck. These injections, however, made his head feel weak and he had difficulty supporting his head.

**139**  Dr. O'Connor said that even though it is not common for carpal tunnel to be caused by a motor vehicle accident, this can occur as a result of the double crush phenomenon, explaining that this phenomenon is:

Where the nerves are irritated proximally at the neck, involving the C8 and T1 nerve fibres that continue down and then eventually pass through the carpal tunnel at the wrist. The compression at the wrist is not significantly exacerbated by the motor vehicle accident but the subsequent muscle spasm and irritation of the brachial plexus proximally at the neck leads to a flare in the patient's symptoms and they are subsequently diagnosed with carpal tunnel.

**140**  Dr. O'Connor stated that the plaintiff has "repeated evidence of irritability of the ulnar nerves at both elbows." He states in his report that this is "the double crush phenomenon where the ulnar nerve has been irritable both at the elbow and proximally at the neck."

**141**  Dr. O'Connor also said in his report that the plaintiff suffers from musculoligamentous strain to the neck, mid and low back. At para. 4 he said:

He has gone on to develop chronic myofascial pain involving the head and neck musculature and, in particular, the left-sided shoulder blade musculature involving the latissimus dorsi, teres major and scalene muscles. This is contributing to some of his hand numbness and tingling as it is a common referral pattern for particularly some of the shoulder blade muscles that cause numbness and tingling down the arm.

**142**  Dr. O'Connor described the mechanism of injury occurring at the brachial plexus between the scalene muscles: "[it is] related to either muscle spasm, fibrous band or scarring in the area. Sometimes an extra bone in the area. Or, at the collarbone and the rib location, or the location of the pec minor, which is a much less common spot, which is just in the pectoral muscle in the front of the chest."

**143**  He also testified that where patients have experienced irritation to the nerve, artery or vein, and specifically the brachial plexus at the inter-scalene triangle at the side of the neck:

... it makes the nerve more susceptible to injury or to be irritated, compressed downstream. So downstream, when we're talking about thoracic outlet, the classic nerves that are affected are the lower part of the brachial plexus, the CA T1, which is the part that goes down into the inside of the hand or the baby finger side of the hand.

If those nerves that are going down to that part of the hand are irritated high in the neck, they can easily be irritated at the elbow or at the wrist.

**144**  Dr. O'Connor agreed with the principle that the neck irritation at the brachial plexus level "actually makes the irritation at the carpal tunnel entry points more likely to occur."

**145**  Dr. O'Connor went on to state that a "motor vehicle accident can cause either scarring or irritation of muscle spasm high up in the neck that can irritate that brachial plexus and then lead to the development of symptoms that sound neurological down the arm." He also agreed that there does not have to be a separate entry in the arm whatsoever, adding:

... and no injury to the wrist, no injury to the elbow, and all of a sudden they've got this neck, shoulder, medial elbow and wrist pain that they never had before, and then they're diagnosed with some mild carpal tunnel. Sometimes you do the surgery and the symptoms improve, but a lot of times those symptoms persist because it's not just a problem here [at the wrist] ...

**146**  Dr. O'Connor testified that the net mechanics of the accident were consistent with the plaintiff's thoracic outlet syndrome and neck, jaw and muscle injuries.

**147**  On cross-examination, Dr. O'Connor testified that simple numbness or tingling would not in itself be indicative of a thoracic outlet injury (other than in the case of a transient worsening). He explained:

... You follow it along and you see if those symptoms go away. You also don't just rely on the numbness and tingling, you try and get a sense of whether the pulse is going away, which helps you a bit with the chronicity, or the pattern that that patient describes as far as when they do things with that arm, what it does. That's probably the most ... the hallmark findings. What happens when they use that arm with patients with thoracic outlet. So when somebody does have rip-roaring thoracic outlet, when they do do it, it causes increased neck, shoulder, elbow, hand pain and numbness and tingling that gets worse the more they use it; they back off, it gets better. If it's numbness and tingling and that seems to be it, and then it resolves, it was either very subtle TOS, yes, possible, or another cause, like carpal tunnel or something else.

**148**  Dr. O'Connor noted that the plaintiff did not fit the expected pattern of having developed a double crush syndrome on the right side after the second accident, although he did have some symptoms that were similar to the syndrome. However, on re-examination, Dr. O'Connor acknowledged that prior to the second accident there was bilateral ulnar neuropathy in both arms, which involved irritation to the plaintiff's ulnar nerve on both sides. He testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, you were asked -- Mr. Moen was engaged in this fantasy of being a plaintiff lawyer and recruiting you to establish the second motor vehicle accident as causative of TOS. Now, would the fact that there was bilateral ulnar neuropathy in both arms be a factor that would go against that conclusion that the second motor vehicle accident was causative? |  |
|  | A |  | He had irritation to his ulnar nerve both sides that were present before the second accident. So those -- a lot of those symptoms of irritability to the nerve behind both elbows that can cause numbness and tingling to his hands were there before, yes. |  |
|  | Q |  | And you explained the mechanism of thoracic outlet syndrome, that it often occurs bilaterally, and it will affect the various levels down the arm? |  |
|  | A |  | It can be bilateral, can be, yeah. It definitely can be. |  |

**149**  Dr. O'Connor also testified that thoracic outlet syndrome can increase in severity over time, independent of any further trauma, and for no readily apparent reason.

**150**  Dr. O'Connor testified that the plaintiff's main complaint was that the use of his left arm was reduced when he was wanting to do things that were repetitive in nature or required a reaching movement, or any movement that required more physical activity. This was significant to the plaintiff because he was not using his right side as readily (due to his previous injury to that area), and as such, "... he was a little bit reliant on that left side than he would have been if that shoulder or arm was perfect. So he had to use that arm more."

**151**  Dr. O'Connor testified that the "consistency in the chronicity of his symptoms, your best trend at what's going to happen down the road is what's happened to date, and so if the patient's symptoms are staying the same or getting worse, it's a bad prognostic sign." At the time of the report, he noted that despite the plaintiff doing all of the right things, his symptoms had not resolved, and that "more likely than not, those symptoms are going to continue."

**152**  Dr. O'Connor noted that in the plaintiff's situation, there are multiple other things going on:

... where one can actually fuel or feed the other problem, the jaw pain problem can fuel a neck problem. The neck problem can fuel the thoracic outlet problem, and all vice versa. Those all are muscle tension or spasm problems that when one starts, they tend to build on one another. So in those patients that seem to have multiple things going on, they tend to fumble along or those symptoms last longer.

**153**  Dr. O'Connor also testified that almost every day he sees patients who have had the rib removal surgery and the "symptoms have not resolved."

**154**  Dr. Fry stated in his report dated March 11, 2007, that on physical examination of the plaintiff he felt that he had symptoms compatible with thoracic outlet syndrome, including paraesthesias and numbness in both hands when using his arm above shoulder level, and also with neck rotation and flexion. He also stated at pp. 2-3:

He had symptoms as well compatible with peripheral nerve problems, was noted to be very handicapped with this issue and unable to function as a ski instructor. He also listed trouble driving and trouble using a mouse on his computer.

... he had positive findings of carpal tunnel syndrome on the left side and also cubital tunnel syndrome on the left as well as signs clinically of carpal tunnel syndrome on the right side with strong positive Tinel's sign ...

On examining his C-spine I noted that extension produced paraesthesias in fingers 3, 4 and 5 and this progressed to the whole of the hand after a period of time.

Flexion produced numbness in the palm of the hand particularly on the left side. Axial-compression test or Spurling's sign was negative for neurological symptoms but he had upper back pain and lower back pain with this test. (The finding of paraesthesias in finger 3, 4 and 5 with C-spine extension tends to suggest nerve root entrapment of the lower brachial plexus ie C7-8, T1 nerve roots.)

I then conducted provocative tests for thoracic outlet syndrome and these were difficult to elicit because of the shoulder injury and getting his shoulder into the elevated position was quite painful.

...

... on the left side he developed tingling and numbness in fingers 3, 4 and 5, being worse on the left than the right. (These findings are compatible with possible neurogenic thoracic outlet syndrome again involving the lower brachial plexus.)

I summarized at the time that the findings were compatible with a double crush syndrome noting that his flexion and extension of the neck was associated with neurological symptoms and this suggested the possibility of C-spine involvement in spite of his CT scan being negative.

**155**  Dr. Fry also indicated in his report that his findings actually constitute what is called a multiple crush syndrome, where the neurological distribution to the upper extremity is being "irritated" at multiple levels (i.e., nerve roots of the brachial plexus, the brachial plexus itself, and also peripheral nerves such as ulnar nerve and carpal tunnel). Dr. Fry stated that this is a recognized entity but obviously adds a tremendous level of complexity in terms of assessing whether a patient is a candidate for decompression of the thoracic outlet.

**156**  Dr. Fry noted in his report that Dr. O'Connor concurred with the diagnosis of 1) mild carpal tunnel syndrome on the left with sensory involvement; 2) mild ulnar nerve irritation and neuropathy bilaterally, worse on the right than the left; and 3) neurogenic thoracic outlet syndrome. Dr. Fry said that these three issues would together constitute a condition of multiple crush syndrome.

**157**  Dr. Fry also said in his report that Dr. Mezei confirmed an impression of left-sided thoracic outlet syndrome or cervical radiculopathy, as well as left carpal tunnel syndrome, and recommended to the plaintiff consideration of both first rib resection and also decompression of the carpal tunnel.

**158**  At p. 9 of his report, Dr. Fry summarized his findings, as follows:

Certainly there is compelling evidence of neurogenic thoracic outlet syndrome on the left side but this is clouded by the fact that he also has evidence of C-spine problems and peripheral nerve issues that have been described thoroughly in my report and the reports of Dr. Mezei and Dr. Russell O'Connor.

The difficulty with this situation is that although he can be treated for thoracic outlet syndrome by removing the first rib, it is going to be very difficult to offer a prognosis in terms of the resolution of his symptoms given the fact that there are two other issues namely the carpal tunnel and cubital syndrome and the nerve root irritation.

Typically if patients only have neurogenic thoracic outlet syndrome, they tend to derive a significant benefit from having first rib surgery in the region of 60-70 percent anticipated improvement certainly with respect to neurological symptoms.

Given the complexity of multiple crush syndrome this statement however has to be modified and it would be very difficult to give a firm figure in terms of what might be expected if he was to undergo first rib surgery.

Certainly in terms of causation from the history it would appear that Mr. Sauer's symptoms were exacerbated by the accident of November 1st and historically, from notes of other physicians, particularly Dr. Mezei, Dr. Regan and Dr. Zybutz, that his neurological symptoms derived from that accident were exacerbated by the subsequent accident of May 2006.

**159**  On p. 10 Dr. Fry said:

It seems clear that Mr. Sauer does in fact have significant musculoskeletal and neurological symptoms with respect to the left arm and that the diagnosis is one of a multiple crush syndrome where he has evidence of cervical spine compression, of neurogenic thoracic outlet syndrome, of cubital tunnel syndrome and of carpal tunnel syndrome.

I would relate these events to the accident of November 1, 2004.

**160**  Dr. Fry also said at p. 10 that both carpal tunnel and cubital tunnel syndrome are fairly easily resolved from a surgical standpoint and that thoracic outlet syndrome surgery is somewhat more complex, but nevertheless surgery is usually very beneficial. He stated that he would have to defer to a neurosurgeon with respect to comment on the C-spine issues in this particular setting. In his best assessment, Dr. Fry said that there is at least a 50 percent chance that at some point in the future the plaintiff will have to face the need for surgical intervention for this condition.

**161**  Dr. Fry has most recently advised the plaintiff that he will require cubital tunnel surgery as a further step in determining whether he will require thoracic outlet surgery.

**162**  The plaintiff also claimed that his neck injuries include cervical sensory root radiculopathy and acceleration/deceleration injury to C-spine herniation, and that he also suffers from muscle hypertonicity, muscle weakness, facet degeneration of C2/C3, spondylosis of C5/C6 and C6/C7, and foraminal stenosis of C5/C6.

**163**  Dr. Fry noted in his report that it was difficult to postulate whether the plaintiff's neurological symptoms with respect to the neck were coming from his nerve roots or from compression on the thoracic outlet. He also noted that the plaintiff had clear cut evidence, clinically at least, of carpal tunnel and cubital tunnel syndrome on the left and suggested that, if the diagnosis was confirmed, that, rather than consider first rib resection, it would be more appropriate to think in terms of carpal tunnel release and ulnar decompression, with a re-evaluation to follow.

**164**  In addition, Dr. Fry testified that the plaintiff suffered from C-spine nerve root irritation prior to the second accident. Dr. Fry testified that on his first examination of the plaintiff:

... he had reproduction of his neurological symptoms, and all he was doing was sitting there, you know, extending his neck, flexing his neck, lateral flexion, and that produced neurological symptoms. So you're not stressing the brachial plexus at all. What you're doing is an examination of the nerve roots, and that was positive, which is why I said something [was] going on, probably with the nerve roots. And in the elevated arm stress test, there's a whole different issue, because now you're stressing the brachial plexus further out. So that's where I concluded that, okay, there's an issue in the neck, don't know exactly what it is, issue at the level of the first rib, and then more peripheral issues. So I think they're all discrete.

**165**  On cross-examination, Dr. Fry testified that it is likely that surgery would only be 60 to 70% effective, "in terms of getting rid of the neurological symptoms." On re-examination, he stated, "I mean if I was operating on him tomorrow, I would say there is probably a 50-50 chance that I'm going to improve his symptoms, and then the neck would be an unknown, and that's why I wouldn't touch it without getting an opinion from a neurosurgeon." Dr. Fry then said, "... Once you factor in other issues, such as arthritis, potentially nerve root problems, obviously the numbers go down."

1. **Treatments**

**166**  Turning to the plaintiff's therapy providers, Dr. Zybutz gave the following opinion in his April 10, 2007 report, on p. 7:

It is my opinion that Mr. Sauer's injuries were sustained by a hyperflexion/hyperextension injury, and that they are consistent with the rapid deceleration he experienced in the November 1, 2004 MVA.

**167**  It was Dr. Zybutz's opinion that the following accident related injuries were sustained by the plaintiff:

1. Cervical Spine Degenerative changes at C2/C3 restricting ROM, in addition to a disk herniation at C6 contributing to a radiculopathy. Hyperflexion from deceleration damaged the disk. Nerve root impingement resulting from inflammation from injury;
2. Headaches resulting from ischemic changes from the cervical injury as well as the TMJ injury;
3. Lumbar spine facet damage from hyperflexion around lap belt;
4. TMJ ruptured disks with associated muscle injury from anterior translation of the mandible during deceleration;
5. Thoracic outlet injury sustained by damage to the left brachial plexus;
6. Carpal tunnel and cubital tunnel syndrome from the force of deceleration.

**168**  Dr. Zybutz stated that, "Over the course of his treatment Mr. Sauer has experienced poor results with his TMJ function, carpal tunnel syndrome, cubital tunnel syndrome and thoracic outlet symptoms."

**169**  Mr. Roach stated in his report dated April 13, 2007, that on initial examination the plaintiff described his symptoms as follows:

These included pain and tenderness of the temporomandibular joint (TMJ) bilaterally, neck pain in the trapezius region and muscles along the side and back of the neck up to the base of his skull; lower back pain in the Thoracic and Lumbar regions as well as over the sacroiliac joints; broken teeth, daily headaches and dizziness with "the top of his head feeling as if the hair is standing on end". Mr. Sauer also complained that these symptoms were interfering with his sleep and daily routine. Generally, Mr. Sauer had to refrain from any physical activities during this time.

**170**  Mr. Roach said that the plaintiff's range of motion in his lumbar spine had decreased significantly and his active range of motion at the neck was only 12 degrees to the right and 11 degrees to the left, at which point pain was then experienced.

**171**  Mr. Roach further stated in his report that on palpation all suboccipitals were painful to touch, even when using only ounces of pressure, which was in sharp contrast to the week prior to this accident when he last treated him. He also stated that his middle trapezius and rhomboids were stiff and sore to touch with numerous trigger points throughout; that the left quadratus lumborum was in clear spasm, as were the right upper trapezius and left latissimus dorsi; and, that bilaterally the hamstrings had increased tonicity, with the left seeming more taut and more painful at the attachment on the ischial tuberosity.

**172**  Mr. Roach said in his report that the TMJ examination revealed a decreased range of motion in the plaintiff's right TMJ, resulting in a shift of his jaw to the right when opening.

**173**  At pp. 7-8 of his report, Mr. Roach provided his clinical impression, as follows:

... Mr. Sauer suffers from severe ligamentous sprains in his low back and neck regions as a direct result of this MVA. I also believe he suffers from severe stains to his anterior and posterior paraspinal musculature, deep hip rotators, left hamstring and anterior compartment musculature. As a result he experiences muscular compensations due to an imbalance in the muscular tonus system thus leading to faulty posterial deviations and dysfunctional biomechanics. There is a definite instability in the upper cervical spine as well as lower lumbar spine and sacral iliac joints. He lives with headaches ... and low back pain on a daily basis, as well as stiffness and general fatigue. His life style has changed dramatically as a direct result of his symptoms. His sleeping habits, daily life activities, social and physical activities were and remain interrupted due to his condition. He has made some improvements in strength and endurance, but not to his pre-crash level.

... Mr. Sauer's injuries include the tearing of the connective tissues: muscles, tendons, ligaments, fascia, and joint capsules. Neck and back pain, headaches, muscle hypertonicity, trigger points, postural deviations, joint instability, and muscle weakness, are initially the result of early swelling of the joint capsules and soft tissues. Spraining and straining of soft tissues in this fashion results in the healing by granulation tissues (collagenous/scar tissue). Scar tissue results in weakness, and decrease in elasticity of the soft tissues. Every day activities can irritate the tissues and cause severe discomfort. This is definitely the case with Mr. Sauer. Faulty biomechanics, joint instability and postural deviations, as described previously ... can lead to early degenerative changes. This is because the body has moved off the coronal and midsaggital planes, resulting in abnormal stress placed on his joints. Chronic pain and disability, such as Mr. Sauer experiences, is the inevitable result.

**174**  Mr. Roach noted in his report that the plaintiff was physically active prior to his accident and was in good health, that he had an active social life as well as having many demands placed on him in home life, and that he was living a full life.

**175**  Mr. Roach said that the plaintiff has made some improvement, for instance his headaches have decreased and are not as debilitating as they used to be, but that he continues to experience low back, hip and hamstring pain as well as upper back and neck pain, and the instability in his low back and neck persists, despite corrective treatment.

**176**  In her report dated April 12, 2007, Ms. Fraser stated:

Findings on Assessment

On my initial assessments made of Doug during my sessions in February, 2005, I found the following:

1. marked restriction in both opening and closing his mouth with significant malocclusion of his teeth. His opening measured 30mm (normal is 50-60mm and 40mm is functional) and his retrusion and his right lateral deviation was significantly restricted;
2. painful trigger points in his masseters, temporalis, and pterygoids bilaterally, upper trapezius, and scalenes;
3. very tight anterior muscles of his neck;
4. neurogenic pain down his left arm with left-side flexion of cervical spine;
5. left-sided radicular pain to the medial left hand 3 fingers and related paresthesia in his left hand and left forearm.

Initial Treatments and Response

1. Education regarding posture;
2. manual therapy including manual mobilizations of the TMJ (TMJ traction, right lateral deviation, anterior glide), cervical traction, sub-occipital traction;
3. soft tissue mobilization of the masseter, temporalis, medial pterygoid, and pressure release of the lateral pterygoid;
4. manual stretching of the scalenes, upper trapezius, pectoralis minor;
5. ice as anti-inflammatory for the TMJ;
6. heat for release of soft tissue spasm of the neck, lumbar spine and TMJ muscles;
7. Posture Exercises including lying on a half Styrofoam roll for postural correction, chin tuck for suboccipital muscle lengthening and for deep cervical strengthening;
8. anti-inflammatory modalities including ultrasound of the TMJ and Laser therapy;
9. Home Exercise program of TMJ exercises including exercise to "spin" the TMJ joint to facilitate opening.

**177**  Ms. Fraser also stated in her report that the opening of the TMJ was observed to increase after traction therapy, from 30mm initially to 45mm in May 2005. By January 2006 an opening of 50mm was attained, and has remained at that level to date.

**178**  Ms. Fraser indicated that she implemented and has continued to implement a program of physical medicine modalities to improve cervical as well as TMJ range of motion under the direction of Dr. Mehta. Dr. Mehta also requested that physiotherapy target soft tissue mobilization of the masseter in order to improve closing of the mouth and occlusion of the teeth; however, closing of the teeth remains limited.

**179**  Ms. Fraser further stated that traction mobilization of the cervical spine was performed as prescribed by Dr. Regan, further to his diagnosis of irritation of the posterior cord of the brachial plexus due to acceleration/deceleration of the cervical spine.

**180**  Ms. Fraser said that she used cervical traction, heat, and postural exercises as a result of Dr. Fry's diagnosis of double-crush syndrome, carpal tunnel syndrome and cubital tunnel syndrome on the left, and his findings that cervical spine extension produced paresthesias in fingers 3, 4, and 5, which progressed to the whole left hand, and flexion produced numbness in the palm of the hand.

**181**  Ms. Fraser said that Dr. O'Conner diagnosed the plaintiff with neuropathy bilaterally, and neurogenic thoracic outlet syndrome on the left with associated paresthesia down into the hand, and found muscle tension and spasm in the scalenes, trapezius, teres major and minor, and latissimus. As a result, physiotherapy was recommended and Ms. Fraser taught the plaintiff techniques to settle his scalene spasm, which included diaphragmatic breathing, stretching and strengthening, and posture correction. Ms. Fraser also prescribed an exercise program to correct scapulo-thoracic rhythm, which included strengthening the middle and lower trapezius.

**182**  Ms. Fraser said that because Dr. Mazei diagnosed the plaintiff with carpal tunnel syndrome, ulnar nerve irritation and radiating neck pain with positive Spurling's maneuver, which supported a cervical sensory nerve root irritation finding likely due to degenerative spine disease, she worked on postural correction, including stretching of pectoralis minor and the scalenes.

**2. Quantum of General Damages**

1. **The Parties' Positions**

**183**  The plaintiff submitted that the management of his injuries has required that he comply with a massive number of physician and therapist appointments. He contended that the accident has deprived him of the ability to perform even the basic functions of life without pain. He argued that general damages should not merely reflect the almost five years of chronic pain and severe lifestyle limitations, but also the fact that his prognosis both with respect to his TMJ injury and thoracic outlet syndrome are pessimistic. He also said that it is probable that he will undergo indefinite treatments and perhaps further surgical procedures to address his symptoms.

**184**  The plaintiff referred to the report of Dr. O'Connor, where at p. 5 of his report he said:

Overall, the combination of jaw pain, headaches, neck and left-sided shoulder girdle symptoms and the neck, arm, elbow and hand pain and a numbness and tingling as a result of thoracic outlet have all contributed to a global deterioration in Mr. Sauer's ability to function on a day to day basis. His chronic pain has reduced his tolerance to his exercise activities, including recreation activities such as tennis and his workout routine as well as his enjoyment of day to day life. He has at varying times missed several board meetings as a result of ongoing chronic pain and inability to sit for prolonged periods of time and focus on the task at hand.

Although Mr. Sauer has improved considerably from where he first started, he is going to continue to be limited globally by accumulation of the previously mentioned problems. The jaw pain affects his ability to chew and enjoy food, although it has improved recently with the surgeries that he has had. The left arm numbness, tingling and pain limit his ability to exert himself with the left arm and do overhead activities and this too has also improved. He will have a reduced capacity for overhead lifting, reaching or grasping or repetitive uses of the left arm because of this. The headaches continue, although independently are not limiting to the point where it is stopping him from doing most activities on a regular basis.

From a prognostic point of view the symptoms of headaches and neck, arm and hand pain and the thoracic outlet symptoms and myofascial neck pain are going to persist as they are still occurring on a daily and weekly basis.

**185**  The plaintiff submitted that the decisions in *Vaillancourt v. Molnar Estate*, [*2002 BCCA 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3NP-00000-00&context=) ($125,000); *Gagnon v. Lefebvre*, [*2006 QCCS 4649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JHG1-FJTD-G3FN-00000-00&context=) ($160,000); *Kemp v. Wittenberg,* [*2001 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2S2-00000-00&context=) ($140,000); *Cybulski v. Bertrand,* [*2000 BCSC 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06N-00000-00&context=) ($75,000); *Briere v. Cyr*, [*2007 QCCA 1156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JHV1-JWJ0-G1Y5-00000-00&context=) ($82,000); and *Mikkelsen v. Hunter* [*(1998), 49 B.C.L.R. (3d) 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S2BV-00000-00&context=) (C.A.) ($80,000), are the most appropriate precedents to establish the range of quantum. He noted that while some of the authorities involved injuries that appear to be more serious, few have involved a five year history of comprehensive and aggressive conservative treatment with surgical intervention, as in his case. Further, most have involved much more positive outcomes than the plaintiff will face given his poor prognosis due to the spectre of increasing chronic pain, along with multiple future surgeries offering questionable success -- all of which have been further complicated by his underlying cardiac problems and the significant added risk of heart attack to which these surgeries expose him.

**186**  The plaintiff submitted that on the basis of the lengthy and partially successful full conservative treatments, coupled with the many years of continuing treatment and surgeries, that the sum awarded to him should be at the higher end of the range. More specifically, he asserted that the massive dental reconstruction will not solve his myofascial pain problems or jaw function; that he has already undergone carpal tunnel surgery and will have to undergo cubital tunnel surgery, as well as indefinite treatment for myofascial pain disorder and for thoracic outlet syndrome; that he may have to undergo the removal of a rib in a lengthy general anaesthetic surgery, which will place his heart at risk; that it is likely that over time he will experience ongoing serious depression and continued insomnia, for which he is required to take prescription sleeping medication; and that he faces uncertainty with regard to his TMJ, myofascial pain and thoracic outlet syndrome disabilities. He submitted that he should receive an award of $175,000.

**187**  The defendant conceded that the plaintiff sustained injuries in the accident. However, the defendant does not agree with the nature and scope of the injuries alleged by the plaintiff. The defendant contended that the severity of the injuries allegedly sustained by the plaintiff in the accident does not withstand close scrutiny.

**188**  The plaintiff said that immediately after the collision he was aware of the pain in his neck and face, and that he spat out pieces of his teeth into his hand. He recalled being shocked at the big chips of white enamel which turned out to be his front lower teeth. The defendant said that this description of the damage done to his teeth from the accident is clearly not borne by the evidence.

**189**  First, there is no mention of broken teeth in the ambulance crew report. The chief complaint is listed as "anxiety". There is an examination column with no reference to broken teeth, and the plaintiff conceded that he did not report broken teeth to the ambulance crew.

**190**  Secondly, even though the plaintiff attended at the office of Dr. Van Eeden within 30 minutes of the accident, there is no mention in the doctor's clinical records of an injury to the plaintiff's teeth. The symptoms listed on the doctor's clinical record for the day of the accident include neck and lower back pain, headache, tremor, and dizziness. However, on March 7, 2005, the doctor wrote an addendum to his November 1, 2004 clinical entry noting, "three lower jaw anterior teeth broken as well in MVA", upon receipt of information from the plaintiff that he had broken those teeth in the accident. Moreover, in the plaintiff's letter to the doctor dated November 29, 2004, he included in his summary of symptoms, "Two chipped front lower teeth from the snapping shut of my mouth at impact."

**191**  Thirdly, the clinical record of Dr. J. Griffith, the plaintiff's family dentist, entered on January 17, 2005 only mentions "chipped lower anter teeth (R)" and, "32 M significantly chipped."

**192**  Fourthly, when Dr. Mehta was asked whether the plaintiff had big chunks of his teeth missing when he was first examined he replied, "I don't know if the average person would notice this. Maybe not, because it's the lower teeth ... in the beginning I really discouraged him from getting those repaired right away. I wanted to wait on that, and so maybe it was minor enough where the average person would not notice it."

**193**  The defendant argued that perhaps the plaintiff had some fractured teeth as a result of the accident, but that it was an exaggeration to claim that his teeth were broken or that the number of teeth chipped were as many as he claimed.

**194**  In fact, said the defendant, the plaintiff has a rather lengthy medical history relating to his teeth and jaw which predates the accident and may have served to complicate the injuries he sustained in the accident.

**195**  The plaintiff testified that he reported to his doctor in 1997 that he had a lot of jaw tension because of teeth grinding for which he wore a dental split. He said that it was, "a pretty difficult time of my life, that's for sure." He agreed that he would have started wearing a dental splint from 1997 onwards, if not years sooner.

**196**  In his report dated May 20, 2002, Dr. J. Grisdale, a periodontist, wrote to Dr. Griffiths and stated, "As you are aware the patient exhibits parafunctional habits and wears occlusal night guard appliance on a regular basis." The plaintiff was referred in cross-examination to a clinical record of Dr. Griffiths dated April 14, 2004, which reads, "TMJ sore. Dr. G. says mostly related to grinding." The plaintiff confirmed that he reported this to the doctor.

**197**  Dr. Mehta, who was qualified to give expert evidence as a general dentist with an interest in the TMJ area, agreed in cross-examination that his primary concern is treating the problem as opposed to looking for causation of the problems. He testified that at the time of writing his first report dated February 15, 2007, he had been told by the plaintiff that prior to the accident he had no history of jaw pain or TMJ and that his general physical condition was good. He was also not aware that the plaintiff had a lot of jaw tension because of teeth grinding or that he wore a dental splint. The plaintiff did tell him that he had a dental splint, a mouth guard or oral appliance. When the doctor was asked whether, if he had a patient who had a long history of jaw tension and teeth grinding, he would like to know about it, he replied that he would, but that with clenching and grinding teeth you would not necessarily have limited opening or severe pain. He also said that there was controversy as to whether clenching and grinding of teeth alone would cause degeneration to one's jaw.

**198**  Dr. Mehta was also not aware that the plaintiff had some gum grafting undertaken in 2002. He explained that people need gum grafting for a variety of reasons, including trauma and clenching. He was also referred to a clinical record noting, "DB or the distal buckle cusp appears to have a 'crack'", and was asked whether, if one is having bruxism, "obviously 4-6, 4-7 are conceivably the molars that are getting some action, taking some abuse?", and replied that it could be so, or the person could have bitten on something which caused the tooth to crack. When asked what causes bone loss, the doctor replied that it could be poor oral hygiene, a genetic or environmental cause, or it could be clenching of the teeth.

**199**  Defence counsel pointed out to Dr. Mehta that the first MRI taken three months after the accident showed mild degenerative change involving the right mandibular conda and was asked whether it was evidence of a longstanding degenerative change. He said that it was most likely something that was ongoing before the accident. He also said that he would not necessarily blame bruxing for the condition, and that it could be associated with a genetic component or trauma of some kind, including a hit on the head in a rugby game.

**200**  The doctor explained that the first MRI did not show that the jaw was a bit forward, but that the cartilage and the inter-articular disk might be sitting a little bit forward. The doctor testified that his main concern in the early part of 2006 was that while the plaintiff had a good range of motion it was still not normal, which might imply that the cartilage was still not quite sitting in the proper position.

**201**  In his report to Dr. Van Eeden dated January 10, 2006, Dr. Mehta said that further review as to improvement of the posterior dental contacts, prior to irreversible measures such as fixed prosthodontics or crownwork, was needed. He said that his long term concerns remained interfering with any improvement to muscular spasm, with even a temporary change to the dental contacts. In cross-examination he agreed that just prior to the second accident he was recommending a conservative approach to treatment and against fixed prosthodontics, and said that if there was something that required urgent care then it would have to be dealt with. He said his preference was not to jump into any dental work. He also confirmed that in February 2007 he was still taking the position that a decision with respect to prosthodontics should be withheld in favour of something less traumatic and less invasive, but also said that the plaintiff was getting pretty frustrated with this approach.

**202**  Dr. Mehta testified as follows about the involvement of Dr. Karateew:

1. So as of June 15, 2007, you finally have some posterior contact on the molars, you've got the 50 millimetre range of motion opening, and then you state further down:

Defer protho TX for now.

1. Yeah, defer prostho treatment for now.
2. That's with reference to, obviously, Dr. Karateew and the extensive reconstruction of the teeth, correct?
3. Again, my preference -- there are certainly two schools of thought here, you know, one being mine, to wait and try to see if we could get the pain under a little bit better control, because it's still, from my understanding, an issue. The other issue that I have with it was that, well, this is expensive -- potentially expensive dental work.

*...*

1. Now, Dr. Mehta, in this response of May 21, 2007, after saying Dr. Karateew is very knowledgeable, you go on to state your ongoing reservations and you state [as read in]:

My concern always remains in these types of situations when pain is involved, where we could possibly aggravate the situation and cause more pain to the musculoskeletal system. I agree and share in your frustration of trying to improve things.

I take it again you're conveying your thoughts to Mr. Sauer that you're having some reservations about permanently changing the nature of his bite.

1. Yeah, and I guess the nature of my practice, I have reservations about every sort of treatment, and you probably get the feeling from some of these notes, they're some extensive notes just going over the history of things. I tend to question every kind of treatment, I mean even mouth guards, and Mr. Sauer could probably agree with that even for something as silly as a mouth guard, I would question whether it would be of any benefit. For some people something very simple would help and other people it might not. But for something invasive, I think I mentioned before, I do like to debate it, the pros and cons on it.
2. And at the bottom of that paragraph on your email, you say:

The question then is --

I guess you're talking about, if you go ahead with the prosthodontic:

The question then is how will the muscles and ligaments respond after the "new and improved" bite.

1. Correct.
2. And you've put new and improved in quotation marks, presumably conveying the motion that you might fix something and create more problems in the process?
3. Absolutely, yeah, that was definitely my concern, absolutely, and I guess that's the nature of a university practice; we see some very severe cases at the UBC pain clinic, and that's the paranoia that I have, is that some people come in and they have a lot of problems after -- after the dental work.

**203**  On the subject of who made the decision that the plaintiff should have dental reconstruction, Dr. Mehta testified:

1. Who is, Doctor -- or maybe it's just lawyers that like to talk about the quarterback, who's the quarterback of the care. I take it, I'm not sure, was there a quarterback in this case in terms of when we're going to do prosthodontics, when we're not going to do prosthodontics?
2. Well, normally, that would be the family dentist, but I had conversation with Dr. Griffiths about that, as well. I mean especially in the beginning, he and I both decided, well, we're going to wait for now. But we both understood that at some point, we're going to have to repair these teeth.
3. What I'm suggesting to you is, in the final analysis, it wasn't you that made the call to say: I give up, let's go prosthodontics. Essentially, Mr. Sauer and Dr. Karateew, in conjunction, primarily made the decision. Isn't that really fair?
4. Well, yeah, they did, but -- I mean I felt informed. You know, part of my job was to play devil's advocate, so to speak, in that, okay, these are -- you know, it's informed consent. I had to explain to Mr. Sauer that these are the problems that you could encounter if you do go through fixed prosthodontist work, with either the restoring dentist, the family dentist, or the prosthodontist, and I'm always concerned that the dentist may not realize some of the problems that they may encounter. So I tend to play up the problems that could happen, and might stress those.
5. Have you, prior to -- well, actually, even prior to today, have you had many conversations with Dr. Karateew?
6. No. No, I don't believe I've spoke to him on the phone.
7. You've never talked to him?
8. No. All this informed consent, I've been mainly doing through Doug, with Mr. Sauer. You know, I've trusted him as being an intelligent individual, that he would then communicate that to Dr. Karateew.

...

1. Dr. Mehta, just briefly before we continue on, before the break we were discussing the issue of who was quarterbacking the care, and I'm not sure I got a direct answer to my question. It's fair to say that the decision to proceed to the fixed prosthedontic was that of the patient, Mr. Sauer, and Mr. Karateew, or Dr. Karateew.
2. Yeah, I mean usually the quarterback would be the -- either the family physician or family dentist. I mean certainly the patient would have some decision-making capability, so certainly Mr. Sauer and Dr. Karateew, and I guess at this point, Dr. Niktash, would be the main quarterbacks, so to speak.
3. I just want to be clear. It wasn't you that made the call?
4. Correct. Yes. Yeah.

**204**  Dr. Karateew, who was qualified to give evidence as an expert in general dentistry with a specific knowledge and interest in prosthodontics and periodontics, explained, in chief, his treatment of the plaintiff:

1. Okay. And what were your concerns about not rebuilding them? What would happen to his mouth if you did not rebuild them?
2. The teeth would further break down. By providing full coverage or PFM crowns, we're providing support or a superstructure to the teeth, whereby they avoid further breakdown.

*...*

1. And TM?
2. Temporomandibular dysfunction.
3. So the reconstruction was to address these issues directly, and that was because the conservative approach did not put the teeth back into their normal occlusion?
4. Correct.
5. Now, if I could quickly have you go to Dr. Blasberg's report at tab number 12 of Exhibit A for identification. You've had a chance to look at Dr. Blasberg's reports?
6. Yes, I have.
7. And is there anything in those reports that changes the opinion you've given or your opinion as to the appropriateness of reconstructing Mr. Sauer's mouth to address the concerns you've identified?
8. No. What Dr. Blasberg deals with is talking about the issues of pain, and when I'm talking about the reconstruction, discussing specifically the function and the strength or the reinforcing of the teeth.
9. Okay. And restoring the ability to chew?
10. To bite, to chew, yeah, meaning the function.

**205**  Dr. Kerateew was referred to the MRI taken shortly after the accident and said, as follows:

1. Okay. Now, Doctor, there was an initial MRI performed shortly after the November 1, 2004 motor vehicle accident, and that MRI demonstrated mild degenerative changes to the jaw joint. I'm sorry, let me take you right to that. It's referenced in Dr. Blasberg's report. Yes, here we go, it's on page 4 of Dr. Blasberg's first report. That's tab 12, August 29, 2006, under "imaging" [as read in]

Magnetic resonance imaging of temporal mandibular joints was performed January 1, 2004. The report includes the following findings. Mild anterior displacements of the right and left articular disks with normal translation and recapture on the open mouth images.

And the important reference here:

The right mandibular condyle is flattened, suggesting mild degenerative change.

Now, Doctor, are those findings common in the population in asymptomatic individuals?

1. Anterior displacement with normal translation or recapture is considered now normal within the population. And someone of Mr. Sauer's age, flattening of the condyle head, suggesting, as Dr. Blasberg says, a mild degenerative change, would be expected.

**206**  Dr. Kerateew explained his use of cone beam scans which provide a three dimensional view -- a degree of detail that cannot be seen on conventional radiography. He said, as follows:

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| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And maybe you could just identify what that is on there, just draw the name? |  |
|  | A |  | Okay. Mylohyoid fossa, condyle head, ramus, and blue is normal. In a rough approximation of what I see on this latest scan, with respect to his right would be an invagination of the bone, like that. So this portion of the head is missing or is reduced in its capacity. |  |
|  | Q |  | And what do you describe that as in terms of mild, moderate, severe? |  |
|  | A |  | Moderate to severe, stressing severe degeneration of condylar head. |  |

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| --- | --- | --- | --- |
|  | Q | Okay. And are you saying it's on the severe end? |  |
|  | A | It's on the severe end. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And what are the implications of that finding with respect to the need to have done what you did and with respect to Mr. Sauer's ongoing treatment? |  |
|  | A |  | One can surmise that degeneration like this, considering we have previous reports that describe it as being mild, that the two years that have elapsed have allowed this degeneration to occur to such a significant level. Reconstruction of the occlusion will allow us to alleviate some of the aberrant forces on the condylar head, thereby hopefully slowing down the deterioration process, but I would suggest that this deterioration is going to be ongoing for the rest of Mr. Sauer's foreseeable life. |  |
|  | Q |  | What type of treatment will be required to address that? |  |
|  | A |  | It's uncertain at this moment to suggest exactly what type of treatment, but rather, address each treatment step conservatively and in a timely fashion as it arises. |  |

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| --- | --- | --- | --- |
|  | Q | And the types of treatments, other than |  |
|  |  | conservative, could also involve what? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Could also involve surgical, surgical replacement of the condylar head, would be the most significant. |  |
|  | Q |  | Okay. And is that a treatment that is successful or it carries risks with it? |  |
|  | A |  | Carries significant risks. The history of that type of surgery is fraught with failure, surgical failure; not only product recall, but frank surgical failure; product recall meaning artificial replacements of the joint has been recalled, so they have to go back and surgically remove it. Also, there's significant trauma to the nerves, specifically the cranial nerves (indiscernible) in the area. |  |

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| --- | --- | --- | --- |
|  | Q | Now, the other joint? |  |
|  | A | The left joint shows similar degeneration. |  |
|  | Q | And would have similar -- |  |
|  | A | Would have similar consequences down the road. |  |

**207**  In cross-examination, Dr. Kerateew was asked about whether he consulted with Dr. Mehta about Dr. Kerateew's treatment plan for the plaintiff:

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| --- | --- | --- | --- | --- |
|  | Q |  | It's fair to say that at no time in this decision you contacted Dr. Mehta, who would be treating him for a couple or three years? |  |
|  | A |  | I had received, throughout my treatment of Mr. Sauer, continual letters with respect to update of the condition, and Mr. Sauer proved himself to be an excellent relayer of information with respect to his medical situation. |  |
|  | Q |  | So you relied upon the patient to tell you what another doctor way saying? |  |
|  | A |  | We didn't feel it was necessary at that time. The history that had come through in letters and as was related by Doug Sauer, who is a very intelligent person, related that information directly to me. |  |
|  | Q |  | You never actually ever talked to Dr. Mehta on this phone, ever on this case, have you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. I haven't talked to him. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And, in fact, I think you introduced yourself to Dr. Mehta just today in the courtroom? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Absolutely, yes. |  |
|  | Q | So you've obviously never met him before? |  |
|  | A | Haven't met him before. |  |

**208**  Dr. Kerateew was also asked about teeth grinding:

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| --- | --- | --- | --- | --- |
|  | Q |  | And finally, it's true, isn't it, that bruxism or grinding of the teeth can actually lead to micro fractures of teeth? |  |
|  | A |  | It's common to see a few micro fractures in isolated teeth due to bruxism, and ongoing wear of the teeth in a person of Mr. Sauer's age. However, to have wholesale or large scale, I should rather say, cracks and destruction of the teeth, that's only -- can be inferred from major traumatic events. |  |

**209**  The defendant submitted that the opinions and conclusions of Dr. B. Blasberg, who was qualified to testify for the defence as an expert in facial pain and TMJ disorders, warranted greater weight than to those of either Drs. Mehta or Karateew, neither of whom were certified in B.C. as periodontists or prosthodontists.

**210**  The plaintiff reported to Dr. Blasberg that an MRI of the TMJ showed ruptured disks "worse" on the right. The doctor testified that the term ruptured would not be accurate according to his interpretation of the word -- he said it more accurately would be fragmentation or tearing or some injury that actually created pieces of the joint, "when I don't think that ended up to be true when I saw the MRI report."

**211**  Dr. Blasberg said that the plaintiff reported fracturing six teeth in the accident. The plaintiff also told him that prior to the accident he wore a night guard due to bruxing, but denied any jaw joint noises, jaw pain or occlusal changes prior to the accident. However, there were entries regarding these problems before the accident noted by Dr. Blasberg, one from a general dentist who mentioned that the plaintiff had jaw pain, and another from an ear, nose and throat specialist, who reported that the plaintiff had increased jaw tension.

**212**  Dr. Blasberg measured the plaintiff's mouth opening at 48 millimetres and noted that for a male of his age normal was between 40 and 60 millimetres. He also reported that both mandibular condyles or lower joint jawbones moved in a normal manner. He found crepitus in the left jaw joint. He did not find irregularities or clicking in the joints when they were moving back and forth. His opinion when he saw the plaintiff was that the plaintiff's jaw problem was consistent with a soft tissue injury. He found no reason for the altered dental bite, meaning that when the plaintiff closed his mouth his jaw made contact in the front teeth without contact on the back teeth, and there were no findings associated with bone structure that could account for the change in jaw position. His prognosis was that the majority of individuals with the plaintiff's condition improve with treatment that is non-surgical, which includes jaw self-management and forms of therapy.

**213**  Dr. Blasberg also said that it is not possible to determine whether disk displacements were present prior to the accident or were the result of the accident, because there is not a test that indentifies the time at which change like that takes place. Nor is it possible to determine when the flattening occurred, unless there is a whole series of imaging tests looking at the joint repeatedly over time. In his opinion, it was likely that the flattening took place over a time greater than three months, "So on the balance of probabilities I would think that probably began happening before [the accident]."

**214**  On the issue of whether prosthodontic reconstruction was appropriate, Dr. Blasberg testified:

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| --- | --- | --- | --- | --- |
|  | A |  | I put Dr. Mehta's chart entries or reports of changes in this letter because those changes suggested that the dental bite and the jaw position and posture was fluid and changing. It wasn't static in one position, and the changes suggested that the jaw position and the bite was improving, and that the prosthetic dental rehabilitation would permanently the structure, alter the bite, and the changes that Dr. Mehta was reporting would suggest that Mr. Sauer was improving with regard to his jaw condition. |  |

**215**  Dr. Blasberg testified that the literature reporting studies of TMJ indicates that permanently changing the bite is not an effective treatment for jaw muscle conditions or TMJ disorders.

**216**  Dr. Blasberg reviewed the cone beam scans taken by Dr. Kerateew on May 8, 2008. He said:

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| --- | --- | --- | --- | --- |
|  | Q |  | Upon your review of Dr. Karateew's cone beam scan films from May 8, 2008, were you able to draw any conclusions as to whether or not they displayed any evidence of moderate to severe degeneration of the left and right condylar heads as alleged by Dr. Karateew? |  |
|  | A |  | Well, if I can qualify my answer, because I don't consider myself an expert in diagnostic imaging or interpretation of images, but the majority of the views that I looked at I thought had mild changes suggestive of degenerative changes. I didn't see images that I would consider moderate to severe degenerative changes. And there were several images that appeared to be, at the very end of the joint structures, that had various shadings that I couldn't interpret, and I wasn't certain whether it was the technique and the beam orientation or how the image was projected. So I would defer to a radiologist to be able to say what the significance of those images were. |  |

**217**  Turning to the diagnosis of thoracic outlet syndrome, the defendant pointed to Dr. Fry's explanation that there are no specific tests for this diagnosis and that the condition can have a huge constellation of different symptoms depending on which areas are being irritated. The doctor said that the issue of thoracic outlet syndrome, of the neurogenic variety, really comes into play when the nerves and/or artery are being compressed by what has happened to the scalene muscles:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | So fundamentally you've got a triangle and the two components include the scalene muscles, and the bottom component is a rigid rib. And in that triangle, which you have to sort of imagine in three dimensions, you've got the brachial plexus or the entire nerve supply to the arm, plus the subclavian artery. |  |

*...*

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| --- | --- | --- | --- | --- |
|  | Q |  | Now, Doctor, you talk about -- I must say, I didn't make a note, but the neurogenesis as opposed to there are other types of thoracic outlook-like involvement, involving the vascular end as opposed to the compression of the nerve. Could you perhaps -- |  |
|  | A |  | Yes. I mean, basically, thoracic outlet syndrome is all about compression. The commonest varieties are where the nerves are compressed. Another variety is where the vein is compressed, which actually is not in that same triangular space that I talked about. |  |

**218**  Dr. Fry also explained the element of controversy in the medical profession surrounding the diagnosis of thoracic outlet syndrome:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, you're almost asking me to comment on the politics of medicine. I mean, the reality is that there are certain specialties and certain people within those specialties who completely disagree with thoracic outlet syndrome even being present. That being said, there's a huge amount of published literature, thousands and thousands of articles, you know, in the journal (indiscernible) surgery and so on. You know, they're published by people who know what they're talking about. They're published by people who specialize, not necessarily a surgeon, it could be a physical medicine specialist or physiatrist. But, I mean, my own personal experience is that there are some neurologists in this city who I would not refer a patient to for assessment of thoracic outlet syndrome because I know that they don't believe in the entity. So there's actually no point in my sending you as a patient to somebody who I know is not going to help in terms of solving the problem. I'm going to send you to somebody who I think understands thoracic outlet syndrome, be it a physiatrist or a neurologist or (indiscernible). So there definitely is controversy and there definitely is (indiscernible). |  |

**219**  In cross-examination, Dr. Fry said that he did not know how the plaintiff was placed inside the vehicle at the time of the impact, and he did not know which hand he had on the steering wheel at the time. More specifically, the doctor testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But at the time that you first saw him in June of 2005, your findings were suggestive -- suggesting thoracic outlet on the right-hand side as well as the left; is that correct? |  |
|  | A |  | I'm not sure that it says that; I don't see that I've actually said thoracic outlet on the right. |  |
|  | Q |  | No, it says: does produce neurological symptoms of the fingers 3, 4 and 5, left side worse than the right, which would suggest that he had findings on the right; is that correct? |  |
|  | A |  | That's correct but he also had a positive to nil sign for cubital tunnel, I believe. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | On the right-hand side? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, certainly, carpal tunnel on the right; it's sort of unclear about the cubital tunnel on the right, so I can't answer that. |  |
|  | Q |  | Let's assume for a moment that you've got a patient that comes in, they sustained injuries to the left-hand side, that it's certainly of interest to you if he or she is showing neurological symptoms on the right-hand side, because that might suggest that the problem is bilateral and not related to a trauma, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, that's a reasonable question. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | How could it be -- well, it was the first time you've ever seen him. |  |
|  | A |  | Yes, I checked him out for a tunnel sign, which is concussion of the nerve, which is done with the arm relaxed and then putting him in the elevated arm stress test position, you reproduce those symptoms of numbness. So that's what led me to believe that he may have double crush syndrome because his ulnar nerve was irritable and now in the provoked position, he had a reproduction of certain symptoms as well. |  |
|  | Q |  | I think perhaps we're not really disagreeing. When we're talking about thoracic outlet syndrome, and as you alluded to in your direct evidence, it's essentially a clinical diagnosis, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And what clinical diagnosis means is that there's no objective, independent test that will determine whether or not the person has it, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And because there's no objective test, it's very important to look closely at the patient's history and previous traumas that may have occurred when dealing with causation? |  |
|  | A |  | Yes, and to re-examine, yes, which is where that other expert report comes in. |  |

...

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| --- | --- | --- | --- | --- |
|  | Q |  | Is it fair to say that the clinical diagnosis of thoracic outlet syndrome is quite difficult? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | In this case? |  |
|  | Q | In any case, particularly in this one. |  |
|  | A | I think it is difficult in this one, yes. |  |

*...*

**220**  Dr. Fry was asked about the surgical options to treat thoracic outlet syndrome, and said:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Is it fair to say that somebody who is more active and getting back to tennis and doing things such as skiing, where you're planting the poles, that would certainly suggest somebody who was, functionally perhaps, not a patient that you would recommend to undergo a first rib resection. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | You're talking about his right side? |  |
|  | Q | I'm talking about either side. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I'm a pretty conservative surgeon when it comes to taking out a first rib, which is why I recommended these other issues be dealt with. And I think it depends on the patient's disability, once the other issues have been resolved. I mean I would hope that he would be treated conservatively, but I don't know the answer to that long term. |  |
|  | Q |  | Just to be fair and make sure we're clear, you're not sitting there advocating first rib resection for Mr. Sauer right now because simply it's too early; the other things haven't been thoroughly investigated or operated on, correct? |  |
|  | A |  | I think fundamentally what I've said is, and I advised him of this way back, was to get his carpal tunnel fixed, to then get his ulna nerve assessed and possibly have that transposed, and once that was all resolved, he would need reassessment, and also a neurological opinion, a neurosurgical opinion with respect to the neck. So no arrangements had been made to proceed with those ribs. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And you're not aware of him having seen a |  |
|  |  | neurosurgeon at this point, are you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

**221**  Dr. Regan was asked in chief whether carpal tunnel is also related to acceleration/deceleration in motor vehicle accidents, and replied:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, it can be, it doesn't have to be. I mean, if you -- in his particular case I believe it is because he had both of his hands on the steering wheel with his wrists, holding on tightly, and so that there would be a transmission of force to the palm all the way through his upper extremities. Again, I believe there's been a combination of injury to the entire neurological structure, mainly affecting the left side. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. |  |
|  | A | But it can affect, again, the carpal canal. |  |
|  | Q | And Doctor, can these injuries develop over time? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes. For example, women who have become pregnant can develop carpal tunnel syndrome. As they get pregnant and they have more fluid retention, gradually there's a loss of volume in the carpal canal and so they develop it, often times after they've given birth. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | But in terms of post-traumatic -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Post-traumatic, same idea. You have an injury, over the passage of time other areas of your brachial plexus are slightly injured so that this area becomes more of an issue of nerve irritability. And since it is an easy accessible place, you can oftentimes relieve symptoms by simply releasing that carpal canal. |  |

**222**  Dr. Regan was referred to the report of Dr. Mezei and said, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, I'd just like you to turn to page 91 of Dr. Mezei's consultation report. So obviously one of the reasons for sending Mr. Sauer to the neurologist was to have nerve conduction studies done to confirm/deny the existence of carpal tunnel and cubital tunnel? |  |
|  | A |  | Well, it was really more of a sending a net out; what are the causes of this gentleman's numbness. Not -- I wasn't trying to, you know, put words in her mouth. What are the causes? Anything from his neck right on down, to sort of look at all those mixed nerves. |  |
|  | Q |  | And under "Impression" on page 91, Dr. Mezei's opinion appears to have been that the electrophysiological studies were compatible with mild left carpal tunnel syndrome -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- mild left ulnar neuropathy, and then she raises the possibility of a mild left ulnar irritation either at the elbow or at the thoracic outlet; is that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But her expert opinion was she could not confirm that under conduction studies? |  |
|  | A |  | Yes. Well as you probably are aware, people that have brachial plexus irritations, shall we call it, often don't have any abnormality or any injuries. |  |

*...*

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| --- | --- | --- | --- | --- |
|  | Q |  | And Dr. Mezei goes on to state that the sensory route irritation would likely be due to degenerative spine disease that may have flared up at the time of the motor vehicle accident? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | You don't take any particular disagreement with her? |  |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | No. And can we agree that in a person, man or woman, at a certain age you're going to see degenerative disk disease? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And degenerative disk disease by -- well, I guess by definition means that it continues to degenerate as a person gets older, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Unfortunately. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And to the extent that you get older and it becomes more degenerated, that's -- that increases the likelihood of there being symptoms? |  |
|  | A |  | Yes, although I will qualify that by stating that there's many people, including myself, that have degenerative disk disease of their spine, and if you don't have any trauma, you have really much less likelihood of developing symptoms from it. You're clearly at risk, you're a person at risk the older you get with the degenerative disk changes, having symptoms, following any sort of trauma. |  |
|  | Q |  | So given what you've just said then, it would be extremely important for you, as an expert, to what to know about prior traumas prior to November 1, 2004; is that correct, if, in fact, you, as an expert, wanted to determine causation for -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, correct. |  |

**223**  Dr. Regan was asked whether it would be reasonable to refer the plaintiff to a neurosurgeon for a further examination of the possibility of a forearm irritation. He testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | To narrow down what, the diagnosis or the etiology of the complaints or? |  |
|  | Q |  | Etiology. When you say etiology, you mean the cause of the pain, right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | Okay. |  |
|  | A | I'm not sure what you're referring to though. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It would be a logical thing to do, as the quarterback of a case such as this, that the logical progression would be, you've raised the possibility of a nerve root irritation in the neck, it's not a crazy idea to then refer to a neurosurgeon to see if he or she can investigate that further? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, correct. |  |

**224**  Dr. Regan was referred to his report and his statement that the plaintiff's right upper extremity was not affected by the accident. He confirmed that there was no damage to the plaintiff's right arm. He then testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Is it not your understanding that he was actually having some carpal tunnel signs on the right side upon testing, after the first accident? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, but I don't have a notation of that here. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Is that not something of possible interest when you've got somebody who has bilateral carpal tunnel complaints but trauma only on one side? |  |
|  | A |  | Well, not necessarily, because if you have an injury to your cervical spine, for whatever reason, you can irritate those nerves there, or you can irritate them, as you've suggested, repetitive strain injury. |  |
|  | Q |  | Well, you've already test -- or you've already indicated in your report here that the right upper extremity was not affected by the first accident. |  |
|  | A |  | Correct. Yeah, I don't believe there's been any -- yeah, there wasn't any specific mention of, you know, huge pain in that arm. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Okay. Well, I'm not sure that really has a huge impact if he has some irritation of his right median nerve in his arm, because that may in fact be like, you know, again, as you've suggested, maybe some people get repetitive strain injury. And so to say that that means that his left was not caused by the accident, I -- I don't -- I don't agree. |  |
|  | Q |  | What I -- let's take a hypothetical. I'm driving a car, I get in an accident, I straight-arm my hand on the steering wheel, I come in to see you, I complain of left arm complaints, you send me for testing and I have carpal tunnel syndrome on both sides, or as we know it to be, bilateral carpal tunnel syndrome. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Mm-hmm. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | So you've got somebody saying they're injured on the left side, but they've got carpal tunnel on both sides, does logic not suggest that initially, out of the gate, you're going to be questioning whether or not the trauma has anything to do with the findings or the symptomology of carpal tunnel? |  |
|  | A |  | Well, first of all, the carpal tunnel syndrome was an EMG diagnosis, correct? Correct? |  |
|  | Q |  | I'm not the -- you're the expert witness. You tell me what the diagnosis -- |  |
|  | A |  | Okay. You might have carpal tunnel syndrome. If somebody did EMG studies, you might have carpal tunnel syndrome. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yes. |  |

*...*

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| --- | --- | --- | --- | --- |
|  | Q |  | If you've got bilateral findings that are the same, does that -- your first concern is, hold on a second, is the trauma actually causing this condition, because the patient has symptoms on the non-trauma side? The logic -- to me the logic seems to be pretty painfully obvious. Can we agree on that, that the -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, we can. |  |

**225**  Dr. O'Connor testified about crush injuries. He explained:

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| --- | --- | --- | --- | --- |
|  | Q |  | Okay. So, Doctor, you talk of accident. A motor vehicle accident can cause these crush injuries? |  |
|  | A |  | A motor vehicle accident can cause either scarring or irritation of muscle spasm high up in the neck that can irritate that brachial plexus and then lead to the development of symptoms that sound neurological down the arm. That's one of the causes. |  |
|  | Q |  | So there doesn't have to be separate injury down in the arm? |  |
|  | A |  | A lot of the time, the patients have no injury down in the arm whatsoever, and no injury to the wrist, no injury to the elbow, and all of a sudden they've got this neck, shoulder, medial elbow and wrist pain that they never had before, and then they're diagnosed with some mild carpal tunnel. Sometimes you do the surgery and the symptoms improve, but a lot of times those symptoms persist because it's not just a problem here; we've found that by happenstance -- |  |
|  | Q |  | And you're pointing to "here" being the carpal tunnel? |  |
|  | A |  | Here at the wrist. And they still have problems higher up in the neck. |  |
|  | Q |  | Okay. And the mechanism of injury, what types of physical injury can cause damage to the scalene muscles or the other structures that can cause TOS? |  |
|  | A |  | The scalene muscles are fixed at the rib cage, so they're not all that mobile at the lower end. The rib cage is a pretty rigid structure. So the higher part of the neck where they come from at the top of the neck is a more mobile structure. So when that happens, they're fixed at one end and they're either flexed or extended, or particularly laterally flexed. That'll often really stretch that muscle and cause a bit of bleeding into the muscle or some scarring that we think is what actually causes that triggering of the muscle that actually all of a sudden becoming (indiscernible) spastic or overactive and irritate that area. |  |
|  | Q |  | Okay. And that can occur in motor vehicle accidents, that type of injury to these muscles? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Definitely could, yes. |  |

**226**  Regarding the plaintiff's alleged TMJ injury, the defendant said that it was obvious from the whole of the evidence that the object is to stabilize the TMJ, and that altering the plaintiff's bite alters the dynamics of the jaw muscles and joints, and is therefore risky. The defendant conceded that Dr. Blasberg is not a radiologist and therefore does not have the expertise to read the cone beam scans taken by Dr. Karateew. However, the defendant pointed out that Dr. Karateew was not a radiologist either, and that Dr. Blasberg had superior qualifications to opine about treatment of TMJ issues. The defendant submitted that, based on Dr. Blasberg's opinions, there was no evidence of displacement, and that Dr. Karateew's evidence should be rejected on this point. The defendant contended that, despite the x-rays and the procedures performed on the plaintiff, the Court was not left with anything more than evidence of mild degeneration, which was ongoing before the accident, and a few cracked teeth.

**227**  The defendant also contended that the plaintiff was under a misapprehension that loose bodies were extracted from his jaw, stating that there was no evidence that loose bodies were removed from any joint. In a radiology report dated April 20, 2005, the findings state, "The bilateral mandibular condyles and articular eminences are unremarkable. The joint spaces are well maintained. No evidence of degenerative changes are seen." In an MRI report dated January 27, 2006, there is a note that there is no significant change to a previous CT scan dated January 31, 2005, that in the closed mouth positions the TM joint menisci have a normal position, and that with mouth opening there is a normal translation of the mandibular condyle bilaterally and the disk position is normal. The report states, "Again noted is the mild degenerative change involved in the right TM joint space ...". In Dr. Braverman's operative report of September 12, 2006, he noted, "There do not appear to be any loose bodies visualized in the joint."

**228**  The defendant also submitted that none of the medical experts opined that it was 100% certain that the plaintiff had thoracic outlet syndrome or that it was causing the plaintiff's symptoms. In fact, claimed the defendant, it was not entirely clear what was causing the symptoms. The defendant submitted that not only is Dr. Fry not saying that thoracic outlet syndrome is the only cause, but that the plaintiff will have to get the opinion of a neurosurgeon to determine if the problem is originating in the neck.

**229**  The defendant also argued that even if the plaintiff has thoracic outlet syndrome, when one looks at the plaintiff's daily activities the condition is on the milder end of the scale, so that at the end of the day it is, "much ado about nothing." The plaintiff testified that prior to the second accident he was playing doubles tennis two or three times a week. Sometime before he started playing doubles tennis at this frequency, the plaintiff went back to jogging. By December 15, 2005, the plaintiff was jogging 30 kilometres a week and playing competitive tennis with no chest pain. In the spring of 2006 he played a round of golf. In the winter of 2005 and the spring of 2006, before the second accident, he skied about five times. In the spring of 2007 he skied three or four times.

**230**  The defendant argued that if the plaintiff had a serious functional disability such as thoracic outlet syndrome, or chronic pain, then his evidence as to the level of his physical activity after the first accident and before the second accident calls into question whether the plaintiff is as disabled as he claimed at trial. The defendant also noted that the plaintiff reported substantial improvement to Dr. Zybutz in 2007 regarding his neck pain, headaches, low back pain and TMJ, and therefore the evidence indicates that the plaintiff's post accident condition is not nearly as bad as he alleges.

**231**  In sum, the defendant submitted that the thoracic outlet syndrome is a red herring given that all of the medical experts acknowledged that the plaintiff's numbness may be originating from more than one location, and that the C-spine degeneration pre-dated the accident and might be causing a nerve root irritation. Furthermore, the symptoms of carpal tunnel syndrome are of questionable relevance to the accident as the plaintiff had signs on both sides, despite the alleged trauma from the accident being to the plaintiff's left arm. In any event, the defendant contended that the second accident aggravated the plaintiff's problems.

**232**  The defendant submitted that given the totality of the evidence the Court should award general damages to the plaintiff in the range of $60,000 to $80,000.

1. **Decision**

**233**  First, with respect to the controversy surrounding the plaintiff's diagnosis of thoracic outlet syndrome, I prefer the opinions of the plaintiff's medical experts on this issue over those of the defence experts.

**234**  In the report of Dr. A.I. Munro, a specialist in thoracic and cardiac surgery, dated March 9, 2006, he concluded that as a result of the accident the plaintiff sustained a mild soft tissue injury of the neck and that he did not have thoracic outlet syndrome. He also concluded that the plaintiff had a left ulnar entrapment syndrome which was causing his disability, and that the bilateral carpal tunnel syndrome had recovered, stating that, "only one hand was on the steering wheel so it cannot be due to the MVA." He also said that the plaintiff's disability is associated with numbness and weakness caused by a left ulnar entrapment syndrome plus cervical nerve root pains. However, despite his experience as a thoracic surgeon, Dr. Munro testified that he may have done one thoracic outlet syndrome surgery between the years 1994 to 2001. He said that he may have done one at St. Paul's Hospital, but he was not sure, and otherwise a previous one would have been done at UBC Hospital. He also testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- at VGH? Mm-hm. And what type of surgeries were you performing over that period from '68 to 1990, if I have the years roughly correct. |  |
|  | A |  | General thoracic surgery and cardiac surgery, both closed and open heart surgery. |  |
|  | Q |  | Okay. And of the -- I take it there were other surgeons who performed a similar practice to yours? |  |
|  | A |  | I suppose all the surgeons had slight variations in their practices. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Mm-hm. Were any of these surgeons -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Some of them were purely thoracic, some of them were purely cardiac, and some were mixed. |  |
|  | Q |  | Okay. Were any of the ones that were purely thoracic involved with thoracic outlet syndrome and surgeries on that condition? |  |
|  | A |  | Early on, no. Probably I saw most of them until probably Dr. Fry, Dr. Nelems came on staff, and they saw most of the thoracic outlet surgery after that. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And when would that be? |  |
|  | A | I'm not sure of the actual dates. |  |
|  | Q | Was it shortly after -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Probably in the -- my guess would be the early '80s, -- |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And prior to 2001 when you were at VGH after Dr. Fry and the other physician you mentioned began to specialize, those cases would be -- TOS cases would be sent to them for -- |  |

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| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | -- assessment at surgery; correct? |  |
|  | A | Yes. |  |

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|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The second aspect is looking at a specific five-year period and analyzing what cases I had seen during that five-year period. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And what five-year period is this? |  |
|  | A | That was 2002, 3, 4, 5 and 6. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Mm-hm. Mm-hm. And -- and that -- that is where you were giving me these approximate numbers? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. So during that period, there were somewhere between 25 to 30 per cent that were involving non-severe neck injuries that -- where -- that could have been, in your opinion, thoracic outlet syndrome issues? |  |
|  | A |  | No. There was a fair percentage of people who had such bizarre symptoms and signs that you couldn't fit them into any logical medical diagnosis, -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Mm-hm. |  |
|  | A | -- often associated with psychiatric disease. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Mm-hm. But other specialists had assessed them as thoracic outlet syndromes? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | Mm-hm. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | These were all people who had been sent to me to consider this diagnosis. |  |
|  | Q |  | Mm-hm. Now, going back to my question in terms of your -- oh, maybe I'll finish. In that five-year period, I take it, Doctor, there were people who you did concur with the other physician that the diagnosis was thoracic -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | In that particular -- |  |
|  | Q | -- outlet syndrome? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- five-year period, no. In the previous five years, yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. And how many occasions was that, do you recall? |  |
|  | A | In the previous five years, -- |  |
|  | Q | Mm-hm. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- I think it was two, but I cannot tell you for sure. |  |
|  | Q |  | Two of approximately 30 per year? Thirty reports a year? |  |
|  | A |  | Probably at that time I was seeing less than 30 per year. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Mm-hm. |  |
|  | A | I do not have the exact figures -- |  |
|  | Q | Sure. |  |
|  | A | -- for that previous -- |  |
|  | Q | Okay. |  |
|  | A | -- five-year period. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So -- but in the last 10 years it would be reports in the order of several hundred reports, and of those several hundred reports you concurred with the other specialists on two occasions that you can recall? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

**235**  Dr. R. McGraw is an expert in orthopaedic medicine. Although Dr. McGraw's report is dated December 18, 2006, he actually saw the plaintiff on June 8, 2006, about one month after the second accident. Dr. McGraw gave frank and clear testimony that he was not an expert in thoracic outlet syndrome and that he would defer to the plaintiff's experts on this condition. He testified, in part, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, I'll respond by saying -- I should let the court know I'm not an acknowledged expert in thoracic outlet syndrome. There are a host of tests and manoeuvres to put the arm through. Suffice it to say, there is no perfect slam-dunk test for thoracic outlet syndrome. The more suggestions there is with various manoeuvres, the more likely the person has, especially if there are x-ray or MRI changes. This screening test that I did for my purposes is a common one and raised the suspicion in my mind that he does have some tightness in the thoracic outlet. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | If I -- in doing so, My Lord, could I just make one explanation because this is an unusual situation here? I am giving an opinion about the injuries of November 1, 2004, having performed an orthopaedic examination on Mr. Sauer a month after a second accident. So in forming my diagnosis, I'm very conscious of there was a second accident. I'm trying to accurately describe what happened in MVA 1, in spite of being handicapped, if you will, by an orthopaedic examination following a recent accident, not involved in this opinion, okay? So. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, Dr. McGraw, I don't see much in the way of discussion of Dr. Regan or Dr. Fry's reports which were -- and his various clinical records that you reviewed which were created prior to Mr. Sauer's second motor vehicle accident. Is that -- would it be fair to say that you would defer discussion of the thoracic outlet issue to Dr. Fry as an individual who regularly operates on individuals with that condition? |  |
|  | A |  | As I've stated to the court already, I don't want to set myself up as an expert on thoracic outlet syndrome, but I have to point out that dealing with the '04 accident, I sided with the family physician that in the first six weeks there were no arm complaints, so I didn't think it was appropriate for me to refer to those because I chose to side with the family doctor that for six weeks it was a neck and back problem. If you're asking, I'm not an expert on thoracic outlet syndrome. |  |
|  | Q |  | And so Dr. Fry would be better able to express an opinion to the extent of which there may be a delay in the onset of thoracic outlet syndrome after a motor vehicle accident because of his lengthy experience and clinical experience. |  |
|  | A |  | I would defer to Dr. Fry's experience in thoracic outlet syndrome. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right, right. So basically your review of a lot of the other reports would be fairly cursory to identify the questions to ask, and then you most want the history that's coming from him, Mr. Sauer, or your patient, any patient? |  |
|  | A |  | Well, the starting point -- first of all the subject at hand was to assess a particular injury. That was my assignment. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I had a letter of engagement to give an opinion not about his larynx or anything else, but to give an opinion -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | I'm sorry, Doctor, yes? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was -- my understanding of my letter of engagement was to see Mr. Sauer in order to express an opinion about the '04 injuries that he sustained. That was the main focus of what my assignment was of an hour and a half. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | In order to do that thoroughly you have to have some background information -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. |  |
|  | A | -- a lot of which he did provide. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And between the time of you getting that referral, unfortunately Mr. Sauer had the second accident? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And in fact, I think you were quite -- you acknowledge quite honestly that that made it a difficult task because you've got this man who just had this accident where his car was lifted up, a fairly severe accident, and you're trying to unravel that from 2004, the 2004 accident? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

**236**  From the above evidence, I find, with respect, that no weight should be given to the opinions of Drs. Munro or McGraw on this issue.

**237**  In any event, I note that the defendant did not rely heavily on the opinions of these experts in her submissions on this issue, but rather on the alleged uncertainty surrounding the diagnosis of thoracic outlet syndrome raised through the cross-examinations of the plaintiff's medical experts.

**238**  However, I find that the plaintiff's medical experts not only established the plaintiff's diagnosis that he suffered from thoracic outlet syndrome, but also that of a multiple crush syndrome. In my opinion, the thorough cross-examinations of these experts did not serve to weaken their conclusions that the plaintiff did in fact have this condition and that it was caused by the accident.

**239**  Secondly, I recognize the fact that Dr. Blasberg is an expert in facial pain and TMJ disorders, and that he has oversight of Dr. Mehta's activities in one of the clinics where general residents see patients with jaw muscle and joint disorders. However, I do not think, with respect, that the opinions and evidence of Dr. Blasberg has shaken the opinions and testimony of the plaintiff's medical experts that he sustained a serious TMJ injury as a result of the accident, and that he should undertake dental reconstruction to treat this disorder.

**240**  On the issue of causation, in his report of August 29, 2006, Dr. Blasberg referred to two chart entries in the records of Drs. Morrison and Gifford to suggest that TMJ symptoms occurred before the accident. He said that there were no physical findings recorded to establish a TMJ diagnosis. He concluded that the plaintiff "probably had episodes of jaw pain or headache due to tooth clenching or bruxing prior to [the accident]. The [accident] probably caused soft tissue injury to the jaw joints and muscles and resulted in the symptoms that [the plaintiff] reported. [The second accident] by [the plaintiff's] report aggravated the existing jaw symptoms but did not appear to cause the other jaw injuries."

**241**  Dr. Karateew testified on this point, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | The report of August 29, 2006, talks about -- well, the final paragraph is speculative in that it says [as read in]: |  |

In summary, Mr. Sauer probably had episodes of jaw pain or headaches due to tooth clenching or bruxing prior to November 1, 2004. The motor vehicle accident probably caused soft tissue injury to the jaw, joints and muscles and resulted in the symptoms that Mr. Sauer reported. The accident of May 1, 2006, by Mr. Sauer's report, aggravated the existing jaw symptoms, but did not appear to cause other jaw symptoms.

What is -- first of all, how prevalent is bruxing or grinding of teeth in the population?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Extremely prevalent. I can't give you a number, but it relates to some degree to sex and some degree to stress. |  |
|  | Q |  | Okay. And there are -- a reference in his treating physician, I believe, Dr. Morrison, who provided Mr. Sauer with treatment for his laryngeal dystonia, about an incident of muscle soreness in his jaw, due to grinding of teeth, and then another reference from Dr. Griffith's file. I believe those are referenced in Dr. Blasberg's second report. And I understand Mr. Sauer was also wearing a mouth guard, had been fitted with a mouth guard for teeth grinding. In terms of the relationship between this type of jaw condition, this altered bite, is there any relationship in the two, what is identified by Dr. Blasberg and this altered bite in terms of grinding and the altered bite? |  |
|  | A |  | The altered bite is not a result of any grinding. The grinding that Dr. Blasberg was talking about within the scope of this letter may be some transient muscle soreness, maybe some minor wear facets on the teeth, which he demonstrates. And might I suggest, the majority of adults have wear facets on their teeth from repeated function. That's the scope of what Mr. Sauer reportedly had in terms of results of bruxing or grinding. |  |
|  | Q |  | So when you say wear facets, from looking at the teeth, you can observe the extent of the grinding problem? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

**242**  Dr. Karateew also said that Dr. Blasberg, in his report dated August 29, 2006, was dealing with the extent to which the reconstructive work would address any myofascial pain syndrome, noting:

What Dr. Blasberg deals with is talking about the issues of pain, and when I'm talking about the reconstruction, discussing specifically the function and the strength or the reinforcing of the teeth ... to bite, to chew, yeah, meaning the function.

**243**  Dr. Karateew testified that the plaintiff advised there were "chips and fractures in the teeth after the first MVA". On cross-examination he testified that the grinding of the teeth can only be "inferred from major traumatic events". On re-examination, he testified that given that altered job function had been established prior to the second accident, all of the fractured teeth would in any event have to be ground down as they were "not in a normal occlusion".

**244**  I agree with the plaintiff that Dr. Blasberg's opinion about bruxing, which is based essentially on two chart entries made prior to the accident, does not adequately or fairly address the plaintiff's serious jaw issues that Drs. Mehta and Karateew had to address and treat, jaw issues that the plaintiff did not experience before the accident.

**245**  Moreover, Dr. Blasberg acknowledged that he had never performed cone beam scans, and that he would defer to a person who had skill in interpreting them. Dr. Karateew testified about the results of the cone beam scan as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Can you tell me why that piece of equipment is used as opposed to other imaging equipment? |  |
|  | A |  | Cone beam scans are like -- are similar to CT scans in that they give an image of the hard structures or the ossified structures of the anatomy; in this case, specifically the head and neck, or more specifically, the condyle and the articular eminus (phonetic). The computer takes the image acquisition and is able to slice it in millimetre slices so we can see a true representation of the entire boney structure as we progress from front to back. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So it's giving a three-dimensional slice? |  |
|  | A | Three-dimensional, exactly. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And I take it that that provides a certain degree of detail that you don't see -- |  |
|  | A |  | A degree of detail that we can't see on conventional radiography. |  |
|  | Q |  | Okay. And what is it showing compared to prior cone scans with respect to Mr. Sauer's jaw; what has happened since the earlier -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | In the prior reports? |  |
|  | Q | Mm-hmm. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Dealing with the images that were reviewed, it was discussed that the degeneration was mild, specifically on the right condylar head. Now the images I have here show significant invagination of the bone of both the right and left condylar heads. |  |

**246**  Given the absence of experience on the part of Dr. Blasberg with this diagnostic tool I think that the Court should accept the interpretation of the scans by Dr. Karateew who was experienced in reading the results of cone beam scans.

**247**  Dr. Blasberg also testified that the length of time TMJ problems continue may indicate a poor prognosis, and that if they continue after four or five years it would be an adverse factor when trying to estimate prognosis.

**248**  In his report of April 7, 2008, Dr. Blasberg opined that comprehensive prosthetic dental rehabilitation for jaw muscle disorders is not a treatment supported by the dental literature and that it was not an appropriate treatment for the plaintiff's jaw muscle disorder. Dr. Karateew testified on this point, as follows:

1. Now, Doctor, if you could go to the last paragraph on Dr. Blasberg's second expert report of April 7, 2008. He notes [as read in]:

Comprehensive prosthetic dental rehabilitation for jaw muscle disorders is not a treatment supported by dental literature and in my opinion is not appropriate treatment for Mr. Sauer's jaw muscle disorder.

Now, first of all, was the treatment of reconstruction ever done specifically to treat Mr. Sauer's jaw muscle disorder?

1. Absolutely not.
2. And it was done for the reasons you have described?
3. Done to restore function and a protective mechanism to further breakdown of the teeth.
4. Okay. And would it have any benefit in terms of -- with regard to the muscles, any future benefit? I think you've referenced that in terms of protecting the muscles from continued --
5. The muscles would -- facilitation of the ideal occlusion would alleviate the muscles of any abnormal trigger points, causing further stress and spasticity.

**249**  Furthermore, when asked in cross-examination whether the plaintiff's treating dentist and doctors were in a better position than him to make judgments as to whether he should obtain certain dental and medical treatments, Dr. Blasberg replied, "Well, I think his treating dentists, the individuals who have the responsibility for advising him on what they feel is in his best interest."

**250**  When Dr. Mehta was asked how decisions were reached about the plaintiff's treatment plan, he testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, you talked about wanting a better view of the mouth function. Was a model ultimately done of Mr. Sauer's mouth? |  |
|  | A |  | Often times with these mouth guards, we would get models of the teeth. |  |
|  | Q |  | Right. But was a comprehensive model done showing the bite? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did that show a number of areas where teeth were not contacting? |  |
|  | A |  | It did. It did. Mainly along those back teeth, the posterior teeth. |  |
|  | Q |  | Okay. Now, ultimately, I understand, Mr. Sauer is embarking a process where the vast majority of his teeth are being capped to raise them, so that the teeth contact and his bite is restored? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Could you tell me why you moved to that solution and what the risks are specifically for Mr. Sauer in those procedures. |  |
|  | A |  | And again, it was after much debate, you know, going back and forth. I had convinced Mr. Sauer of avoiding it for quite some of time, but, unfortunately, there were several other teeth that were starting to fracture, given the fact that he's just biting down on those front teeth. So the fractures were becoming more severe. He was starting to develop other sorts of dental pathology. I understand he needed a root canal procedure and endidontic procedure on one of the front teeth because of just the constant trauma. Because of that, all of those, between the teeth fractures, the constant trauma to those front teeth, and just the increased frustration on his part, that he's just not able to eat adequate foods. I mean at one point he was, you know, describing some concerns to digestion because he's just not chewing efficiently. |  |

**251**  Dr. Mehta also said that he had read Dr. Blasberg's reports and that nothing in them changed his opinions. He testified:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Now, Dr. Blasberg, in the very last paragraph of the April 7, 2008, notes [as read in]: |  |

Comprehensive prosthetic dental rehabilitation for jaw muscle disorders is not a treatment supported by the dental literature and in my opinion is not an appropriate treatment for Mr. Sauer's jaw muscle disorder.

Could you just comment on that conclusion?

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| --- | --- | --- | --- | --- |
|  | A |  | That's a valid statement, and that's what we were going for in the beginning. The current treatment recommendations and guidelines by the American Academy of Oral Facial Pain, which comes up with these recommendations for these kind of TMJ problems, is that we start off with conservative management modalities first, not jumping into these irreversible treatments. Irreversible meaning something that you just can't take away. For example, a mouth guard, that would be considered conservative and reversible in that if the mouth guard isn't working, we can always take that away from the patient and not cause further harm. An irreversible thing like a surgical procedure, dental reconstruction, prosthetic dental rehabilitation, that would be irreversible, and certainly not something we would want to do right off the bat. But at some point, sometimes you have to do a surgical procedure for some individuals; sometimes the teeth do need to be re-built, and in this situation, Mr. Sauer's case, those teeth were fractured from the beginning. We held off for a very long time to avoid any kind of irritation, because I told him, well, if you're in the dental chair, you're going to be open for 45 minutes to an hour; that's going to aggravate your jaw. But once he started developing more pain and problems because of those tooth fractures we had to address them. We couldn't just ignore those problems and not do anything about them. |  |
|  | Q |  | And at that point, there had been no change in the altered jaw -- |  |
|  | A |  | There had been some improvements but not as far as the bite, the occlusion; that had not improved. Well, it might have decreased a little bit, but that was still an ongoing problem. His range of motion was improving, not 100 percent better. His pain may be improving but not completely eliminated, because he was taking pain medication. |  |
|  | Q |  | So the reconstruction, if I have it right, was done to address the teeth fractures and to allow him to eat properly? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And you also believe that it would also avoid a chronic facial pain problem because of repetitive strain on his jaw muscles? |  |
|  | A |  | That would be an added goal, and, yeah, I'm hopeful of that. But that will, obviously, remain to be seen. |  |
|  | Q |  | Okay. So all of that wasn't done simply with that last, third, icing on the cake benefit? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah, correct. Correct, yes. |  |

**252**  Thus, I am satisfied and find that when the conservative approach taken to address the plaintiff's symptoms failed to resolve the plaintiff's complaints, it was reasonable for the plaintiff and Dr. Karateew to conclude that a more aggressive treatment was necessary and appropriate.

**253**  Finally, I am satisfied that while the injuries sustained by the plaintiff in the second accident may have aggravated some of the plaintiff's symptoms from his accident related injuries they had a minimal impact on his symptoms and quickly resolved. I find that for all intents and purposes the injuries sustained by the plaintiff in the second accident should have no bearing on my assessment of the plaintiff's claim for general damages.

**254**  Dr. O'Connor noted that there may have been a transient change in the plaintiff's thoracic outlet symptoms. He said:

... when I saw him in February and then I think I saw him in December, as well, his symptoms I think initially were slightly worse. I did not get a sense that there was a dramatic deterioration. We hadn't changed his medication dramatically. We hadn't jumped in and tried medication or therapy that we hadn't already done afterwards. So his symptoms were still present after the second accident. I didn't get the sense that there was a huge change after. Or, more importantly, maybe a permanent change afterwards.

**255**  Dr. O'Connor did not identify any new jaw problems after the second accident, and said:

I don't remember him sort of endorsing or describing new or more symptoms to me in that regard, no. In fact, the symptoms that I mention on 2 and 3 of that where I'm talking about the second motor vehicle accidents, number 2 and 3 on page 6, he wasn't complaining of those symptoms to me much at all. Those were symptoms that had obviously resolved by that point or not bothering him as much anymore.

**256**  In the result, I find, on the whole of the evidence, that the plaintiff has proven to the requisite standard that as a result of the accident he sustained moderate to severe injuries to his eyes, teeth, jaw, neck and back. I accept Dr. Fry's opinion, confirmed by the other experts for the plaintiff who opined on this issue, that as a result of the accident the plaintiff has significant musculoskeletal and neurological symptoms with respect to his left arm and that the diagnosis is one of multiple crush syndrome, where he has evidence of cervical spine compression, of neurogenic thoriacic outlet syndrome, of cubital tunnel syndrome and of carpal tunnel syndrome.

**257**  I also find that the injuries he sustained in the accident and the requirement to take therapy and medication on a continuing basis since the accident to treat those injuries has had a significant impact on the quality of the plaintiff's life, including sleeping, eating and physical fitness, as well as upon his social and personal relationships.

**258**  I am mindful of the evidence that since the accident the plaintiff has experienced varying degrees of improvement in his overall symptoms; that to some limited extent he has been able to return to physical pursuits such as tennis, jogging and skiing; that he has been able to travel on family vacations; and, that during the time he was involved with the affairs of Global Synfrac he frequently commuted to Calgary to attend Board meetings. I am also mindful of the evidence that his prognosis remains poor with regard to his TMJ disorder and thoracic outlet syndrome, and there remains the possibility of him having to undergo further surgical procedures to address these conditions. Moreover, he will have to continue taking therapy and medications to treat his ongoing symptoms.

**259**  Taking all of the above factors into account, I find that $135,000 is a fair and reasonable sum to award the plaintiff for general damages.

**B. Loss of Opportunity Claim**

**260**  Pursuant to an agreement between the plaintiff and Global Synfrac dated August 31, 2004, the plaintiff received options for 100,000 shares, half of which had an exercise price of $1, and the other half had a price of $2.50, as a director's remuneration package. The agreement was valid for the period of time the plaintiff served as a director, and expired 90 days after he left the Board. Upon leaving the Board, the plaintiff was forced to either exercise the options, or lose them. The cost of exercising the options would have been $175,000. The plaintiff claimed that due to circumstances at the time he did not have the funds needed to exercise the options. He made several attempts to raise the funds, including a bank loan, a loan from a family member, and a request to the President of Global Synfrac to extend the time period to exercise the options. However, none of his efforts were successful.

**261**  The plaintiff submitted that as he was unable to exercise the 100,000 share options, and as the share trading price in 2006 was $6.00 per share, he lost $425,000.

**262**  On April 15, 2005, the plaintiff and his fellow directors were granted a second share option agreement of 100,000 shares exercisable at a price of $6 each, 25,000 of which vested on April 15, 2005, and 25,000 of which would vest on April 15th of each of the following 3 years. The plaintiff said that as he was forced to resign as a director, only 50,000 of the shares had vested, and therefore he lost the opportunity to receive the remaining 50,000 share options for his service as a director.

**263**  Pursuant to another agreement between the plaintiff and Mr. Michael Fitzgerald dated February 15, 2005, the plaintiff received 50,000 share options priced at 1/10 of a cent as compensation for his "extraordinary work as a director."

**264**  The plaintiff alleged that due to his legal expertise he was able to assist in getting the company organized, serving as an information conduit with respect to legal matters, and assisting in corporate governance work. However, he claimed that as a result of the accident he could not carry out the second portion of the reorganization work and could not carry on as a director, and, therefore, lost the opportunity to be compensated with further share options for his work as a director.

**265**  Finally, the plaintiff served as Chairman of the Board for approximately one year and received 25,000 extra share options exercisable at a price of $6 each, beyond what a director would get as compensation. However, he claimed that he resigned as Chairman in February 2006, primarily because of Mr. Fitzgerald's desire to regain control of the Board and to serve as Chairman himself, and also because the injuries he was experiencing as a result of the accident made it increasingly difficult for him to perform the duties of Chairman.

**266**  The plaintiff submitted that the proper approach to the assessment of damages for future loss of opportunity is set out in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), and *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), where at para. 9 the Court said, "the standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of possibilities ... Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation."

**267**  The plaintiff said that in his case the Court can consider his ability to be involved in corporate governance as a director or as a qualified individual providing valuable expertise and knowledge. He said that for this type of service he would receive valuable share options. He also submitted that in addition to the Global Synfrac opportunity, other capital opportunities that would have been available to him, but for the accident, should also be taken into consideration.

**268**  I find that the plaintiff has failed to prove his loss of opportunity claim for the following reasons.

**269**  First, the minutes of the board for the February 2, 2006 Board meeting, under the heading "Board Governance", clearly identified the reasons for the plaintiff's departure from the position of Chairman. The reasons appear to have nothing to do with his accident related injuries:

The Board had a long discussion about governance issues and what role each of the Directors would play in the future. Mike felt very strongly that he should be the Chairman of the Board in place of Doug and he shared his vision for the Corporation and his leadership intentions with the Board. As Mike effectively holds about 56% of the voting shares of the Corporation, his wishes must ultimately be respected. Mike stated clearly that he is not requesting this change because Doug has failed to do a good job as Chairman. In fact, Mike said that Doug has done an excellent job and has demonstrated his commitment to the Corporation in many ways, including raising capital and serving on the Board and dealing with governance matters. In light of Mike's desire, Doug said that it would appear to be in the best interests of the Corporation that he resign voluntarily and not force a vote of the shareholders on the issue or start a dispute with Mike over it. Thus, Doug resigned as Chairman effective immediately so that Mike could be appointed Chairman.

Cam suggested that Doug and Mike be joint Chairmen of the Board for a period of time such that Mike could ease into the role and responsibilities of Chairman slowly. However, Mike felt that he was ready to assume the Chairmanship alone immediately.

Peter then moved that Mike be appointed as Chairman of the Board -- carried unanimously. The Board thanked Doug for his hard work and diligence during his term as Chairman. Doug confirmed that he would remain a Director of the Corporation.

**270**  Moreover, in the December 13, 2005 minutes, under the heading "Corporate Governance", there is a discussion about the level of the director's satisfaction with the work that the plaintiff had been doing as Chairman. There was unanimous approval by the directors of the job that the plaintiff had done since assuming the position of Chairman, and the directors expressed their wish at that time that the plaintiff continue to serve as Chairman and stand for re-appointment.

**271**  Thus, contrary to the plaintiff's position that he resigned as Chairman of the Board and as a director because of his accident related injuries, there is no evidence that at any time in his relationship with Global Synfrac, as a director or as Chairman of the Board, that he expressed to the directors, or the directors expressed to him, that he was challenged in providing his services to the company by reason of any physical disability or impairment arising out of his accident related injuries.

**272**  Secondly, the director's minutes for February 15, 2005 record, as follows:

**Doug left the meeting at this time.**

Discussion ensued about granting further share options to Doug to compensate him for his extraordinary work on governance issues since May 2004. It was the consensus of the Board that the benefit of this work, while it accrued to the Corporation, was primarily of a benefit for Mike and Thomas as co-founders. It was also noted by John that Doug was the recipient of Director's share option remuneration established August 31, 2004. As a result of the discussion, Mike moved that no further options can be granted by the Corporation to Doug for his past service to the Corporation -- carried unanimously.

However, Mike confirmed that he, with Thomas' concurrence, had in July 2004 made a personal commitment to Doug to compensate him for this work. As a result, Mike advised the Board that he would grant Doug 50,000 share options which would vest immediately at an exercise price of $0.001 per share. Thomas confirmed that he will compensate Mike for one-half of these share options, i.e., 25,000 shares, once Thomas is able to exercise the share options which he now holds from Mike. Mike then asked Ari to prepare this agreement.

*Action Item: Ari to prepare an Option Agreement between Mike and Doug as described above.*

**Doug then returned to the meeting.** He was advised of the Board's decision and he thanked Mike for the granting of this option. He stated that in the future event that he may be called upon to grant extraordinary services to the Corporation such as the negotiation of the sale of the Corporation, he will, before he commences such work, first negotiate and agree upon an appropriate compensation agreement with the Corporation.

[emphasis in original]

**273**  In cross-examination, the plaintiff was asked about this arrangement, and he testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now Mr. Sauer, before we broke we were looking at the minutes of Global Simfrac corporate board meeting, February 15, 2005. We were at page 4. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Sir, just to recap, obviously we can agree that for this second batch, or second tranch of work that you say you would have done, there was no written agreement or any contract drawn up at the time of the accident with respect to that second batch of work? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |
|  | Q | You're agreeing with me? |  |
|  | A | I am. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And whether that was ever going to happen was a matter of speculation, isn't that fair? |  |
|  | A |  | Yes. I mean Mike and I had discussions about it and if I had been able to do the work, then he probably would have come through again with some more shares, but that's -- it is, you're correct, speculation. |  |

**274**  Thus, there was no contract in place for any second phase of corporate governance work.

**275**  Finally, and in any event, I do not think that the plaintiff should be permitted to claim damages for loss of opportunity given his representations to his disability insurers.

**276**  For example, in a form completed for the Maritime Life Assurance Company dated June 8, 2004, under the heading "Current Impairments", Dr. Van Eeden marked the box for "capable of minimal activity". Under the heading of "Diagnosis" in answer to the question, "What do you think is required to enable your patient to return to work?", the doctor replied, "Miracle". This form was filled out five months prior to the accident at the same time that the plaintiff was getting involved with Global Synfrac.

**277**  In the Manulife Financial Group benefits attending physician's update, Dr. Van Eeden wrote after both accidents that the plaintiff will never be able to return to work as a lawyer.

**278**  In his application for disability benefits with the Canada Pension Plan signed May 25, 1999, in reply to the question, "if considered suitable, would you consent to a vocational rehabilitation assessment?", the plaintiff answered, "no", and wrote in explanation, "My doctors advise that I am unable to work and to work would endanger my life."

**279**  On p. 24 of the Reassessment Medical Report dated November 22, 2001, the plaintiff said that he did not expect he would be able to return to work. He was asked whether he had engaged in any work activity including employment, self employment or volunteer work during the period under review and he answered "no". He was asked in cross-examination about this answer and testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then over on page 24, item 10, it indicates, "Have you engaged in any work activity, employment, self-employment, volunteer, during the period under review," and you've indicated no. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Hmm. |  |
|  | Q | Was that you? Was that you who put the X there? |  |
|  | A | Yeah. I didn't see the word "volunteer". |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So obviously we can agree that that actually wasn't correct at the time you filled out this document. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right, that aspect is not correct. |  |

**280**  In a Maritime Life Assurance Company form dated June 23, 2003, in answer to the question whether his disability completely prevented him from doing any work for remuneration or profit, the plaintiff said "yes", and wrote, "I do not ever expect to return to work as a lawyer."

**281**  In a Manulife form dated July 12, 2005, the plaintiff wrote, "I do not ever expect to return to work as a lawyer." In cross-examination the plaintiff testified, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And at the top of that page, you've indicated that you hadn't enrolled in any education or work-related courses in the past 12 months? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you've indicated that you do not ever expect to return to work as a lawyer? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I don't see any reference to any of your activities with Global Simfrac reported to Manulife Financial by July of 2005. I presume -- I'm sorry? |  |
|  | A |  | I don't see any either. Where are you supposed to report that? |  |
|  | Q |  | It didn't cross your mind that perhaps a disability insurer might be interested that you are actively, I'll use the term working, with Global Simfrac and corporate governance issues? |  |
|  | A |  | No, not at all. I wasn't making any money. That's all they care about. Soon as I start making money, then they'll be all over me like a dirty shirt, but at this point in time -- in fact, I never have made any money, at least not so far, out of Global Simfrac. |  |

**282**  The plaintiff, in his submission, noted that his legal expertise gave him a skill set in the area of corporate governance, a skill set which made him especially useful to Global Synfrac as a director and Chairman of the Board. In fact he was heavily engaged in providing assistance and advice on corporate governance issues during his term as director and Chairman. Indeed the February 15th agreement recorded that he was being granted share options for his "extraordinary work as a director."

**283**  Thus, I find that the plaintiff should not be permitted to claim a loss of opportunity to earn compensation, past or prospective, based essentially on a skill set using his legal experience when he consistently advised his disability insurers in the period leading up to and during his tenure on the Board that he could not work, including work as a volunteer, because of his disabilities.

**284**  For all of the above reasons I find that the plaintiff should be denied his damage claim for loss of opportunity.

**C. Special Damages**

**285**  The plaintiff claimed special damages in the amount of $93,509.15, which included amounts for: chiropractic ($4,835); dental ($47,422.11, which includes $21,574 not yet paid by the plaintiff to Dr. Karateew); massage therapy ($15,370.25); physiotherapy ($1,750); optical ($4,231.92); miscellaneous expenses of $4,175 for MRIs/CT scans; $5,943.30 for prescriptions not covered by medical insurance, $5,365.94 for a special bed; and, $4,415.63 for structural medicine therapy.

**286**  The plaintiff also claimed an amount of $4,195.05 for attending appointments with his treating doctors and therapists, and $3,832.81 for opening, closing, cleanup, woodcutting and cleaning costs associated with the plaintiff's family cabin.

**287**  Regarding the special damage claim for optical, the defendant objected to the $2,500 cost associated with the plaintiff's laser eye surgery on the basis that it was performed to correct his myopia. I partially agree with this objection. Although Dr. Beattie testified that the plaintiff's condition of experiencing floaters did improve after he had laser surgery, in cross-examination he said that it was the plaintiff who initially discussed interest in laser surgery, and that he was also interested in having his myopia corrected. When asked if part of the reason for the surgery was to have the plaintiff's near-sightedness corrected so that he did not have to wear contacts, the doctor replied that the subjective improvement that occurs in the plaintiff's condition is by removing a layer of correction. He said it would be with the goal of treating the myopic refract nerve for distance so that one would then need glasses only for reading. Thus, I find it appropriate to award the plaintiff 50% of this item ($1,250).

**288**  I agree with the defendant that the cost of the special bed in the amount of $5,365.94 appears excessive given the evidence of Dr. O'Connor. When he was asked in cross-examination whether he told the plaintiff to purchase a special bed for this amount of money, he replied that they had a conversation about a bed but he did not mention a price range and did not tell the plaintiff to purchase the one that he did for $5,300. In the result, I allow this item of special damage at 50% of the amount claimed ($2,682.97).

**289**  The defendant also objected to the cost of $15,370.25 associated with massage therapy. This objection is based on the fact that in cross-examination Mr. Roach testified that assuming that the plaintiff had not been involved in the accident, and given the plaintiff's history of attending him periodically, it was his reasonable expectation that the plaintiff would continue to see him for therapy into the future. In light of this evidence, I allow this item of special damage at 50% of the amount claimed ($7,685.12).

**290**  I find that the claim for costs associated with the plaintiff's family cabin should be partially allowed given the plaintiff's pre-accident medical history, which indicates that absent the accident he would have incurred some of these costs in any event. I award the plaintiff 50% of the amount claimed ($1,916.40).

**291**  The item most strongly contested by the defendant is that of the cost associated with the services performed by Dr. Kerateew. For the reasons set out in the general damages award, I find that the defendant must pay the cost of Dr. Karateew's treatment of the plaintiff.

**292**  Thus, I fix the amount of the plaintiff's special damages at $4,835 for chiropractic treatment; $47,422.11 for dental costs; $7,685.12 for massage therapy; $1,750 for physiotherapy; $2,981.92 for optical; $4,175 for MRIs/CT scans; $5,943.30 for prescriptions; $2,682.97 for a special bed; $4,195.05 for attending appointments; and, $1,916.40 for costs associated with the plaintiff's family cabin.

**293**  I do not allow the amount claimed of $4,415.63 for structural medicine therapy with Mr. Root. While I am mindful that the plaintiff said he found this therapy beneficial, I agree with the defence that there is no evidence to support this therapy.

**D. Cost of Future Care**

**294**  The plaintiff submitted a chart of future care costs setting out his estimated costs for one year and for future care to a life expectancy of age 81(at the time of trial the plaintiff was age 56). He also submitted a chart claiming that his total annual cost of travel to and from medical appointments is $6,180, for a total to age 81 of $97,440; that his future costs for general repairs and maintenance is $24,802, based on maintenance costs of $1,573 in 2008 in connection with his family cabin.

**295**  The defence position is that the plaintiff had a long history of physiotherapy before the accident and received massage therapy just prior to the accident. The defence contended that these therapies would have continued into the future even if the accident had not happened, and particularly after the second accident.

**296**  As well, Dr. Van Eeden in his report set out the plaintiff's monthly expenses, including amounts for massage therapy twice a week, physiotherapy once a week, and for a chiropractor once a week. He testified in cross-examination that he was not stating in his report that as a sole result of the accident the plaintiff required massage therapy, physiotherapy or chiropractic treatments at the cost the plaintiff was incurring at the time of his report. The doctor said that he leaves it up to the patient and the specialist of the patient to assess the patient's progress, and then recommend further treatment options.

**297**  Dr. Van Eeden said that the plaintiff would need to continue with physiotherapy, massage therapy and chiropractic treatments for two to five years. Dr. Mehta said that the plaintiff will require dental appliance replacement every six months. Dr. O'Connor's evidence was that given the duration of the plaintiff's thoracic outlet symptoms in his neck, shoulder, arm and hand, that it is likely the plaintiff's pain will continue for three to five years and that there was a greater than 50% chance that his symptoms will persist indefinitely. Dr. Fry opined that there was at least a 50% chance that at some point in the future the plaintiff will face the need for surgical intervention for his condition of thoracic outlet syndrome.

**298**  In my opinion, with the exception of physiotherapy (the plaintiff claims $100 per session for physiotherapy, once per week for one year, for a total of $5,200) it would be fair and reasonable, on the whole of the evidence, to assess the plaintiff's future care costs on the basis of a time frame of 5 years from the date of trial.

**299**  The plaintiff claims $88 per session for massage therapy, twice per week, for a total amount of $9,152 for one year, and $143,480 to age 81. I do not consider it reasonable to calculate this item on the basis that the plaintiff will attend massage therapy twice per week for every week of the year. Rather, I fix the amount for this item at $88 per session, twice per week for 44 weeks for five years for a total of $38,720.

**300**  The plaintiff claims $42 per session for chiropractic treatments and progress examinations, once per week for one year for a total of $2,500 per year. I fix the amount for this item at $42 per session, once per week for 44 weeks for five years, for a total of $9,240.

**301**  I fix the amount of the plaintiff's claim for medical prescriptions at $600 per year for five years for a total of $3,000.

**302**  The plaintiff claims that he will require mouth guards twice a year at $500 per mouth guard for the rest of his life, at a future cost of $15,767. However, I fix the amount of this claim at $1,000 per year for 5 years for a total of $5,000.

**303**  The plaintiff claims that he will have to attend Dr. Mehta once every two months at $125 per visit. As well he will have to attend Dr. Mehta once every three months for Botox injections at $625 per injection. The total is $3,250 per year. I fix the amount for this item at $3,250 for five years for a total of $16,250.

**304**  Dr. Karateew estimated treatment of comprehensive prosthetic rehabilitation at $40,000 to $45,000, with supporting periodontal therapy at $3,000 to $6,000. I find that the plaintiff should be compensated for this item in the amount of $40,000. However, from this amount must be deducted $6,000 for gum grafting, which is not part of Dr. Karateew's rehabilitation plan for the plaintiff, as well as $5,200 relating to repairs caused by the second accident, based on the following testimony of Dr. Karateew:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, it's fair to say, is it not, that given you were coming onto the scene later in the years after the fact, it's pretty difficult to sort out MVA 1 versus MVA 2 when we're talking about these cracked teeth? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | On page 2 of the report, the second paragraph from the bottom in the middle of the paragraph, you state [as read in]: |  |

These cracks are almost certainly due to the force of the impact of the second MVA in which Mr. Sauer suffered a concussion.

I believe that was -- and then you made a reference to some --

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Let me just re-read that paragraph, please. |  |
|  | Q | Certainly. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | What I say in the next paragraph is that he had serious TMJ and dental pain for three years since the first motor vehicle accident, and it's my feeling that these difficulties were made worse by the second motor vehicle accident. |  |
|  | Q |  | I think what I was trying to get you to address was the fact that you're saying that the cracks or fractures in some of these teeth, and I wanted to know which ones, were actually caused by the second accident? |  |
|  | A |  | As I'm sure you can appreciate, you can't sit and look at cracks and determine which cracks were caused by which accident, but rather, suggest that significant cracks were initiated in the first T-bone-type accident in which the head received some significant back and forth trauma. This would have been exacerbated by the second accident. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | That's sheer speculation on your part, isn't it? |  |

A It's based upon a fundamental knowledge of teeth receive fractures when the head is whipped back and forth in extreme trauma or extreme traumatic event.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, perhaps I can just revert back to plain old English. Just the second paragraph from the bottom of the page, middle of the paragraph: |  |

These cracks are almost certainly due to the force of the second MVA in which Mr. Sauer suffered a concussion.

Are you now resiling from that, saying that they're not caused due to the force of the second impact?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | If I was to rewrite this letter now, I wouldn't be so adamant in the wording, but I'm not, and it's there, so -- |  |
|  | Q |  | Well, you understood when you were preparing these reports that they were likely going to end up in court, were you not? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So what cost are we attributing -- if we take your conclusion here that these cracks were almost certainly due to the force of the impact in the second MVA, are we talking about teeth 25, 26, 27 and 36? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's what I have written. |  |
|  | Q | I don't want to -- |  |
|  | A | No. |  |
|  | Q | It's your report, you tell me. |  |
|  | A | That's what I have written. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So the $40,000 we're talking about, how much of that is 25, 26, 27 and 36? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Approximately 5,200. |  |

**305**  There is no evidence to support the frequency of the plaintiff's attendance at medical appointments in the future. I fix the amount that he can claim for this item at an annual cost of $1,000 per year for 5 years for a total of $5,000.

**306**  I fix the amount that the plaintiff can claim for future cost of general repairs and maintenance of the family cabin at $5,000.

**307**  I disallow the plaintiff's claim of $196,299.15 for structural medicine therapy with Mr. Root for the same reasons that I gave for disallowing this item under the plaintiff's claim for special damages.

**5. Special Costs and Prejudgment Interest**

**308**  The plaintiff seeks special costs on a contingency fee basis. He claims that the litigation has been made unnecessarily complex by the defendant's denial of liability in circumstances where the defendant's liability for the accident was obvious. Moreover, the plaintiff asserted that the defendant raised unnecessary complexity by introducing the evidence of Drs. Munro and Blasberg in circumstances where their evidence did not fairly, reasonably or adequately address the plaintiff's injuries, nor did they have the expertise to contradict the plaintiff's experts in the areas where they were called upon to give their expert opinions.

**309**  I do not agree that defending the plaintiff's claim was reprehensible as the plaintiff contended. It is plain that the plaintiff's claim for damages is complex for the reasons mentioned in these reasons. In my view, the thorough cross-examinations of the lay and medical witnesses was necessary given the plaintiff's pre and post medical history, and did not unnecessarily protract the proceedings.

**310**  Finally, the plaintiff submitted that the trial was adjourned in 2007 as a result of defence counsel being ill. He contends that there was sufficient time for another counsel to have been retained by the defendant, but the defendant chose not to pursue this option. The plaintiff claimed that while a standard rate of prejudgment interest is appropriate for a "typical delay", where the delay is extended the principle of restoring the plaintiff to his previous position necessitates that prejudgment interest equal to what he would have been able to attain by market investments. He submitted that an appropriate rate is 6%.

**311**  I do not think that it would be appropriate to grant the rate of interest sought by the plaintiff. There have been delays in the scheduling of the proceedings, but they have not been solely due to the conduct of the defendant. For example, when he was asked in chief by his counsel why the trial could not be rescheduled for October/November 2008, he answered that he had suffered another setback because of his heart condition. He explained that he was hospitalized in August 2008 and required heart surgery to replace a stent that was placed in January 2007. He was also hospitalized on December 23, 2008 for heart arrhythmia.

**312**  Accordingly I dismiss the plaintiff's claims for special costs and for prejudgment interest based upon delay in the proceedings.

**6. Conclusion**

**313**  The plaintiff shall have judgment for the following amounts:

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| --- | --- | --- | --- | --- |
|  | (i) | General damages | $135,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (ii) | Special damages | $83,586.87 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (iii) | Cost of future care | $116,210.00 |  |

B.I. COHEN J.

**End of Document**

[***Severn v. Bokelman, [2018] B.C.J. No. 1291***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SRY-8JT1-JW5H-X4RH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

B.J. Brown J.

Heard: April 20, 2018.

Judgment: July 3, 2018.

Docket: S165881

Registry: New Westminster

**[2018] B.C.J. No. 1291** | 2018 BCSC 1100

Between Mr. Craig Severn, Plaintiff, and Dr. John F. Bokelman, Dr. Ashit Bardhan, Ridge Meadows Hospital, Defendants

(29 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Failure to inform — Relationship with patient — Disclosure — Treatment, authorization for — Consent — Particular professions — Doctors — Application by doctor to dismiss action allowed — Doctor who performed pre-anaesthetic consultation for plaintiff's planned abdominal surgery recommended combined general/epidural anaesthetic — Reasonable person in plaintiff's position, advised of one in 10,000 chance of major or severe complication resulting in permanent injury or death from epidural and of risks of proceeding without it, would have proceeded with it — Specialist's opinion that proceeding without epidural would have significantly higher risk of serious, critical of fatal complications was accepted.**

**Professional responsibility — Self-governing professions — Duties — *Negligence* — Duty to inform — Liability — Professions — Health care — Doctors — Application by doctor to dismiss action allowed — Doctor who performed pre-anaesthetic consultation for plaintiff's planned abdominal surgery recommended combined general/epidural anaesthetic — Reasonable person in plaintiff's position, advised of one in 10,000 chance of major or severe complication resulting in permanent injury or death from epidural and of risks of proceeding without it, would have proceeded with it — Specialist's opinion that proceeding without epidural would have significantly higher risk of serious, critical of fatal complications was accepted.**

|  |
| --- |
| Application by a doctor to dismiss the action. A doctor who performed a pre-anaesthetic consultation for the plaintiff's planned abdominal surgery recommended a combined general/ epidural anaesthetic. The plaintiff did not want an epidural because he thought that the insertion of the needle would be too painful. The doctor advised the plaintiff that his concern could be managed with the judicial use of anaesthetic during the insertion. The plaintiff proceeded with the epidural. The plaintiff pleaded that, as a result of the epidural, he suffered permanent nerve damage and was effectively a paraplegic. The doctor provided an opinion from a specialist in anaesthesiology.  HELD: Application allowed.  A reasonable person in the plaintiff's position, advised of a one in 10,000 chance of a major or severe complication resulting in permanent injury or death from the epidural and of the risks of proceeding without it, would have proceeded with it. The specialist's opinion that proceeding without the epidural would have a significantly higher risk of serious, critical of fatal complications was accepted. The plaintiff was known to have issues with his cardiovascular system. As such, he was at a higher than normal risk for complications postoperatively. He would almost certainly have required higher than normal doses of narcotics postoperatively if no epidural were used. He could have expected to have many of the negative effects and possible resulting complications with increased doses of narcotic. The potential complications were significantly less likely with an epidural. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 9-7

**Counsel**

Counsel for Plaintiff: S.P. Grey.

Counsel for Dr. John Bokelman and Dr. Ashit Bardhan: M.G. Thomas.

Counsel for Ridge Meadow Hospital: D.J. Bell.

**Reasons for Judgment**

|  |
| --- |
| **B.J. BROWN J.** |

**Introduction**

**1**  This matter comes before me as a summary trial application. There is only one issue that I am to determine and that is: "would a reasonable patient, in the position of Mr. Severn, fully apprised of the risks associated with an epidural, have proceeded with that treatment option?" If the plaintiff cannot satisfy me that a reasonable person in his position would not have proceeded with an epidural then the action must be dismissed.

**2**  The parties agree that this issue is appropriate for determination on a summary trial basis.

**Background**

**3**  In September 2012, the plaintiff's doctor, Dr. Greg Kotylak recommended that the plaintiff undergo major abdominal surgery; a sigmoid resection to treat persistent diverticulitis. The plaintiff had several pre-existing conditions which made him a higher risk for surgery. These conditions included: raised cholesterol; increased fasting glucose; previous cardiovascular events with left sided palsy; stroke; and heavy smoking. Because of his conditions, Mr. Severn required a pre-anaesthetic consultation. The consultation was performed by Dr. Bokelman at Ridge Meadows Hospital on November 1, 2012.

**4**  During the consultation, Dr. Bokelman recommended a combined general/epidural anaesthetic for the planned surgery. The epidural would assist with pain control during and after the surgery. The alternative treatment option was general anaesthetic with a PCA (patient controlled analgesic) after the surgery.

**5**  Mr. Severn was concerned about an epidural. He did not want one because he thought the insertion of the needle would be too painful. This belief was based on a previous experience he had with a similar injection. Dr. Bokelman advised the plaintiff that his concern about pain could be appropriately managed with the judicial use of anaesthetic during the insertion. He was told by Dr. Bokelman that the procedure could be stopped if it was too painful. The plaintiff agreed to proceed with the epidural.

**6**  There is a dispute as to whether Dr. Bokelman warned the plaintiff of the risk of neurological damage at the time of the pre-anaesthetic consultation.

**7**  On the day of the surgery (November 5, 2012), the plaintiff met with Dr. Bardhan who was the anaesthesiologist assisting with the surgery. He confirmed with the plaintiff that he was scheduled to have an epidural. Mr. Severn looked uneasy. Dr. Bardhan asked him if he had any concerns. The plaintiff told him that he had a previous experience with a similar injection and found the insertion of the needle to be very painful.

**8**  Dr. Bardhan told the plaintiff that he provides a lot of numbing medication to reduce the pain of insertion. He also told the plaintiff that he could stop the insertion at any time. He told the plaintiff that he did not have to have the epidural but given his clinical situation it would be better if he proceeded with the insertion of the epidural. The plaintiff agreed to proceed with the epidural.

**9**  In the statement of claim, the plaintiff pleads that as a result of the epidural he has suffered permanent nerve damage and is now effectively a paraplegic.

**Position of the Parties**

**The Applicants**

**10**  The applicants (the defendants Dr. Bokelman and Dr. Bardhan) argue that the matter is suitable for determination on summary trial. They submit that the determination of this specific issue will resolve the litigation faster, promote the orderly use of court time and reduce the costs to both parties and the court.

**11**  The applicants argue that the plaintiff must prove two elements:

1. Informed consent was not obtained; and
2. A reasonable person in the position of the plaintiff would not have given consent if he had been adequately apprised of all material risks.

It is only this second aspect that is at issue before me.

**12**  The applicants argue that assessing this liability issue without incurring the time and expense of assessing damages is appropriate. It will not require the court to make any findings of credibility. They submit potential savings in court time and expense would be considerable.

**13**  The applicants note that onus is on the plaintiff to prove that a reasonable person in his position would not have proceeded with the epidural had they been advised of the risks. This requires the court to consider what the reasonable patient in the circumstances of the plaintiff would have done in the same situation. The trier of fact must take into consideration any particular concerns of the patient and any special considerations affecting the particular patient in determining whether the patient would have refused treatment if given all the information about possible risks: see *Reible v. Hughes*, [*[1980] 2 S.C.R. 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1Y2-00000-00&context=) [*Reible*], at para. 25.

**14**  The applicants submit that a reasonable patient in the circumstances of Mr. Severn would have opted to undergo the epidural on November 5, 2012. This is so because proceeding without an epidural posed a significantly higher risk of serious, critical or fatal complications in comparison to proceeding with the epidural.

**The Plaintiff**

**15**  Mr. Severn says that he made it abundantly clear to Dr. Bokelman that he did not want an epidural. He says that Dr. Bokelman in effect browbeat him into going ahead with an epidural in addition to the general anaesthetic.

**16**  He agreed that the issue of whether a reasonable person in the position of the plaintiff would have consented to having an epidural with knowledge of all risks associated with the procedure can be determined on the summary judgment application.

**17**  Mr. Severn argues that someone in his position who:

1. did not want to have an epidural;
2. had experienced pain related to an epidural-like procedure before;
3. was undergoing a similar abdominal surgery; and
4. had been properly advised of all of the risks associated with the epidural;

would not have proceeded with the epidural.

**Discussion**

**18**  The issue before me is a narrow one--whether a patient in a similar position to Mr. Severn, having been apprised of the risks of an epidural, would have proceeded with one anyway. I am able to determine this issue on the evidence before me. It is does not turn on conflicting affidavit evidence.

**19**  To be successful, Mr. Severn must prove that a reasonable person his position would not have given consent if he had been adequately apprised of the material risks.

**20**  In *Reible*, the Supreme Court of Canada said the following with respect to the objective test for determining what the Court should consider when addressing this issue:

[25] ...the objective standard would have to be geared to what the average prudent person, the reasonable person in the patient's particular position, would agree to or not agree to, if all material and special risks of going ahead with the surgery or foregoing it were made known to him. Far from making the patient's own testimony irrelevant, it is essential to his case that he put his own position forward.

[26] The adoption of an objective standard does not mean that the issue of causation is completely in the hands of the surgeon. Merely because medical evidence establishes the reasonableness of a recommended operation does not mean that a reasonable person in the patient's position would necessarily agree to it, if proper disclosure had been made of the risks attendant upon it, balanced by those against it. The patient's particular situation and the degree to which the risks of surgery or no surgery are balanced would reduce the force, on an objective appraisal, of the surgeon's recommendation. Admittedly, if the risk of foregoing the surgery would be considerably graver to a patient than the risks attendant upon it, the objective standard would favour exoneration of the surgeon who has not made the required disclosure. Since liability rests only in ***negligence***, in a failure to disclose material risks, the issue of causation would be in the patient's hands on a subjective test, and would, if his evidence was accepted, result inevitably in liability unless, of course, there was a finding that there was no breach of the duty of disclosure. In my view, therefore, the objective standard is the preferable one on the issue of causation.

[27] In saying that the test is based on the decision that a reasonable person in the patient's position would have made, I should make it clear that the patient's particular concerns must also be reasonably based; otherwise, there would be more subjectivity than would be warranted under an objective test.

**21**  In *Arndt v. Smith*, [*[1997] 2 S.C.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3W7-00000-00&context=), the Court elaborated on this modified objective test and said at para. 9:

[9] ..."[S]pecial considerations" affecting the particular patient should be considered, as should any "specific questions" asked of the physician by the patient. In my view this means that the "reasonable person" who sets the standard for the objective test must be taken to possess the patient's reasonable beliefs, fears, desires and expectations.

**22**  The applicants have provided me with an opinion dated May 3, 2017, from Dr. Pantel, a specialist in anaesthesiology. He opines as follows:

1. Potential advantages of using a combined general anesthesia/epidural technique;
2. An epidural provides excellent analgesia in the post-operative period
3. An epidural positively contributes to recovery by facilitating mobilization and recovery of gut function
4. An epidural can reduce pulmonary, cardiovascular, thromboembolic, gastrointestinal and other complications occurring after abdominal surgery
5. An epidural allows the anesthesiologist to use lower doses of general anesthetic agents intraoperatively, facilitating recovery
6. Use of an epidural reduces the acute stress response to surgery
7. Studies have shown a higher level of patient satisfaction with combined GA/epidural techniques
8. Risk factors, considerations and potential complications of using an epidural technique, in general:
9. Difficult Insertion or failure to properly place the epidural in the correct location
10. Anatomic factors (eg scoliosis, obesity)
11. Epidural dislodgement or failure after insertion
12. Pain on insertion of the epidural
13. Localized pain at the insertion site
14. Paresthesia (nerve pain after contacting a nerve during insertion)
15. Positioning factors
16. Sitting vs. lateral position for insertion
17. Requirement for sedation or analgesia during placement
18. Bleeding during placement or removal of the epidural
19. Localized bleeding at the insertion site
20. Spinal hematoma causing pain or neurological damage
21. Risk factors for excessive bleeding (eg anticoagulants or blood clotting disorders)
22. Infection
23. Localized infection (eg cellulitis) at or near the insertion site
24. Systemic blood-borne infections (eg bacteremia)
25. Adverse drug reactions or allergies to local anesthetic agents
26. Potential for drug administration errors
27. Difficult removal or knotting of the epidural catheter
28. Potential for accidental dural puncture or CSF leak
29. Immediate: on placement of the epidural
30. Delayed: while the catheter is indwelling
31. Difficulty in managing a dural puncture headache if it does occur
32. Potential for Neurological Damage
33. Pre-existing nerve disease (eg Multiple Sclerosis)
34. Pre-existing known spinal cord pathology (eg spina bifida, syringomyelia, spinal tumours, arachnoid cysts, etc)
35. Potential for physical damage to nerves at the site of insertion
36. Toxic reactions to local anesthetic agents or the components of the drug solutions
37. Surgical Requirements
38. Ability to assess lower limb neurological function post op
39. Interference with the surgical site
40. Hospital policy and post-op nursing requirements
41. Previous experience with epidural or spinal anesthesia
42. Patient preference and consent
43. Anesthesia protocols known as Enhanced Recovery After Surgery (ERAS) have recently been introduced in many hospitals, including at Lions Gate Hospital (LGH) in 2016. The ERAS protocol at LGH is attached as Appendix D, with references to the epidural highlighted. The ERAS Protocols emphasize that the preferred technique for open abdominal surgery is a combined thoracic epidural with general anesthesia. Many anesthesiologists have ben following the principles of ERAS, even if they have not been formally adopted at their hospital.
44. For major abdominal surgery, the patient will require a GA (General Anesthetic) no matter which technique is chosen, In general, my decision to recommend a combined GA/epidural technique is based on an assessment of the potential benefits vs risks (outlined above) in each individual patient.

**23**  He quotes the risks of complications of epidural anaesthesia for Mr. Severn as:

1. With respect to the relative risks and the potential consequences of proceeding with epidural placement and without epidural placement, in this particular patient:
2. Mr. Severn was known not to have a healthy cardiovascular system. He was a long-standing smoker with a tendency to diabetes and high cholesterol. He had already had a minor stroke. I would consider this patient a higher than normal risk for complications post-op.
3. I would have been very uncomfortable proceeding without an epidural and providing only general anesthesia for the planned surgery. It would not have ben the surgery itself that concerned me, but the first 24-48 hours post-op when the risk of complications is highest.
4. Mr. Severn was a patient who was already sensitized to pain and would almost certainly require higher than normal doses of narcotics post-op if no epidural was used, Without an epidural, and thus receiving increased doses of narcotics he would be expected to have many or all of the following effects and possible resulting complications. Each one of these possible complications may result in significant or critical illness, and in combination they can be fatal:
5. Increased nausea and vomiting with potential disruption of incisions and suture lines
6. Slower GI tract recovery and greater degrees of ileus, leading to poorer bowel healing, possible infection and/or suture disruption
7. Increased fluid requirements, leading to bowel edema and poorer healing
8. Slower mobilization, possibly leading to an increased chance of blood clots, deep vein thrombosis and pulmonary embolism
9. Decreased cough and respiratory depression, possibly leading to pneumonia and hypoxemia (low oxygen levels)
10. Longer use of post-op narcotics, possibly leading to narcotic dependency and addiction issues
11. Urinary retention, leading to prolonged catheter use and possible bladder/kidney infection
12. Poorer nutritional intake, possibly leading to malnutrition, poor wound healing and infections
13. All of the effects and potential complications listed above are significantly less likely to occur with a combination epidural/GA technique
14. Overall, I would say that proceeding without the epidural would have a significantly higher risk of serious, critical or fatal complications than proceeding using a combination epidural/GA technique.

...

1. I typically do not quote the risk of rare complications or death from anesthesia, but if the discussion goes in this direction then I typically discuss the common complications of epidural anesthesia as:
2. 1:4 chances of a backache at the site of the epidural insertion. If the patient has pre-existing backache or disk disease then I tell them that there is a possibility that needle insertion into the spine could exacerbate their underlying condition, however, I explain that the epidural is posterior and does not go near the discs (which are located on the anterior aspect of the spine)
3. 1:200 chance of an inadvertent dural puncture with the possibility of a Post-Dural Puncture Headache (PDPH)
4. 1:10,000 chance of a major or severe complication resulting in permanent injury or death.

**24**  In my view, a reasonable person in the position of Mr. Severn, provided with the information above, would have proceeded with the epidural in combination with a general anaesthetic, rather than a general anaesthetic followed by PCA. I accept Dr. Pantel's opinion that proceeding without the epidural would have a significantly higher risk of serious, critical or fatal complications.

**25**  As Dr. Pantel noted in his opinion, Mr. Severn was known to have issues with his cardiovascular system. As such, he was at a higher than normal risk for complications postoperatively. He would almost certainly have required higher than normal doses of narcotics postoperatively if no epidural was used. He also could have expected to have many of the negative effects and possible resulting complications with increased doses of narcotic which could result in critical illness, addiction or fatality. All of those potential complications were significantly less likely to occur with a combination of epidural and general anaesthetic.

**26**  I note that the only concern expressed by Mr. Severn regarding the epidural was with respect to the pain that he had experienced before in a similar procedure. As both Dr. Bokelman and Dr. Bardhan have stated in their affidavits, they addressed this concern, advising Mr. Severn that they would guard against the pain by local anaesthetic where the epidural was to be inserted and if it were too painful, they could stop. That is what happened. Mr. Severn then proceeded with the epidural.

**27**  I conclude that a reasonable person in Mr. Severn's position, advised of a 1 in 10,000 chance of a major or severe complication resulting in permanent injury or death from the epidural, and of the risks of proceeding without an epidural, would have proceeded with an epidural. The fact that Mr. Severn may have suffered the rare risk that the epidural involved, does not negate the likelihood that a properly advised patient, weighing the pros and cons of each treatment option, would have proceeded with the epidural.

**28**  As such, the action against doctors Bokelman and Bardhan is dismissed pursuant to R. 9-7 of the *Supreme Court Civil Rules*.

**29**  The applicants are entitled to costs.

B.J. BROWN J.

**End of Document**

[***Shallow v. Dyksterhuis, [2013] B.C.J. No. 2130***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23DS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Fort St. John and Vancouver, British Columbia

S.F. Kelleher J.

Heard: January 21-25, June 24-28 and July 3, 2013.

Judgment: September 26, 2013.

Docket: 10-1614

Registry: Victoria

**[2013] B.C.J. No. 2130** | 2013 BCSC 1761

Between Lacey Dawn Gail Shallow, Plaintiff, and Bernard Thomas Dyksterhuis, Defendant

(121 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Head injuries — Brain damage — Considerations impacting on award — Age of claimant — Determination of liability and damages for injuries arising from motor vehicle accident — Defendant was 100 per cent liable; plaintiff was awarded $85,000 in non-pecuniary damages, $225,000 for loss of earning capacity, $48,000 for cost of future care and $13,000 in special damages — Plaintiff was in left turn lane on highway, with signal on, starting to turn when defendant struck her while attempting to pass on left — Defendant was in no passing zone — Plaintiff, 17, suffered mild traumatic brain injury and thoracic outlet syndrome, but improved significantly.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Cost of future care — Loss of earning capacity — Special damages — Non-pecuniary loss — Determination of liability and damages for injuries arising from motor vehicle accident — Defendant was 100 per cent liable; plaintiff was awarded $85,000 in non-pecuniary damages, $225,000 for loss of earning capacity, $48,000 for cost of future care and $13,000 in special damages — Plaintiff was in left turn lane on highway, with signal on, starting to turn when defendant struck her while attempting to pass on left — Defendant was in no passing zone — Plaintiff, 17, suffered mild traumatic brain injury and thoracic outlet syndrome, but improved significantly.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Determination of liability and damages for injuries arising from motor vehicle accident — Defendant was 100 per cent liable; plaintiff was awarded $85,000 in non-pecuniary damages, $225,000 for loss of earning capacity, $48,000 for cost of future care and $13,000 in special damages — Plaintiff was in left turn lane on highway, with signal on, starting to turn when defendant struck her while attempting to pass on left — Defendant was in no passing zone — Plaintiff, 17, suffered mild traumatic brain injury and thoracic outlet syndrome, but improved significantly.**

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| Determination of liability and damages for injuries arising from a motor vehicle accident. The plaintiff was in a left turn lane on a highway, with her signal on, starting to turn onto an access road when the defendant struck her while attempting to pass on the left. The defendant received a violation ticket, which he did not dispute, charging him with unsafely passing on the left and following too closely. He conceded that he was partly to blame for the accident, but argued that the plaintiff was as well. At the time of the accident, the plaintiff was 17, enjoyed sports and planned to teach elementary school.  HELD: The defendant was 100 per cent liable for the accident; the plaintiff was awarded $85,000 in non-pecuniary damages, $225,000 for loss of earning capacity, $48,000 for cost of future care and $13,000 in special damages.  The defendant was in a no passing zone, wrongly assumed that the plaintiff was not able to turn left, passed against a double solid line and did not sound his horn. The plaintiff's failure to look over her shoulder was not a failure to take reasonable care. The plaintiff suffered mild traumatic brain injury, trauma induced thoracic outlet syndrome, myofascial injury and headaches. She had considerable pain and discomfort, but improved significantly. She socialized much less, but met and married her husband. She lost the ability to compete in figure skating. She had the capacity to obtain a university degree and work as an educational assistant, but not to handle the demands of a teaching job. She was not guaranteed admission to a teaching program. There was a substantial possibility that she would not be able to work full-time. The award for cost of future care included amounts for therapy. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 155*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GG-00000-00&context=), s. 157, s. 157(1), s. 159, s. 162(1), s. 170

Offence Act, [*RSBC 1996, CHAPTER 338, s. 14(11)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5RT9-7VD1-JBDT-B0RS-00000-00&context=)

**Counsel**

Counsel for the plaintiff: B.J. Flewelling.

Counsel for the defendant: K. Armstrong, S. Stewart.

**Reasons for Judgment**

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| **S.F. KELLEHER J.** |

**1**   This trial concerns a claim by Lacey Shallow that the defendant, Bernard Dyksterhuis caused a collision and that she was injured as a result. Since the commencement of the action the plaintiff married. Her name is now Lacey Orcutt.

**2**  The issues are first, whether Ms. Orcutt was partially to blame for the accident; second, if so, the extent of her responsibility; and third, the measure of her loss.

**3**  The accident took place on March 24, 2008 in the area of Charlie Lake, northwest of Fort St. John, B.C. Ms. Orcutt was driving south on the Alaska Highway, Highway 97. She intended to turn left onto an access road, two kilometers south of the junction with Highway 29.

**4**  Highway 97 has one southbound lane in this area. However, there is a right turn lane and a left turn lane, as well as the through lane, at this intersection. The intersection is not controlled by a traffic light. The northbound lanes and southbound lanes are separated by a solid double yellow line, making it a no passing lane.

**5**  The accident occurred at 8:30 a.m. There was daylight. The roads were covered with snow and it was continuing to snow. Visibility was satisfactory. Ms. Orcutt testified that she had her left turn signal on. As she commenced her turn, the defendant's vehicle struck her vehicle as he was attempting to overtake her by passing her on the left.

**6**  The defendant testified that he was driving south in a loaded logging truck. He had started work at 12:30 a.m. that day and was hauling the logs from an area north of the accident scene to a mill south of Fort St. John. This was his second load of the day.

**7**  Mr. Dyksterhuis testified that he was travelling in the one southbound lane. He noticed the plaintiff's car driving south in front of him. He saw the vehicle slow down and saw that the brake lights were coming on and off. Mr. Dyksterhuis knew that Ms. Orcutt was at an intersection, but assumed, mistakenly, that there was no left turn possible there. He presumed, then, that the plaintiff was either turning right or stopping on the highway.

**8**  The defendant decided it was safe to pull out and pass her on the left. As he came up on her left, she began her left turn. His front bumper struck her vehicle.

**9**  Ms. Orcutt's evidence is that she stopped for a few seconds to allow two northbound vehicles to pass her and then turn left. However, she stated during her examination for discovery that she did not come to a stop before commencing her turn. As well, she later told her physician that she was travelling very slowly in the process of making a left turn.

**10**  Ms. Orcutt feels that she was in the left turn lane but said in cross-examination that because of the snow, she could not "know for sure" that she was in the left turn lane. She said it was "possible" but "very unlikely" that she was in the through southbound lane.

**11**  Donna Lessard witnessed the accident. She was stopped on the access road on the east side of Highway 97, waiting to turn left or south onto Highway 97. She was waiting for Ms. Orcutt's vehicle to turn left in front of her. She is certain that Ms. Orcutt had her left turn signal on. She said Ms. Orcutt had not started her turn when the accident occurred.

**12**  Robin Brekkas testified that he was driving northbound on Highway 97. He estimated he was some 250 metres away when he observed Ms. Orcutt's vehicle and the logging truck. He said the plaintiff's left turn signal was on. He saw her turning left and saw the logging truck hit the car. He testified he believes that she was in the left turn lane. He said that he could not "guarantee" that because the snow covered the road markings.

**LIABILITY**

**13**  Several sections of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318* are relevant. Sections 155, 157, 159 and 170 provide as follows:

**Highway lines**

155(1) Despite anything in this Part, if a highway is marked with

1. a solid double line, the driver of a vehicle must drive it to the right of the line only,
2. a double line consisting of a broken line and a solid line,
3. the driver of a vehicle proceeding along the highway on the side of the broken line must drive the vehicle to the right of the double line, except when passing an overtaken vehicle, and
4. the driver of a vehicle proceeding along the highway on the side of the solid line must drive the vehicle to the right of the double line, except only when finishing the passing of an overtaken vehicle, and
5. one single line, broken or solid, the driver of a vehicle must drive the vehicle to the right of the line, except only when passing an overtaken vehicle.

(2) Subsection (1)(b)(i) and (c) do not apply if a driver is avoiding an obstruction on the highway and first ascertains that the movement can be made with safety and without affecting the travel of any other vehicle.

...

157(1) Except as provided in section 158, the driver of a vehicle overtaking another vehicle

1. must cause the vehicle to pass to the left of the other vehicle at a safe distance, and
2. must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle.

...

**Passing on left**

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

...

170(1) If traffic may be affected by turning a vehicle, a person must not turn it without giving the appropriate signal under sections 171 and 172.

(2) If a signal of intention to turn right or left is required, a driver must give it continuously for sufficient distance before making the turn to warn traffic.

(3) If there is an opportunity to give a signal, a driver must not stop or suddenly decrease the speed of a vehicle without first giving the appropriate signal under sections 171 and 172.

**14**  Counsel referred me to a number of decisions concerning liability for accidents which occurred in similar circumstances: *Smith v. Bileck,* [*2006 BCSC 989*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1V8-00000-00&context=); *Pipe v. Dusome,* [*2007 BCSC 1066*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1K3-00000-00&context=); *Eccleston v. Dresen,* [*2009 BCSC 332*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3Y1-00000-00&context=); *Stewart v. Fedderly,* [*[1985] B.C.J. No. 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F4GK-M18Y-00000-00&context=) (SC); *Kingsfield v. Powers,* [*2012 BCSC 562*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3F2-00000-00&context=); *Langley v. Heppner,* [*2011 BCSC 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33F-00000-00&context=), and *Samograd v. Collison,* [*1995 17 B.C.L.R. (3d) 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=) (BCCA).

**15**  In *Samograd*, Finch J.A., as he then was, comments on the responsibility of overtaking drivers at para. 63:

His "greater obligation" to ensure that he could pass in safety arose from the circumstances of the case rather than from any higher legal duty, statutory or otherwise.

Recently, Justice Dillon of this Court reiterated this "greater obligation" principle in *Pipe* at para. 11:

Apportionment of liability in this situation requires consideration that the overtaking driver generally bears greater obligation to ensure that he can pass in safety...

**16**  These cases contain useful statements of principle but liability in motor vehicle cases is very much determined on their individual facts. The question really comes down to who had the better opportunity to see the potential for a collision and therefore a greater opportunity to avoid it.

**17**  There are two conflicts on the evidence to be resolved. First, where the plaintiff was positioned on the highway before she began her turn; and second, whether her left turn signal was on.

**18**  Ms. Orcutt testified that her left turn signal was on. This is corroborated by the evidence of Mr. Brekkas and Ms. Lessard.

**19**  There was a suggestion by the defendant that although he did not see her turn signal, it may have been obscured by snow.

**20**  This is highly unlikely. Ms. Orcutt testified that she brushed the snow off the car before leaving her home. She had only travelled a few kilometres. Her evidence in this regard is corroborated by her mother, who observed her clearing snow off the car before leaving home.

**21**  As to the position of the vehicles, Ms. Orcutt and Mr. Brekkas both said that they could not "guarantee" that her car was in the left turn lane, but they both believed it was. Any uncertainty was based on the fact that the lane markings were obscured by snow.

**22**  Ms. Lessard, on the other hand, was in perhaps the best position to view Ms. Orcutt's vehicle. Her evidence is that the plaintiff's vehicle was in the left turn lane and her turn signal was on.

**23**  I find that Ms. Orcutt was positioned in the left turn lane and her turn signal was on.

**24**  The recent case of *Eccleston* is factually similar in that the accident occurred when the plaintiff was being overtaken on the left in the process at making a left turn. Justice Barrow of this Court summarized the defendant's liability in this way at para. 43:

The defendant was also negligent in two respects. First, she decided to pass the plaintiff's vehicle when she did not know with sufficient certainty what the plaintiff was going to do. I recognize that to a degree that uncertainty was caused by the faulty equipment on the plaintiff's vehicle. Nevertheless, the plaintiff was slowing down and it was apparent to the defendant that she was likely going to do something other than continue to drive down the highway. The defendant knew that there were places at which a vehicle might turn left or right along that portion of the highway. She, like the drivers in *Pipe*, [*Mergle v. Formosa Resources Corp.*, [*[1994] B.C.J. No. 1642*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F57G-S17T-00000-00&context=) (SC)] and [*Wiebe v. Greyhound Bus Lines of Canada Ltd.*, [*[1995] B.C.J. No. 2582*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25B-00000-00&context=) (SC)], was faced with an uncertain situation. Her obligation was to not pass until she knew with reasonable certainty what the plaintiff was going to do. Second, once she was committed to passing and once she realized the plaintiff was not going to turn right, she was obliged to sound her horn to warn the plaintiff of her presence and the hazard she posed.

In *Eccleston*, the plaintiff was held to be contributory negligent for failing to signal in a timely way and failing to keep a proper look out when turning left off a highway at a point where passing is permitted. Neither of those factors is present here.

**25**  There is no dispute that Mr. Dyksterhuis tried to pass the plaintiff on the left in a no passing zone. There was a solid double yellow line on the highway, but it was covered with snow.

**26**  Mr. Dyksterhuis should not have attempted to pass Ms. Orcutt. First, he was in a no passing zone. Second, he wrongly assumed that she was not able to turn left at that place. Third, he was passing against a double solid line and did not sound his horn to warn Ms. Orcutt that he intended to overtake her.

**27**  The defendant received a Violation Ticket charging him with two offences: unsafely passing on the left (s. 159) and following too closely (s. 162(1)). The defendant did not dispute the ticket. Therefore, he is deemed to have pleaded guilty: *Offence Act,* [*R.S.B.C. 1996, c. 338, s. 14(11)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5RT9-7VD1-JBDT-B0RS-00000-00&context=).

**28**  The defendant concedes he was partly to blame for the accident, but argues that Ms. Orcutt was also partly to blame. This is said to be based on her admission that she did not look over her left shoulder to determine whether there was a vehicle passing her before commencing her left turn.

**29**  I am not persuaded that Ms. Orcutt's action in not looking over her shoulder, amounts to a failure to take reasonable care. She was making a lawful left turn. She was in an area where passing was not permitted. She was in the left turn lane. The defendant did not sound his horn to warn her.

**30**  Mr. Dyksterhuis faced a situation in which the intention of Ms. Orcutt was uncertain to him. His decision to pass her when faced with that uncertainty gives rise to total liability. For these and the above reasons, I conclude that the defendant is 100% at fault.

**DAMAGES**

**Background**

**31**  Ms. Orcutt has lived in Charlie Lake throughout her life. She was 17 years old at the time of the accident and is now 22. At the time of the accident, she lived at home with her parents. Her mother, Sheryl, is a bookkeeper/accountant and her father, Wayne, has his own company, working in the oil patch. She has two brothers.

**32**  Ms. Orcutt was an athlete. She enjoyed recreational quadding, snowboarding and wakeboarding. She was a dedicated and talented figure skater. This involved practicing six days per week. In addition, there were two weekly sessions in the gym with her coach. All of this was as a member of the Fort St. John Figure Skating Club.

**33**  Ms. Orcutt began competing at age 6. She was in the provincial championships at age 12 and placed 17th in the Province. In February 2003, she placed second. She won the gold medal in the 2003 Senior Ladies Division.

**34**  Ms. Orcutt's only pre-existing condition is celiac disease which she contracted at age 9. She has a gluten-free diet as a result and there is no suggestion that this condition is not entirely under control.

**35**  Ms. Orcutt testified that she enjoyed school. She also coached figure skating, did some baby sitting and worked part-time at Ernie's Sporting Goods. In June 2008 she graduated with average marks from North Peace Secondary School.

**36**  Ms. Orcutt's ambition was to teach elementary school. Her work experience includes teaching young people to skate. In grade 12 she took a course entitled "Work Experience". It involved 100 hours of work in grade 1 at Charlie Lake Elementary School. She helped children stay on task, did some preparation and did some marking.

**37**  In 2008 Ms. Orcutt was accepted for a two year program at Northern Lights College leading to AHCOTE Teacher Education. This is the Alaska Highway Consortium on Teacher Education. The purpose of the program is to train teachers and address teacher shortages by retaining people who have grown up in the community. The program involves Northern Lights College, Simon Fraser University, University of Northern British Columbia and School Districts No. 59, 60 and 61.

**38**  Dr. Lauren Lovegreen is the registrar of the college. She explained that a student must complete the two year Associate of Arts program and then spend one and a half years in the AHCOTE program. Upon completion, the successful graduate obtains a conditional teaching certificate. He or she then has five years to complete an additional 30 credits in order to obtain a degree.

**39**  The plaintiff lived at home until 2011 when she married Tyrell Orcutt. Mr. Orcutt has his own welding business. He works long days, in and out of town, in the oil and gas industry.

**40**  When they got married, they lived in a basement suite in Tyrell's parent's home in Fort St. John. In 2012 they moved to a holiday trailer and then to a guest house on the plaintiff's parents' property in Charlie Lake.

**The plaintiff's condition**

**41**  When the plaintiff's vehicle came to a stop after the collision, she testified, she did not know where she was. Her main concern was that something struck her forehead. This resulted in a "goose egg" and some swelling around her eye.

**42**  An ambulance attended. She was advised to go to the hospital. Mr. Brekkas took her to the emergency department at Fort St. John Hospital. She felt nauseous and vomited several times. Hospital records indicate that her Glasgow Coma Scale was 15/15. The plaintiff was discharged the same day.

**43**  The plaintiff's mother, Ms. Sheryl Shallow, testified that when the plaintiff got home, she slept a great deal and complained of headaches, low back pain and a burning sensation in her right arm.

**44**  The plaintiff testified that she saw her family physician, Dr. Heinrich Brussow in Fort St. John who recommended physiotherapy.

**45**  Ms. Orcutt also felt tingling in the third, fourth and fifth fingers of her right hand, and up the inside of her arm. Her headaches continued. There was bruising and pain in her scalene muscle and the right side of her neck. She said she had trouble sleeping. Her eyes were sensitive to bright lights.

**46**  The accident happened during spring break. She missed very little school and was able to graduate from grade 12.

**47**  Sheryl Shallow testified that she observed the plaintiff had trouble focussing and completing her homework. The plaintiff gave up competitive skating, but continued with her coaching job.

**48**  Ms. Orcutt testified that she continued to see her physician regularly.

**49**  The plaintiff registered at Northern Lights College in September 2008. She had difficulty spending much time at the computer. Having her arms in front of her was painful. This problem, together with her difficulty sitting or focussing for long periods of time, led her to register for only two classes.

**50**  Ms. Orcutt began her classes but her right arm became numb and heavy when she worked at the computer. This led to her withdrawing from the college in October 2008.

**51**  Ms. Orcutt had worked for the Fort St. John Skating Club before the accident. After it, she moved to Peace Passage Skating Club in Taylor, some 15 minutes south of Fort St. John.

**52**  The plaintiff coached 8 to 10 hours per week. She said she had difficulty with heavy tasks such as lifting small children. She continued to coach at Peace Passage until 2012.

**53**  Ms. Orcutt also obtained a job at Sharp Instruments. This was a two day per week position. The company's business is installing and repairing electrical instrumentation.

**54**  Christine Woodruff is one of the four owners of Sharp Instruments. She testified that Ms. Orcutt worked there from May 2009 until June 2010. Her tasks were limited to filing. I infer that the plaintiff resisted computer work because of the pain it caused. Ms. Woodruff said that the plaintiff went home early when she did not feel well.

**55**  Ms. Orcutt also enrolled in online courses. She took business math and accounting courses online but was able only to do one course at a time.

**56**  Ms. Orcutt testified about what she felt was a change in her personality. Before the accident, she considered herself outgoing and enjoyed being busy. She has since become easily frustrated and has had little patience. She said she often wants to withdraw from busy situations. She testified she is now forgetful, moody and easily irritated.

**57**  Ms. Orcutt met her future husband Tyrell in the summer of 2008, following the accident. They married in June 2011.

**58**  Ms. Orcutt took over bookkeeping for Mr. Orcutt's welding business. He testified that she has trouble staying on task and that her mother checks her work.

**59**  Ms. Orcutt does some recreational activities, but has been unable to return to skiing and wakeboarding. She now enjoys side-by-side quadding, a more mellow version of the activity. She also has limitations in doing housework. Her mother helps her with vacuuming. Mr. Orcutt testified that she has trouble reaching up to higher cupboards.

**60**  Ms. Orcutt described her pain symptoms: She testified she never has a day without pain. When it is not severe, she said it is 2 or 3 out of 10. When it is severe, she said it is 12 out of 10. She said this occurs 3 to 4 days a week.

**61**  Tammy Beach is a nurse who has known the plaintiff for many years. The plaintiff babysat her children.

**62**  Ms. Beach described Ms. Orcutt before the accident as "very outgoing and energetic, friendly and happy". She said "Lacey enjoyed skating, snowmobiling and wakeboarding. After the accident, Ms. Beach found the plaintiff quiet, not as happy and complaining of pain. She referred to headaches and blurring vision.

**63**  The plaintiff testified that two circumstances have led to an improvement in her symptoms. First, she gave up coaching, and second, she has benefitted from Feldenkrais treatment, which is described below.

**Expert Medical Evidence**

**64**  Ms. Orcutt was examined by Dr. Anthony Salvian, a vascular surgeon, in July 2010. Based on his interview and physical examination as well as his review of other reports, he diagnosed:

1. Myofascial injury of the neck and upper back;
2. Headaches resulting from para-spinal muscle spasms; and
3. Post-traumatic thoracic outlet symptoms causing the numbness and pain in the shoulder, forearm and fourth and fifth fingers.

**65**  Dr. Salvian's prognosis and treatment plan includes these important observations:

I would emphasize that one cannot simply "work through" the pain and symptoms of thoracic outlet syndrome. Trying to carry on with an "activation program" or "work hardening program" will simply cause further muscle spasm and muscle injury and exacerbation of the syndrome possibly resulting in a chronic pain syndrome which should be avoided at all costs.

**66**  He recommended that she avoid a number of activities:

In general, she must avoid overhead use of the arm and repetitive activities with the arm, particularly with the arm away from the chest and above chest level. She should avoid heavy lifting with the arm or prolonged repetitive activities such as typing or driving or writing. Activities such as retail with the arms overhead, i.e. hanging clothes or putting dishes or clothes away on a top shelf, will be difficult. She should avoid activities like heavy gardening, shovelling and sweeping, painting, wall washing and window washing.

**67**  Dr. Salvian also recommended "Feldenkrais" physiotherapy. The purpose of this treatment, he explained, is to improve the patient's posture and gently stretch the scalene muscles. It focusses on abdominal breathing.

**68**  Ms. Orcutt has in fact undergone such treatment. She has travelled to Bezanson, Alberta, some three hours away, to be treated by Travis LaValley. She made several trips to Bezanson between September 2010 and July 2012, often for three days of treatment. Ms. Orcutt said she would see Mr. LaValley more often if she could. She described the treatment as "one of most helpful things I've tried."

**69**  Dr. Andrew Travlos is a physiatrist. He evaluated the plaintiff on August 31, 2009 and September 11, 2011. He diagnosed thoracic outlet syndrome, mild traumatic brain injury, concussive and cervical-genic headaches, myofascial and soft tissue pain of the neck caused by the concussion, neck pain and upper back pain, and cognitive deficits in attention and concentration.

**70**  A significant aspect of Dr. Travlos' report is the improvement noted between 2009 and 2011. He stated in his second report:

When Ms. Orcutt was asked what had transpired in the last two years, she indicated to me that everything was still the same and that there was not much change. However, on conclusion of the assessment, when it was apparent to me that she had clearly improved, I did state this to her and she definitely nodded in agreement.

Although Ms. Orcutt indicated that there was no initial change in her symptoms, it does appear that from a functional perspective, her activity level has increased. She stated that she is now teaching skating again and has been teaching as many hours as are available to her to teach, sometimes up to six hours per day. She finds she is able to manage such activity. Importantly, Ms. Orcutt stated that she did work out with a trainer for approximately a year and although she initially did not seem to indicate any change or any improvement with her various interventions, it was also quite clear at the end of this assessment, that she has, indeed, improved *remarkably* since last seen.

Ms. Orcutt's current headache pains are certainly less than before. They now occur at most once or twice a week and she showed no indication of any prolonged headache pains lasting for days at a time....It is possible there are still some residual post-concussive headache symptoms, but I think that those have mostly settled. ....

Ms. Orcutt no longer complains of any significant memory issues. When last seen, she was still having memory problems. She has had a full neuro-psychological assessment done by Dr. Corney, whose assessment clearly shows normal intelligence but some attention deficits that were attributed to residual effects from a mild traumatic brain injury. It is clear from my perspective that Ms. Orcutt has improved in terms of her cognition, as expected....At this point in time, Ms. Orcutt's overall cognition has almost certainly plateaued. Importantly, she has normal cognition, normal executive functioning, and has the ability to make decisions and the ability to learn and study as she desires.

|  |  |
| --- | --- |
| [emphasis added] |  |

**71**  Dr. Travlos also commented on Ms. Orcutt's future education prospects:

Although there will be some limitation in terms of her concentration span and attention, she should still be able to advance her education. It would seem, therefore, that the only residual factor as a result of the head injury is the attention problems. This could impact on various avenues of her life, but this is not something that is insurmountable and she should, in fact, be able to resume fairly normal functioning as long as she is aware of her limitations and understands that she needs to take regular breaks and interrupt her activities to ensure that she can keep her concentration span running for the duration of the tasks required.

**72**  Dr. Travlos went on to state that there are still some concerns about sleep, but the significant concerns about fatigue were not present at the time of this interview. He feels that the thoracic outlet symptoms have reduced to a point that they are reasonably controlled. She has learned to adapt.

**73**  Dr. Patrick Corney, a neuropsychologist, oversaw the conducting of a number of tests in October, 2010. The results are consistent with her having sustained a mild traumatic brain injury. The tests show significant deficits and attentional disabilities. In his report dated November 26, 2010, he concluded:

The results of this neuropsychological assessment identified symptoms that are consistent with a mild traumatic brain injury. It is my opinion that the difficulties identified will have a negative effect on Ms. Shallow's ability to complete college or university level education and, by extension, on her ability to meet future occupational goals. Although there is evidence that she can successfully manage single online courses, her ability to manage a more significant course load in a classroom setting will be limited by compromised attention in combination with physical symptoms such as pain and fatigue.

He went on to say that the plaintiff appeared to be functioning well from a psychological perspective. He pointed out that she has no known history of depression or other psychological disorders and has a high level of social support around her.

**74**  As the defendant pointed out, Dr. Corney also stated:

In the Physical domain, significant elevations were evident on the Pain Scale and Somatic Complaints scales, and a moderate elevation was evident on the neurological status scales.

**75**  This indicates, the defendant argues, the plaintiff is somewhat focussed on her pain, the opposite of stoic. I am in general agreement with that observation.

**76**  Sharyle Jewett is an occupational therapist. She assessed the plaintiff on three occasions and made a number of recommendations which will be considered under the plaintiff's claim for cost of future care.

**77**  Derek Nordin, an occupational consultant, concluded because of the plaintiff's constellation of symptoms, she would not succeed as an elementary school teacher. He is of the view that the cognitive and emotional demands would be too much for her.

**78**  The defendant relied on the opinions of three experts.

**79**  First, Gary Nix is an educational/vocational consultant. He reviewed expert reports and conducted a two-day assessment of the plaintiff. He reached these conclusions:

I am of the opinion that, prior to the motor vehicle accident of March 24, 2008, Ms. Orcutt was capable of completing at least a two-year diploma program and, given her dedication and hardworking nature, most likely a four year degree in education. This has not changed as a result of the MVA.

In my opinion, prior to the accident of March 24, 2008, Ms. Orcutt was capable of working with young children in either a day care or teaching capacity and this has not changed subsequent to it.

**80**  He specifically disagreed with Mr. Nordin's conclusion that the plaintiff could not pursue a career as an elementary teacher. He put it this way:

Ms. Orcutt is of average intellect, above average reading comprehension, possesses good verbal skills, normal memory capacities, low average attention, average reasoning abilities, and appears to have the physical capabilities to perform the duties of an elementary school teacher should she decide to pursue a teaching career. I am of the opinion that she would not have to settle for a "subservient role" as proposed by Mr. Nordin....

**81**  Gary Worthington-White provided an expert opinion in reply to Ms. Jewett's cost of future care which is addressed later in these reasons.

**82**  Dr. Frank Kemble is a neurologist who gave expert evidence regarding an independent medical examination of Ms. Orcutt. It was conducted in February 2012. Dr. Kemble stated that his neurological examination of Ms. Orcutt was "normal". He said that her headaches have reduced significantly since the time of the accident.

**83**  Dr. Kemble attributed Ms. Orcutt's symptoms to emotional and physical stress brought on by chronic pain. He felt that thoracic outlet syndrome was the less likely source of her symptoms.

**Non-Pecuniary Damages**

**84**  Non-pecuniary damages "should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation." It is essential to appreciate the nature of the individual's loss. An award must meet the specific circumstances of each case: *Lindal v. Lindal*, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 637.

**85**  In *Stapley v. Hejslet,* [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), the British Columbia Court of Appeal reviewed the factors to be generally considered in awarding non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd v. Harris,* [[*2004 BCCA 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss of impairment of life.

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton,* [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**86**  The plaintiff sustained injuries including mild traumatic brain injury, trauma induced thoracic outlet syndrome, myofascial injury and headaches. She has had considerable pain and discomfort. However, I accept Dr. Travlos' evidence that she has improved significantly.

**87**  Ms. Orcutt enjoyed socializing a lot less after the accident. Nonetheless, she has been able to meet Tyrell Orcutt, develop a relationship and enter into what appears to be a stable and enriching marriage.

**88**  Ms. Orcutt lost the ability to compete in figure skating. She was able to coach almost without interruption. But it has caused her pain, nonetheless.

**89**  Ms. Orcutt also has been able to travel, including to Hawaii, Mexico and Cuba.

**90**  As I stated above, I would not describe Ms. Orcutt as stoic. Her description of her symptoms seems more serious than what she reported to Dr. Travlos.

**91**  I have reviewed several authorities including those the parties referred to in argument.

**92**  The plaintiff seeks an award of $165,000. Counsel referred the Court to three cases.

**93**  In *Cikojevic v. Timm*, [*2010 BCSC 800*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-224D-00000-00&context=), the plaintiff was a passenger in the defendant's truck. She suffered a brain injury, leading to difficulties with her final year of high school. She suffered memory loss, chronic back pain and headaches. The brain injury had a significant effect on her ability to maintain employment. She was awarded $152,000.

**94**  In *Danicek v. Alexander Holburn Beaudin & Lang*, [*2010 BCSC 1111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2115-00000-00&context=), the plaintiff suffered injuries from a collision and fall on a dance floor. She suffered severe headaches and was unable to work. The headaches persisted. Her post-concussive symptoms included physical, cognitive and emotional difficulties. The injury "had a profound effect on her life". Her headache pain persisted to the date of trial, some 9 years after the accident. She was completely disabled for 8 months. The Court found she would likely be incapable of ever working at the job she held before the accident. Non-pecuniary damages of $185,000 were awarded.

**95**  In *Adamson v. Charity*, [*2007 BCSC 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HS-00000-00&context=), the 42-year-old plaintiff's vehicle was struck. He suffered a mild traumatic brain injury, chronic pain syndrome, major depression, headaches and hearing loss. He would be unemployable for the rest of his life. He was awarded $200,000.

**96**  The injuries of the plaintiffs in these cases were substantially more severe than those of Ms. Orcutt. Ms. Orcutt suffered soft tissue injuries, a mild traumatic brain injury and trauma induced thoracic outlet syndrome. She suffered memory loss, but that has improved. Indeed, many of her symptoms have eased considerably. Her examination by Dr. Travlos in 2011 and his observations persuade me that her pain level is less than described in her evidence.

**97**  The accident has had a serious impact on her competitive figure skating and her progress towards a career in school teaching, but there was no period of total disability and she has been able to continue with many activities she enjoys.

**98**  I have reviewed a number of the decisions referred to me by the defendant: *Baxter v. Jamal*, [*2010 BCSC 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X12M-00000-00&context=)*; Peterson v. Ram*, [*2008 BCSC 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1RF-00000-00&context=)*; Langley v. Heppner*, [*2011 BCSC 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33F-00000-00&context=); *Singh v. Clay*, [*2011 BCSC 1172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6227-00000-00&context=); *De Gaye v. Bhullar*, [*2010 BCSC 1798*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4PV-00000-00&context=)*; Ho v. Dosanjh*, [*2010 BCSC 845*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-227X-00000-00&context=); and *Durand v. Bolt*, [*2007 BCSC 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-242B-00000-00&context=).

**99**  Of course the plaintiff's circumstances in each case are singular and distinct. Some of these cases involve depression. Thankfully, that is not present here. Nonetheless, the cases read together are instructive as to the range of damages in analogous cases.

**100**  Having considered the plaintiff's injuries and the factors listed above, in light of the case law, I assess non-pecuniary damages at $85,000.

**Loss of Earning Capacity**

**101**  Mr. Justice Savage in *Parker v. Lemmon,* [*2012 BCSC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1FJ-00000-00&context=) at para. 42, summarized Madam Justice Garson's decision regarding loss of future earning capacity in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=), as follows:

1. A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
2. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
3. A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
4. An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
5. It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
6. If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
7. Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
8. An earnings approach will be more useful when the loss is more easily measurable;
9. The capital asset approach will be more useful when the loss is not easily measurable.

**102**  Ms. Orcutt's claim for future income loss is substantial: $650,000. It is based on the assumption that she would have worked as an elementary school teacher commencing in September 2013 and can now only work in an office environment. A second assumption is that she will take longer to obtain a college certificate or diploma and as a result her earning capacity will be some substantial amount below that of an elementary school teacher. The third assumption is that Ms. Orcutt is only capable of working part-time.

**103**  The evidence does not support all of these assumptions. Dr. Nix, Dr. Travlos and Mr. Nordin are all of the view that she is capable of completing a bachelor's degree. I agree with that.

**104**  Dr. Travlos encouraged the plaintiff to pursue her goal of becoming an elementary school teacher.

**105**  Mr. Nordin was of the view that she could not handle the demands of a teaching job. Dr. Nix felt that she was capable of it. I accept Mr. Nordin's opinion in this regard. The demands of the classroom might well exceed her capacity for multi-tasking in a noisy environment. The plaintiff testified that she did not feel she was capable of working as a full-time teacher or working full-time in an office environment. As I stated above, Dr. Travlos thought she was capable of more than she did. I agree with Dr. Travlos on this point.

**106**  That said, one cannot expect the plaintiff to undertake a long course of specialized education, towards obtaining a teaching certificate, only to learn upon graduating, or in the course of her practicum, near graduation, that she lacks the capacity to work in a classroom environment.

**107**  I conclude that Ms. Orcutt has the capacity to obtain a university degree. I conclude that she is also capable of working as an educational assistant.

**108**  Her loss of future earnings assessment is based on the helpful evidence and analysis of accountant Robert Carson. She would have earned more as an elementary teacher. Teaching positions are better paying than other occupational groups with a university degree.

**109**  Ms. Orcutt has clearly suffered an income loss. The assessment of her loss must take into consideration the fact that Ms. Orcutt was not guaranteed admission to the AHCOTE program. There is also a substantial contingency that because of the accident she will be unable to work full-time. But it is only a contingency. I am in agreement with those who expressed the opinion that generally, she is capable of full-time work. Based on all of these factors, I assess her loss of earning capacity damages at $225,000.

**Special Damages**

**110**  Ms. Orcutt's claim for various items was provided and totals $10,322.50. There are, in addition, transportation expenses incurred in the many trips to Vancouver. I award $13,000 for special damages, including transportation expenses.

**Cost of Future Care**

**111**  The approach of a trial judge in determining damages for future care was described in *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (CA):

The award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

**112**  Mr. Justice Masuhara in *Izony v. Weidlich*, [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=), explained a sensible limitation on this principle. At para. 74, he said that future care costs must be reasonable in the sense that the plaintiff will be likely to incur them:

I therefore do not think it appropriate to make a provision for items or services that the plaintiff has not used in the past... or for items or services that it is unlikely he will use in the future.

**113**  The defendant referred the Court to *Penner v. Insurance Corporation of British Columbia*, [*2011 BCCA 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1R6-00000-00&context=) where the British Columbia Court of Appeal quoted comments by Johnston J. in *Travis v. Kwon*, [*2009 BCSC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B110-00000-00&context=):

[109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews. v. Grand & Toy, Alberta Ltd.,* [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), [*[1978] 1 W.W.R. 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=).

[110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.

[111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

**114**  The Court of Appeal went on to say:

This is a reminder that a little common sense should inform claims under this head, however much they may be recommended by experts in the field.

**115**  Ms. Jewett examined the plaintiff and made a number of recommendations which she felt were "necessary to enable Ms. Lacey Orcutt to maintain a reasonable level of functioning now and in the future." Amongst others, they include assistive devices (such as an ergonomic office chair, laptop holder and document holder), exercise equipment, medical equipment and pain management aides, sunglasses, physiotherapy or Feldenkrais therapy, a gym membership and seasonal house cleaning and maintenance.

**116**  The total cost of Ms. Jewett's recommendations over Ms. Orcutt's lifetime is $110,606.

**117**  I found Ms. Jewett's report to be thorough. Her evidence was in many ways persuasive, but she described a plaintiff whose needs exceed those of this plaintiff. I have not found the plaintiff's condition as serious as the basis of the assumptions made by Ms. Jewett.

**118**  The plaintiff will require Feldenkrais therapy and the travel costs to attend it. Massage therapy is also indicated. The therapeutic mattress, ongoing gym membership and a measure of assistance with home maintenance are reasonable.

**119**  I assess $48,000 as the cost of future care. It is awarded.

**SUMMARY**

**120**  I find that the defendant is entirely responsible for the accident. Ms. Orcutt is entitled to damages as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (a) | Non-Pecuniary Damages | $85,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (b) | Special Damages | $13,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (c) | Cost of Future Care | $48,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (d) | Wage Loss | $225,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $371,000.000 |  |

**121**  Costs may be spoken to.

S.F. KELLEHER J.

**End of Document**

[***Sidhu v. Wawanesa Mutual Insurance Co., [2011] B.C.J. No. 1573***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-61Y3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

T.C. Armstrong J.

Heard: January 31, February 1-4 and February 7-11, 2011.

Judgment: August 17, 2011.

Docket: S96994

Registry: New Westminster

**[2011] B.C.J. No. 1573** | [*2011 BCSC 1117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MX-00000-00&context=) | [*[2011] I.L.R. I-5187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MX-00000-00&context=) | [*1 C.C.L.I. (5th) 262*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MX-00000-00&context=) | [*206 A.C.W.S. (3d) 400*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MX-00000-00&context=) | [*2011 CarswellBC 2175*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1MX-00000-00&context=)

Between Hardip Singh Sidhu, Gurmit Kaur Sidhu and Santokh Singh Sidhu, Plaintiffs, and The Wawanesa Mutual Insurance Company, The Wawanesa Life Insurance Company and Don Wotherspoon & Associates (Panorama) Ltd., Defendants

(201 paras.)

**Case Summary**

**Damages — In contract — Type of contract — Insurance — Action by insured family against fire insurer for payment of insurance proceeds and punitive damages allowed — Insurer entitled to thoroughly investigate incendiary fire at home, but acted unfairly in delaying almost two years in dealing with family's claim to insurance proceeds — Punitive damages of $55,000 awarded.**

**Damages — Types of damages — Exemplary or punitive damages — Action by insured family against fire insurer for payment of insurance proceeds and punitive damages allowed — Insurer entitled to thoroughly investigate incendiary fire at home, but acted unfairly in delaying almost two years in dealing with family's claim to insurance proceeds — Punitive damages of $55,000 awarded.**

**Insurance law — Insurers — *Negligence* — Action by insured family against fire insurer for payment of insurance proceeds and punitive damages allowed — Insurer entitled to thoroughly investigate incendiary fire at home, but acted unfairly in delaying almost two years in dealing with family's claim to insurance proceeds — Punitive damages of $55,000 awarded.**

**Insurance law — Risk — Exclusions — Criminal or intentional act by insured — Action by insured family against fire insurer for payment of insurance proceeds and punitive damages allowed — Although evidence showed fire was incendiary, insurer failed to establish family started fire from within home or that family had financial motive to do so — Inconsistencies in statements by insured could be explained by language difficulties and passage of time — Delay of almost two years in dealing with claim warranted punitive damage award.**

**Insurance law — Fire insurance — Action by insured family against fire insurer for payment of insurance proceeds and punitive damages allowed — Although evidence showed fire was incendiary, insurer failed to establish family started fire from within home or that family had financial motive to do so — Inconsistencies in statements by insured could be explained by language difficulties and passage of time — Delay of almost two years in dealing with claim warranted punitive damage award.**

|  |
| --- |
| Action by the Sidhu family to recover from their insurer the proceeds of the fire insurance policy, as well as aggravated and punitive damages for the insurer's refusal to pay. Seven members of the Sidhu family lived in the home. It was purchased in 1990 for $122,000 with a mortgage of $117,000. Each of the adult members of the family had a modest income. They borrowed against the home to finance business and rental property ventures. In January 2005, the Sidhus' van and a customer's car were damaged in a fire in front of the house. The Sidhus' vehicle was set afire. In February 2005, the fire giving rise to the present claim took place. The family rented replacement accommodation. They did not repair the home before selling it in January 2007 for $207,000. On the evening of the fire, the entire family was home save for the oldest male, who was out working at the business owned by the male head of the household. The male head, Hardip, was in the master bedroom with his wife and infant son. He asked them to leave shortly before he heard something hit the bedroom window. He got out of bed, dressed and looked around. His wife also looked outside to the front yard. They did not see anyone. The smoke alarm started to beep. They looked upstairs and saw smoke in the hallway where the bedrooms were. The family exited the home while Hardip called 911 and the neighbours from the kitchen. He then went outside and saw a fire near the master bedroom. No one was in the area. Hardip gave some contradictory evidence about the timing of the smoke detector sounding and other matters. The family was denied entry into the home for several days while the insurer's adjuster conducted an investigation. The family was unable to identify any suspects. The fire investigator concluded the fire had been set. He found accelerant both outside and in the master bedroom and in another bedroom, not occupied on the evening of the fire because the children were scared to sleep there after the broken window incident. It was later determined that only the master bedroom contained accelerant. A fire expert opined a person in the master bedroom who set a fire of this type could have been affected by smoke or burnt very quickly. There was no evidence Hardip was affected in either way. The insurer delayed two years in dealing with the family's claim, denying coverage in January 2007.  HELD: Action allowed.  This was an incendiary fire. It was possible Hardip was being untruthful, but the inconsistencies in his statements could be explained by language barriers and the passage of time. The insurer failed to prove the accelerant in the master bedroom did not originate outside. The expert evidence militated against the suggestion Hardip started the fire. The family lacked motive for starting the fire, as the insurance proceeds from the fire policy would not necessarily have improved the family's financial circumstances. The insurer was entitled to investigate the family's claim thoroughly. The delay of almost two years in responding to the claim was unfair. While the family was not deprived of dignity through the insurer's conduct, the delay left a cloud over the family for too long. Punitive damages of $50,000 were awarded for the insurer's ***negligence*** in handling the claim. The family failed to provide adequate evidence of aggravated damages. |

**Counsel**

Counsel for Plaintiffs: M.S. Menkes.

Counsel for Defendants: A. Roberts.

**Reasons for Judgment**

|  |
| --- |
| **T.C. ARMSTRONG J.** |

**1**   In November 1990, the plaintiffs, Hardip Singh Sidhu and Santokh Singh Sidhu, purchased a house at 13875-88 Avenue in Surrey, B.C. (the "house"). Seven members of the Sidhu family lived in the house. In these reasons I will use the parties' first names to avoid any confusion between them.

**2**  In 2005, the plaintiffs purchased a fire insurance policy from Wawanesa. In the early hours of February 7, 2005, the house was damaged by a fire. Wawanesa refused to pay them for the loss because they allege the Sidhus deliberately started the fire in order to recover the insurance money. If the Sidhus deliberately started the fire, the defendant is not obliged to pay them for the repairs and other losses caused by the fire.

**3**  The Sidhus argue that they are not responsible for the fire and that Wawanesa acted wrongfully, in bad faith, and has been high handed and disrespectful in the denial of their claim. They are asking for aggravated and punitive damages.

**The Issues**

**4**  There is common ground between the parties that the fire was an incendiary fire - one that was deliberately set by a person. It is also acknowledged that the fire resulted in fire and smoke damage to the house. Wawanesa resisted the claim and argues that the Sidhus or someone at their behest started the fire. If this is true, then the Sidhus delivered a wilfully false statement to Wawanesa in relation to the loss, vitiating their claim.

**5**  The burden of proof rests with the insurer to establish that the insured deliberately caused the fire. In order to succeed, Wawanesa must prove on the balance of probabilities that there was an incendiary fire, one caused by a person; the insured had the opportunity to start the fire; and, the insured had a motive to set fire to their house: *Rizzo v. Hanover Insurance Co*. [*(1990), 68 D.L.R. (4th) 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCP1-JCJ5-238F-00000-00&context=) (Ont. S.C.) at para. 31, aff'd [*103 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1KV-00000-00&context=) (Ont. C.A.), leave to appeal ref'd [*[1993] S.C.C.A. No. 488*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FJTD-G09S-00000-00&context=), [*108 D.L.R. (4th) vii*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FJTD-G09S-00000-00&context=) (S.C.C.).

**6**  Following the decision of the Supreme Court of Canada in *F.H. v. McDougall*, [*2008 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D5-00000-00&context=), the balance of probabilities is the civil standard of proof at common law. The sliding scale of proof in the civil context that previously applied to circumstances such as the incendiary origin of a fire is no longer relevant: *Johnson v. AXA Pacific Insurance Company*, [*2011 BCSC 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1FX-00000-00&context=) at para. 126; and *The Performance Factory Inc. v. Atlantic Insurance Company Limited*, [*2010 NLTD 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8Y1-FCSB-S03N-00000-00&context=) at paras. 26-30.

**7**  For the Sidhus to succeed in their claim for punitive and aggravated damages they must prove that Wawanesa did not act in good faith and failed to fairly investigate and assess their claim. The test to be applied was described in *Fidler v. Sun Life Assurance Co. of Canada*, [*2006 SCC 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B175-00000-00&context=):

63 In *Whiten*, this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* [*(2000), 184 D.L.R. (4th) 687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F30T-B52G-00000-00&context=) (Ont. C.A.), at para. 29:

The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

**The Evidence**

**The Policy**

**8**  The Wawanesa policy of insurance included the following:

SECTION I CONDITIONS

LOSS OR DAMAGE NOT INSURED

We do not insure:

1. loss or damage resulting from your intentional or criminal acts;

Requirements After Loss

1. (1) Upon the occurrence of any loss of or damage to the insured property, the Insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11,
2. forthwith give notice thereof in writing to the Insurer;
3. deliver as soon as practicable to the Insurer a proof of loss verified by a statutory declaration,
4. giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
5. stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the Insured knows or believes,
6. stating that the loss did not occur through any willful act or neglect or the procurement, means or connivance of the Insured,
7. showing the amount of other insurances and the names of other insurers,
8. showing the interest of the Insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,
9. showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,
10. showing the place where the property insured was at the time of loss;
11. if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;
12. if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.
13. The evidence furnished under clauses (c) and (d) of sub-paragraph (1) of this condition shall not be considered proofs of loss within the meaning of con-ditions 12 and 13.

Fraud

1. Any fraud or willfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration.

**Background**

**9**  Hardip is a 41 year old who immigrated to Canada in 1996. He has three children: Gurlene Sidhu, age 12; Ravnit Sidhu, age 9; and Gurmant Sidhu, age 7. At the time of the fire, the Sidhu children were 7, 4, and 18 months old, respectively. Hardip's wife is Lakhwinder Kaur Sidhu.

**10**  Santokh and Gurmit Kaur Sidhu are Hardip's parents. Along with Hardip, his wife, and children they all resided at the house at the time of the fire.

**11**  Although Gurmit was an owner of the house, the parties were agreed that she had become mentally incapable of testifying at the trial.

**12**  Hardip is trained as an auto mechanic and carried on an auto repair business. Hardip described his business as a family enterprise, where he said the whole household earns income and shares expenses.

**13**  In 2004, his taxable income was $24,000. In 2005, it was $23,000.

**14**  Lakhwinder is 40 years old and had been employed at the Khalsa Credit union as a service representative since 1998. She took maternity leave from August 2003 until August 2004. Her total income during 2004 was $22,385. In 2005, her income was $33,998. In both of those years she contributed close to $9,000 into an RRSP.

**15**  Santokh and Gurmit each earned $11,000 and $10,000 in 2004 and 2005, respectively.

**16**  The house was purchased in December 1990, for a price of $122,000 with a mortgage for $117,000.

**17**  The mortgage debt was increased in 2003 to $138,000, at which time the additional money was used to expand Hardip's business. On March 23, 2004, the parties again remortgaged the house with Coast Capital. The mortgage increased to $200,000, with the difference between the previous balance and the new balance being used to finance the business losses from a fire that occurred in 2002. In addition to a fresh advance of funds under the 2004 mortgage, the interest rate on that debt was reduced from prime plus 2% to prime.

**18**  At the time of the 2004 remortgaging of the house, Hardip invested an additional $37,000 - $40,000 in an investment property he owned with his sister.

**19**  The defendant issued several policies on the house from 2002 to 2005; the last policy insuring the house was issued December 3, 2004.

**20**  In January 2005, there was a car fire in front of the house. The Sidhu's van and a customers' car were parked in front of their house; their van was set on fire and the customer's vehicle was damaged. Their vehicle was insured, but the loss to the customer's vehicle was not covered. Hardip performed the work to repair the customer's vehicle and insurance monies were not required.

**21**  On February 7, 2005, the house and contents were damaged by an early morning fire which appears to have started sometime around 1 a.m.

**22**  The plaintiffs rented replacement accommodation. In January 2007, they sold the house for $270,000. It had not been repaired by the plaintiffs after the fire.

**Hardip Sidhu**

**23**  On the evening of the fire, Hardip and his wife had retired to bed between 9 and 10 p.m. after doing the family prayers; they prayed and kept their holy book in an adjacent room.

**24**  Gurmant was with Hardip and Lakwinder in the master bedroom. Hardip said the lights remained on as they tried to settle Gurmant for the night.

**25**  In addition to the master bedroom there were two other bedrooms. Hardip's two daughters normally slept in the second bedroom. His parents normally slept in the third bedroom. Approximately three weeks before the fire, someone broke the window to the daughters' bedroom. After that incident, the children were frightened to sleep in their bedroom; they began sleeping with Gurmit in the living room. On the night of the fire they were sleeping in the living room.

**26**  On February 6, 2005, Santokh left the home at approximately 8 p.m. He customarily worked at his son's business providing night time security. He was not present at the house at the time of the fire.

**27**  After going to bed, Gurmant interrupted Hardip and Lakwinder's sleep. He asked his wife to take the son out of the room. Lakwinder and Gurmant left the master bedroom.

**28**  Hardip heard a loud noise coming from outside the house. There is a window in the master bedroom. It sounded like someone hit the glass window. He concluded the noise had come from the window. He was quite afraid and went to see if his cars parked at the front of the house were safe. He got out of his bed, went to a hanger on the door, put on his pyjamas, and walked down the hall toward the living room area where his mother was sleeping on the sofa. On reaching the living room, his wife moved the curtain to look into the front yard. She was sitting on the sofa at the time. Neither of them saw anyone in front of their house.

**29**  There was a smoke detector on the ceiling at the end of the hallway leading from the bedroom into the living room. The smoke detector was visible in the photographs tendered into evidence.

**30**  They spent approximately two to three minutes looking outside to see if anyone was there, after which they heard the smoke alarm beep. The smoke alarm was in an area near the junction of the hall from the bedroom and the living room. He looked up and saw smoke at the top of the hallway where he had just walked from. The smoke seemed to be increasing. He woke his children and mother and took them outside.

**31**  He used a phone in the kitchen to call 911.

**32**  The neighbours were also called from the house; they came to assist the Sidhus.

**33**  Once outside the house, Hardip noticed a fire at the northeast corner of the house by the master bedroom. There was a small shed situated behind the bedroom window and the fire appeared to be in that area.

**34**  Hardip did not notice anyone in the backyard when he looked out after exiting the house, nor did he or his wife see any persons leave the property onto the street in front. The back of their property was enclosed on three sides, save and except for the gate to their neighbours.

**35**  Hardip watched the fire crew as they arrived. They entered the house through the front door. He said that a fireman retrieved his wallet and threw it to him. He noticed the fire department were throwing items out of the house including the foam mattress that had come from the master bedroom. He noted drywall material had fallen off the ceiling and the firemen were also throwing this material out of the window in the master bedroom.

**36**  He said he did not immediately contact his father who was at the business.

**37**  Before exiting the house Hardip noticed that that lights went out. He could not be sure where he was when the lights went off.

**38**  In partial contradiction, Hardip indicated that he was in the room where the holy book was kept, next to the sundeck, when the saw the lights go off. This indicates that Hardip had moved his family from the living room into the next room en route to the outside deck when he noticed the lights.

**39**  After the fire the house was secured by the defendant's adjuster for several days. The plaintiffs were initially denied entry. They were allowed to return and take their things after the keys to the house were returned to them.

**40**  Under cross-examination Hardip was asked about the statement given when he had gone to the offices of the defendant's fire investigator. He confirmed that he told Mr. Brown, the fire investigator, that the smoke alarm had come on as he was going from the bedroom to the hallway. In cross-examination he said that that statement was not true; he was upset at the time and felt he was being forced to give that statement. He later said he did not know the length of time passing between the noise at his bedroom window and the alarm sounding.

**41**  Hardip was questioned about the statement he made at the offices of the insurance adjusters on February 22, 2005. He was present at this meeting with his counsel. In a statement Hardip described the sequence of events as follows:

As I went down the hallway to the living room as I reached the living room entry a smoke detector was beeping and I saw smoke near the smoke detector. As I was in the living room I saw black smoke at the upper regions of the hallway.

**42**  This statement had been altered before it was signed by Hardip. In the unaltered version Hardip had said:

As I went down the hallway to the living room as I reached the living room entry a smoke detector was beeping and I saw smoke above my head.

**43**  He was referred to the another statement in which he is reported to have said:

As I went down the hallway to the living room as I reach the living room entry the smoke detector was beeping and I saw smoke near the smoke detector.

**44**  Hardip agreed that the smoke detector started beeping as he came from the bedroom into the living room. He had said that two to three minutes elapsed between the time he heard the breaking of the glass (the loud noise in his bedroom) and the beginning of the smoke alarm.

**45**  When cross-examined against his discovery evidence that he did not know how much time had elapsed between the breaking of the glass and his walking to the living room, he could not be sure how much time elapsed but eventually conceded that it was "a short time". On this point his evidence was less than convincing. During his cross-examination he conceded that he could not remember how things happened because he was scared.

**46**  Hardip's responses were confused and somewhat contradictory as he tried to reconcile the different descriptions of how much time passed between the noise in his bedroom and the sounding of the alarm.

**47**  The day after the fire, investigators returned to the house with Hardip and video-taped his re-enactment of the events of the evening of the fire. He confirmed that the fire investigator's video showing his path of travel from the bedroom to the living room was accurate. This evidence was consistent with his evidence of the route taken from the bedroom to the living room and to the outside.

**48**  Hardip was unable to identify anyone who he suspected might have started this fire. He confirmed that no one was seen running from the house or the fire immediately after he became aware of the blaze. To his knowledge no one in the house noticed anyone leaving the scene at or around the time of the fire.

**49**  In relation to the vehicle fire in January 2005, on cross-examination Hardip would not acknowledge that any sum of money was paid out, even when asked if the amount was less than $100,000. His response to this question was, in my view, irrational and raised some question as to his understanding of what was being asked.

**50**  Hardip was cross-examined about his signature on the fire proof of loss sent to Wawanesa. He acknowledged signing the document, but could not remember if he was able to read the words because his English was poor. Most of the information in the proof of loss was provided by his wife.

**51**  He also confirmed that his automobile repair shop had been damaged in a fire in 2002. He agreed this incident had put a strain on his family finances at the time because the shop had been closed for repairs during which he could not work. He also confirmed that he had been personally obligated to pay for some of the damage to the vehicles in his shop at the time of that fire. Hardip had little recollection of increases to the insurance coverage on the house between 2002 and 2005. He recalled receiving copies of his insurance policy and other documents from his insurance agent, but did not recall the details of any meetings or exchanges of documents.

**52**  He confirmed that renovations were done to the house, likely before his son was born in August 2003.

**Lakwinder Sidhu**

**53**  Lakwinder testified that she had been sitting in the living room for about ten minutes before Hardip came into the room and said he had heard a bang. She initially said he came running to the living room but later said she was not sure if he was walking or running into the room. She said he appeared to be scared.

**54**  They looked out the living room window and she stood up; she looked toward Hardip and saw smoke behind him following which the alarms sounded. She screamed, called her neighbour, and woke her family.

**55**  Under cross examination she denied seeing smoke chasing Hardip down the hall. She was referred to the statement given by her at Mr. Brown's office. In this statement she said:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Lakwinder: |  | Yeah, he was running toward us where we are all of us sleeping. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Lakwinder: | ---smoke there and the I--- |  |
|  | Brian Brown: | Was it chasing Hardip? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Lakwinder: |  | It looks like. Like, he, he just here and the smoke is coming after him. |  |

**56**  She also testified that Hardip was behind the sofa on which his mother was sleeping when the smoke detector sounded.

**57**  She was asked about the January 25, 2005 fire. She could not recall telling an ICBC adjuster she needed ICBC's cheque to replace the car that was destroyed.

**Santokh Sidhu**

**58**  Santokh was not present at the house on the evening of the fire.

**59**  His evidence is relevant to the issue of motive.

**60**  He indicated that the parties borrowed $97,000 to fund the purchase of the house.

**61**  Santokh owned the property where Hardip carried on his automotive repair business. Santokh purchased this property in 2000.

**62**  Santokh indicated that Hardip's business suffered losses in a fire two years after they began the business. In this fire a portion of the building was destroyed along with at least two cars in the building. Two customer vehicles damaged in this fire were insured, but his son carried no business insurance and was responsible for the loss and damage to the uninsured vehicle.

**63**  Hardip took out a loan to pay for the damage and also borrowed money to repair the building. He repaid Santokh for monies loaned to him to cover the losses sustained in this fire.

**64**  Santokh was cross-examined on evidence he had given at the examination for discovery. On at least two occasions he gave evidence at trial that contradicted his discovery testimony

**65**  Santokh was shown a diagram of the house contained in Exhibit 1, Tab 22. Santokh denied ever seeing this plan prior to the trial and denied that he had answered questions at his examination for discovery in relation to this document.

**66**  Counsel for the plaintiff admitted that Santokh attended for examination for discovery on January 28, 2009, and was asked, at question 198, if he had seen a plan of the house.

**67**  Santokh repeatedly told the Court that he had never seen the plan. On more than one occasion he gave this response in answer to a completely unrelated question.

**68**  On this point, Santokh was obdurate in maintaining his untruthful answer with regard to the house plan for no apparent purpose.

**69**  Santokh gave evidence that on the evening of the fire he received a call from a neighbour who told him that "someone set his house on fire." He remained at the business premises until 6:00 a.m., when he drove home. In cross-examination he was unable to explain adequately why, at his examination for discovery, he had sworn that his son had come to the business and picked him up.

**70**  Santokh stayed the night with neighbours and on the next day they rented a house which they lived in for some eight to nine months. Eventually, the Sidhus purchased a new house where they currently reside. Hardip and Lakhwinder are the only owners of the new house.

**71**  Santokh was questioned by someone from the insurance company; he told them he was not at the house at the time of the fire. He was also aware that his son and daughter-in-law had spoken with representatives of the insurance company. He was asked to sign a document which authorized the insurance company to investigate the fire. He told the person that he did not know anything, but signed the document.

**72**  Santokh confirmed that one of the people who he spoke with about the fire was a Sikh gentleman who spoke his language; he never asked for the man's name and was not told his name. He simply told them that he was not present at the time of the fire.

**73**  Santokh was questioned about the 2002 fire at his son's business. He said he was living with his family and went to the business where a policeman told him they could not go into the building. They left at the direction of the police, but were not told by the police that someone had set the fire. On cross-examination Santokh was asked about question 255 at his examination for discovery where he deposed that the police had indicated that the fire may have started from a heater.

**74**  Santokh was also questioned about a fire in January 2005, which resulted in damage to two vehicles in the driveway of the house. Santokh indicated he was not present and received a phone call that there was a fire. He did not discuss with his son how this fire started; however, one vehicle was totally damaged while another was repaired.

**75**  From 2000 to 2005, Santokh's only income was from his pension, by which I understood him to mean his Canada Pension. He was not working and was not receiving any other income.

**76**  Santokh's income tax returns for 2002 and 2003 reflected some rental income. He denied receiving rental income, stating that he left the preparation of his income tax return to an accountant and filed what was given by the accountant. He explained that the family were doing things together but there was no question of rent. On this point, I conclude that Santokh was unsophisticated in the business arrangements relating to the operation of his son's business. Ownership of the business building and the accounting for the parties and the business may have resulted in some confusion regarding any rental income Santokh might have historically received.

**77**  Since 1999, his pension has been his only source of income.

**78**  Santokh did not sign the proof of loss sent to Wawanesa by his lawyer.

**Inspector Berg**

**79**  Inspector Fred Berg of the Surrey Fire Department testified for the defendants. He is an 18-year Surrey Fire Department investigator. He has investigated approximately 30 fires and trained as a fire investigator. He testified that on February 7, 2005, in the early hours of the morning he attended a fire at 13875 - 88 Avenue, Surrey, B.C. He said he would have been called out to the fire after the firefighting crew had substantially extinguished the fire. He made some records of his visit which he had reviewed prior to giving evidence.

**80**  He said he met the fire crew at the scene and "would have received information from the occupants." He said that he "would have talked to" the firefighters about the firefighting techniques employed in extinguishing the fire. He believed "he would have" obtained information from the occupants and believes he spoke with the RCMP. He confirmed doing a site review and eventually left the fire.

**81**  He said that on the way home from the fire there was "something troubling him about what he observed." The next day he returned to the fire scene with Inspector Paul Mahil, also a Surrey Fire Department investigator. On their return he took photographs of the damage to the house. He observed finding a space heater in the bathroom which, at the time, was believed to be the probable cause of the fire.

**82**  Because of concerns he had about the burn patterns on the floor of the master bedroom, Inspector Mahil brought an accelerant dog with him. He was concerned about how the fire had appeared to have travelled. Inspector Berg noticed the accelerant dog indicate the presence of accelerant at two locations in the house.

**83**  The dog indicated a combustible substance on the ground outside the master bedroom window, in the master bedroom, and in the daughters' bedroom. Inspector Berg said that the dog also noted some combustible substances between the master bedroom and the ensuite, "as far as I can remember." He was not able to say if there was any indication of a combustible liquid in the areas the dog identified.

**84**  Inspector Berg said he "would have" also done a more detailed examination of the area, including moving some carpet and flooring debris. He said he brought bedding back into the house to reconstruct the scene and he and Inspector Mahil took some material from the rooms. He noted that the fire crew would have moved objects to extinguish the fire, including the bedding, mattress, and furniture.

**85**  He eventually concluded that this was a "set fire." No further investigations were done. He believed someone from his office would have conveyed the theory of the fire to the RCMP.

**86**  Inspector Berg reviewed the photographs in Exhibit 2, Tab 1, and confirmed that they appeared to be copies of the photographs that he took when he attended the scene the next day.

**87**  He reported a discussion with occupants who advised of hearing a large noise.

**88**  In cross-examination Inspector Berg confirmed that he did not know what was moved from the fire scene by the firefighters. He speculated as to the movement of the mattress and furniture and did not remember moving any furniture himself. He identified an area at the back of the house by the master bedroom taken from outside of the property.

**89**  Inspector Berg confirmed that the photograph marked "Reconstruction #4" on Exhibit 3B looked like the window to the master bedroom had been broken. He did not remember if there was any glass in the area.

**Paul Mahil**

**90**  Inspector Paul Mahil testified for the defendants. He has been a investigator with the Surrey Fire Department since 1995.

**91**  Inspector Mahil is an accelerant dog handler for the fire department. He speaks Punjabi.

**92**  Inspector Mahil reviewed Inspector Berg's notes of the fire prior to testifying. He had also reviewed Inspector Berg's photographs.

**93**  Inspector Berg had asked him to bring the accelerant dog to the fire scene to obtain a second opinion. The dog was used inside and outside the house. The dog located evidence of an accelerant outside the house in the cove area underneath the window to the master bedroom. He also indicated that there was some accelerant identified by the dog inside, but could not remember clearly.

**94**  Inspector Mahil reviewed the photographs at Tab 1, Exhibit 2, and confirmed that the accelerant dog indicated the presence of accelerant outside the bedroom window.

**95**  He could not remember being part of an attempt to reconstruct the fire scene with Inspector Berg.

**Chris Reed**

**96**  The defendants tendered an opinion of Christopher Reed, P. Eng., concerning the origins and cause of the fire. Mr. Reed's expertise is in the investigation and determination of the origins and causes of fires in buildings.

**97**  Mr. Reed's conclusions can be summarized as follows: the fire was concentrated in the master bedroom at the northeast corner of the house and the fire damage was limited to smoke deposits throughout; the fire originated from an area source, including the surface of the bed and surrounding floor area, and not a single point; the fire origin could also include the localized area outside the master bedroom window and within the master bedroom en suite; there was no accidental ignition mechanism that would correlate with the observed fire damage; volatile substances consistent with gasoline were found in the master bedroom and on a chair in the southeast bedroom; the absence of evidence of accidental ignition, the general area of origin, and the presence of an ignitable liquid in the area of origin is consistent with an incendiary fire; and given the extent of fire damage, the reported activities, and the reported occupant observations Hardip ought to have known where the fire originated if not what caused the fire.

**98**  He was unable to identify the exact nature of the accelerant suspected of igniting the fire. He could not say that the accelerant was gasoline. He stated that one of the substances identified in the chemical analysis, naphthalene, is highly volatile and found in aerosol sprays. Gasoline was only one possible substance revealed in the chemical analysis. He could not discriminate between gasoline and bug spray.

**99**  Mr. Reed was unable to confirm whether the master bedroom window broke with pieces falling outside or inside. There appeared to be some glass on the ground outside, but not enough to conclude most of the glass from the broken window was forced outside. He could not recall the melting temperature of glass, but indicated that glass would melt in the upper ranges of heat generated by a fire. I conclude from these comments that I am unable to determine if the window was broken inward or outward.

**100**  He did indicate that if the window was broken due to the heat inside the bedroom, he would expect the glass to be predominantly outside of the window. He said the location of the glass might not affect his opinion, but it is one observation in the formation of his opinion.

**101**  He reiterated his opinion that a fire origin outside the bedroom window could be included as one of the possibilities. Although the accelerant dog indicated accelerant outside the window, the tests did not confirm the presence of accelerant on the ground. He suggested that the evidence outside the window displayed a drop down fire pattern; this indicated that the accelerant may have fallen down on the house with the ignition of that accelerant coming from above. I conclude from this description that the exterior ignition may have come from someone igniting the fire from inside or outside the window.

**102**  He gave evidence that the condition of the bedroom door was most consistent with the door having been closed during the development of the fire, but the door would not have sealed the smoke in the room. The smoke would fill the room within 30 seconds. He confirmed that between one and three minutes would have elapsed from the ignition of the fire to activation of the smoke alarm. He said that accelerant igniting the foam mattress in the master bedroom would lead to black smoke developing instantaneously on combustion.

**103**  He said the burn patterns did not permit him to discriminate between the action of splashing accelerant on the foam mattress as opposed to pouring it on the mattress. He said that with accelerant splashed on the bed, the flames in the room would reach the ceiling within one minute and the room would be full of smoke within 30 seconds. If a person had stood up in the room they would be compromised within the first 30 seconds by the smoke. A person could suffer burns at 600 degrees Celsius within one to three minutes. If a person in the room had started a fire, that person could have affected by the smoke.

**Arguments**

**Opportunity**

**104**  The defendant submits that I should not believe Hardip and that I should infer from the inconsistencies in his testimony, discovery evidence, and statements to investigators that he was present in the master bedroom when the fire started and that he started the fire. The defendants submit that Hardip's explanation that the smoke appeared over his head at the time he reached the living room or that the alarm sounded as he reached the living room is consistent with the conclusion that Hardip started the fire.

**105**  The defendant argues that I can find that Hardip had the exclusive opportunity to start this fire. It argues that this is supported by the fact that all other family members were in the living room and not in their bedrooms when the fire broke out. Lakhwinder removed their infant son from the master bedroom just before the fire. The evidence of an accelerant in his daughters' bedroom is, according to the defendants, more than suspicious. They submit that these circumstances support the conclusion that this fire was planned.

**106**  The defendants focused on contradictions between various reports of the facts given by Hardip. These contradictions are:

1. Hardip testified that he heard a noise that sounded like breaking glass in the bedroom. He put on his pyjamas and when he left the bedroom there was no evidence of fire in the room.
2. He told Mr. Brown that he had run down the hall towards the living room where Lakhwinder was sleeping with her son; he also said he walked down the hall.
3. Lakhwinder saw the smoke appear after Hardip appeared in the living room.
4. Hardip's statement, as recorded by Mr. Brown, said "I reached the living room entry as smoke detector was beeping."
5. The smoke detector sounded after two to three minutes; he and his wife looked out the living room window before the alarm sounded.
6. Hardip testified that the smoke detector started beeping two to three minutes after he came from the bedroom into the living room. At his examination for discovery he responded, at question 363:
7. Can you estimate the amount of time that elapsed between when you heard the breaking glass and the time you walked to the living room?

A: No, I cannot estimate about that.

1. At the discovery Hardip's answers to further questions about the time elapsed were inconsistent with his evidence at trial.

**107**  The defendants argue that in light of the sequence of events - Hardip running down the hall, the smoke appearing just behind Hardip as he reached the living room, and the sounding of the smoke alarm after Hardip entered the living room - the evidence is compelling that Hardip was in the bedroom when the fire started. He denied seeing any fire burning when he left the room.

**108**  The plaintiffs argue that the evidence clearly supports a conclusion that Hardip was not in the bedroom at the time the fire started and did not have the opportunity to start the fire.

**109**  The plaintiffs point out that the post-fire investigation did not reveal the presence of large amounts of broken glass outside or inside the structure. The plaintiffs submit that it is probable that the fire was started in the master bedroom from the exterior of the house.

**110**  The plaintiffs point out that the accelerant was spread in a six foot diameter of the center of the southwest corner of the bed. They note that the evidence of Chris Reed was that within 30 seconds of ignition of the accelerant the room would have been filled with smoke and within one minute the heat at the head level in the room would have exceeded 600 degrees Celsius. The fire patterns on the interior door of the master bedroom indicate the door was closed for the duration of the fire. Assuming the door was closed, the smoke from the master bedroom would not have reached the smoke detector in less than one minute. It may have taken as long as five minutes after ignition to activate the smoke alarm.

**111**  A person who left the room 30 seconds after the moment of ignition would have encountered smoke in great quantity within the room. There might have been evidence of coughing, wheezing, or burns to the face or soot on the person's clothing. There was no evidence of Hardip demonstrating any of these indicators.

**112**  The plaintiffs submit that the defence theory, that Hardip ran down the hallway and reached the living room at the same time as smoke reached the detector, and within 30 seconds, is not consistent with the evidence of the expert on the causation of the fire. The defence argument that Hardip ignited the fire and remained in the room while the fire developed and the heat increased, then ran down the hall and was under the fire extinguisher shortly before the smoke arrived, is inconsistent with the evidence.

**113**  The plaintiffs submit that there is no evidence that Hardip had a gas can or other container for the accelerant in the house, and that it was improbable that he could have taken such a container outside before the fire was started.

**114**  The plaintiffs argue that the circumstances are more consistent with the plaintiffs' version of the events: after hearing the noise at the bedroom window Hardip dressed himself, walked down the hallway, looked out the living room window, and after two to three minutes noticed smoke coming down the hall which activated the smoke alarm. The expert evidence is that the smoke alarm would not have been activated for at least one minute after the fire began.

**115**  The plaintiffs attack the suggestion that Hardip's oral statement to Mr. Brown, written statement, and the explanations at trial were indications of a lack of honesty on Hardip's part. He argues that Mr. C.J. Singh, who was present in the Sidhu house and the interviews at Mr. Brown's office, was not a trained interpreter. He was employed by the investigators and did not report Hardip's responses "word for word." During meetings with the defendant's adjuster and investigators Hardip's words were not accurately reported and the circumstances of those meetings raised doubts as to the reliability of the reports of what he said or meant during the interviews.

**116**  The plaintiffs submit that it is inherently improbable that Hardip would have put his family's lives at risk by starting a fire while they remained asleep in the living room.

**Motive**

**117**  The defendant argues that the Sidhus had a motive to cause the fire for the purposes of securing the insurance proceeds. They submit that the family derived income from the repair business, Lakhwinder's credit union salary, and pension incomes of Santokh and Gurmit. They say the income tax returns disclose a very modest income.

**118**  They suggest that the Sidhus increased their mortgage debt from $97,000 in 1990 to $138,500 in 2003 and $200,000 in March 2004.

**119**  Hardip confirmed that a fire in his business in 2002 had put a strain on the family finances. The shop closed for seven to eight months and they had to pay for the damage to some uninsured vehicles. The insurer also paid a portion of his lost salary resulting from the fire in 2002.

**120**  The defendants suggest that the birth of Gurmant in 2003 and ensuing maternity leave for Lakhwinder increased economic strain on their household.

**121**  They also suggest that the fire at the house on January 25, 2005, resulting in the damage to one uninsured vehicle caused some financial grief.

**Analysis**

**122**  The incendiary origin of the fire is conceded. The defendants have the burden of establishing opportunity and motive on a balance of probabilities.

**Opportunity**

**123**  The accelerant found in the master bedroom appears most likely to have been the principal origin of the fire. However, there was evidence of an accelerant outside the window and some evidence of an accelerant in the daughters' bedroom. Unfortunately, the analysis done of the substances was not conclusive as to type; there was no evidence that the material found in the daughters' bedroom was anything but an innocent substance. The substance in the master bedroom accelerated the fire.

**124**  There was significant fire damage outside of the bedroom window. The accelerant dog gave an indication that there was accelerant outside and on the ground. There was fire damage under the window that indicated that the fire had been ignited in that area. The window was broken when observed by Inspectors Berg and Mahil; however, there was no evidence of which way the glass fell.

**125**  The controversy arising from the different descriptions of Hardip's movements from the bedroom to the living room and activation of the smoke alarm raise concern about the reliability of Hardip's recollection and possibly his credibility. In his direct examination he said that he walked down the hallway the living room and spent two to three minutes with his wife looking outside searching for the source our origins of the sound he had heard in his bedroom. After that time the alarm sounded.

**126**  He confirmed giving a statement at the insurance adjuster's office on February 22, 2005. In that statement he said he walked down the hallway and as he reached the living room entry a smoke alarm was beeping and he saw smoke. He qualified that statement by saying that two to three minutes had elapsed. Under further cross-examination Hardip denied changing his written statement to reflect that the smoke alarm was beeping and that he saw smoke near the smoke detector rather than above his head. He then agreed with counsel that the smoke alarm started beeping as he came from the bedroom into the living room. When questioned further he said that two to three minutes had elapsed between the sound and hearing the smoke alarm beeping. When cross-examined against evidence given at his examination for discovery he confirmed that he did not know how much time elapsed between the sound and his entry into the living room. He then said he was scared and was unsure of the timing details.

**127**  On this point Hardip's evidence is cloaked in a level of uncertainty as to the actual timing of these events. It is not surprising that uncertainty on these points arises in view of the language difficulties surrounding the statements given to the insurance adjusters, the fear and chaos prevailing at the time that the fire was engulfing the house, and the amount of time that has passed since the fire.

**128**  It is possible that Hardip has been untruthful; however, I conclude that the evidence does not rise to the level of probability that he has been untruthful.

**129**  Mr. Reed, the defence expert, said that accelerant igniting foam mattress would cause black smoke instantaneously on combustion. The smoke would fill the room within 30 seconds. There was damage on the inside of the door consistent with the fire door being closed at the time; the door does not seal smoke on the inside. He confirmed that from the ignition point to activation of the smoke alarm would have taken between one and three minutes. He also said that flames in the room would reach the ceiling within one minute. If a person stood up in the room they would be compromised within 30 seconds by the smoke and might suffer burns.

**130**  The defendants' evidence does not satisfy me on the balance of probabilities that the source of the accelerant in the bedroom was not from a person outside the house who could have broken the window and splashed the substance around the bedroom. The accelerant dog gave indications of an accelerant on the ground outside the window; these facts are consistent with someone outside the window throwing accelerant into the bedroom and, deliberately or accidentally, spilling accelerant down the outside wall.

**131**  In spite of the difficulties in Hardip's evidence, I conclude that the defense expert's evidence militates against the suggestion that Hardip started the fire or was in the room at the time of ignition of the blaze. If smoke reached the alarm as Hardip walked down the hall, he was most likely not in the room for the 30 seconds or more required for the fire to take hold and smoke to fill the room. The evidence of the amount of smoke, flame, and the potential heat within the room developing during that time undermines that construction of the events.

**132**  The absence of glass outside of the bedroom window is also troubling. If the fire was begun by Hardip inside the house the evidence suggests the window would have blown outward and glass would have been found on the ground outside. There was no evidence of a large amount of glass outside the window. If it was broken from the outside, as suggested by Hardip, glass would have been deposited on the inside. The glass on the inside may have been removed during the process of cleaning up the master bedroom or it might have been destroyed by the heat.

**133**  In the final analysis, the defendant was able to point to some suspicious circumstances suggesting Hardip could have started the fire. Although the fire of January 25, 2005, is a curious coincidence, there was no evidence to suggest that it was connected in any way to the Sidhus.

**134**  On the balance of probabilities I am not satisfied that the defence has proven that Hardip set the fire. Although he was alone in the bedroom immediately before the fire started, I accept his evidence, on the balance of probability, that he was not in the room when the fire started and therefore he did not have the opportunity to set the fire.

**Motive**

**135**  I do not accept that the defendant has proven the plaintiffs' motive for starting this fire. The defendant submitted there were several facts leading to the conclusion that the plaintiffs were in need of the insurance proceeds and therefore had a motive to start the fire. The pattern of the plaintiffs increasing the insured value of their house is consistent with prudent steps taken by the Sidhus on the advice of their insurance agent. There was no evidence that they had initiated the increase in insurance. They denied seeking the increases in coverage, but had informed the agency they had made improvements to the structure prior to the increase in coverage. It is equally possible that the insurance agent had learned about the improvements to the house and recommended increasing their insured values.

**136**  The defence relied on the increase in the mortgage debt registered against the house from 1990 until 2004 as evidence of motive. In that time frame the principal amounts increased from $97,000 to $200,000. In the same time, the interest rate had dropped from 12.75% to prime +2% to prime +0%. I take note of the fact that although the mortgage debt increased between 2003 in 2004, the Sidhus were able to negotiate a reduction in their interest rate of 2% per annum.

**137**  Further, a portion of the proceeds for the 2004 increase were used to purchase an investment property; this use of money militates against an inference that the plaintiffs were in financial difficulty.

**138**  The defence pointed to parties' fire loss in March 2002, some of which was uninsured, as an event that caused a financial strain on the business and the family. In my view, there was no evidence that at the time of their house fire that any strains existed because of the 2002 business loss.

**139**  The defence also argued that the fire loss in January 2005, a portion of which loss was not insured, was evidence of further financial strain on the family.

**140**  The defendants rely on *Bains v. Dominion of Canada General Insurance Co.* [*(1997), 43 B.C.L.R. (3d) 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0RJ-00000-00&context=) (S.C.), for the proposition that a web of circumstantial evidence can lead to a conclusion that the insured has motive to destroy their own property. However, in that case the Court found many circumstances supporting the complicity of the insured. The arsonist was seen driving the plaintiffs' associate's car, carrying a 10 gallon can of gasoline in the neighbourhood of the plaintiffs' house the morning before the fire. The arsonist confessed to the fire and admitted that he was hired by the plaintiffs' business associate to do the job. The plaintiff was under financial pressure. The circumstances in *Bains* are distinguishable from the plaintiffs in this action.

**141**  The defendants also rely on *Montini Foods Ltd. (Trustee of) v. General Accident Insurance Co. of Canada* [*(1997), 150 D.L.R. (4th) 378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF21-FH4C-X1PX-00000-00&context=) (Ont. C.J.), as a guide to the type of evidence necessary to establish motive and opportunity in defence of an insurance claim. The evidence in *Montini* was far more comprehensive and compelling on the issue of motivation and opportunity. In the matter before me, the evidence of opportunity for Hardip to set the fire was offset by the expert evidence relating to the timing of smoke reaching the alarm and Hardip's explanation of the events prior to the sounding of the alarm.

**142**  The defendants also rely on *Richardson v. Smith*, [*2010 NBQB 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KWB1-F1WF-M193-00000-00&context=), in which goods were removed from the premises prior the fire. The defendant asked the Court to view the fact that the children and Gurmit were sleeping in the living room at the time of the fire as parallel to removing the goods from the premises in *Richardson*. On the balance of the evidence, I do not conclude that the presence of the children, mother, and grandmother in the living room at the time of the fire is evidence of a movement or removal of these people in preparation for the fire Hardip intended to set. He was not directly challenged in cross-examination on that point. It would be necessary to disbelieve Hardip and speculate as to the reasons for these persons to have spent the evening in the living room. I am not able to conclude that the location of the family was connected to a plan to destroy the house.

**143**  The defendants' allegation that Hardip attempted to burn down his own home for financial gain is very serious. There was no evidence of a gas container in the house after the fire and he was not asked if he had taken a container of gasoline into the house at any relevant time. The plaintiffs argued that many of the essential allegations about the fire were never put directly to Hardip in cross-examination. I am cognizant of the inconsistencies in the testimony of Hardip; but those inconsistencies do not lead me to a conclusion that the essential evidence of opportunity and motive meet the burden on the defendant.

**144**  On this issue of motive, the defendants submit that the motive was to obtain a financial advantage from the benefits under the policy. I must be satisfied of the balance of probabilities that the plaintiffs' financial circumstances revealed a need or, at least, an interest in obtaining insurance monies.

**145**  Lakhwinder testified that the family's only debt was owed to the bank. There was a line of credit used to purchase an investment property.

**146**  In the circumstances I cannot come to the conclusion advanced by the defendants. Although a fire to the house could have resulted in receipt of insurance proceeds, I am not convinced that the evidence discloses a motive. It seems to me that to find a motive in the plaintiffs' financial circumstances, I would have to find that the benefit of the insurance proceeds coming from the loss would exceed the economic damage brought about by the fire. The policy allowed the insurer to repair damage rather than pay the insured cash value for the damage. To conclude otherwise I would have to conclude that the Sidhus were planning for a total destruction of the house and a complete replacement of the structure and contents. One can speculate that following a complete destruction of the structure and rebuilding, the Sidhus would have had a property more valuable than the one existing immediately prior to the fire. There was no evidence of that fact.

**147**  There was no evidence of financial stress on this family, no evidence of creditors demanding payment, no evidence that the Sidhus wanted a new house, no evidence that their mortgage was in arrears, and no evidence that there were any financial strains on this family that are sufficient to discharge the defendants' burden.

**148**  The plaintiffs invited the Court to reject the defence theory, in part because the defendants did not put aspects of that theory to Hardip and his wife during cross-examination.

**149**  I have reviewed *R. v. Carter*, [*2005 BCCA 381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B11J-00000-00&context=), a decision of our Court of Appeal summarizing the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). I find that the rule is fundamentally about fairness and is not an absolute one. I have accepted the evidence of Hardip. If I was otherwise inclined to doubt his credibility there might be an issue about some aspects of the defence that were not put directly to Hardip. As an example, Hardip was not directly questioned about his financial circumstances nor was it suggested to him that he started the fire to obtain the advantage of the insurance proceeds. As evidence of motive, I would have expected a more direct confrontation of Hardip on that evidence. In view of my conclusions on the issues of motive and opportunity, I do not need to resolve the plaintiffs' argument on this issue.

**150**  In my view, the evidence does not rise to the requisite standard of proof on either opportunity or motive. On the balance of probabilities I am unable to conclude that the fire was started by or at the direction of one or more of the plaintiffs or that Hardip delivered a fraudulent and wilfully false statement or breached their policy of insurance with Wawanesa. Accordingly, the plaintiffs' action is allowed on the claim for benefits under the insurance policy.

**151**  Counsel discussed an issue in this trial as to whether the plaintiffs had properly perfected their right to claim for recovery of the losses arising from thefts from the house after the fire. I understand the defendant to say that the proof of loss delivered as required by the policy was inadequate or otherwise flawed. The proof of loss did not mention a loss due to theft.

**152**  There was no argument about the sufficiency of the proof of loss as it might relate to losses due to those thefts. The plaintiffs seek a declaration that their claims "are valid" for losses that occurred February 7, 2005 and April 17, 2005. I understood there was evidence of theft; however, the statement of claim pleaded damage by fire alone. The proof of loss submitted by Hardip mentions "loss or damage by fire" and makes no reference to theft.

**153**  I will give liberty to the parties to provide further argument on these issues if there is no agreement.

**Punitive and Aggravated Damages**

**154**  The plaintiffs seek punitive and aggravated damages.

**Punitive Damages**

**155**  In *Whiten v. Pilot Insurance Co.*, [*2002 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=), Binnie J. summarized the principles of punitive damages as follows:

1. Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": Hill v. Church of Scientology of Toronto, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=), at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

**156**  The plaintiffs allege bad-faith on the part of the defendant Wawanesa. They submit that the defendant owed them a duty to investigate and assess the claim on the merits and in a balanced and reasonable manner. The decision to refuse payment should have been made on a reasonable interpretation of its obligation under the policy and should have promptly been communicated to the insureds.

**157**  The defendant strongly suspected arson after the inspection by Mr. Berg and Mr. Mahil. There were very early interviews of the plaintiffs in which the Sidhus were cross-examined as to the details of the fire. They were asked about other fire losses and questioned about possible suspects who might have wanted to kill them.

**158**  Marilyn Hegarty testified for the defendant. Hegarty was the supervisor of telephone adjusters and was engaged in administrative training. She had conduct of the file relating to the plaintiffs' loss when it was first reported. She assigned the adjusting role to T. Simpkins Associates and gave instructions to the adjuster. Mr. Simpkins promptly retained Brian Brown and Associates to investigate the fire.

**159**  Ms. Hegarty confirmed receiving a copy of the Brian Brown and Associates Inc. origin and cause report dated February 23, 2005. She saw this report for the first time at the round table meeting in late March 2005. This meeting was attended by counsel for the defendant, Brian Brown, Tom Simpkins, and managers and supervisors of the defendant. Ms. Hegarty was given general details of the plaintiffs' claim from Mr. Simpkins; he had received those details from Mr. Brown. She did not remember receiving anything from Mr. Brown, but assumed that he would have spoken at the meeting. She did not remember reading the report, but recalled from the discussions at the meeting they needed further investigations due to the suspicious nature of the fire. She was not aware of the forensic lab reports at that time. She believed that additional interviews of more family members were needed and would be undertaken by T. Simpkins. She maintained conduct of the plaintiffs' file with the defendant until April 2007. At that point, she had not received further information about other interviews discussed at the round table meeting. She was not aware of and did not have copies of the recorded interviews.

**160**  Ms. Hegarty believed that Mr. Simpkins would have communicated with the insured and would likely have supplied them with a proof of loss document. She had no direct dealings with the insureds.

**161**  There is no evidence that a proof of loss was sent to the plaintiffs prior to February 2007. Mr. Simpkins believed that a blank proof of loss "would have been forwarded" to the plaintiffs; there was no evidence to support that assumption other than his simple assertion that he usually followed a standard procedure. The plaintiffs did not receive a proof of loss prior to commencing this law suit.

**162**  Ms. Hegarty does not appear to have received further information from Mr. Simpkins. Mr. Simpkins testified that multiple reports were sent to the defendant; there was no evidence of those reports having been received or acted upon by Wawanesa. Ms. Hegarty accepted and relied on the conclusion in the Chris Reed report that the fire started inside the home by someone who was inside the home at the time.

**163**  It appears that the only communication to the plaintiffs after March 31, 2005, was a letter from defence counsel to the plaintiffs' lawyer dated January 27, 2007. Ms. Hegarty received a copy of this letter on February 2, 2007. This letter was in response to service of the statement of claim and writ of summons to the offices of T. Simpkins Associates Ltd. Mr. Carnello advised Mr. Randhawa (the plaintiffs' lawyer at the time) that no proof of loss had been received by the defendant and no action could be maintained until a proof of loss had been delivered. He also complained about the bad-faith claim and mentioned that the loss was not payable until 60 days after the submission of a proof of loss.

**164**  Mr. Carnello then informed the plaintiffs of the state of the investigation. He said:

This brings us to the most important issue, which is the cause of the fire. We have reviewed the circumstances of your client's claim, including the statements and investigators reports, and it is clear from our review that the fire could not have occurred in the manner stated by your clients.

Therefore, according to the fire investigator, the fire started in the bedroom, Hardip was in the bedroom when the fire started and the fire was deliberately set. Furthermore, the fire investigator has ruled out any connection between the exterior fire and the interior fire in the bedroom.

There is an exclusion in the policy of insurance for intentional or criminal acts. This exclusion is contained on page 39 of the policy booklet at cause five, a copy of which is enclosed for your reference.

**165**  This letter appears to be the only communication to the plaintiffs advising them of the denial of their claim and advising them of the allegation that they were responsible for the fire and that the insurer would decline to pay for the loss.

**166**  After reviewing her notes, Ms. Hegarty indicated that it appeared that she had received Hardip's statement but not the statements of other family members. She had no recollection of receiving the statement, but believed it came from Mr. Simpkins; she said she would likely have read it. She also confirmed that Simpkins would have been responsible for obtaining further statements as required by the defendant.

**167**  Although the round table meeting concluded with Ms. Hegarty expecting further interviews to enable the defendant to assess the loss, it appears that no such interviews were done. There was no evidence of other contact between the plaintiffs and defendant from February 2005 until January 2007.

**168**  The first meeting between Simpkins, Brian Brown, and Mr. Sidhu involved a type of cross examination of the Sidhus. The tone appears to have been accusatory. The plaintiffs argue that outcome of the interviews was not reliable due to the interpretation issues. It seems that Mr. Simpkins formed his opinion that the Sidhus had caused the fire, in part, because the plaintiffs could not offer the name of a credible suspect who might be the culprit. The plaintiffs argue that early in the investigation it was entirely illogical to assume that the owner living in the house with his family members would set a fire for the purpose of defrauding the insurance company; a cunning arsonist would have made other arrangements to ensure that his family was not put at risk.

**169**  The plaintiffs say that the report by Mr. Brown was deliberately misleading. In that report, Mr. Brown said: "Mrs. Sidhu states she was sitting up on the living room chesterfield by the window and when she heard the smoke detector she looked up and saw her husband under the smoke detector and she could see black smoke above his head beneath the smoke detector."

**170**  Mrs. Sidhu's actual evidence was that after she looked out the window, she stood up and heard the alarm and saw smoke behind her husband. Mr. Reed's report in his evidence confirmed that the smoke would not have reached the smoke detector for a minimum of one minute after the blaze was set. Neither Mr. Brown nor Mr. Simpkins allowed for the possibility that Hardip was telling the truth.

**171**  The plaintiffs argue that there was a breakdown in communication between the investigators and the defendant and that the defendant did not take reasonable steps to fairly and properly assess the plaintiffs' claim.

**172**  Almost two years elapsed after the fire before the plaintiffs served their writ of summons, during which time nothing was heard from the defendant. Then, the defendant sent an accusatory letter to plaintiffs' counsel informing the plaintiffs of the denial of their claim and raising a significant issue of their failure to provide a proof of loss. Ms. Hegarty believed this correspondence was the defendant's attempt to respond to the claim and seek further information from the insureds. She was waiting for additional statements and from her perspective it appears that the defendant had not yet dealt conclusively with the claim.

**173**  The insureds had been left in the lurch for almost two years without the defendant concluding their investigation, providing the insureds with information about their concerns, providing them a proof of loss, or providing any financial assistance.

**174**  It is clear to me that the defendant suffered from miscommunication between their investigator, adjuster, and Ms. Hegarty. The burden of furnishing a form of proof of loss rested with the defendant and there is no evidence that the defendant provided such document prior to commencement of litigation.

**175**  The issue is whether the defendant breached its contractual duty to pay insurance benefits and whether it failed to deal with the plaintiffs' claim in good faith. The duty of good faith required the defendant to act fairly in the investigation and assessment of the claim and in the decision whether or not to pay the claim.

**176**  The insurer was entitled to take all necessary steps to assess the merits of the claim in a balanced and reasonable manner. They were not permitted to deny or delay payment in order to take advantage of the insureds' vulnerability or to gain bargaining leverage in negotiating a settlement. The mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

**177**  The duty requires the insurer to deal with the claim fairly and in a timely way. In the circumstances of this case the investigation was never completed to the satisfaction of the defendant. The investigators had formed the opinion that Hardip was responsible for the fire and communicated that view to the insurer. In the circumstances, the defendant may have been justified in denying the claim and litigating the plaintiffs' entitlement. Apparently Wawanesa did not want to rely on that recommendation or assessment as a basis for denying the claim without obtaining further statements. They delayed their response to the Sidhus until the investigation was complete; that response came two years after the fact and only in response to a writ of summons claiming benefits under the policy. This appears to be the first time the defendant (as opposed to the investigators' suggestions in the interviews) told the plaintiffs that their claim was denied.

**178**  In the circumstances of this case I conclude that the defendant was entitled to investigate the claim thoroughly and fairly. However, the plaintiffs had a reasonable expectation that their claim would be dealt with fairly, including timely investigation and resolution of their claim, and to be informed of the defendant's decision in a reasonable time.

**179**  On the evidence before me, the defendant did not undertake the investigation or assess the claim in a fair or reasonable fashion. I am directed to consider the insurer's conduct throughout the whole claims process to assess whether the insurer acted "fairly and promptly in responding to the claim": *702535 Ontario Inc. v. Non-Marine Underwriters Members of Lloyd's London* [*(2000), 184 D.L.R. (4th) 687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F30T-B52G-00000-00&context=) (Ont. C.A.) at para. 30.

**180**  It is on the issue of the promptness of the investigation and communications with the Sidhus that Wawanesa failed in its duty to the plaintiffs. The enormous delay between April 2005 and January 29, 2007, is unexplained and clearly unfair to the plaintiffs.

**181**  The plaintiffs acted responsibly in immediately renting alternative accommodation and eventually purchasing a new property. This was done in spite of the defendant's neglect in dealing with their claim.

**182**  Hardip noted that the defendant placed security at the house for several days after the fire. They were told initially they could not go into the house to pick up their possessions. When they left the home after the fire they took no personal possessions except for their holy book and a cell phone.

**183**  He was told that once the security services were taken away from the house the defendant had no responsibility for the security of their house.

**184**  Immediately after the fire the family stayed with friends for approximately two or three days and eventually rented a house elsewhere in Surrey. They lived in the rental property for one year after which they purchased another home.

**185**  Many of their belongings in the house at the time of the fire were stolen by strangers about one month after the fire. The Sidhus reported the theft to the police but did not recover the goods.

**186**  Hardip confirmed that they did not hear anything from the defendant and were not advised by the defendant of its decision to deny their claim until hearing from their lawyer. This would appear to have been a communication from Mr. Menkes about the Carnello letter of January 27, 2007.

**187**  Hardip testified that since the fire his health has not been as good as before the fire and he has been taking pills to deal with the change in his condition. There was no medical evidence to expand on Hardip's complaints nor any evidence of the impact of these events on the other insureds. Although I accept that he was upset because of the fire and the ensuing uncertainty regarding the defendant's position, there is little evidence as to any other effects on he or his family arising from the defendant's dilatory dealing with his claim.

**188**  Hardip testified that he signed the proof of loss. He was unable to recall who translated the document for him. He said that the prices were values attributed to items in the proof of loss prepared by his wife. He noted that his wife handled the family money and banking.

**189**  I do not accept the plaintiffs' assertion that they suffered the loss of peace of mind and dignity as a result of the defendant suggesting that the plaintiffs were culpable in setting the fire. This was not an outrageous accusation given of some inconsistencies in statements made after the fire. However, the delay in properly assessing the claim and reporting to the Sidhus left a serious cloud over their heads for far too long. The Sidhus were forced them to make alternate arrangements without support from Wawanesa, all the while facing an allegation of a serious fraud.

**190**  House insurance contracts are purchased by the public to achieve a level of assurance and peace of mind that they will be treated promptly and fairly if their home is damaged by fire. Punitive damages are not compensatory damages and the focus of this claim must be on the blameworthy conduct of the insurer.

**191**  The Supreme Court of Canada in *Whiten* discussed some of the factors influencing the assessment of blameworthiness. In my view the conduct that supports a conclusion of blameworthy conduct of the part of the insurer is the dilatory manner in which the claim was handled. This delay does not appear to have targeted the plaintiffs; but the charges outlined in the January 27, 2007 letter had an offensive tone. The plaintiffs were unsophisticated and vulnerable victims of the delay. The plaintiffs did not demonstrate any hostility or anger toward the insurer.

**192**  The conduct of the insurer, although serious, does not require a large penalty to reflect the denunciation required of the insurer's conduct. The insurer was negligent in the handling of this claim and that disregard of the plaintiffs' reasonable expectations rises to the level of blameworthiness discussed in *Whiten.* The issue of the measure of the plaintiffs' claims under the policy is not to be decided at this time. I have no accurate measure of the damages except the estimations contained in the proof of loss filed by Hardip. The house was sold and I have no evidence as to the impact of the fire damage on the sale price.

**193**  In *Whiten*, the Court discussed the importance of considering the proportionality of the measure of the punitive damages. There is no direct correlation, but the measure of the loss can be a factor in the assessment of punitive damages.

**194**  Many of the items listed on the proof of loss were items stolen from the house after the fire. The proof of loss lists a total of $110,968. I do not believe that amount represents the cost to repair the fire damage to the structure; I do not know what the plaintiffs' total claim will be.

**195**  In the result, the plaintiffs will recover damages under this head in the sum of $50,000. I conclude that this amount will be sufficient to deter the defendant from repeating this conduct.

**Aggravated Damages**

**196**  Mental distress damages for breach of contract are recoverable as compensatory damages designed to restore a party wronged by the breach of the contract by the opposite party (*Fidler* at para. 44).

**197**  These damages are recoverable where they are established on the evidence and within the reasonable contemplation of the parties. To succeed in this case the plaintiffs must prove that the object of their policy was to secure a psychological benefit - peace of mind - and that they experienced mental suffering as a result of the breach.

**198**  In the circumstances of this case, I understand the plaintiffs' claim that the delay in receiving the protection offered by their insurance policy has caused suffering.

**199**  The evidence on this point was inadequate as a foundation for damages under this head. The only evidence was from Hardip, and he did not convince me he had suffered more than minimal changes to his life as a result of the delay in processing his claim. He spoke about his feelings and that he had been taking medications after the fire; there was no opinion evidence connecting these observations to the manner in which the defendant dealt with the plaintiffs.

**200**  In this case I am not satisfied on the balance of probabilities that the plaintiffs have suffered aggravated damages. The evidence is not convincing on this issue.

**201**  The parties will have liberty to speak to the issue of costs failing which the plaintiffs will have their costs of the action.

T.C. ARMSTRONG J.

**End of Document**

[***XY LLC v. Canadian Topsires Selection Inc., [2014] B.C.J. No. 2650***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0MW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: August 26-28, 2014.

Judgment: October 28, 2014.

Docket: S122330

Registry: Vancouver

**[2014] B.C.J. No. 2650** | 2014 BCSC 2017

Between XY, LLC, Plaintiff, and Canadian Topsires Selection Inc., Fraser Biomedical Inc., Ai De Diagnostic Co. Ltd. (also known as Aide Diagnostic Co. Ltd.), Sire Lodge Inc., GenerVations Inc., Technoterm Integrated Services Ltd., International Newtech Development Incorporated, IND Embryontech Inc., IND Diagnostic Inc., 497244 BC Ltd., Barry Dong Sheng Cheng, Kevin Chung Li Xu also known as Kevin Chun Li Xu, Abbotsford Veterinary Clinic & Hospital Ltd., Canadian Pacific Genetics Center Ltd., Richard Vanderwal, Zhenyu Zhang, Jesse Zhu (also known as Jia-Bei Zhu and Jesse Jia-Bei Zhu), Shu Li Wang (also known as Shuli Wang), Shu Xi Wang (also known as Peter Wang and Peter Shu Xi Wang), Jin Tang (also known as Tang Jin), Selen Zhou (also known as Cui Feng Zhou and Selen Cui Feng Zhou and Selen Cheung), James Yang, Alice Lin, Cheng Li (also known as Li Cheng), Fu Qi (also known as Qi Fu, also known as David Qi Fu), Zhigang Wang (also known as Gary Wang and Zhigang (Gary) Wang), Shu Qing Wang, Xiahong Xu (also known as Xu Xiahong and Xiahong (Amy) Xu), Maggie Hu, Jane or John Does #3-10, IND Pharmaceuticals Inc., John Doe (Company) #2, and John Doe (Company) #3-10, Defendants

(173 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Particulars — Estoppel — Estoppel by record (res judicata) — Issue estoppel — Application by several defendants for particulars of plaintiff's claim adjourned until discoveries completed — Plaintiff claimed damages for use of confidential information — In separate action, Trial Order defined confidential information — Doctrine of res judicata and issue estoppel applied to prevent defendants from re-litigating issue of whether confidential information was truly confidential — Definition of confidential information set out in Trial Order was sufficiently adequate to notify defendants of case to meet — Plaintiff was to provide particulars of all patents and patent applications referenced in its claim.**

**Tort law — Practice and procedure — Pleadings — Particulars — Application by several defendants for particulars of plaintiff's claim adjourned until discoveries completed — Plaintiff claimed damages for use of confidential information — In separate action, Trial Order defined confidential information — Doctrine of res judicata and issue estoppel applied to prevent defendants from re-litigating issue of whether confidential information was truly confidential — Definition of confidential information set out in Trial Order was sufficiently adequate to notify defendants of case to meet — Plaintiff was to provide particulars of all patents and patent applications referenced in its claim.**

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| Application by several defendants for particulars of the plaintiff's amended notice of civil claim. The plaintiff was suing for damages for conspiracy, breach of confidence, interference with economic relations, and unjust enrichment for the use of confidential information including technology, processes and protocols for creating sex-selected inseminates. The defendants sought to clarify exactly what the plaintiff alleged was confidential information. The plaintiff confirmed its allegations as to what was confidential information arose solely from the definition in a Trial Order in another action that granted a permanent prohibitory injunction as against certain defendants restraining the use of the confidential information. The Trial Order provided that confidential information did not include information that was in the public domain. It was upheld on appeal. The Trial Order applied to Zhu and his related companies, employees and servants, some of whom were defendants in the within action.  HELD: Application adjourned.  The defendants were raising the same issue as in the original action, namely whether the confidential information identified in the Trial Order was in fact confidential on the basis that it was in the public domain. Any publication of the confidential information after the original trial could legitimately be raised as a new issue. All of the applicant defendants were caught by the terms of the Trial Order. They were privies of Zhu sufficient to ground the application of res judicata. The doctrine of res judicata and issue estoppel applied to prevent the defendants from re-litigating the issue of whether the confidential information was truly confidential. The doctrine of abuse of process was equally applicable to the defendants raising a public dissemination defence. The definition of confidential information in the Trial Order was sufficiently particularized to define the narrow the issues raised, determine what facts were at issue, inform the defendants of the case they had to meet, and to limit the issues to be tried and upon which discovery could be conducted. The plaintiff was to provide particulars of all patents and patent applications referenced in its claim. The remainder of the application was adjourned until the conclusion of discoveries. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 3-7(22)

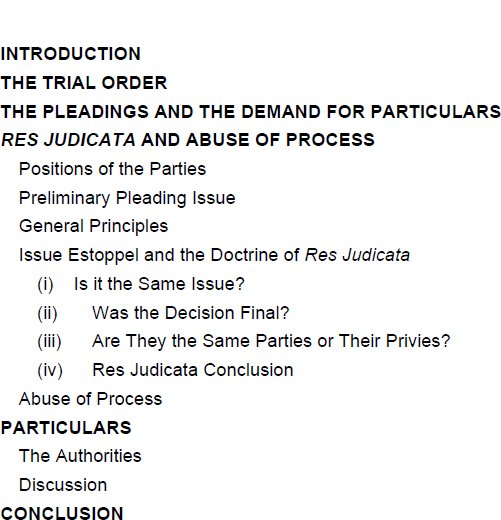
**Counsel**

Counsel for the Plaintiff: C.S. Wilson, G.M. Bowman, K. Smiley, K. Harrison, Articled Student.

Counsel for the Defendants James Yang, Kevin Xu, Alice Lin, Barry Cheng, Fu Qi: R. Clark, QC.

Counsel for the Defendants, Canadian Topsires Selection Inc., Fraser Biomedical Inc., International Newtech Development Incorporated, IND Embryontech Inc., IND Diagnostic Inc., Technoterm Integrated Services Ltd., Jesse Zhu: Timothy Lo D. Gileff.

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**Reasons for Judgment**

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| **S.C. FITZPATRICK J.** |

**Introduction**

**1**  This action involves allegations that the defendants have been improperly using certain parts and related items (the "Confidential Information") of the plaintiff XY, LLC ("XY"). The Confidential Information includes technology relating to equipment (such as cytometers), processes and protocols for the purpose of creating sex-selected inseminates.

**2**  The confidentiality issues arise from findings of this Court in earlier litigation between the same or related parties and the resulting court order after trial (the "Order After Trial"), which was slightly modified by the Court of Appeal: *XY, Inc. v. International Newtech Development Incorporated*, [*2012 BCSC 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6265-00000-00&context=), varied [*2013 BCCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B23D-00000-00&context=), leave to appeal to the S.C.C. refused [2013] S.C.C.A. Nos. 376, 378, 380 (as modified, the "Trial Order").

**3**  Despite this litigation having been outstanding for over two years, the parties are still not far beyond the pleadings stage. In the meantime, various other battles have been waged, principally relating to the production of documentation, the securing of evidence (through Anton Piller orders, [1976] Ch. 55) and the prevention of dissipation of assets (through Mareva injunctions).

**4**  The present battle is an application by the defendants Canadian Topsires Selection Inc. ("CTS"), Fraser Biomedical Inc. ("FBI"), Barry Dong Sheng Cheng ("Cheng"), Kevin Chung Li Xu ("Xu"), James Yang ("Yang") and Alice Lin ("Lin") (collectively, the "Applicants") for particulars of XY's amended notice of civil claim filed on June 13, 2012 (the "Amended Notice of Civil Claim"). The application is brought pursuant to Rule 3-7(22) of the BC *Supreme Court Civil Rules* (the "*Rules*").

**5**  The Applicants seek to clarify exactly what XY alleges is Confidential Information, particularly in light of the potential issue of loss of confidentiality by reason of public disclosure of information relating to XY's technology. The Applicants say that these particulars are necessary in order to save significant time and expense in relation to examinations for discovery, which have not yet taken place, and, of course, the trial.

**6**  The starting point is the terms of the Trial Order that granted a permanent prohibitory injunction as against certain defendants restraining the use of the Confidential Information, as defined by the Trial Order. On this application, XY has confirmed that its allegations in this action as to what is Confidential Information arise solely from that definition in the Trial Order.

**7**  At its core, this fight is over who should, at this post-pleadings/pre-discovery stage, delineate in very technical detail what the Confidential Information is and more importantly, what it is not, by reason of possible disclosure of XY's information into the public domain both before and since the granting of the Trial Order. It is fairly acknowledged by both parties that this would entail a significant amount of work, time and expense in terms of an analysis of very technical publications, such as patent applications, patents and technical or industry papers. Each side points to the other as best able to do that work.

**8**  Further, and in partial response to this application, XY alleges that issues as to confidentiality now advanced by the Applicants at least to a certain point in time have already been decided by the Trial Order and are, therefore, *res judicata* or otherwise foreclosed to them by the doctrine of abuse of process.

**9**  It is important to recognize at the outset that this application is not about disclosure of documentation by XY pursuant to its obligations under the *Rules*. XY has already disclosed hundreds of published or publicly filed documents, including patent applications, patents and papers. The Applicants have indicated that they are not yet satisfied with the level of disclosure by XY but no issue in that respect has yet been brought forward to the court.

**10**  The background of the original litigation between XY and others -- including some of the defendants here -- (the "Original Action") and also the course of this action to date has already been summarized in various court decisions, including my earlier reasons relating to the Mareva injunctions, [1980] 1 All E.R. 213: *XY, LLC v. Canadian Topsires Selection Inc.*, [*2014 BCSC 1331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B167-00000-00&context=) at paras. 1-44 (the "Mareva Reasons"). For the sake of as much brevity as possible in these reasons, I do not propose to restate that history. I will, however, continue in these reasons to use the various defined terms referred to in the Mareva Reasons.

**The Trial Order**

**11**  The Order After Trial dated March 2, 2012 of Mr. Justice Kelleher, following the decision in *XY, Inc. v. International Newtech Development Incorporated*, [*2012 BCSC 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6265-00000-00&context=) (the "Trial Reasons") included a mandatory and prohibitory injunction against the principal actors in this conflict, being Zhu, Tang and Zhou, and others (who I will loosely describe as related to these individuals):

1. The defendants JingJing, Jesse Jia-Bei Zhu, Selen Zhou, Tang Jin, and Shu Xi Wang and each of them (including by themselves, or by their directors, officers, agents, employees, servants, affiliates, joint venturers, successors, assigns, subsidiaries or related companies, and all those over whom they exercise control, directly or indirectly) are restrained from using the Confidential Information, for any purpose or to any extent, and are restrained from communicating, transferring, distributing, selling, publishing, leasing, licensing or in any other way or by any other means disclosing the Confidential Information to any person or for any purpose; and
2. Within 14 days from the date of this order, namely on or before March 16, 2012, the defendants JingJing, Jesse Jia-Bei Zhu, Selen Zhou, Tang Jin, and Shu Xi Wang and each of them, shall deliver up to the plaintiff or its designate any and all Confidential Information in their possession, power or control.

[Emphasis added].

**12**  The Order After Trial provided that "Confidential Information" had the meaning set out in Appendix "A" to the Trial Order.

**13**  The mandatory aspects of the Order After Trial related to the delivery of all Confidential Information in their possession, power or control to XY. It is well established that no Confidential Information was ever returned to XY in the brief period of time after the issuance of the Trial Reasons and leading to the execution of the Anton Piller Order (the "APO") on April 2-4, 2012.

**14**  The prohibitory aspects of the Order After Trial were to protect XY's Confidential Information and all improvements and restrain Zhu, Zhou, Tang and Shu Xi Wang from using the Confidential Information and also from communicating, distributing, selling, publishing, leasing, licensing or disclosing the Confidential Information to any other person.

**15**  As I will discuss in more detail below, upon appeal, the court upheld the findings at trial of confidentiality, but amended the extensive definition of Confidential Information in Appendix "A" to the Order After Trial to delete one provision (subparagraph (f)) and add another provision: *XY, LLC v. Zhu*, [*2013 BCCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B23D-00000-00&context=) (the "Appeal Reasons"). Appendix "A" to the Trial Order is attached as Schedule "A" to these reasons.

**16**  In substance, the Appeal Reasons clarify the provisions of Appendix "A" by maintaining the detailed listing of certain parts, protocols and other information that *prima facie* are confidential but include an overriding exception that any Confidential Information that is or becomes generally available to the public (other than by the defendants in breach of the Order) is no longer protected as Confidential Information. This exception would, of course, include any public dissemination of such Confidential Information by XY, whether by the filing of patents or patent applications or by the publication of industry papers and the like.

**The Pleadings and the Demand for Particulars**

**17**  On June 13, 2012, XY filed the Amended Notice of Civil Claim. As indicated in the Mareva Reasons, XY claims against the defendants for conspiracy, breach of confidence, unlawful and direct interference with economic relations, and unjust enrichment and constructive trust. All of the allegations are based on the central proposition that the defendants are improperly using XY's Confidential Information.

**18**  Paragraphs 34-38 of the pleading outline XY's allegations about what is encompassed by "Confidential Information". While paragraph 36 presently provides an expansive (and non-exhaustive) list of what is "confidential". I recognize that, as stated above, XY has now clarified that when it speaks of "Confidential Information" it is confined to those matters as were determined to be such by the terms of the Trial Order. The pleading also provides for the public dissemination exception, consistent with XY's position throughout both this and the earlier litigation:

1. XY also owns, controls, licenses or otherwise has an interest in various device, method and business patents and patent applications relating to sex selection technologies in various countries around the world, including the United States of America, Canada and China. For clarity, XY's Confidential Information as defined above does not include information disclosed in its patents and patent applications, but rather is restricted to information that has not been disclosed to any third party except under an obligation to maintain its confidentiality.

**19**  In their responses, the Applicants adopted the phrase "Confidential Information" as used by XY and denied that they received or used any such alleged Confidential Information. In the alternative, they allege that the Confidential Information was not confidential in character and that, in any event, the Confidential Information was public knowledge or generally known.

**20**  The demand for particulars is dated October 18, 2012 (the "Demand"). I consider that some of the questions raised by the Demand have been answered, particularly with regard to paragraphs I(a)-(b), II, III, IV and V. In short, XY has indicated that it relies on the particulars set out in Appendix "A" to the Trial Order as responding to those aspects of the Demand. With respect to the other requests under the Demand, the remaining contested matters can be summarized as follows:

1. particulars as to the "information and techniques" imparted to the defendants in the Original Action, as referred to in Appendix "A" para. (d): Demand, I(c);
2. particulars as to what "portions" of the protocols and an XY report, as referred to in Appendix "A" paras. (b) and (c) are included in Confidential Information: Demand, VI;
3. particulars of the various "device, method and business patents and patent applications" that XY alleges it owns, controls, licenses or otherwise has an interest in and relevant locations, as per para. 37 of the Amended Notice of Civil Claim: Demand, VII(a) and (b);
4. particulars of information, techniques, processes and protocols that have *not* been published or provided to third parties except under an obligation to maintain its confidentiality: Demand, VII(c) and (d); and
5. particulars of which parts or components of XY's equipment are *not* commercially available, including particularly which components and methods of use of the SX Cytometer were not disclosed in patents or patent applications per para. 37 of the Amended Notice of Civil Claim: Demand, VII(e) and VIII.

**21**  It will become apparent from the above list that what would be entailed by most of these particulars is a detailed technical analysis of XY's Confidential Information in terms of any patents, patent applications or publications and a detailed technical analysis of what exactly remains confidential. These are really two sides of the same coin of the public dissemination exception - one negative and one positive.

**22**  On February 8, 2013, XY responded by email to the Demand and advised that particulars were not necessary given the Trial Reasons and Trial Order that were said to be well known to the Applicants. In reply, by email on February 13, the Applicants indicated that XY's claim was for confidential information "at large" (as opposed to the Trial Order that was based on contractual arrangements) and that it remained open to non-contracting parties (such as the Applicants) to advance the issue as to whether the Confidential Information remained confidential, particularly in light of XY's patents, patent applications and publications.

**23**  Finally, by email dated October 1, 2013, counsel for the Applicants confirmed XY's position that the Confidential Information arose from the Trial Order only but then stated that a number of issues arose as to "what information truly is confidential apart from the contractual underpinnings of the first law suit."

**24**  Before I turn to the specific issues, I wish to confirm a point of agreement in this case. Substantial arguments were made by the Applicants regarding the effect of the filing of patents or patent applications. The extensive authorities cited to me confirm that by filing such documents, the "bargain" underpinning the patent system is that XY obtains protection of its inventions; but in return, XY must fully disclose its confidential information and trade secrets to the public: *Cadbury Schweppes Ltd. v. FBI Foods Ltd.,* [*[1999] 1 S.C.R. 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41H-00000-00&context=) at 171-72; *Teva Canada Ltd.* v. *Pfizer Canada Ltd.,* [*2012 SCC 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X220-00000-00&context=) at para. 32. Further, if trade secrets are published, then any property right in the confidential information ceases to exist: *F.P. Bourgault Industries Cultivator Division Ltd. v. Nichols Tillage Tools* , [*[1989] 21 C.P.R. (3d) 358*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-F30T-B28R-00000-00&context=) at 362 (Sask. Q.B.).

**25**  XY does not dispute the general proposition that if otherwise confidential information has been disclosed in one of its patents or patent applications or if information has been published into the public domain, then any aspect of confidentiality with respect to that information has been lost.

***Res Judicata* and Abuse of Process**

**26**  The issue of what is confidential and what is not confidential is of importance in this litigation. The issue arises at this preliminary stage in relation to the particulars demanded simply by reason of the breadth of the particulars requested.

**27**  The issue that arises is what effect, if any, does the Trial Order have on the availability of the parties to argue that issue?

**Positions of the Parties**

**28**  The Applicants argue that one of the central issues in the litigation is whether XY's Confidential Information -- due to its filing of patents and extensive publication by its employees -- has in fact remained confidential. In part, the foundation of the application for particulars relating to the definition of Confidential Information is the Applicant's desire to litigate (or as XY would put it, re-litigate) the question of confidentiality that was before the court in the Original Action. The Applicants argue in their notice of application that "the very particulars claimed from [Appendix] "A" of the [o]rder of Mr. Justice Kelleher include matters which cannot possibly be confidential".

**29**  XY does not dispute that the issue of confidentiality does arise in this action to some extent. However, XY takes the position that the Applicants' arguments, at least in part (and from a timing perspective), are *res judicata* by way of issue estoppel or, alternatively, foreclosed by the principle of abuse of process. XY says that, just as predicted by them in the Court of Appeal proceedings, the Applicants (who are all said to be related to Zhu and his business activities in some fashion) are simply attempting to re-litigate the findings of fact of Kelleher J. at trial.

**30**  The Applicants dispute that the doctrines of *res judicata* or abuse of process apply and, in any event, take the position that this issue is not appropriately before the court at this time.

**Preliminary Pleading Issue**

**31**  The Applicants refer to a number of authorities establishing that issue estoppel or *res judicata* must be pleaded at least generally if a party seeks to rely on it, and that the facts relied upon as establishing estoppel must be specifically alleged: *Comeau v. Anderson* [*(1977), 18 N.B.R. (2d) 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW51-FG12-60G4-00000-00&context=) at 185 (C.A.); *Collier v. Moncton Kinsmen House Inc.*, [*2002 NBQB 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-JPGX-S26P-00000-00&context=) at para. 23; *32262 B.C. Ltd. v. McDonell*, [*[1998] B.C.J. No. 1503*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2C0-00000-00&context=) at paras. 47-49, [*1998 CanLII 3895*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2C0-00000-00&context=) (S.C.); *Custer v. Hui*, [*2006 BCSC 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1S9-00000-00&context=) at para. 16; *Casa Rio Developments Ltd. v. Hooymans*, [*2014 BCCA 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B17B-00000-00&context=) at para. 20.

**32**  As I have indicated above, the Amended Notice of Civil Claim provides a number of references to XY's Confidential Information. I have already referred to paragraph 36, which defines what XY considers to be Confidential Information (now clarified by XY during argument). In addition, in paragraph 38, XY refers to the Order After Trial that is stated to have "confirmed the existence of XY's Confidential Information".

**33**  The Amended Notice of Civil Claim also includes a reference to the fact that XY is relying on Kelleher J.'s findings of fact in respect of the Confidential Information. The pleading states:

1. XY relies on the findings of fact in relation to XY's Confidential Information set out in the Reasons for Judgment pronounced March 2, 2012 in the 2007 Action.

**34**  Accordingly, while the Applicants are correct in that XY's pleading does not specifically state that *res judicata* or issue estoppel are being raised, in substance this pleading does raise those issues: *32262 B.C. Ltd.* at para. 49; *Custer* at para. 16.

**35**  In addition, the exchanges between counsel in February and October 2013 regarding the Demand also clearly raise the issue in that XY confirmed that the Trial Order established what was Confidential Information for the purposes of this action. In reply, the Applicants advised that they would be taking the position that they were not bound by the determinations under the Trial Order.

**36**  Nor was there any secret that this issue was going to be specifically raised by XY in responding to this application. The notice of application was filed and served in mid-March 2014. XY's application response and written argument filed and served in April 2014 clearly identified the issue, with the response stating under its "Legal Basis" that estoppel and abuse of process applied to prevent the Applicants from "relitigat[ing] the confidentiality of the information listed in the Order After Trial."

**37**  In *32262 B.C. Ltd.*, the court noted that the pleading rule is not a strict one. Madam Justice Morrison stated:

[47] ... Where it appears clear either from the pleadings or the evidence or both that estoppel is at issue, I believe it is appropriate to consider the issue. The underlying concern is fairness[.]

**38**  In these circumstances, I am of the view that the Applicants have been given ample notice of XY's intention to raise this issue such that they are hardly taken by surprise. Indeed, the Applicants made substantial arguments and referred to authorities on the point during the application. Accordingly, I will consider the merits of the arguments as presented.

**General Principles**

**39**  Before turning to the specific doctrines of *res judicata* or abuse of process, it is useful to review the summary of the principles underlying each, as set out by Madam Justice Abella in *British Columbia (Workers' Compensation Board) v. Figliola*, [*2011 SCC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XY-00000-00&context=):

[34] At their heart, the foregoing doctrines [of *res judicata*, collateral attack, and abuse of process] exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, [*[2004] 1 SCR 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B111-00000-00&context=) at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

1. It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
2. Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
3. The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, [*[2005] 3 S.C.R. 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B159-00000-00&context=) at para. 35; *Danyluk*, at para. 74).
4. Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, [*[2010] 3 S.C.R. 585*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1VX-00000-00&context=) at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
5. Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

**Issue Estoppel and the Doctrine of Res Judicata**

**40**  The doctrine of *res judicata* was recently summarized by Madam Justice Dardi in *Lougheed v. Wilson*, [*2012 BCSC 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1S1-00000-00&context=):

[61] *Res judicata* is a core doctrine of our Canadian justice system. The policy objectives underlying *res judicata* are well established and can be distilled as follows - there is an interest in putting an end to litigation and no person should be twice vexed by the same cause of action: *Foreman v. Niven,* http:// www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc14 76/ 2009bcsc1476.html2009 BCSC 1476 at para. 9; *Giles v. Westminster Savings Credit Union,* [*2006 BCSC 1600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2MF-00000-00&context=) at para. 26 (the relevant portions of which were ultimately affirmed on appeal: [*2010 BCCA 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-223T-00000-00&context=)). Notwithstanding the importance of these objectives, they must be balanced with the competing principle that litigants should not be deprived of their right to have their cases decided on the merits: *Cliffs Over Maple Bay Investments (Re),* [*2011 BCCA 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1VH-00000-00&context=) at para. 26.

**41**  Issue estoppel, as a form of *res judicata*, precludes "litigation of the constituent issues or materials facts necessarily embraced" within a cause of action: *Danyluk v. Ainsworth Technologies Inc.*, [*2001 SCC 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48G-00000-00&context=) at para. 20.

**42**  The well-known three part test for successfully invoking issue estoppel is: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies: *Toronto (City) v. C.U.P.E., Local 79*, [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=) at para. 23.

1. ***Is it the Same Issue?***

**43**  As noted in *Danyluk*, the requirement that the same issue be determined was discussed by Middleton J.A. in *McIntosh v. Parent*, [*[1924] 4 D.L.R. 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-DXWW-2288-00000-00&context=) at 422 (Ont. C.A.):

... When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[Emphasis added].

**44**  In *Danyluk*, Mr. Justice Binnie for the Court stated that "estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings" or such issues as are "necessarily bound up with the determination of that "issue" in the prior proceeding": paras. 24, 54.

**45**  As Levine J. (as she then was) stated in *Genesee Enterprises v. Rached*, [*2001 BCSC 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2TS-00000-00&context=) at paras. 219, 221, the first step of the same question analysis requires a review and determination as to what was actually decided in the first instance and the second step requires a review and determination of the issues in the present action.

**46**  Here, the parties fundamentally disagree as to the effect of the Appeal Reasons and decisions relating to certain findings of fact by Kelleher J. in the Trial Reasons concerning whether certain matters were found to be confidential to XY or whether they were in the public domain.

1. ***The Original Action***

**47**  In the Original Action, the issue of confidentiality was squarely raised by the pleadings. The consolidated statement of claim filed by XY listed various confidential information, trade secrets, know-how, technical data, masks, code, programs, processes, methods, operations, devices, innovations and inventions, all defined as "Confidential Information". XY also referred to its ownership of certain "Patent Rights" and confirmed that the "Confidential Information" did not include information disclosed by way of those "Patent Rights". The relief sought by XY included a permanent injunction against the defendants and their servants, agents and any company owned or controlled by them.

**48**  Some of the defendants in the Original Action (who described themselves as corporate "non-licensee" defendants or individual defendants) did not admit these allegations and put XY to the task of strictly proving them.

**49**  In April 2010, the non-licensee and individual defendants served a demand for particulars seeking further and better particulars of both the "Confidential Information" and the "Patent Rights" referred to in XY's pleading. The response to this demand outlined various elements of the "Confidential Information" that essentially correspond to paragraphs (a) to (e) of Appendix "A" to the Trial Order. In addition, XY provided a detailed listing of certain "Patent Rights", outlined some 117 different patents and patent applications dated from August 1992 to January 2010.

**50**  At trial, evidence on the confidentiality issue was given by XY's employees, Mike Evans and Thom Gilligan, and Zhu. In addition, after the evidence by the XY witnesses was heard at trial, the defendants in the Original Action sought to call Zhigang Wang as a witness on the issue of confidentiality, to introduce 43 documents comprising some 802 pages that the court described as technical documents and included academic papers and training manuals. However, during the course of the trial, Kelleher J. ruled that the defendants could not rely on these documents since the defendants had failed to disclose them to XY and they had no reasonable explanation for their late production.

**51**  The Trial Reasons indicate that the issue of confidentiality as it related to XY's allegations of breach of confidence was very much before the court and considered by the court. Kelleher J. at paras. 209-217 of the Trial Reasons described in detail XY's confidential parts, the protocols and the patent information and went on to describe the "widespread misuse of XY's confidential information" at paras. 218-229.

**52**  He specifically rejected the defence's contention that XY's so-called confidential information was in the public domain:

[331] The defendants argue that no prohibitory injunction should be granted because the so-called confidential information is in the public domain. They rely on the testimony given by Mike Evans. Mr. Evans was employed by DakoCytomation Inc. from 1991 to 1997. He then worked for XY from 1997 to 2003. His job at XY included assisting new licensees to become accustomed to the technology.

[332] Mr. Evans has been with ST from 2003 to the present. He gave evidence about XY's technology and the separation of process.

[333] The defendants rely on the following questions and answers in cross-examination:

1. I am going to suggest to you, Mr. Evans, that everything you told us this morning about the process from ejaculate to freezing is information that is in the public domain. Agree or not agree?
2. Agree.
3. You agree?
4. Yes.

[334] This evidence must be placed in context. Mr. Evans was referring to what he had said in the first part of his testimony. A sealing order was made regarding the rest of his testimony. There was no suggestion made to him in cross-examination that his sealed testimony did not contain anything that was not in the public domain.

[335] As discussed above, I am satisfied that XY's protocols are confidential. They are only provided to licensees. The terms of the license represent an agreement by JingJing that [] they are in fact confidential.

[336] The defendants also rely on the evidence of Jesse Zhu who testified that semen can be sorted without XY's confidential information.

[337] I do not find this evidence persuasive. For reasons explained above, I have not found Mr. Zhu credible. Moreover his evidence is uncorroborated. It is contrary to the detailed and credible evidence of Mr. Gilligan and of Mr. Evans.

[338] Finally, and as the plaintiff argues, it is difficult to understand why, if XY's technology was not required to sort semen, JingJing did not immediately terminate the [Commercial License Agreement]. Instead, JingJing acquired a third cytometer.

[Emphasis added].

**53**  The clarity of Kelleher J.'s findings of fact as to XY's claims to confidentiality were also noted by Mr. Justice Voith in one of his earlier decisions: see *XY, LLC v. Canadian Topsires Selection Inc.*, [*2013 BCSC 780*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CT-00000-00&context=) (the "APO Reconsideration"):

[55] To the extent there might have been a dispute about what the confidential or proprietary content XY's information and processes were, that dispute was resolved in the reasons that were issued by Justice Kelleher. Those reasons were issued more than one month before the Anton Piller Order was executed.

1. ***The Appeal***

**54**  At this point, it is necessary to review the proceedings leading up to and following from the revision of the Order After Trial by the Court of Appeal.

**55**  In his factum, Zhu raised similar arguments concerning confidentiality. He did not challenge Kelleher J.'s ruling to exclude the late produced documentation, but he did argue that Kelleher J. was required to make an independent determination as to whether information was truly confidential. He argued that there was insufficient evidence upon which a permanent injunction could be issued. He argued:

1. [T]he evidence of Messrs. Evan and Gilligan -- with few exceptions -- failed to establish the specific aspects of XY technology that are confidential, in the sense of being information not publicly available (through published patents or research) and not generally known to others in the same industry.

...

1. Nothing published in an XY patent or patent application, or published by XY (or affiliated authors) in a scientific journal, can reasonably said to be confidential. Such information is inherently public.

...

1. Mr. Gilligan acknowledged that the patents and research papers put XY's technological information in the public domain and contain descriptions of the technology that w[ere] "adequate enough to allow someone who is knowledgeable in [the] field to use the invention papers, which appear in peer-reviewed journals"... The trial judge, however, was never take through XY's public information in an effort to define the scope of its information which remains confidential.
2. Without detailed evidence from XY with respect to which part(s) of its information are publicly available, it was not possible for the trial judge to define the scope of information that required protection.

**56**  On the issue of confidentiality, the Court of Appeal's only clarification of the Order After Trial arose from the agreement of the parties, principally arising from the exception under the Commercial License Agreement (the "CLA"), that publicly available documents were excepted from what would otherwise be Confidential Information. In summary, the Court of Appeal found as follows:

1. Mandatory and permanent injunctive relief was held to be appropriate by the trial judge because "[i]f it were denied, the defendants would be permitted to sort semen using their intimate knowledge of XY's equipment and protocols without paying royalties to XY and in competition with other [royalty-paying] licensees": Appeal Reasons at para. 102; Trial Reasons at paras. 328-29;
2. Kelleher J. rejected the defendants' arguments (based on testimony by Mr. Evans at trial taken out of context) that XY's technology was in the public domain and Zhu's evidence that semen could be sorted by the defendants without using XY's Confidential Information: Appeal Reasons at para. 103; Trial Reasons at 337;
3. Zhu's main argument on appeal was that the definition of "Confidential Information" contained in Appendix "A" failed to distinguish between information that had been made publicly available through publication of research or patent applications and truly confidential information: Appeal Reasons at para. 105;
4. Section 3.10 of the CLA provided that information that became publically available not in contravention of applicable law or confidentiality or other similar agreements was excepted from confidentiality restrictions. The court found this included published research and patent applications and did not find XY to argue to the contrary: Appeal Reasons at para. 106;
5. It is not appropriate for a court to refer to all patent applications and public research in the terms of an order: Appeal Reasons at para 107;
6. Kelleher J. accepted Mr. Evans' evidence concerning the SX cytometer components that were confidential and that licensees are not able to modify or add to most of the cytometer components. Further, he held that:

it is clear the people at XY had used their brains in creating XY's protocols based on published and unpublished research and experiments and had produced something that could only be produced by having gone through such a process. As such, it is clear that the information contained in the protocols was confidential and the plaintiff's evidence that the protocols were conveyed in confidence has not been undermined.

Appeal Reasons at para. 108; Trial Reasons at para. 215 [emphasis added by the Court of Appeal];

1. Based on the terms of the injunction and the definitions contained within it as well as the definitions in the CLA, the Court did not agree with the submissions of Zhu's counsel that the Order After Trial "operates to prevent the use of information that have been made public as a result of patent applications by persons other than the defendants": Appeal Reasons at para. 110 [emphasis added by the Court of Appeal];
2. Zhu objected to paragraph (f) of Appendix "A" to the Order After Trial as being too broad and precluding him from "pursuing businesses that involve the production of embryos that are not dependent on XY's technology." XY argued that there was no evidence that Zhu had "any "legitimate business" in the same field as XY that does not rely on XY's technology": Appeal Reasons at paras. 111-12;
3. Although cognizant of XY's distrustfulness toward Zhu, the Court "regard[ed] paragraphs (d) and (e) as sufficient to capture the defendants' future use of XY's technology, especially in light of the definition of "'Improvements'": Appeal Reasons at para. 113; and
4. Ultimately, paragraph (f) of the definition of "Confidential Information" in Appendix "A" to the Order After Trial was deleted and the listed exceptions from s. 3.10 of the CLA were substituted. The appeal was dismissed concerning all other terms of the injunction: Appeal Reasons at para. 114.

**57**  Despite the Appeal Reasons, issues arose between counsel in respect of the settling of the Trial Order. In an email on August 14, 2013, Zhu's counsel stated to XY's counsel:

If I understand things correctly, XY is concerned that the defendants might take the position that they are not obliged to return certain items referred to in paragraphs (a) -- (e) of the Appendix to the Order -- on the basis that portions (or perhaps all) of certain technology, parts, etc. that fall within these sections are "publicly available" and therefore not confidential as defined in the Order.

From my perspective, I can tell you that I do not see this as a legitimate position to take and I do not believe our clients have any intention of making such an assertion.

The Court of Appeal has crafted their reasons to provide for the immediate return of the components, protocols, etc. to XY. This is the mandatory component of the injunction. Going forward, the Order as proposed by the Court of Appeal is intended to ensure that the appellants are in the same position as others in Canada (which was not the case following trial). If they so choose, they can access publicly available information concerning XY products and attempt to improve on the technology. XY still retains its ability to pursue the individuals for breaches of its intellectual property rights. This is the prohibitory component of the injunction.

Your proposed change to the Order prohibits the defendants from this latter prospect. Assuming everything is returned pursuant to the mandatory injunction, if there are aspects of the returned technology that are in the public domain, I do not believe that the Order is intended to restrict the defendants from accessing this information. Your proposed change to the Order would appear to have precisely such an effect.

[Emphasis added].

**58**  XY's counsel, in a letter dated October 24, 2013 to the Court of Appeal, raised the concern that the draft order proposed by the defendants would "permit the defendants to re-litigate the question of confidentiality in [the Appendix "A" items (a) to (e)]". He stated:

Counsel also agree... that the end result was intended to be that the defendants could enter or re-enter the business by *independently* obtaining and relying on publicly available information. The intention is not to permit the defendants to obtain an advantage by using, disclosing or keeping information they obtained from XY or developed themselves (or with the assistance of third parties) during the period of the license agreement. That information was found to be confidential by the trial judge, listed in items (a) through (e) of the definition of Confidential Information, and upheld by the Court on appeal.

[Emphasis in the original].

**59**  In reply, by letter dated October 29, 2013, Zhu's counsel stated:

Put simply, XY's technology that is in the public domain and fall within section 3.10 of the CLA exception does not have the requisite element of confidentiality to fall within the definition of "Confidential Information" necessary to be protected under a prohibitory injunction.

**60**  On November 4, 2013, XY's counsel responded:

XY's proposed wording permits the use of publicly available non-confidential information, provided it was not obtained from XY on a confidential basis but rather is obtained independently from a non-confidential source.

**61**  The Court of Appeal rejected XY's proposed addition to the order, stating that it was "not appropriate in that [it] has the potential to extend the prohibition beyond its intended scope". The order was entered on March 10, 2014.

1. ***"Same Issue" Discussion***

**62**  What emerges from the above is the following:

1. in the Original Action, XY claimed confidentiality concerning the items that would later be detailed in Appendix "A" to the Trial Order;
2. all of the defendants, including Zhu, clearly contested that claim to confidentiality, taking the position that the information was in the public domain. This position was advanced particularly with regard to certain patents or patent applications obtained by XY prior to the trial that were disclosed at least in part in the response to the demand for particulars; and
3. the issue of confidentiality was also specifically raised at trial before Kelleher J. He rejected the evidence of Zhu and accepted the evidence of XY's employees, specifically finding as fact that the Appendix "A" items were confidential.

**63**  In substance, the defendants to the Original Action, including Zhu, disputed XY's claim to confidentiality of the Confidential Information and lost.

**64**  The Applicants say, however, that the reasons of the Court of Appeal confirmed that the public dissemination exception that arose from section 3.10 of the CLA is such that it remains open to any party (including presumably Zhu) to argue in the future that the Appendix "A" items were not truly confidential but were and are in the public domain.

**65**  I disagree. As XY notes, there is no indication in the Appeal Reasons that the court overturned the findings of fact by Kelleher J. on the issue of confidentiality. To the contrary, they specifically referenced those findings of fact at paras. 102-103, 108-109. It is of some importance that XY has never alleged, either in the Original Action or on the appeal, that the Confidential Information included matters in the public domain, including published research and patent applications. As is clear, the CLA expressly excepted such matters and this was, of course, the focus of the Court of Appeal's reasons in terms of the clarification of the Trial Order: see Appeal Reasons at paras. 106, 110.

**66**  At time of trial in the Original Action, the issue that directly arose was whether the information XY alleged was "confidential" was truly confidential in the sense of whether by that time, it was or was not in the public domain. Again, Zhu advanced an argument against that allegation and again he failed to prove that the alleged confidential information was in the public domain. Rather, the court accepted XY's evidence that it was not. Zhu's own counsel's understanding of the direct determination that the Appendix "A" items (a) to (e) were conclusively found to be confidential is confirmed in the email set out above at paragraph 57 of these reasons.

**67**  In my view, the clear concern of the Court of Appeal was to ensure that *going forward*, Zhu and such other parties as may be related to him would have the opportunity to argue that their future activities were based, not on the use of the Confidential Information, but on information in the public domain. This "going forward" concept was employed by Zhu's counsel in his email as set out at paragraph 57 above. I will repeat the conclusions of the Court of Appeal:

[113] XY is understandably distrustful of Mr. Zhu and wants to cast its net widely so as to avoid having to re-litigate the confidentiality of its information at a later date should Mr. Zhu re-enter the business of producing embryos or otherwise using sexed semen. Nevertheless, XY's rights do not go so far as to entitle it to demand that Mr. Zhu never enter or re-enter that business. He and his companies, however, may not use or build on XY's technology to do so. It is not clear to me whether paragraph (f) was specifically referred to in argument before the trial judge, but in my respectful view, it is overly broad. I regard paragraphs (d) and (e) as sufficient to capture the defendants' future use of XY's technology, especially in light of the definition of "Improvements".

[Emphasis added].

**68**  But for this one clarification, the Court of Appeal dismissed Zhu's appeal "[i]n all other respects ... concerning the terms of the permanent injunction": Appeal Reasons at para. 114.

**69**  Accordingly, I conclude that the clear findings of this Court in the Original Action, as confirmed by the Court of Appeal, are to the effect that the items listed in Appendix "A" items (a) to (e) were found to be confidential to XY.

**70**  Turning to this action, the issue raised by XY is whether the defendants have been using its parts and the configuration of those parts, and the protocols and information imparted in training, as defined as "Confidential Information" in Appendix "A" to the Trial Order. The issue is not to define as confidential information that which was not the subject of the Original Action. As I indicated above, the mandatory injunction granted by Kelleher J. ordered the defendants to return the Confidential Information to XY. But for some minor items, none of XY's parts, protocols or other materials listed and none of the defendants' "Improvements" have been returned. Although many were seized during the execution of the Anton Piller Order, XY now contends that many of these items remain in the control of the defendants in China or elsewhere, in the form of physical parts, drawings, photographs and protocols used for the purpose of reverse engineering the parts and for the purpose of manufacturing and training.

**71**  As I have stated above, the pleadings of the defendants, including the Applicants, is to deny generally the claims of confidentiality in respect of the Confidential Information. XY does not dispute the ability of the defendants to raise the "public domain" argument in respect of their future activities. XY does, however, argue that with respect to the confidentiality of the Confidential Information as found at trial, that issue has been determined.

**72**  This issue has arisen on this particulars application due to the argument of the Applicants in their notice of application filed March 14, 2014 that XY's alleged "Confidential Information" cannot be confidential because:

1. [T]he very particulars claimed from [Appendix] "A" of the Order of Mr. Justice Kelleher include matters which cannot possibly be confidential, again absent contract.

**73**  The approach of the Applicants is made even more blatant by their argument that "[i]n hindsight, it now appears that a number of positions taken by XY in the previous litigation were clearly in error". In that respect, it is now apparent that the Applicants wish to argue that at the time of trial, the various patents, patent applications and publications of XY were such as to put into the public domain that which is specifically listed in Appendix "A" to the Trial Order.

**74**  The Applicants say that the individual items of XY's protocols are not confidential. They cite *Ocular Sciences Ltd*. & Anr. v. *Aspect Vision Care Ltd. & Ors.,* [1997] R.P.C. 289 at 368:

If the claim to confidentiality was being made in respect of the total package as a single item rather than the individual contents, it would have been necessary to show that the defendants had taken, in substance, the whole package. A 'whole package' claim could not be used to bestow confidentiality on the individual contents when, by themselves, they were not protectable.

**75**  The matter of the protocols was expressly dealt with by Kelleher J. at paras. 213-215 of the Trial Reasons. He stated that the protocols, which included both published and unpublished materials, were as a whole confidential. This finding was expressly noted by the Court of Appeal at para. 108.

**76**  The Applicants say that going forward, they wish to be free to use any individual, non-confidential parts of the "package" of protocols. Whether they have done so will no doubt be an issue at trial. The Applicants say that they have not used, nor do they intend to use XY's package of materials or protocols as per the Trial Order. However, given the findings of this Court on the confidentiality of the package of protocols as a collection of materials, that issue has now been decided. It remains to be seen whether the Applicants have been using the protocols in breach of XY's Confidential Information.

**77**  In substance, I agree with XY that the Applicants intend to argue that Kelleher J. was in error in making his findings of fact that the Confidential Information was truly confidential.

**78**  The Applicants also argue that there is a distinction in that the confidentiality was determined in the Original Action "based on contractual arrangements", rather than the confidentiality issues here that are "at large". But, as XY points out, it sued not only on a contractual basis (i.e., the CLA signed by JingJing) but also raised issues against the various individuals under the common law tort of breach of confidence. Justice Kelleher found an independent breach of confidence on the part of not only JingJing, as the contracting party, but also Zhu, Tang and Zhou, who were not parties to the CLA. The Court of Appeal noted the findings of Kelleher J. on this issue in upholding the conspiracy claim:

[50] In my view, the misconduct of the Personal Defendants in this case -- essentially the preparation of false records and reports sent by JingJing to XY and the breach of confidence found by the trial judge -- satisfies in law the "unlawful act" requirement for these purposes.

[Emphasis added].

**79**  Just as in the Original Action, this action is advanced against the Applicants, being CTS, FBI, Cheng, Xu, Yang and Lin, not as contracting parties, but as persons who have allegedly committed the tort of breach of confidence.

**80**  There is, of course, a temporal quality to the allegations of breach of confidence. The additional wording to Appendix "A" of the Trial Order in accordance with the Appeal Reasons includes:

... Confidential Information shall not include information that ... is or becomes generally available to the public other than as a result of a disclosure by any of the defendants[.]

[Emphasis added].

**81**  As I have stated above, I interpret this language as intending to allow the defendants in the Original Action to enter (or more likely re-enter) the business of producing embryos or otherwise using sexed semen using information that they obtained legally or such as was in the public domain. However, in my view, this does not extend to allowing them to revisit the very issue that was raised before Kelleher J. at trial and that was decided in March 2012. By that decision, the court decided that that Confidential Information was *not* in the public domain, whether by patents, patent applications or publications existing at that time.

**82**  The question that arises then is to what point in time does the trial decision relate? The trial commenced in October 2010 and finished on March 11, 2011. The Trial Reasons were released on March 2, 2012 and the Appeal Reasons were issued on July 26, 2013.

**83**  After considering the underlying principles for the application of *res judicata*, I consider that the only relevant date must be the time at which the case for the defence was closed, which would have been by March 11, 2011. By that time, the defendants in the Original Action would have been able to marshal whatever evidence they considered relevant and admissible at trial for the purpose of meeting the allegations of confidentiality advanced by XY. Needless to say, the Trial Reasons address the state of the evidence at the trial and nothing further. The Appeal Reasons did not address any fresh evidence (there was no such application to allow it) and, therefore, the court addressed the matter based on the evidence adduced at trial.

**84**  Accordingly, for the purpose of the application of the doctrine of *res judicata* and issue estoppel, I conclude that the Applicants are raising the same issue as in the Original Action; namely whether on or before March 11, 2011, the Confidential Information identified in the Trial Order was in fact confidential on the basis that it was in the public domain. Any publication of the Confidential Information after that time was not before Kelleher J. or the Court of Appeal and may legitimately be raised by the Applicants as a new issue as a defence to this action.

**85**  The issue as it relates to the "Improvements" referenced under paragraph (e) of Appendix "A" of the Trial Order does not fit easily within the concept of *res judicata* and whether the same issue was decided. These Improvements (if any) were never disclosed to XY at the trial or otherwise and therefore, the issue was not directly before Kelleher J. If any such Improvements existed, they were never returned to XY in accordance with the Trial Order. Indeed, the central allegation is that rather than "improving" upon XY's technology, the defendants simply copied the more concrete items of Confidential Information as listed in Appendix "A", items (a)-(d).

**86**  For these reasons, I do not consider that the issue of Improvements is caught by the issue as the "same issue".

***(ii) Was the Decision Final?***

**87**  There is little controversy that the decision arising from the trial in the Original Action was final. Zhu, Tang and Zhou appealed to the Court of Appeal and then unsuccessfully sought leave to appeal to the Supreme Court of Canada.

***(iii) Are They the Same Parties or Their Privies?***

**88**  The Applicants, including CTS, FBI, Yang, Cheng and Xu, were not parties to the Original Action. Nevertheless, XY contends that they are the privies of the defendants in the Original Action such that they are bound by the findings of Kelleher J. above.

**89**  Many cases, such as those discussed below, refer to earlier editions of the leading text, Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed (Toronto: Butterworths, 2010). In the most recent edition, the author discusses the issue of privies at 83-85:

A privy of a party has been variously defined in issue estoppel cases. Privity can be one of blood, title, or interest. Before a person can be a privy of a party, there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. A person who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. The privy must have notice of the previous proceeding to be bound by it. A privy is a person who has a right to participate with a party in the proceeding or who has a participatory interest in its outcome... To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privy requires parallel interest in the merits of the proceeding, not simply a financial interest in the result. However, a non-party who enters into a formal agreement with the party in a proceeding for disposing of the proceeds is a privy of that party and bound by the first proceeding. To establish privy, it is not enough that the non-party have control over the first proceeding. The non-party must be taken into the confidence of the party in the first proceeding. A non-party in an earlier proceeding is a privy on the basis of being involved in the first proceeding by being present and by giving evidence. The term "parties" includes those who are named in the proceeding and those who have an opportunity to attend the proceeding.

...

Factors which have been considered in ... establish[ing] a privy of a party [include], namely, having knowledge of the previous proceeding, a clear interest in the proceeding, the ability to intervene as a participant but choosing to stand by and watch, active participation in the previous proceedings by giving evidence, and being part of the litigation team.

[Emphasis added].

**90**  The law as to when parties may be privies was ably summarized by Mr. Justice Walker in *J.P. v. British Columbia (Director of Child, Family and Community Services)*, [*2013 BCSC 1403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B25S-00000-00&context=). He noted at para. 70 that "[t]he concept is elastic and the categories of privies are not fixed: *Danyluk* at paras. 59-60; *Lougheed v. Wilson*, [*2012 BCSC 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1S1-00000-00&context=) at para. 67; and *Foreman v. Niven*, [*2009 BCSC 1476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B26W-00000-00&context=) at para. 26" and concluded:

[71] Ultimately, the court has to determine whether there is a "sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is a party": *Gleeson v. J. Wippell & Co. Ltd.*, [1977] 3 All E.R. 54 at 60 (Ch.).

...

[74] In *Roberge v. Bolduc*, *[1991] 1 S.C.R. 374* at 410-411 and 413, L'Heureux-Dubé J. confirmed that privies need not be identical persons in both cases. There is sufficient identity of interest where one party represents another or is represented by him:

This is not to say that the parties must be physically identical in both cases. It is the juridical identity of the parties that is required for the presumption of *res judicata* to apply, as Mignault, op. cit. contends, at p. 110:

[TRANSLATION] And by identity of persons must be understood *legal* identity, not *physical* identity.

Nadeau and Ducharme, op. cit., at No. 573, p. 472, emphasize this distinction:

[TRANSLATION] For *res judicata* there must be legal identity of the parties, not mere physical identity. The one may exist without the other. There is legal identity whenever one person represents another or is represented by him. [References omitted.]

...

Suffice it to say that, for the identity of parties in so far as it relates to *res judicata*, juridical identity is all that is required.

[Underlining added in *J.P. v. British Columbia*. Italics in the original.]

**91**  In *Bank of Montreal v. Mitchell* [*(1997), 143 D.L.R. (4th) 697*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD01-K0BB-S44D-00000-00&context=) (Ont. Gen. Div.), Mr. Justice Farley stated:

[66] For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding, as discussed above, where that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have the battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision: see *ATL* [*Industries Inc. (c.o.b. ATL Industries) v. Han Eol Ind. Co.,* [*[1995] 36 C.P.C. (3d) 288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCV1-F22N-X55M-00000-00&context=) at 312-14 (Ont. Gen. Div.)]; [*House of*] *Spring Garden* [*Ltd. v. Waite*, [1990] 2 All E.R. 990 at 998-1000].

**92**  In the Mareva Reasons, I recounted in some detail the evidence to date concerning the status of the Applicants and the various efforts made by them to assist Zhu in setting up the new lab. That evidence indicates:

1. some months after JingJing's bankruptcy, FBI, a company controlled by Zhu, was making efforts to acquire the cytometers from the trustee (para. 35);
2. a month after the trial began, CTS, another company controlled by Zhu, was set up by Yang who, with FBI, was to run the new lab that was to include the retrofitting of parts from the cytometers claimed by XY to be confidential (para. 35);
3. in the APO proceedings, in April and December 2012, a strong *prima case* was found to be established against both FBI and CTS as to the misuse of the Confidential Information (paras. 24-31);
4. based on false submissions to the court, Xu attended in court during the trial for the purpose of hearing the confidential testimony of Mr. Evans, an XY employee; information that was subsequently used by the defendants in breach of the undertaking given to the court: the APO Reconsideration at paras. 44-47. I commented on the conflict in Xu's June 2012 evidence as to the resources used for the research and development of the technology for the new lab as against what is apparent from earlier email exchanges (paras. 88-89); and
5. given the substantial information later disclosed in documentation obtained arising from the APO as to their active involvement in the new lab and their apparent use of XY's Confidential Information, a strong *prima facie* case was found to have been made out against Cheng, Xu and Yang (paras. 80-95).

**93**  In addition, at least two of CTS' or FBI's employees, Cheng and Xu (along with Fu and Tang) were shown in an August 2010 email to have attended a meeting where there was a specific discussion of preparations for the upcoming trial in terms of sorting out litigation documents. The minutes of the meeting indicate under "items for task arrangement":

1. Sorting out the litigation documents, mainly the documents that have not been produced; we have done ample preparation, categorizing and putting the documents into folders, as a backup[.] Persons in charge: TANG Jin, FU Qi

**94**  In a September 20, 2010 email, Yang refers to the Trustee in bankruptcy of JingJing wanting to inspect the machines. Yang stated "if there is confidential information, it could be disclosed already."

**95**  Accordingly, it can be seen that some of the individual Applicants, being Yang, Cheng and Xu, within the corporate group that comprised the corporate Applicants, CTS and FBI, were actively involved in either the litigation itself or in the operations that were the subject of the trial before Kelleher J., or both. The involvement of the employees is also evident from an e-mail from Jimmy Liang to Zhu, Xu and Tang on March 28, 2012:

1. The first battle in the lawsuit with U.S.A.'s XY has ended. The result is very bad. Now [we] have hired a team of the most famous lawyers. Everyone is very confident in winning the second battle.
2. The direction of the second battle is: ... [and] (4) final victory in terms of the intellectual property rights.

**96**  It was, of course, the case that XY was not fully aware of the many steps taken by the various defendants to set up the new lab at the time of the trial; nevertheless, by that time, the known evidence was sufficient to establish the misuse of the Confidential Information on the part of Zhu and the others. Only by reason of the disclosure of documents arising from the APO proceedings in this action did XY become aware of the course of Zhu's efforts from at least February 2010, well before the trial began, to set up a new lab for his operations.

**97**  In any event, in my view, the involvement of Zhu's employees, Yang, Cheng and Xu, in his efforts and their knowledge of the issues arising from the litigation is manifest. As I said in the Mareva Reasons:

[113] ... This scheme on its face involves elements of concealment, misrepresentations and dishonesty that have been ongoing for years and were undertaken in the face of known efforts of XY to assert its rights both during and at the trial. The evidence strongly suggests that Yang, Xu, Cheng and Fu were an integral part of that scheme and that they knew that XY's rights were being improperly used by them.

**98**  It will be obvious that the privy alleged here is not that of blood or title, but rather "interest". The issue to be determined is whether the Applicants have a sufficient interest with the defendants in the Original Action such that they are privies and therefore bound by the determination of the confidentiality issue.

**99**  The relevant case law speaks of various factors that will be considered in terms of whether a person will be considered the privy of another. One is where that person inserts themselves into the litigation and becomes a witness at the trial.

**100**  This is what occurred in *Fancy v. Clayton Professional Centre Ltd***.,** [*2007 NSSC 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-JP9P-G2V9-00000-00&context=). In that case, the plaintiff Fancy and another person, D'Arcy, had slipped in a parking lot within a half hour of one another. Both commenced "slip and fall" actions almost identical in substance against the defendants in ***negligence***. During the D'Arcy trial, Fancy testified. The action was dismissed. The defendants then moved to dismiss the Fancy action on the basis of issue estoppel and abuse of process. Mr. Justice Davison accepted both arguments, and in particular found that Fancy was a privy of D'Arcy given her interest in the outcome of the D'Arcy action: paras. 23-27, 31.

**101**  See also *Foreman v. Niven,* [*2009 BCSC 1476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B26W-00000-00&context=) at para. 27 where Niven was a witness in previous proceedings and was found to be privy of the defendant Chambers in the prior action. In *Foreman*, the court also found that Niven was the agent of Chambers, which is another well-known factor that can lead to a finding of privity: see paras. 26-29.

**102**  In this case, Xu was a clear and direct participant in the trial proceedings as a witness. Other factors mentioned by Lange in his text are whether that person has knowledge of the previous proceeding or is "part of the litigation team". In this case, I agree that the evidence establishes that the individual Applicants, with the possible exception of Lin, were aware of the litigation or were involved to a certain extent in preparing the defence in that litigation.

**103**  Perhaps the closest case in this vein is that of *Giles v. Westminster Savings Credit Union*, [*2006 BCSC 1600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2MF-00000-00&context=); reconsideration hearing [*2008 BCSC 1312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3JR-00000-00&context=), aff'd [*2010 BCCA 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-223T-00000-00&context=). In that case, a large number of plaintiffs sued certain parties for knowing assistance and knowing receipt in connection with allegations of breach of trust and breach of fiduciary duty by Taylor Ventures Ltd. Ten of the plaintiffs proceeded with the action and they did not succeed at trial. The defendants then brought an application to dismiss the remainder of the claims on the basis of *res judicata*. The court found that there was a clear privity of interest between the various plaintiffs. While there was no agreement between counsel that the outcome of the trial would be binding on the defendants, the court found that there was general approval between them of a litigation committee that instructed counsel and acted as a liaison between counsel and all of them. As such, they were found to have "parallel" or "shared" interests in the outcome of the proceedings: BCSC at paras. 43-61; BCSC (Reconsideration Hearing) at paras. 21-39; BCCA at paras. 37-43.

**104**  XY also refers to *Tylon Steepe Homes Ltd. v. Pont*, [*2011 BCSC 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1MF-00000-00&context=). That case involved a complex fact situation concerning a real estate development and contracts for the purchase and sale of lots. In the earlier action, Mr. Romfo and like-minded purchasers (the "Romfo Plaintiffs") sued Tylon Development for specific performance of contracts. The Romfo Plaintiffs were successful, with Tylon Development having abandoned certain issues during the course of the proceedings. In the later action, Tylon Homes, a company related to Tylon Development, sued the Ponts and Ms. Landon for monies due under construction contracts. They counterclaimed for rescission of the construction contracts, alleging misrepresentations that arose from findings of misrepresentation in the judgment arising from the first trial. The person who was found to have made the misrepresentations was the principal of both Tylon Development and Tylon Homes. In its defence of the counterclaim, Tylon Homes denied that any misrepresentations had been made. The Ponts and Ms. Landon contended that such issues had been decided in the first action, were *res judicata* and could not be raised by Tylon Homes.

**105**  The court in *Tylon* had no difficulty in holding that Tylon Homes and the defendants in the first action (including Tylon Development) were privies. Further, the Romfo Plaintiffs and the Ponts and Ms. Landon were found to be privies based on the expansive approach articulated by Chief Justice McEachern in *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*, [*[1989] 47 D.L.R. (4th) 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22C1-00000-00&context=) (B.C.S.C.). Madam Justice Ballance in *ylon* found:

[92] With respect to the issue of privity, it is my view that there is plainly a community of interest sufficient to establish privity between Tylon Homes and the Romfo defendants [the vendors including Tylon Development]. In my opinion, the question of privity relative to the Applicants (as plaintiffs by counterclaim) and the Romfo plaintiffs is more vexing. However, based on the expansive approach endorsed in *Saskatoon*, and the approach more recently followed by this Court in *Petrelli v. Lindell Beach Holiday Resort Ltd.,* [*2010 BCSC 956*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22HK-00000-00&context=), I conclude that the interests of the Applicants under their original purchase contracts are sufficiently parallel to the interests of the Romfo plaintiffs so as to establish privity as concerns the government delay excuse and certain other findings of Myers J. To paraphrase Chief Justice McEachern in *Saskatoon*, I find that privity is wide enough to embrace them within its grasp; they were all purchasers pursuant to the original purchase contracts and had the same interest as against the vendors and Mr. Kretschmer, and were all damnified by the purported cancellation of the original contracts.

**106**  In this case, the Applicant employees submit that various factors support that they are not privies. They point to the facts that they were not parties, they did not testify at the trial, they were not the agents of the defendants in the Original Action and that they did not have the ability to participate.

**107**  The Applicant employees say that while they may have been part of the "litigation team" in the Original Action, something more is required. They rely heavily on the comments of the court in *Genesee* in that "[p]rivity requires parallel interest in the merits of an action, not simply a financial interest in the results": para. 237. The court goes on to say:

[241] ... Paying the legal fees for a party does not make a non-party privy to proceedings (***Mercantile Investment***), [1894] 1 Ch. 578 nor does controlling the litigation (***Carl-Zeiss-Stiftung***) [1966] 2 All E.R. 536 ... Both ***Carl-Zeiss-Stiftung*** and ***Mercantile Investment*** support the proposition that a concern with the results is an insufficient basis to find privity.

[242] To establish that Mr. Abou-Rached is privy in interest to Mr. Stephenson, the plaintiff would have to establish that Mr. Abou-Rached's interests in the subject of the first dispute paralleled Mr. Stephenson's interests. The cases in which privity of interest was established involve relationships in which a party's cause of action flows from its privy's parallel cause of action. In each of ***Canam***, [*[2000] O.J. No. 651*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-F873-B2RF-00000-00&context=), ***ATL***, [*[1995] O.J. No. 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCV1-F22N-X55M-00000-00&context=), and ***Bank of Montreal***, [*[1997] O.J. No. 602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD01-K0BB-S44D-00000-00&context=), the cause of action or defence was such that either the party or privy could have presented the same legal arguments and both the party and privy would benefit directly from a successful result.

**108**  In the Original Action, the court imposed the prohibitory injunction against Zhu, Tang and Zhou and the various other persons through whom they might seek to use the Confidential Information. In that regard, the Trial Order explicitly refers to a large group of such persons, including Zhu's related companies, employees and servants:

The defendants JingJing, Jesse Jia-Bei Zhu, Selen Zhou, Tang Jin, and Shu Xi Wang and each of them (including by themselves, or by their directors, officers, agents, employees, servants, affiliates, joint venturers, successors, assigns, subsidiaries or related companies, and all those over whom they exercise control, directly or indirectly) are restrained from using the Confidential Information[.]

Appeal Reasons, Schedule II.

**109**  Accordingly, all of the Applicants are expressly caught by the terms of the Trial Order. Indeed, their counsel concedes that they are so bound, from the time at which they became aware of the terms of the order.

**110**  As Kelleher J. stated (in relation to the mandatory injunction): "[t]he injunction does no more than hold JingJing and its employees and related companies who had access to the bargain struck under the CLA": Trial Reasons at para. 329.

**111**  In my view, CTS, FBI, Cheng, Yang and Xu must of necessity be viewed as privies of Zhu, sufficient to ground the application of *res judicata* in this case. There is certainly no difficulty in seeing that CTS and FBI, as newly created corporate vehicles of Zhu, have a sufficient interest with the defendants in the Original Action to support this finding.

**112**  With respect to Yang, Cheng and Xu, they were well aware of the litigation and did participate in Zhu's "litigation team" in respect of his defence. Xu also directly participated at the trial on behalf of the defendants in hearing XY's evidence on the confidentiality issue. Further, these employees either specifically knew or would have generally known that XY was seeking a determination of the confidentiality issue (and Zhu's defence of that issue) and also that XY was seeking injunctive relief with respect to a group of people that would clearly have included them. As I noted in the Mareva Reasons at para. 114, there can be no doubt that these employee defendants benefited from their actions since "they no doubt realized that this new scheme was the only way to secure their ongoing employment." In that respect, contrary to the assertions of the employee Applicants, they were definitely touched by the results of the Original Action.

**113**  On the evidence, contrary to the submissions of the Applicants, these employees did have a "parallel interest in the merits of an action" as per *Genesee* in that success by Zhu on the confidentiality issue allowed them to benefit in the context of their ongoing employment with the companies controlled by him.

**114**  It is quite apparent that the Applicant employees, with the possible exception of Lin, were employees and servants, and otherwise under the control of the group of companies controlled by Zhu at all material times, including at the time of the Original Action.

**115**  It would be anomalous indeed if these Applicants, after having participated in the Original Action and/or having knowledge of issues that directly related to their present and future activities in the course of their employment with Zhu, could now re-litigate the same issue that was earlier and unsuccessfully argued by Zhu. I agree with XY that the Applicants either knew or should have known of the issues arising in terms of the allegations of confidentiality and must, of necessity, have understood the benefits they stood to gain or risks they ran depending on how that issue was decided.

**116**  I conclude that with the exception of Lin, the Applicants are privies of the defendants in the Original Action.

***(iv) Res Judicata Conclusion***

**117**  Accordingly, I find that the doctrine of *res judicata* and issue estoppel applies to prevent the Applicants CTS, FBI, Cheng, Xu and Yang from re-litigating the issue of whether the Confidential Information, being the items listed in (a) - (d) of Appendix "A" of the Trial Order, were confidential to XY as of March 11, 2011.

**Abuse of Process**

**118**  In the alternative, and in addition to *res judicata*, XY argues that the Applicants' attempt to re-litigate the question of confidentiality is an abuse of process. It argues that it would "undermine the credibility of the entire judicial process" if Zhu and those he controls could now challenge the confidentiality of the items listed in the Trial Order, where Zhu was specifically enjoined from using the Confidential Information "by themselves, or by their directors, officers, agents, employees, servants, affiliates, ... and all those over whom they exercise control, directly or indirectly": Order After Trial at para. 15.

**119**  XY contends that the abuse is particularly acute in this case because of Xu's attendance in court to hear sealed testimony about the Confidential Information as a putative witness on false pretenses. It says that Xu had the opportunity to testify on the defendants' behalf in the Original Action, but a strategic decision was made not to call him as a witness. Even so, Zhu and the other defendants still advanced their public dissemination defence.

**120**  At paragraph 37, the court in *Toronto (City)* cited Goudge J.A.'s dissent in *Canam Enterprises Inc. v. Coles* [*(2000), 51 O.R. (3d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B529-00000-00&context=) (C.A.), majority opinion rev'd [*2002 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4DC-00000-00&context=) for the rationale for the application of abuse of process where issue estoppel might not strictly apply:

Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

See also *Figliola* at paras. 31-33.

**121**  The court in *Toronto (City)* stated that the doctrine of abuse of process applies not only to plaintiffs attempting to re-litigate matters, but also to defendants who are attempting to re-litigate issues decided against them: paras. 47-49. Further, the court said:

[50] It has been argued that it is difficult to see how mounting a defence can be an abuse of process... A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

[51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

**122**  For the same reasons as articulated above, I conclude that, with respect to CTS, FBI, Yang, Cheng and Xu, the doctrine of abuse of process is equally applicable to their raising this public dissemination defence in this litigation. Again, it would be anomalous indeed if Zhu, through recent iterations of his corporate manifestations, could revisit this issue. Further, the participation of the Applicant employees (save for Lin), with knowledge of the issue and their direct benefit from Zhu's defence, invites the same conclusion.

**123**  In my view, it would offend the integrity of the administration of justice if these Applicants were allowed to re-litigate the issue.

**124**  The issue of abuse of process also arises in relation to Lin, who is an employee of CTS. It is conceded by XY that her involvement or potential involvement in the use of the Confidential Information stands on a different plane than that of Cheng, Yang and Xu. XY concedes that there is no evidence at this time that Lin is a privy of the defendants in the Original Action such that the doctrine of *res judicata* could apply to her.

**125**  Knowledge of Lin's involvement in the current operations arises from emails in the fall of 2011 that were received or sent by Yang attaching various files relating to the set-up of the new lab by CTS. In the materials, Lin is referenced as having an accounting background and education. She is also referenced as a "lab technician assistant" involved in various lab operations. It is not entirely clear what her role was in respect of the new lab.

**126**  In any event, XY argues that there is no reason to suggest that Lin has any different interest than the rest of the employees who are also named in this action. I agree. Her defence of this action must necessarily have reference to the findings of the court in the Original Action in terms of the operations of CTS and its employees. Again, Lin, as an employee of CTS, would be bound by the terms of the prohibitory injunction in the Trial Order.

**127**  I conclude that the doctrine of abuse of process equally applies to all of the Applicants so as to prevent a re-litigation by them of the issue of whether the Confidential Information, being the items listed in (a) - (d) of Appendix "A" of the Trial Order, were confidential to XY as of March 11, 2011.

**128**  It will, of course, be obvious that the Applicants comprise only a portion of the defendants in this action. If XY wishes to obtain declaratory relief on this issue in advance of the trial as against these other defendants, then a further application must be made.

**Particulars**

**The Authorities**

**129**  There is no disagreement on the applicable authorities.

**130**  Broadly speaking, the purpose of particulars is to ensure that the party asking for them knows the case they must meet. Particulars may be ordered before a pleading or for the purposes of trial: Anglo-Canadian Timber Products Ltd. *v.* British Columbia Electric Co., [*(1960), 23 D.L.R. (2d) 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X46W-00000-00&context=) at 657-58, 661-62 (B.C.C.A.).

**131**  The issue as to whether particulars will be ordered is primarily one of discretion to be exercised in a judicial manner: G.W.L. Properties Ltd, *v.* W.R. Grace & Co. of Canada, [*(1993), 79 B.C.L.R. (2d) 126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3BV-00000-00&context=) at 128 (S.C.); *Waynes Merthyr Company v. D. Radford & Co.,* [1896] 1 Ch. 29 at 35.

**132**  In Cansulex Ltd. *v.* Perry, [*[1982] B.C.J. No. 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JP9P-G0X4-00000-00&context=) at para. 11, (18 March 1982), Vancouver C785837 (C.A.), the court distinguished between material delineating the issues between the parties and material relating to the way in which the issue will be proved. As Lowry J. (as he then was) noted in G.W.L. Properties at 128, the line between them is notoriously difficult to draw.

**133**  The court in Cansulex summarized the function of particulars at para. 15:

1. to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
2. to prevent the other side from being taken by surprise at the trial;
3. to enable the other side to determine what evidence they ought to be prepared with and to prepare for trial[;]
4. to limit the generality of the pleadings;
5. to limit and decide the issues to be tried, and as to which discovery is required[;] and
6. to tie the hands of the party [providing particulars] so that he cannot without leave go into any matters not included.

**134**  In some cases, examination for discovery and particulars may coincide to the extent that information to be obtained by particulars may also be obtained by examination for discovery. However, the functions of each are distinct and an examination for discovery is not always an adequate substitute for particulars: Anglo-Canadian Timber Products at 658-59. The court in *G.W.L. Properties* similarly observed at 129:

Discovery is not a substitute for particulars. The contention that what is demanded can be obtained, or that it has been obtained, on discovery is no reason to refuse particulars properly sought. Further, the fact that what is sought in a demand for particulars is best known to the party demanding is no reason to refuse. A party is entitled to know what case is made against it when (whether before or after discovery) the other side is in a position to give particulars of the facts it will prove at trial: Cominco, [*[1978] B.C.J. No. 1348*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3FM-00000-00&context=), at pp. 28-29.

**135**  The courts have also approached such applications from a practical point of view toward reducing time and expense in later procedures, such as examinations for discovery and the trial itself: Anglo-Canadian Timber Products at 657-58; G.W.L. Properties at 130.

**Discussion**

**136**  In large part, the focus of the Applicants on this application is to reduce overall time and expense (or at least theirs) in later procedures. As the pleadings are now closed, the particulars are said to be required for purposes of examinations for discovery and trial. They say that their intent in bringing this application is to obtain a court order so as to manage and streamline the progress of the case. They want XY to specify with precision how its equipment, material and techniques differ from what is already known (i.e., published or patented) or in use in the industry.

**137**  I also consider that an important aspect of the application is an attempt by the Applicants to "tie the hands" of XY in terms of the discovery process that is ongoing.

**138**  The Applicants place considerable reliance on the decision of the court in *Napier Environmental Technologies Inc.* v. *Vitomir*, [*2001 BCSC 1704*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61F9-00000-00&context=). That case does bear some similarity to this case in that the allegations against the defendants were for breach of fiduciary duty, contract and use of confidential information against former employees. Also similar to this case, the defendants in that case argued that the process to make the products was public knowledge and not confidential due to certain patents obtained by Napier.

**139**  In Napier, the court ordered particulars but I consider that there were two main bases for the order that distinguish it from this case. Firstly, the court found that the allegations by Napier as to its confidential information were very generally framed such that the defendants did not know what information was alleged by Napier to be confidential: paras. 21-22. So much so that the court inferred that the allegations were "speculative": paras. 23-24. Secondly, the court was clearly concerned that the speculative and general allegations of Napier were, even if not intended to, creating an oppressive or harassing situation with a view to shutting down the operations of the defendants and thus eliminating a competitor: paras. 25-30.

**140**  Particulars were ordered in Napier as to what aspects of Napier's research and development, manufacturing processes, records, knowledge and information were confidential and the nature of such confidential, proprietary and other information alleged to have been possessed and received by the defendants.

**141**  On a later application between the same parties (*Napier Environmental Technologies Inc.* v. *Vitomir*, [*2002 BCSC 1026*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G332-00000-00&context=)), Napier argued that it had provided the particulars. However, the court found that the particulars provided were insufficient given that Napier had stated that, aside from certain patented products (which were known to all parties), the confidential information included "everything" that the former employees had worked on (paras. 13-14, 20-24). Again, the court was concerned that the actions of Napier were oppressive in nature: para. 29.

**142**  The Applicants also refer to *Cercast Inc.* v. *Shellcast Foundries Inc. (No. 3)*, [*[1973] 9 C.P.R. (2d) 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RF1-F4W2-6073-00000-00&context=) (F.C.T.D.). In that case, the plaintiff had made "broad generalized statements" of confidentiality in its pleading. Similar to the facts in *Napier*, the plaintiff took the position that "all" or "practically everything" relating to its equipment and products and the processes by which they were used was confidential and that the defendants were not able to use it. The evidence established that similar equipment and materials were widely used in the industry. The defendants sought an order for better particulars. Rejecting the plaintiff's broad claims of confidentiality, the court indicated that the plaintiff had to "establish with precision" in what manner its equipment, material or techniques differed from, and were an improvement over, those in general use in the industry so as to limit its contentions as to confidentiality: *Cercast* at 27-29.

**143**  The court in *Cercast* did order further particulars but drew a clear distinction between clarifying the general claims to "confidential information" and being required to provide tremendously detailed technical information. In particular, the court stated that the plaintiff was to specify "in a general way" what part of the technical information used in the production was confidential: *Cercast* at 30. Requests for details of technical files, drawings and documents and also for details regarding individual parts or tools was rejected: *Cercast* at 31-32.

**144**  In substance, the Applicants contend that XY has made "wide and unsupportable claims of confidentiality", that XY has refused to provide particulars for what it alleges to be Confidential Information, and has alleged that certain matters are confidential that are not, in fact, confidential. The Applicants say that they are unable to properly defend themselves, as they do not know what information they must show is *not* confidential. Finally, they say that XY's position is such that it destroys their ability to enter the market and that, therefore, the action is acting as a perpetual restraint of trade.

**145**  Firstly, I would observe that this is far from a case where XY is making general and unsupported claims to confidentiality, such as was the concern in *Napier* and *Cercast*. The issue of confidentiality was front and centre in the Original Action. The defendants in the Original Action specifically raised the issue as to whether the alleged Confidential Information was in the public domain and the evidence on that issue, particularly from Zhu, was rejected: Trial Reasons at paras. 201, 336-337.

**146**  After years of litigation, and after consideration of the evidence on the issue of confidentiality, the Trial Order was granted. The Trial Order comprised a comprehensive definition of Confidential Information. Save for the clarifications ordered by the Court of Appeal in July 2013, that definition had been in place for some time now.

**147**  As I have noted above, XY continues to rely on the definition of Confidential Information set out in the Trial Order. I agree with XY that this definition of Confidential Information is sufficiently particularized to define and narrow the issues raised in this matter, determine what facts are at issue, inform the Applicants of the case they have to meet and to limit the issues to be tried and upon which discovery can be conducted.

**148**  In support of their "streamlining and avoiding expense" argument, the Applicants argue that XY is in the best position to particularize which aspects of its products, parts or processes remain confidential. XY is said to know the content of its own numerous publications better than anyone else and to know the industry well enough to be able to forego claiming aspects that are publicly known. On the other side of the coin, the Applicants contend that the development of their equipment and processes has been based on publicly available information, although one would assume that they could readily establish such an assertion through their records.

**149**  This is a true deadlock in that each side says "you show me first". From the perspective of the Applicants, this is clearly in aid of trying to tie the hands of XY so as to limit what might be more expansive discovery of the defendants down the road. In that respect, I am mindful of the strong *prima facie* case that has been established in earlier proceedings arising from the APO and the Mareva orders concerning the alleged wrongdoing of the defendants and, in particular, the apparent substantial efforts the defendants (both in the Original Action and in this action) have undertaken over the years to conceal their activities. That concealment began in respect of XY, continued in respect of the Trustee in bankruptcy and finally, was a matter of concern to the court as expressed in the APO proceedings. In these circumstances, and even after recognizing the general obligation of a plaintiff to plead sufficient particulars, this aspect favours allowing examinations for discovery to proceed without the need for any further particulars at this time.

**150**  The Applicants argue that, if XY refuses to provide proper particulars of its Confidential Information, it suggests that XY intends to oppress and harass its competitors (e.g., CTS, FBI, and others) to achieve a perpetual restraint of trade. The cases demonstrate that the courts are generally keenly aware of the need to avoid abetting harassment or oppressive business strategies in respect of the competitive activities of former employees or others. This was identified as a possible concern in the *Napier* decisions. See also *Ocular Sciences* at 359-60; *Eyes Post Group v. Deluxe Toronto Ltd.,* [*[2003] O.J. No. 4289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-FBN1-208T-00000-00&context=) at para. 98, 2003 CanLII 27559 (S.C.J.).

**151**  Here, I have no sense that XY has approached this litigation for the purposes of harassment or oppression of a competitor. As the Court of Appeal noted at para. 113 of the Appeal Reasons, XY was understandably leery and distrustful of Zhu's potential activities and whether such activities would continue to give rise to the misuse of its Confidential Information. It is, of course, significant that even after the trial in the Original Action had concluded, for the ensuing year to April 2012, Zhu, through CTS and FBI, continued operations with a view to retrofitting the equipment and beginning operations. These operations were hardly innocent in that the very confidential parts and documentation that were specifically claimed at trial in the Original Action, and that would later be included in the definition of Confidential Information (and that were ordered to be returned to XY) were found at the new lab operated by CTS and FBI. In addition, the involvement of the individual Applicants (with the possible exception of Lin) in these ongoing operations is manifest, as noted in the Mareva Reasons. Nor were the specifically identified items of Confidential Information returned to XY in accordance with the Order After Trial.

**152**  I consider that, rather than commencing this litigation to harass or deter a competitor, XY has embarked on this new action in an attempt to preserve the results of the Order After Trial. In addition, it is clear that XY is now seeking a remedy against Zhu and his associates due to the very strong suggestion that Zhu, through his various companies and with the assistance of the individual defendants, has set up operations overseas in China using the very Confidential Information established by the Trial Order. I would also note that the defendants have already been ordered by the court to produce their documentation relating to their activities post April 2, 2012 (the date the APO was executed).

**153**  Strangely, the Applicants also argue that without XY providing these particulars, the scope of the injunction granted under the Trial Order is so unclear that they cannot know what they can or cannot do without misusing alleged Confidential Information. They allege prejudice in this respect, saying that they are faced with the choice of either ceasing to pursue their livelihood, or living under the constant threat that XY will pursue ongoing allegations that they are misusing the Confidential Information.

**154**  In my view, the argument concerning the scope of the injunction has no merit. The Order After Trial was granted in early March 2012, some two and a half years ago. When the injunction was granted in accordance with the Order After Trial, Zhu did not make any application to clarify the definition of Confidential Information. Nor were any such submissions made to the Court of Appeal in terms of the clarity of the Confidential Information as specifically defined in the Order After Trial. The Applicants cite International Tools *Ltd. v.* Kollar, [*[1968] 67 D.L.R. (2d) 386*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M4FW-00000-00&context=) (Ont. C.A.) where an injunction was upheld restraining the defendants from using trade secrets and was limited in scope to the precise secret and the duration of the injunction was limited to the period that the trade secret remained a secret. It is noteworthy here that, for years now, Zhu has had no difficulty in understanding the scope of the injunction in terms of what was Confidential Information and what the injunction entailed in terms of his future activities.

**155**  Zhu controlled JingJing and was the person in charge of the other individuals (Zhou and Tang) who were found at trial in the Original Action to have misused the Confidential Information. Zhu owns and/or controls the corporate applicants, CTS and FBI, and the other individual Applicants are employees of CTS or FBI. Zhu advancing this argument now -- "I don't know what is 'Confidential Information'" -- by way of his new companies (CTS and FBI) and his employees involved is nothing short of disingenuous.

**156**  It would be anomalous indeed if a party, who took absolutely no issue with the clarity of an injunction granted some years ago concerning the definition of Confidential Information, could now somehow indirectly (through newly formed corporations and former employees who are now employees of those new corporations) argue that the terms of that definition were unclear for the purposes of supporting a particulars application.

**157**  The Applicants also cite Stonetile (Canada) Ltd. *v.* Castcon Ltd., [*2010 ABQB 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-F2MB-S18G-00000-00&context=). In that case, as here, there were allegations of breach of confidence in relation to the use by former employees of a technical process relating to certain home cladding materials. However, this was not an application for particulars, but a trial. As one would expect, the court engaged in an extensive analysis of the nature of the confidential information. As part of that analysis, the court considered the contentions of the defendants that the information was publicly available or known and therefore, not confidential. This included a consideration of various factors, including the disclosure in accordance with certain patent applications.

**158**  The reasoning in *Stonetile* does not assist the Applicants. Indeed, the factors considered by the court suggest that the issue concerning confidentiality is one in which a wide range of factors will be considered *at trial*. That would include in this case, just as in the Original Action, evidence from XY concerning its business activities and its efforts to maintain the confidentiality of its information. In the Original Action, Mr. Gilligan gave evidence on behalf of XY on these issues, including XY's patent applications. The substantial arguments of the Applicants concerning the effect of XY's patents and patent applications are best left to the trial where evidence will be before the court, just as it was in the Original Action.

**159**  The Applicants argue that it is in the interests of judicial economy for the court to require XY to particularize its claims of confidentiality to avoid the court itself having to painstakingly sift through information already known by XY to be non-confidential or well-known. However, the further discovery processes (such as examinations for discovery and discovery of documents) will further serve to identify the facts relevant to this issue and thereby delineate the issues between the parties. The court is not involved in a review of those issues as of yet and these pre-trial procedures will likely, as they are designed to, assist the parties in clarifying the issues that the court will consider at trial.

**160**  *Stonetile* does not stand for the proposition that a plaintiff should be required to divulge every bit of evidence that might be adduced at trial on the issue. Nor has any other case referred to by the Applicants resulted in an order for the very substantial disclosure and *analysis* that they seek from XY.

**161**  In addition, I am not convinced that this is a "fishing expedition" on the part of XY. In *Proconic Electronics Ltd. v. Wong*, [*[1986] 67 B.C.L.R. 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21HB-00000-00&context=) (S.C.), Madam Justice Southin (as she then was) expressed similar concerns but stated that a plaintiff making serious allegations must provide "some evidence" in order to require a defendant to answer, as opposed to asserting a "bald allegation" (at 239, 241). In that case, the plaintiff had submitted no evidence in support of the claims.

**162**  In *Waynes Merthyr,* there were allegations of fraud that, to some extent, were admitted by the defendants. The court found that many of the alleged frauds were within the defendant's means of knowledge and not within the knowledge of the plaintiffs. The court held that there was a substantial evidentiary foundation such that it was appropriate that discovery ought to precede particulars: *Waynes Merthyr* at 36.

**163**  The Applicants say that they are under no obligation to first disclose what they are doing. While generally that is true, again I am satisfied with the level of particularity of the Confidential Information in accordance with the Trial Order. In addition, there is substantial evidence before the court that establishes that the Applicants were well aware of the definition of Confidential Information outlined in the Trial Order and the requirements under the prohibitory injunction.

**164**  Similar to that found in *Waynes Merthyr,* there is also substantial evidence in support of XY's allegations of wrongdoing by various defendants (including most of the Applicants), as noted by Mr. Justice Voith in the APO proceedings. I need not repeat the extensive findings of the court to date and the evidence in support of those findings, all as set out in the Mareva Reasons.

**165**  The issues before the court in *VSM MedTech Ltd. v. Elekta AB,* [*2008 BCSC 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3Y5-00000-00&context=), are similar to those raised here. That case also involved allegations that the defendants had conspired to use the plaintiff's confidential information. Particulars were sought as to "individual items of confidential information". After distinguishing the result in *Proconic Electronics*, Master Taylor adjourned the application upon finding that sufficient particularity had been given, supported by evidence, such that examinations for discovery should proceed:

[14] When this application is boiled down to its essence, I take the view that at this juncture of the case, the defendants know some of the broadly based issues which will exist between the parties. It is far too early in the proceedings to yet limit and decide the issues to be tried or to tie the hands of the other party so they cannot without leave go into any matters not included in the particulars.

...

[18] While [the Tim Baird and James Carter] affidavits were not drawn specifically as a defence to this application (they were drawn in support of an interim injunction application which has not yet been proceeded with), they do provide a substantial background to the factual matrix of this case including the fact that there were only four companies worldwide that manufacture such machines and that competition is severe between these four companies. Thus I distinguish ***Proconic Electronics*** from the case at bar.

[19] The defendants also rely on ***Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.***, [*[1993] B.C.J. No. 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-235D-00000-00&context=), a decision of Mr. Justice Brenner, as he then was, where the defendants applied under Rule 19(24)(b) and (c) to strike allegations of conspiracy in the amended statement of claim, or alternatively for particulars. In that case the issue was not the lack of any plea of overt acts of conspiracy, but rather the sufficiency of the overt acts that had been pleaded.

[20] Mr. Justice Brenner considered ***Proconic Electronics Ltd.*** and summarized it by saying that "in my view this test is equally applicable in a case involving allegations of conspiracy. Have the plaintiffs met this 'even if very little' test in their pleadings and in the material filed on the motion?" He then went on to say at paragraph 17:

In my view, the defendants seek to hold the plaintiffs to a higher standard of particularity than is required at this stage of the proceeding. Unlike Proconic the plaintiffs in this case have met the standard which should be imposed on a party prior to discovery. The plaintiff has alleged the conspiracy, a number of overt acts in furtherance of the conspiracy and damages flowing as a result. While the defendants may well be entitled to the particulars sought after discovery and prior to the trial, at this stage, the plaintiffs' pleadings and the affidavit material filed in support meet the test in Proconic and are sufficient to enable the plaintiff to proceed to discovery and examine on those allegations.

[21] Brenner, J. then went on to adjourn generally the defendants' motion to compel answers to the demand for particulars and gave the defendants liberty to re-apply after the plaintiffs have concluded their examination for discovery.

**166**  The reasoning of the court in *VSM MedTech* applies equally here.

**167**  In conclusion, I am satisfied that the definition of Confidential Information set out in the Trial Order is sufficiently adequate to notify the Applicants of the case they have to meet. Further, there is a substantial evidentiary foundation in this case to date that supports that it is appropriate, with one qualification, that discovery ought to precede particulars.

**168**  I acknowledge that the Applicants wish to argue that the subsequent publication of patents or patent applications has lessened the degree of confidentiality of the Confidential Information that may have otherwise applied. In that respect, I do agree that particulars are required from XY with respect to what patents and patent applications are referred to in paragraph 37 of the Amended Notice of Civil Claim. Having that further disclosure and of course the document disclosure relating to such patent documentation as has already been completed, should ensure that the Applicants are able to mount a defence on that issue. While the Applicants are concerned about the cost of the analysis of that patent material, which they are clearly anxious to obtain, they will have the option to proceed in that respect as they wish, with any such costs to be addressed after trial.

**169**  Counsel advise that issues have arisen concerning the level of disclosure of XY's patents and patent applications in that XY has redacted certain information from that listed in its list of documents. I would expect the parties to similarly sort out that issue in relation to the particulars and if not, the issue may be addressed on a later court application.

**Conclusion**

**170**  Subject to my conclusions on the *res judicata* and abuse of process issues above, XY will be required to provide particulars to the Applicants of all patents and patent applications as are referenced in paragraph 37 of its Amended Notice of Civil Claim. If there are any confidentiality issues relating to the listing of these patents or patent applications, those may be addressed by the court if the parties cannot agree.

**171**  The remainder of the application for particulars of XY's Amended Notice of Civil Claim is adjourned, with liberty to apply after the conclusion of discovery of documents and examinations for discovery.

**172**  It is important that the parties proceed as quickly as possible to a resolution of the issues. Accordingly, XY is granted leave to amend its Amended Notice of Civil Claim to address the clarification of paragraph 36 in that pleading concerning the scope of its claim to confidentiality in terms of it being limited to the Confidential Information defined in the Trial Order. This amendment should be completed within two weeks of today's date, or such later date as may be agreed on by counsel.

**173**  Costs of the application are granted to XY in any event of the cause.

S.C. FITZPATRICK J.

\* \* \* \* \*

Schedule A

**Appendix "A" to the Trial Order**

In this Order After Trial **"Confidential Information"** means:

1. The following components of the Dako SX Mo-Flo Cytometer, including their configuration individually and in relation to each other and other components of the cytometer:
2. the PMT (photomultiplier tube) controller;
3. the nozzle assembly;
4. the beam-shaping optics;
5. the detector system;
6. laser beam steering towers, stages and optics;
7. the Summit Workstation hardware and Summit software with Cytrack;
8. the pulsed laser as configured for the SX cytometer;
9. the illumination chamber;
10. the front door rail;
11. the strobe assembly; and
12. the pinhole strip;
13. XY's protocols, as set out in document no. XY015125-175, entitled "XY, Inc. Protocols - Confidential - September 2005" and document no. XY016423-502, entitled "XY, Inc. Protocols - Confidential - March 2006";
14. The technical data and processes contained in XY's report entitled "Confidential Information for the Purpose of Evaluating a MoFlo SX Sperm Sorting Facility in Canada", document no. XY001229-001237;
15. All other information and techniques imparted from XY during training or otherwise to any of the defendants and their employees relating to the use and operation of SX cytometers;
16. Improvements to the Confidential Information made by the defendants, including but not limited to all research and development regarding the use of sexed semen by any of the defendants internally or with the assistance of third parties such as, but not limited to, Abbotsford Veterinary Clinic;

and where:

1. Improvements means namely all know-how, processes, operations, methods, masks, codes, programs, designs, copyrights, patents, patent applications, or other intellectual property rights or other information created, obtained, or developed by either XY or any licensee of XY or JingJing whether through their own efforts or those of any independent contractor, employee, affiliate, or subsidiary, or directly or indirectly with any third party, based upon or derived from XY's Technology, in whole or in part;
2. XY's Technology means any and all Proprietary Rights or confidential information, trade secrets, know-how, technical data, masks, code, programs, designs, processes, methods, operations, innovations or inventions, whether or not patented, and any patents, patent applications, copyrights, or other intellectual property of any kind that XY, now or hereafter, owns, controls, licenses, or has an interest in;
3. Proprietary Rights with respect to XY's Technology means the collection of all Patent Rights, Trademark Rights, Trade Secret Rights, and Copyright Rights, or other rights which are or may be asserted as protectable under the laws of the United States or the laws of any foreign county;
4. Patent Rights with respect to XY's Technology means all rights which are or may be asserted as protectable by license or under the patent laws of the United States or the patent laws, or similar laws, of any foreign country or region, including, but not limited to, any patent applications or grants of patent along with any division, substitution, continuation, continuation-in-part, continued prosecution, or other patent application(s) thereof filed in the United States, under international treaty or agreement, or in any foreign country or region, and all patents, utility models, inventor's certificates, or other similar rights which may be granted thereon and any reissues or extensions thereof, and specifically includes, but is not limited to, those patent rights to United States Patent No. 5,135,759 pursuant to the license agreement with the United States Department of Agriculture, Agricultural Research Service ("USDA License") subject to the reservation of rights therein, including reservation by the Agricultural Research Service of an irrevocable, nonexclusive, nontransferable, royalty-free, license to practice the licensed patent throughout the world by or on behalf of the United States Government and on behalf of any foreign government pursuant to any existing or future treaty or agreement to which the United States is a signatory, and the right to engage in research, either alone or with third parties, with respect to the claimed inventions;
5. Trademark Rights with respect to XY's Technology means all rights, whether registered or not, which are or may be asserted as protectable by license or under trademark, unfair competition, trade dress, anti-dilution, or similar laws of the United States, or any state, or any foreign country or region;
6. Trade Secret Rights with respect to XY's Technology means all trade secrets, confidential information, and know-how which are or may be asserted as protectable by license or under the trade secret, confidentiality, or unfair competition laws of any state, or under similar laws of any foreign country or region;
7. Copyright Rights with respect to XY's Technology means all rights, whether registered or not, which are or may be asserted as protectable under the copyright laws of the United States or the copyright laws of any foreign country.
8. **THIS SUBPARAGRAPH F DELETED BY Court of Appeal** Specifically including but not limited to the research and development of the defendants within the Field of Use and outside the Field of Use with respect to *in vivo* embryos and any other matters using sexed semen:
9. (Field of Use means the collection and preparation of cattle semen, the separation of spermatozoa in such cattle semen into sex-selected subpopulations of cattle spermatozoa based upon the presence of an X- chromosome or a Y-chromosome, use of such sex-selected subpopulations of cattle spermatozoa for in-vitro fertilization of cattle oocytes, the production of sex-selected cattle embryos utilizing in-vitro fertilization, cryogenic storage of such cattle semen, such sex-selected subpopulations of cattle spermatozoa, and such sex selected cattle embryos produced utilizing in-vitro fertilization).

**ADDED BY Court of Appeal**

Provided that Confidential Information shall not include information that

1. is or becomes generally available to the public other than as a result of a disclosure by any of the defendants;
2. becomes available to any of the defendants on a non-confidential basis and not in contravention of applicable law from a source, other than the plaintiff herein or one of its officers, directors, partners, employees, independent contractors, agents, or licensees ("Representatives") not bound by a confidential relationship with the plaintiff or by a confidentiality or other similar agreement;
3. can be proven was known by any of the defendants on a non-confidential basis and not in contravention of applicable law or confidentiality or other similar agreement prior to disclosure to any defendant by the plaintiff.

**End of Document**

[***Hobbs v. Robertson, [2004] B.C.J. No. 1689***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0HH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Pitfield J.

Heard: July 12 - 15, 2004.

Judgment: August 16, 2004.

Vancouver Registry No. C980582

**[2004] B.C.J. No. 1689** | 2004 BCSC 1088 | 243 D.L.R. (4th) 700 | 28 C.C.L.T. (3d) 133 | 133 A.C.W.S. (3d) 191

Between Ernest Hobbs, on his own behalf and Ernest Hobbs as guardian ad litem for Kaleb Hobbs, Travis Hobbs, also known as Travis Redlack and Jada Hobbs, also known as Jada Redlack, plaintiffs, and Dr. John G.M. Robertson, defendant

(97 paras.)

**Case Summary**

**Health law — Liability (malpractice) — *Negligence* — Particular professions — Doctors — Surgeons — Professional responsibility — Professions — Health care — Doctors — Tort law — *Negligence* — Defences — Release — Voluntary assumption of risk (volenti non fit injuria).**

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| This was an action brought by the plaintiff Hobbs on behalf of himself and his children for damages against the defendant Robertson. Hobbs' wife Daphine died as a result of blood loss sustained during the course of surgery performed by Doctor Robertson. Daphine was a Jehovah's Witness. She required a hysterectomy. She was informed of the dangers of the surgery. Robertson was aware she was a Jehovah's Witness and she was against receiving a blood transfusion. She had signed a release document entitled, "Refusal to Permit Blood Transfusion". Robertson opted to perform a laparoscopically assisted vaginal hysterectomy. During the surgery, Daphine began to lose blood and Robertson decided to change the procedure to an abdominal hysterectomy. By this time Daphine had lost critical amounts of blood. A transfusion was not given as it was against her wishes. Hobbs was told that if she did not receive a transfusion she would die. He advised that he could not go against his wife's wishes. Shortly after the surgery was completed, Daphine died. Robertson admitted he was negligent in that he should have converted to the abdominal procedure sooner because the blood loss would have been stopped and she would likely have survived without the need for a transfusion. Despite his ***negligence***, Robertson argued he should not be responsible for her death as a result of the Refusal document she had signed. He argued the plain meaning of the Refusal was to absolve him of any responsibility whatsoever in respect of morbidity or death occasioned by the inability to transfuse blood. Further he argued it would be contrary to public policy to hold him responsible. Hobbs argued the Refusal was not intended to excuse or waive liability in circumstances where the need for a transfusion was occasioned by Robertson's ***negligence***.  HELD: Action dismissed.  The Refusal which released Robertson from responsibility was unrestricted in its application. The release from "any responsibility whatsoever" could not reasonably be construed to have application in some but not all circumstances. In addition, Hobbs admitted that a transfusion would have saved Daphine's life. The court held that her death was due to her refusal to permit the transfusion not from Robertson's ***negligence***. From time to time it is reasonable that doctors make mistakes that amount to ***negligence***. The court could not accept that a person should be able to deny a doctor use of every tool at their disposal to overcome the effects of ***negligence*** and then require the doctor to accept full responsibility. The effects of the ***negligence*** could have been corrected. Daphine was aware of the risks she took and expressly agreed to them. The consequences of her choices did not permit her estate to recover damages where others could not. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, *R.S.B.C. 1996, c. 126*.

***Negligence*** Act, *R.S.B.C. 1996, c. 333*.

**Counsel**

Counsel for the Plaintiffs: L.J. Zivot, D. Dahlgren and S. Brady

Counsel for the Defendant: P.M. Willcock

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| **PITFIELD J.** |

Introduction

**1**  Mrs. Daphine Hobbs, one of Jehovah's Witnesses, died on April 16, 1996, as a consequence of massive blood loss sustained in the course of a hysterectomy surgery. She was 35 years of age. Her surviving husband and three infant children bring this action under s. 2 of the Family Compensation Act, *R.S.B.C. 1996, c. 126* which provides as follows:

1. If the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not resulted, have entitled the party injured to maintain an action and recover damages for it, any person, partnership or corporation which would have been liable if death had not resulted is liable in an action for damages, despite the death of the person injured, and although the death has been caused under circumstances that amount in law to an indictable offence.

**2**  The issue in the action is the extent to which the plaintiffs' claim for compensation is affected by a document entitled "Refusal to Permit Blood Transfusion" signed by Mrs. Hobbs, the effect of which was to deny medical practitioners the opportunity to transfuse Mrs. Hobbs with blood or blood products that would have saved her life.

**3**  As originally framed, the action named Dr. Robertson, other doctors involved with the care of Mrs. Hobbs on April 15 and 16, 1996, and the Chilliwack General Hospital Society as defendants. The action was discontinued without costs as against all defendants other than Dr. Robertson, a specialist in obstetrics and gynaecology.

**4**  This is the second trial of the action. The first proceeded before Melvin J. pursuant to Rule 18A of the Rules of Court on the basis of affidavits and certain assumptions, rather than findings or admissions, of fact: see [*(2001), 85 B.C.L.R. (3d) 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15H-00000-00&context=), [*2001 BCSC 162*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G15H-00000-00&context=). The learned trial judge held that the document signed by Mrs. Hobbs did not bar the recovery of damages for ***negligence***. As a result, he dismissed the defendant's Rule 18A application seeking dismissal of the plaintiffs' action. The Court of Appeal set aside the trial judgment and ordered a new trial: see [*(2002), 172 B.C.A.C. 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2072-00000-00&context=), [*2002 BCCA 381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2072-00000-00&context=). The basis for the Court's decision is set forth in paragraphs 4 through 6 of its reasons as follows:

[paragraph] 4 In this court, the defendants deny any intention on their part to admit ***negligence*** in any form, and attack each of the Chambers judge's conclusions. They say the Chambers judge was wrong to conclude that "[t]he need for the precluded remedial step was created" by the defendants' initial ***negligence*** and that counsel had not intended to "characterize the cause of blood loss." Each of their grounds of appeal creates almost insurmountable difficulties due to the absence of specific findings of fact as to the defendants' assumed ***negligence***. Did it consist in doing something that caused Mrs. Hobbs to bleed copiously, or in not taking particular preventative or remedial measures, or in some other act or omission? Without the answers to these questions, the scope of the Chambers judge's ruling that the release does not bar the action is unclear and the issues on appeal may not be analyzed in any nuanced way. The respondents may argue that if the appeal is allowed, doctors performing surgery on Jehovah's Witness patients have complete immunity from liability for the consequence of carelessness, if injury or death could have been avoided by transfusion. Yet allowing the appeal might mean only that such doctors have no liability for failing to do that which the patient has prohibited them from doing. On the other hand, the appellants may argue that if the appeal is dismissed, the consequence will be that no release will ever be given effect to where a tension arises between the patient's freedom of religion and her need for medical care. Yet dismissing the appeal might mean only that the wording of this release was inapt to excuse the doctors from responsibility for carelessness in causing the bleeding, if that proves to be what in fact occurred.

[paragraph]5 A similar difficulty arises from the Chambers judge's assumption that carelessness on the defendant's part "caused" (in the legal sense) Mrs. Hobbs' bleeding. As indicated above, he was not asked to assume that very important fact, which may well be the central question to be decided at trial.

[paragraph]6 The point is that until it becomes clear, as a factual matter, of what the defendants' ***negligence*** consisted, the scope and consequence of the appeal would be largely speculative, and indeed the appeal might turn out to be entirely moot. That is not, in my respectful view, a proper use of Rule 18A.

[emphasis in original]

**5**  I have had the benefit of evidence and admissions of fact not available to Melvin J. I have also had the benefit of submissions with respect to the nature and meaning of the Refusal that do not appear to have been made in the earlier trial. For those reasons, and the fact the Court of Appeal ordered a new trail, I do not consider myself constrained, on the basis of stare decisis, by the conclusions reached by Melvin J. in the event I should conclude that I must differ with him in the result.

Findings of Fact

**6**  All material facts were admitted at the retrial. No viva voce evidence was called. The facts, in the context of which the case must be decided, are the following.

**7**  Mrs. Hobbs was referred by her family physician to Dr. Robertson who saw her on January 25, 1996. She complained to him of heavy, irregular periods, pelvic pain and tenderness over a period of one year.

**8**  Dr. Robertson discussed medical, non-surgical, options to control her menstrual bleeding. Mrs. Hobbs declined the medical options because some of them had not been effective for her in the past.

**9**  Dr. Robertson discussed surgical options with Mrs. Hobbs. These included dilation and curettage, endometrial ablation or surgical destruction of the endometrial lining of the uterus, and hysterectomy.

**10**  The parties admit that Dr. Robertson's usual practice was to explain that endometrial ablation was day surgery, 20% to 40% of women never have another period after endometrial ablation, 40% to 60% of women have periods that are lighter and shorter after endometrial ablation, and about 20% of women are unhappy with the amount of bleeding they have long term after such surgery. The parties admit that Dr. Robertson told Mrs. Hobbs that the risks associated with endometrial ablation were less than those associated with hysterectomy.

**11**  Mrs. Hobbs told Dr. Robertson that two of her sisters underwent hysterectomies for similar problems and therefore she felt she should also have a hysterectomy.

**12**  Dr. Robertson was aware that Mrs. Hobbs had previously undergone a caesarean section and a tubal ligation. He told Mrs. Hobbs that a vaginal hysterectomy was not an option for her because of the likelihood of scarring and adhesions from the earlier caesarean section. He told Mrs. Hobbs that the risk of bleeding and infection were increased with a laparoscopically-assisted vaginal hysterectomy (LAVH) compared to an abdominal hysterectomy.

**13**  Following her discussion with Dr. Robertson, Mrs. Hobbs elected to undergo a LAVH. Between 1994 and the death of Ms. Hobbs on April 16, 1996, Dr. Robertson had performed the LAVH procedure between 10 and 20 times. He had performed between 20 and 30 vaginal hysterectomies and approximately 30 abdominal hysterectomies.

**14**  Soon after January 25, 1996, Dr. Robertson booked Mrs. Hobbs for the LAVH procedure which was expected to last a total of 2.6 hours or 160 minutes.

**15**  On February 20, 1996, Mrs. Hobbs saw Dr. Robertson on her own initiative because she had questions with respect to the proposed surgery. Dr. Robertson discussed the surgery and post-operative recovery with Mrs. Hobbs. He believed that she left feeling better about her surgery. He gave her a booklet entitled "Understanding hysterectomy - a guide for patients and their families" which described the procedure. He invited Mrs. Hobbs to return to further discuss the procedure if she wished to do so.

**16**  The booklet described a hysterectomy in the following terms:

First: You're about to undergo one of the most common - and thus one of the best understood - of all inpatient procedures. Each year, in fact, about 60,000 Canadian women have a hysterectomy. Operative techniques and aftercare treatments have been perfected over the course of a century, while more recent advances in antibiotics and anaesthetics have all helped too.

Second: As performed today in a modern hospital, hysterectomy is one of the safer major procedures.

Third: Hysterectomy works. By effectively relieving uncontrollable bleeding and intolerable pain, this type of surgery has improved the lives of thousands of women.

[emphasis in the original]

**17**  The booklet described alternative hysterectomy techniques in the following terms:

Vaginal hysterectomy

About one in four hysterectomies are [sic] performed with removal of the uterus through the vagina. There's no abdominal incision, no scar, less pain and you'll return home more quickly. Furthermore, the ovaries are usually left intact.

Laparoscopically-assisted vaginal hysterectomy

This is a relatively new technique which uses the laparoscope, a device like a very small lighted telescope. With the help of a laparoscope and tiny incisions in the abdomen near the navel the doctor detaches the uterus and then removes it through the vagina. Thanks to the laparoscope, the doctor gets a good view of the uterus and also has better control over the surgery than if the whole operation were performed vaginally. There is no major abdominal incision, less pain and as in the vaginal procedure, you should return home more quickly. Today more and more doctors are being trained in this technique.

Traditional abdominal hysterectomy

Most hysterectomies are performed this way; the doctor removes the uterus via an incision about six to eight inches along the abdomen. The doctor may use a "bikini" (horizontal) cut, just across the top of the pubic hair, or a vertical cut just above the pubic bone.

**18**  Dr. Robertson was aware that Mrs. Hobbs was one of Jehovah's Witnesses. He was aware that she did not want any blood transfusions or blood products. Mrs. Hobbs had been referred to him for care in 1994 because of complications surrounding her pregnancy that resulted in a successful delivery by caesarean section. His consultation report dated August 8, 1994 records the following:

I do note that she is a Jehovah's Witness and that we will have to be aware of this during the course of her management.

**19**  Dr. Robertson's clinical notes of January 15, 1996 recorded the notation "no blood". His reporting letter of the same date to the referring physician noted that "she is a Jehovah's Witness and does not want any blood transfusions or blood products".

**20**  Dr. Robertson acknowledged that he wanted to choose a procedure that minimized the risk of bleeding when operating on a patient who advised him that she would not accept a transfusion of blood or blood products. This notwithstanding, the plaintiffs do not suggest that Dr. Robertson was negligent in agreeing to Mrs. Hobbs' decision to undergo the LAVH procedure rather than an abdominal hysterectomy although the latter was likely to result in less blood loss. Dr. Robertson was aware that regardless of the hysterectomy technique chosen, when confronted with uncontrolled bleeding, the abdominal approach was the approach of first choice because it gave the surgeon the best opportunity to see and suture bleeding vessels.

**21**  On April 12, 1996, Mrs. Hobbs attended at a pre-assessment clinic at Chilliwack General Hospital where she signed the Refusal. A nurse was the only medical person Mrs. Hobbs saw on that date.

**22**  The Refusal signed by Mrs. Hobbs was identical to that signed by her on four admissions to the Chilliwack General Hospital in 1994. The document signed April 12, 1996, read as follows:

I request that no blood or blood derivatives be administered to myself, Daphine L. Hobbs, during this hospitalization. I hereby release the CHILLIWACK GENERAL HOSPITAL, its agents and personnel, and the attending doctors from any responsibility whatsoever for unfavourable reactions or complications or any untoward results, which may include death, due to my refusal to permit the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.

**23**  The Chilliwack Hospital requires persons who choose not to accept blood or blood products to sign the refusal at or before their admission. All of Jehovah's Witnesses admitted as patients to the hospital must sign the refusal if they adhere to the religious tenets of their faith, one of which is a Biblical direction to 'abstain from blood'.

**24**  The parties admit that Mr. Hobbs, the husband of the deceased, understood that a patient who objected to receiving a blood transfusion during hospitalization at the Chilliwack General Hospital would have to sign a form which included a release of claims arising out of the refusal to accept a blood transfusion. In fact, Mr. Hobbs himself had signed such a form when he had undergone an operation at the hospital on an earlier date.

**25**  Dr. Robertson was not involved in the preparation or signing of the refusal. He did not discuss the document or its legal effect with Mrs. Hobbs. He was not aware whether or not she had signed the form. Neither he, nor any other doctor or hospital employee advised Mrs. Hobbs of the action they would take if she did not sign the Refusal. Dr. Robertson was not aware of any physician at the Chilliwack Hospital who would refrain from performing surgery on a patient who would not sign the Hospital's form of refusal to permit blood transfusion.

**26**  Mrs. Hobbs was admitted to the Chilliwack General Hospital at 1045 hours on April 15, 1996. She walked to the pre-operative holding area at 1135 hours. Some time between 1135 and 1205 hours, Dr. A.A. Suleman, an anaesthetist, saw from the anaesthesia record that Mrs. Hobbs had signed the Refusal. Dr. Robertson had not told Dr. Suleman that Mrs. Hobbs was one of Jehovah's Witnesses who would not consent to a blood transfusion.

**27**  Dr. Suleman spoke for the first and only time with Mrs. Hobbs in the pre-operative holding area. They spoke for approximately ten minutes. Dr. Suleman recorded the fact that Mrs. Hobbs had signed the refusal on the chart.

**28**  Dr. Suleman's usual practice was to advise a patient, and he so advised Mrs. Hobbs, that the procedure she was to undergo would entail blood loss. He advised that the exact amount of the loss could vary and could not be determined until surgery was underway. He advised it could be minimal or it could be excessive. He advised Mrs. Hobbs that if there were excessive blood loss and it could not be replaced, she would run the risk of arrhythmias, heart attack, congestive heart failure or pulmonary edema. He advised her that she might require ventilation post-operatively and she could die.

**29**  Dr. Suleman recalls discussing red blood cells, white blood cells, plasma and platelets, and clotting factors with Mrs. Hobbs. He says he told her that when one bleeds one loses red and white blood cells, platelets and plasma, and that this entails loss of clotting factors.

**30**  Dr. Suleman discussed with Mrs. Hobbs the possibility of giving her crystalloids and colloids to temporarily replace the volume of blood lost in the event of excessive bleeding. He also told her that crystalloids and colloids would not replace the red blood cells and the blood components that she might need to stay alive.

**31**  Dr. Suleman recalled that Mrs. Hobbs told him she was willing to undergo the surgery despite the risks that he had described to her and under no circumstances was she to receive blood or blood products.

**32**  Dr. Robertson commenced the surgery at 1218 hours on April 15, 1996. At that time, Mrs. Hobbs' vital signs and blood levels were normal. Dr. Robertson proceeded laparoscopically to 1345 hours at which point he decided that the hysterectomy should be finished vaginally. He explained the change in procedure as follows:

The right round ligament was cauterized and cut. The right fallopian tube was cauterized and cut and the ovarian pedicle was cauterized and cut. Dissection was carried down; however, it became more difficult, because of the previous scarring from her cesarean [sic] section, to get at the ligaments adequately. A bladder flap was created anteriorly to dissect the bladder off the uterus and the adhesions were freed up as much as possible.

It was decided at this point in time that the hysterectomy should be finished vaginally.

**33**  Dr. Robertson abandoned the vaginal approach to the hysterectomy in favour of an abdominal approach at 1520 hours. His operative notes record the reason for the change to an abdominal approach as follows:

At this point in time, there was a large amount of bleeding and the site of the bleeding could not be easily ascertained. It was therefore decided that the approach should be switched to an abdominal approach.

**34**  The abdominal procedure was completed at 1635 hours. Dr. Robertson described his observations in respect of the abdominal procedure in his operative note as follows:

There was a moderate amount of blood and clot present in the pelvis and this was removed. The surgical site was identified and there was bleeding coming from the vaginal vault cuff and this was oversewn. There was bleeding coming from the right angle of the vaginal vault and there were two obvious vessels that were clamped and oversewn.

...

At this point in time, there was a great deal of concern about the patient's blood pressure and vital signs and she was resuscitated with [crystalloid].

**35**  Dr. Suleman was the attending anaesthetist throughout the procedure. At 1345 hours, he observed a sharp rise in Mrs. Hobbs' pulse rate, indicating she was bleeding and that her heart was beating faster to compensate for blood loss and dilutional anaemia. Dr. Suleman became concerned about blood loss and attached a second intravenous line to maintain her blood pressure and volume. He told Dr. Robertson that he was starting another blood line for ongoing blood loss.

**36**  Some time between 1345 and 1430 hours, Dr. Suleman began to tell Dr. Robertson and the surgical team that Mrs. Hobbs was losing blood. He so advised them when he observed she had lost 500 millilitres of blood from the surgical site and again when he observed the blood loss to be 1000 millilitres.

**37**  Some time between 1415 and 1430 hours Dr. Suleman left the operating room to obtain a unit of 10 percent Dextran, a colloid solution that can be used as a blood volume replacement. Outside the operating room Dr. Suleman encountered Dr. Undrell, another anaesthetist. When told of Mrs. Hobbs' blood loss, Dr. Undrell recommended that Dr. Robertson convert to an abdominal procedure.

**38**  On returning to the operating room, Dr. Suleman and Dr. Robertson discussed the possibility of converting the operation to an open abdominal procedure. Dr. Robertson stated that he felt that he would be able to achieve haemostasis, or the cessation of bleeding, vaginally. Dr. Robertson believed that the vaginal bleeding was slowing down and that he had the blood loss under reasonable control.

**39**  Dr. Suleman decided there was no point in calling for the assistance of a second surgeon because he had been informed by Dr. Robertson that he did not want to convert to an open abdominal hysterectomy at that point.

**40**  At 1430 hours, Dr. Suleman told Dr. Robertson and the surgical team that Mrs. Hobbs had lost 1,700 millilitres of blood. Dr. Suleman was of the view that by that time, Mrs. Hobbs had likely lost more blood that had been absorbed in sponges or collected internally. Dr. Suleman administered the first 500 millilitres of Dextran.

**41**  By 1500 hours, Mrs. Hobbs had lost at least 2,000 millilitres of blood. After 1515 hours, her blood pressure dropped further. Dr. Suleman administered another 500 millilitres of Dextran. To that point, Mrs. Hobbs had received 10 litres of Ringer's lactate and 1,000 millilitres of Dextran, both of which are blood volume substitutes or replacements.

**42**  By 1500 hours, Mrs. Hobbs had lost approximately one-half of her circulating blood volume. The parties admit that her haemoglobin would then have been in the range of 60 to 70 grams per millilitre and her blood would likely have had sufficient oxygen-carrying capacity to permit survival without a transfusion.

**43**  Dr. Suleman says that at some time just prior to converting to an abdominal approach to the surgery, Dr. Robertson remarked that he could not stop the bleeding. Dr. Robertson recalled that shortly before the operation was converted to an open abdominal procedure at approximately 1520 hours, there was a large amount of bleeding from a site which could not be ascertained.

**44**  Dr. Robertson admits the expert evidence that the standard of care in his specialty required that, in the circumstances of this case, the vaginal hysterectomy be converted to an open abdominal procedure not later than 1430 hours. He also admits that the standard of care in his specialty required that, rather than morselating or cutting the uterus into pieces vaginally or laparoscopically, he should have converted the vaginal hysterectomy to an open abdominal procedure.

**45**  The only ***negligence*** admitted in this action in relation to bleeding is the omission to convert to an open abdominal procedure not later than 1430 hours.

**46**  Dr. Robertson admits that, on the balance of probabilities, the blood loss would have been stopped and Mrs. Hobbs would have survived without need of a transfusion had abdominal surgery been commenced not later than 1430 hours. He admits that, on the balance of probabilities, the delay in the commencement of abdominal surgery to 1520 hours resulted in the need for transfusion. He admits that the inability to transfuse resulted in Mrs. Hobbs' death.

**47**  Upon completion of the operation at 1635 hours, four hours and seventeen minutes after its commencement, Mrs. Hobbs was moved to the intensive care unit. By that time, she had lost at least 4,000 millilitres of blood. She had received a total of 14 litres of Ringer's solution and 1 litre of Dextran, in aggregate approximately three times her circulating blood volume.

**48**  While Mrs. Hobbs was in the intensive care unit, Dr. A. Richmond, a specialist in intensive care, advised Mr. Hobbs that he was concerned about Mrs. Hobbs' life and that she would die if she did not receive a blood transfusion. Mr. Hobbs advised Dr. Richmond that he could not go against his wife's wishes and religious convictions and therefore he would not consent to the administration of blood transfusions.

**49**  The plaintiffs admit that on the balance of probabilities, a transfusion intra-operatively or post-operatively would have enabled Mrs. Hobbs to survive. The plaintiffs also admit that Mrs. Hobbs' instructions, provided when she was capable, were that she not receive blood transfusions and that those instructions were known by the treating physicians and Mr. Hobbs.

**50**  Mrs. Hobbs was pronounced dead at 0129 hours on April 16, 1996. The death resulted from prolonged tissue hypoxia leading to shock and cardiac failure resulting from massive blood loss. Dr. Richmond described the situation in the following terms in his discharge summary:

In summary, this tragic death was secondary to surgical bleeding and then medical bleeding from lack of coagulation factors. Unfortunately, this is death that could have been prevented if this lady could have received blood and coagulation products.

**51**  The parties agree that surgical bleeding is that resulting from surgical action. Medical bleeding is that resulting from the absence of blood components that cause coagulation and promote the cessation of bleeding.

Issues

**52**  On the basis of the admissions of fact as I have described the parties state the question to be determined as follows:

On the admissions made and the opinions admitted into evidence, is this action in ***negligence*** arising out of the death of Daphine Hobbs barred by the release of the attending doctors from any responsibility whatsoever for unfavourable reactions or complications or any untoward results, which may include death, due to Mrs. Hobbs' refusal to permit blood or blood derivatives to be administered to her?

**53**  The plaintiffs respond to the stated question as follows:

1. Death was caused or materially contributed to by Dr. Robertson's ***negligence***;
2. The Refusal is no force or effect because Mrs. Hobbs received no consideration for it;
3. If valid, the Refusal, comprised of the request and release, only constituted a waiver of the liability that would arise in the event Dr. Robertson omitted to transfuse blood or blood products when the standard of medical practice would have required him to do so;
4. The Refusal did not absolve Dr. Robertson of liability for any other kind of ***negligence***;
5. Mrs. Hobbs' request that no blood or blood products be transfused did not result in a voluntary assumption of the risk of medical ***negligence***; and
6. A release that absolves a physician of responsibility for ***negligence*** is contrary to public policy.

**54**  The plaintiffs also say that if the Refusal absolved Dr. Robertson of responsibility for any and all ***negligence*** on his part, the document contravened Mrs. Hobbs' Charter rights of equality and freedom of religion, and the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the fundamental principles of justice. By agreement between counsel, submissions on any constitutional questions were deferred pending disposition on non-constitutional grounds.

**55**  The defendant responds to the stated question as follows:

1. The Refusal was contractually binding on Mrs. Hobbs;
2. The plain meaning of the Refusal was to absolve Dr. Robertson of 'any responsibility whatsoever' in respect of morbidity or death occasioned by the inability to transfuse blood or blood products;
3. The direction and release were not contrary to public policy; and
4. In the alternative, Mrs. Hobbs expressly assumed the physical and legal risk associated with blood loss which could not be treated by transfusion.

Analysis

1. Consideration

**56**  With respect, the plaintiffs' argument that the Refusal was void for want of consideration must fail. Mrs. Hobbs signed the Refusal three days in advance of surgery. She was aware that document was required by the hospital. She had signed a similar document on four previous occasions. The document she signed stated that she understood the consequences that could flow from her refusal to accept blood. The adverse effects that might be associated with her refusal to accept a transfusion of blood or blood products were fully explained to her by Dr. Suleman before the operation.

**57**  The fact the Refusal was procured by the hospital for its benefit and that of staff and doctors involved in Mrs. Hobbs' care does not detract from its binding effect in so far as Dr. Robertson is concerned. There is no reason why, in the context of the provincial medical system, the hospital cannot procure the Refusal as agent for any personnel, including doctors, involved in providing care.

**58**  The fact that Mrs. Hobbs would not pay for the surgical procedure does not alter the fact that there was a contract between her and the hospital and between her and Dr. Robertson. Coverage under a policy of insurance, whether public or private, does not undermine the contract pursuant to which medical services were provided to her. Rather, insurance was the means by which the financial burden associated with health care was assumed by the insurer rather than the insured.

**59**  In other circumstances, a Jehovah's Witness successfully relied on a request similar to that made by Mrs. Hobbs, but without the accompanying release, to support a claim for damages from battery when a transfusion was provided to her as an unconscious patient in life-threatening circumstances: see Malette v. Shulman [*(1990), 72 O.R. (2d) 417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGCG-S2YY-00000-00&context=) (C.A.). In that case, the court held that the patient's request that was recorded on a card she carried on her person and known to the attending physician, stating that no blood or blood products were to be administered to her under any circumstances was a term of the contract between patient and doctor.

**60**  I need not speculate about what might have occurred at the hospital had Mrs. Hobbs declined to sign the Refusal. The fact is, the hospital insisted that the Refusal be signed as a condition of admission, it was signed, Mrs. Hobbs was admitted and the surgery was performed. Consideration was therefore provided for the Refusal which became a term of the contract between Mrs. Hobbs and Dr. Robertson. The challenge is to determine the meaning and effect of the Refusal in the tragic and sensitive circumstances of this case.

**61**  I need not be concerned with the question whether bleeding was originally caused by ***negligence***. Whatever its cause, the bleeding could have been stopped by timely intervention and the need for transfusion would have been avoided. The ***negligence*** in this case, in respect of which liability must be determined, was the omission to intervene to stop the bleeding on a timely basis.

1. Interpretation of the Release

**62**  The plaintiffs submit that the Refusal was only intended to excuse Dr. Robertson from administering blood or blood products when the standard of care would have required him to transfuse in circumstances that did not result from medical ***negligence***. They say the Refusal was not intended to excuse or waive liability in circumstances where the need for transfusion was occasioned by his ***negligence***. The plaintiffs say that the release portion of the Refusal was designed to avoid uncertainty that might surround the meaning of the request first stated in the Refusal to the effect that no blood or blood products be transfused and should not be construed to amount to a waiver of the right to a proper standard of medical care, whatever the circumstances.

**63**  The plaintiffs' submission is predicated on the claim that a waiver of liability for ***negligence*** must be clear and express; construing the refusal and release to waive liability for ***negligence*** would render the signatories likely to receive a lower standard of health care than those who do not sign such waivers; the care providers would not have expected Mrs. Hobbs to agree to negligent care; and contracting out of ***negligence*** in providing a service is inconsistent with the physician's duty and responsibility to his patient.

**64**  With respect, I cannot agree that the Refusal, considered in its entirety, can be given the limited effect urged by the plaintiffs. The suggestion that the release portion of the Refusal applied only in respect of the omission to transfuse blood in non-negligent circumstances cannot withstand scrutiny.

**65**  As I have previously said, in Malette, supra, the Ontario Court of Appeal affirmed the trial judge's conclusion that a statement made by a Jehovah's Witness that she not be administered blood or blood products compelled a physician who knew of the statement to refrain from doing so. In response to the concern that the decision placed the physician on the horns of a dilemma when treating a Jehovah's Witness in emergent circumstances, the court said the following at p. 434:

The appellant argues that to uphold the trial decision places a doctor on the horns of a dilemma, in that, on the one hand, if the doctor administers blood in this situation and saves the patient's life, the patient may hold him liable in battery while, on the other hand, if the doctor follows the patient's instructions and, as a consequence, the patient dies, the doctor may face an action by dependants alleging that, notwithstanding the card, the deceased would, if conscious, have accepted blood in the face of imminent death and the doctor was negligent in failing to administer the transfusions. In my view, that result cannot conceivably follow. The doctor cannot be held to have violated either his legal duty or professional responsibility towards the patient or the patient's dependants when he honours the Jehovah's Witness card and respects the patient's right to control her own body in accordance with the dictates of her conscience. The onus is clearly on the patient. When members of the Jehovah's Witness faith choose to carry cards intended to notify doctors and other providers of health care that they reject blood transfusions in an emergency, they must accept the consequences of their decision. Neither they nor their dependants can later be heard to say that the card did not reflect their true wishes. If harmful consequences ensue, the responsibility for those consequences is entirely theirs and not the doctor's.

**66**  Similarly, in the present case the request expressed in the first sentence of the Refusal cannot be construed to result in liability for assault and battery should a physician administer blood contrary to Mrs. Hobbs' wishes and, concurrently, to result in liability in the event of an omission to administer blood when the need for blood or blood products was not caused by ***negligence*** and the standard of care required blood to be administered. When the need for blood arose in non-negligent circumstances, the request itself, clearly and unequivocally stated, ensured the result urged by the plaintiffs. That being the case, the release contained in the Refusal would not have been required.

**67**  An essential rule governing the interpretation of a contract is that words used by the parties be given meaning. Because of the request and its effect on liability, there is no need to provide a release from, or waiver of, liability in connection with the omission to administer blood where the need arises from non-negligent care. Were the plaintiffs' view to prevail, the release contained in the Refusal would be redundant or, as is sometimes said of phrases without meaning, mere surplusage.

**68**  The release is unrestricted in its application. It absolves the physician "from any responsibility whatsoever for unfavourable reactions or complications or any untoward results, which may include death, due to my refusal to permit the use of blood". The release 'from any responsibility whatsoever' cannot reasonably be construed to have application in some, but not all, circumstances. In addition, the plaintiffs' admit that a transfusion would have saved Mrs. Hobbs' life. In my opinion, that means her death was 'due to' her refusal to permit the administration of blood products.

**69**  The plaintiffs submit that the release should not be construed as a waiver of liability where a physician's ***negligence*** has played a part in creating the need because '***negligence***' is not specifically mentioned in the text. With respect, I am not persuaded that there was any need to make specific reference to ***negligence*** in the release.

**70**  When the wording of a release is capable of application in relation to ***negligence***, it must also be capable of application in some other circumstances if omission of a specific reference to ***negligence*** is to be a limiting factor. In Canadian Steamship Lines Ltd. v. Regem, [*[1952] 2 D.L.R. 786*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4S7-00000-00&context=) (J.C.P.C.) at p. 793 the Privy Council, on appeal from the Supreme Court of Canada adopted the reasoning of Lord Greene M.R. in Alderslade v. Hendon Laundry Ltd., [1945] K.B. 189 at 192, as follows:

Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on ***negligence*** and nothing else, the clause must be construed as extending to that head of damage, because [if it were not so construed] it would lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of ***negligence***, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through ***negligence***. The reason is that if a contracting party wishes in such a case to limit his liability in respect of ***negligence***, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on ***negligence***.

**71**  With and without the assistance of counsel, I have been unable to identify circumstances not involving ***negligence*** in which the release would afford protection that is not otherwise afforded by the simple request that no blood or blood products be transfused. If the standard of medical practice in non-negligent circumstances required transfusion and one is excused from adherence to the standard because of the request, the only circumstances in which there might be a dispute and need for protection and waiver are those in which there is ***negligence***. There is no other head of damage in respect of which protection for the hospital or attending physicians and staff is required. In my opinion, that accounts for the inclusion of the release and its specific wording.

**72**  A reasonable person would be aware that any physician may, from time to time, make a mistake that amounts to ***negligence***. It is difficult to accept that a person should be able to deny a physician the opportunity to use every tool in his or her arsenal to overcome the effects of ***negligence*** and require the physician to accept full responsibility when, as with any other patient, the effects of the ***negligence*** could have been fully ameliorated. She who is aware that blood loss may occur but is not prepared to permit transfusion, and who wishes to assert that the risk associated with blood loss is hers in the case of non-negligent treatment but that of the physician in the case of negligent treatment, should be expected to stipulate that important qualification in the direction that she signs. In this case, there is no suggestion that Mrs. Hobbs provided an uninformed refusal. There is no ambiguity in the terms of the release and the rule of construction suggesting that ambiguity should be resolved against the party drafting the document does not apply in the circumstances.

**73**  In my opinion, the deceased could not reasonably be considered to have held to the view that she assumed some part of the risk associated with the inability to transfuse blood but did not assume all of it. Notwithstanding the absence of specific reference to ***negligence*** in the release or the discussion with Dr. Suleman, the document she signed points to awareness of the risk. Awareness is reinforced by the fact that she willingly signed a document releasing specified persons 'from any responsibility whatsoever' and by her acknowledgment and acceptance in the document and in her discussion with Dr. Suleman of the fact that her inviolable request might cause her death. There is no reason why, aware as she was of what she was doing, for what reason and with what consequences, her actions should be construed to permit her estate to recover damages where others would not because life would have been saved by transfusion.

1. Public Policy Considerations

**74**  The plaintiffs' claim that the release from liability for ***negligence*** in a medical context is void as against public policy cannot be sustained. A patient is free to direct that he or she will not accept care in the form of a specific reasonable medical treatment. Likewise, there is no reason why a patient may not agree to absolve a medical practitioner of any responsibility for negligent treatment that may cause morbidity or death particularly when the treatment that the patient wishes to prevent is the only treatment that will prevent death. I would adopt the reasoning in Canada Trust Co. v. Ontario Human Rights Commission [*(1990), 74 O.R. (2d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGCG-S35F-00000-00&context=) (C.A.) in relation to the role of public policy discussed at p. 494 as follows:

Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that "public policy should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, [*[1938] S.C.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1GD-00000-00&context=), [*[1938] 1 D.L.R. 65*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1GD-00000-00&context=) [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.].

**75**  The plaintiffs' argument that the release of liability for ***negligence*** offends public policy appears premised on the claim that Jehovah's Witnesses will be afforded a lower standard of care than will be the case if doctors cannot be excused from ***negligence***. There are at least three responses to the claim. First, the fact that this is the first case known to counsel in which the issue of the effect of the release in the event of death that could have been spared by transfusion has been clearly raised, suggests that Jehovah's Witnesses have been afforded the same standard of professional care physicians are obliged to provide all patients by virtue of their professional oath and ethics and their membership in and accountability to, governing professional bodies regardless of the patient's willingness or unwillingness to undergo certain types of medical treatment. To suggest that doctors would contravene their professional responsibility and provide Jehovah's Witnesses with a lower standard of care inappropriately impugns the integrity of the profession. Second, ***negligence*** is a fact of life, however regrettable the fact may be, and making a physician solely responsible for the harm associated with the inability to resort to all tools in the medical and surgical arsenal may result in Jehovah's Witnesses encountering considerable difficulty in availing themselves of the services of medical practitioners of their choice. Third, the waiver of liability for ***negligence*** here in question is very narrow. It only applies when ***negligence*** causes blood loss that must be counteracted by transfusion and the resulting morbidity or death would have been avoided by the transfusion.

1. Volenti

**76**  The defendant claims that if the defence based on contract should fail, Mrs. Hobbs should be found to have expressly assumed the physical and legal risk associated with blood loss that could not be treated by transfusion regardless of the initial cause of that blood loss. The defence is embraced by the maxim 'volenti non fit injuria' or, 'to she who is willing, no harm is done'.

**77**  The defence of volenti was described by the Supreme Court of Canada in Car and General Insurance Corp. Ltd. v. Seymour and Maloney, [*[1956] S.C.R. 322*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M10V-00000-00&context=) at p. 331 as follows:

... a person who relies on the maxim must show that the plaintiff consented to the "particular thing being done and consented to take the risk upon himself". ... the question "is not whether the plaintiff voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his master's". [emphasis in original]

**78**  The defence is dependent on the finding of an agreement to assume risk. The agreement may be express or it may be inferred from conduct in particular circumstances. In the absence of express agreement, the defence seldom succeeds in Canada, most likely because of the capacity to apportion fault under statutes such as the ***Negligence*** Act, *R.S.B.C. 1996, c. 333*. In this case, the ***Negligence*** Act was not pleaded, undoubtedly because it cannot be said that adherence to a sincerely held religious belief amounts to fault for purposes of apportioning liability. This is an 'all or nothing' case.

1. The United States Approach

**79**  Counsel urged that I might derive some assistance from two cases originating in the United States involving Jehovah's Witnesses in which the assumption of risk was discussed. The cases are Shorter v. Drury, 695 P. (2d) 116 (Wash. 1985) and Corlett v. Caserta (1990), 3 A.L.R. 5th 1091. Both are instructive but ultimately not helpful in the British Columbia context.

**80**  In Shorter, the Supreme Court of Washington, En Banc, divided 5-4 on the question before it in a wrongful death, medical malpractice action brought by the surviving family of a Jehovah's Witness. Prior to undergoing a dilation and curettage procedure, the deceased signed a refusal to permit blood transfusion worded as follows at p. 119:

I request that no blood or blood derivatives be administered to Doreen V. Shorter during this hospitalization. I hereby release the hospital, its personnel, and the attending physician from any responsibility whatever for unfavourable reactions or any untoward results due to my refusal to permit the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.

**81**  In the course of the procedure, the defendant negligently lacerated the deceased's uterus. After beginning to bleed profusely, the deceased continued to refuse to authorize a transfusion despite repeated warnings by doctors that she would likely die due to blood loss. Death ensued. The surviving husband brought a wrongful death action. He did not allege a 'survival cause of action'.

**82**  A jury found the defendant negligent and determined that his ***negligence*** was 'a proximate cause' of death, but determined that the deceased 'knowingly and voluntarily' assumed the risk of bleeding to death. The jury attributed 75% of the fault for death to the refusal to accept a blood transfusion. The court did not consider the question whether the release was a term of the contract between doctor and patient.

**83**  The court held that the release was not against public policy but did not absolve the defendant of responsibility for ***negligence*** because it did not specifically refer to ***negligence***. In that regard, the law of Washington State appears to differ from that in British Columbia where, as I have stated, the absence of a specific reference to ***negligence*** need not be fatal. At the same time, the court held that there was evidence from which the jury could have concluded that the deceased and her husband understood and expressly assumed the risk of bleeding to death as a result of the defendant's ***negligence***. The apparent inconsistency in reasoning was picked up by the minority who expressed their bewilderment that the majority could conclude the deceased had not released the defendant from liability for ***negligence*** which the jury concluded was the proximate cause of death, but conclude at the same time that the deceased had assumed the risk of death associated with the refusal of a transfusion.

**84**  The answer to the seeming contradiction may lie in the majority's reasons at p. 123:

The defendants do not argue, nor do we hold, that the Shorters assumed the risk of the "direct consequences" of Dr. Drury's ***negligence***. Those "consequences" would be recoverable in a survival action under RCW 4.20.046, .050, and .060. Defendant argues, however, and we agree, that the Shorters could be found by the jury to have assumed the risk of death from an operation which had to be performed without blood transfusions and where blood could not be administered under any circumstances including where the doctor made what would otherwise have been [sic] correctable surgical mistake. The risk of death from a failure to receive a transfusion to which the Shorters exposed themselves was created by, and must be allocated to, the Shorters themselves.

**85**  The reference to 'RCW 4.20.046' is a reference to the Revised Code of Washington State, s. 4.20.046 of which provides for the survival of actions in the following terms:

1. All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action ....

**86**  In Shorter, the reference to the survival cause of action may have been to that for pain and suffering, anxiety and emotional distress endured before death as a consequence of medical ***negligence***. Liability for ***negligence*** could then have co-existed with the assumption of the risk of death from the refusal to permit transfusion. If that is not the explanation, it is difficult understand the differing results reached by the majority and minority.

**87**  In Corlett, a wrongful death action, the deceased had undergone surgery and began to bleed internally. The bleeding was not detected on a timely basis because of medical ***negligence***. After the bleeding was detected, the deceased signed a refusal to accept blood and released the physician from liability for respecting and following his wishes and direction. The Appellate Court of Illinois held that under Illinois law, the direction and release did not constitute a bar to the wrongful death action as the release did not specifically exonerate the ***negligence*** that preceded the signing of the release. The court held, however, that the deceased had a duty to mitigate the damages resulting from the defendant's ***negligence*** with the result that the award of damages would be reduced to the extent that the injuries were caused by the plaintiff's voluntary refusal of reasonable medical treatment. The court added that under principles of assumption of the risk, the award would be offset by the degree to which the plaintiff assumed the risks associated with a defendant's ***negligence*** because the plaintiff knew of the risks and nevertheless voluntarily and unreasonably proceeded to encounter them. The court reasoned as follows at p. 1100:

... we believe that a physician who commits a tortious act should not be totally liable for all subsequent injuries to the patient when the patient's injuries are attributable, in part, to the patient's refusal of a proposed reasonable medical treatment. We decline to create, for a patient who refuses a reasonable life-saving medical treatment because of the patient's religious convictions, an exemption from tort principles governing mitigation of damages, comparative fault, and assumption of the risk.

1. The Canadian Approach

**88**  The impression I gain from the United States decisions to which I was referred is that assumption of risk is a doctrine developed to co-exist with apportionment and mitigation as a means to limit recovery where ***negligence*** is involved in the maturation of a risk that cannot be contained because of a patient-imposed restriction on care. While demonstrating the approach adopted in some courts in the United States, the cases are not of assistance in the action before me because, as a general rule, assumption of risk has no independent status in Canada other than in the context of contract or conduct in relation to another's action from which it can be inferred that the claimant assumed the physical and legal risk associated with that other's conduct.

**89**  In Dubé v. Labar, [*[1986] 1 S.C.R. 649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-239W-00000-00&context=) at p. 658, the Supreme Court of Canada described volenti in the following terms:

Thus, volenti will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any ***negligence*** on the defendant's part.

**90**  Finally, in Crocker v. Sundance Northwest Resorts Ltd., [*[1988] 1 S.C.R. 1186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23K3-00000-00&context=), the court said the following at p. 1202:

Since the volenti defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the courts have tightly circumscribed its scope. It only applies in situations where the plaintiff has assumed both the physical and the legal risk involved in the activity.

**91**  In my opinion, the law in British Columbia precludes the application of the volenti defence based upon an inferred rather than actual agreement in present circumstances. Mrs. Hobbs did not know with virtual certainty that harm would befall her. Such knowledge, and action by her which invited or occasioned the virtually certain harm, are at the root of the volenti defence. In my opinion the plaintiffs' claim fails in this case because the Refusal was a term of the doctor-patient contract, constituted an express agreement to assume risk, and prohibited recovery when death resulted from the inability to transfuse. If the assumption of risk is not complete by virtue of a contractual term, Dr. Robertson's defence would fail and liability for the entirety of the result would ensue.

1. Impossibility of Apportionment

**92**  This is a case where ***negligence*** in the form of delayed treatment resulted in the need for transfusion and the patient's directive prohibited amelioration of the harm. In the absence of the release, equal apportionment of liability might have been considered appropriate. Regrettably, I respectfully suggest, the present state of the law would not have permitted apportionment in such circumstances and the burden of the loss would have been assumed entirely by one party or the other. I query whether that is an appropriate outcome when the adverse effects of ***negligence*** could be avoided but the opportunity to do so has been removed by a patient's deliberate decision and direction.

**93**  Regardless of the result in other circumstances, the burden in this case falls entirely on the plaintiffs because Mrs. Hobbs expressly agreed to assume all risk associated with blood loss that could not be counteracted because of her refusal to accept blood or blood products by transfusion.

Damages

**94**  Had it been necessary to assess damages in this case, I would have endorsed the parties' joint submission that they be assessed in the aggregate amount of $375,000. The joint submission reflects appropriate consideration of the relevant factors in the assessment: loss of past and future financial support; loss of past and future household services; loss of guidance, care and affection; loss of inheritance; and special damages for funeral and medical expenses.

**95**  The difficulty associated with the task of the assessment was described by Finch J.A., as he then was, in Cox v. Fleming [*(1995), 15 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G21G-00000-00&context=) at paragraph 5:

The assessment of damages under the Family Compensation Act is always difficult, and particularly so when the deceased is young and has not yet established a career, and when there is no historical record of financial contribution by him to his survivors, or of economic dependency by them upon him. When there is such a record, actuarial evidence may afford some guide as to what reasonable expectation of monetary benefit has been lost and as to its present value. The award, however, is never a matter of mathematical calculation.

**96**  On the basis of the written submission of counsel on behalf of the plaintiffs, not disputed in any material respect by the defendant, I conclude that damages should be assessed as follows in the event of liability:

Jada Redlack (Mrs.Hobbs' daughter)

1. $23,000 for loss of past and future financial support;
2. $65,000 for loss of past and future household services;
3. $30,000 for loss of care, guidance, training and affection; and
4. $10,000 for loss of inheritance.

Travis Redlack (Mrs. Hobbs' son)

1. $33,000 for loss of past and future financial support;
2. $79,000 for loss of past and future household services;
3. $30,000 for loss of care, guidance training and affection; and
4. $10,000 for loss of inheritance.

Caleb Hobbs (Mr. and Mrs. Hobbs' son)

1. $5,000 for loss of past financial support;
2. $30,000 for loss of past household services;
3. $30,000 for loss of care, guidance, training and affection; and
4. $10,000 for loss of inheritance.

Ernest Hobbs

1. $5,000 for loss of past financial support;
2. $10,000 for loss of past household services;
3. $5,000 for special damages.

Disposition

**97**  In the result, the action is dismissed. In the absence of agreement, the parties may speak to costs.

PITFIELD J.

**End of Document**

[***Nichols v. Warner, Scarborough, Herman & Harvey, [2007] B.C.J. No. 2037***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1CJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Ross J.

Heard: March 5 - 9 and 12 - 15, April 30, and May 1

- 2, 2007.

Judgment: September 18, 2007.

Vancouver Registry No. M024349

**[2007] B.C.J. No. 2037** | [*2007 BCSC 1383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20G-00000-00&context=) | [*161 A.C.W.S. (3d) 809*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20G-00000-00&context=)

Between Donald Wayne Nichols, Plaintiff, and Warner, Scarborough, Herman & Harvey, Karl F. Warner, G.W. Kent Scarborough, and Stephen Herman, Defendants

(210 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — Liability — Conduct of action — Standard of care and *negligence* — Action for *negligence* by plaintiff against the law firm for professional *negligence* as a result of their advice that he settle his claim for injuries sustained in a motor vehicle accident — Action dismissed — The plaintiff had not established that the opinion formed by the defendant law firm was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care — Accordingly, this opinion, even if mistaken, was not negligent.**

**Professional responsibility — Professional duties — Duty of care and *negligence* — Action for *negligence* by plaintiff against the law firm for professional *negligence* as a result of their advice that he settle his claim for injuries sustained in a motor vehicle accident — Action dismissed — The plaintiff had not established that the opinion formed by the defendant law firm was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care — Accordingly, this opinion, even if mistaken, was not negligent.**

**Professional responsibility — Professions — Legal — Lawyers — Action for *negligence* by plaintiff against the law firm for professional *negligence* as a result of their advice that he settle his claim for injuries sustained in a motor vehicle accident — Action dismissed — The plaintiff had not established that the opinion formed by the defendant law firm was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care — Accordingly, this opinion, even if mistaken, was not negligent.**

**Tort law — *Negligence* - Professional — Legal — Action for *negligence* by plaintiff against the law firm for professional *negligence* as a result of their advice that he settle his claim for injuries sustained in a motor vehicle accident — Action dismissed — The plaintiff had not established that the opinion formed by the defendant law firm was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care — Accordingly, this opinion, even if mistaken, was not negligent.**

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| Action by Nichols against Warner, Scarborough, Herman & Harvey (the "Firm") for ***negligence*** -- In 1994 Nichols was involved in a serious single vehicle accident that resulted in the loss of his leg -- Nichols was negotiating a curve at an intersection when he lost control of his motorcycle -- His motorcycle left the road and struck a telephone pole -- Nichols was a professional truck driver, but after he lost his leg, he could no longer pursue this occupation -- There were no witnesses to the accident -- However, several people attended at the scene after the accident to assist Nichols -- The police attended at the scene and prepared a report of the accident -- Nichols retained the Firm to commence an action for damages for injuries he suffered in the accident -- He met first with Scarborough -- At the initial meeting, Nichols told Scarborough that he lost control of his motorcycle because of gravel that had accumulated on the road -- The Firm commenced an action on Nichols' behalf against the District of Chilliwack (the "District") as the only defendant (the "First Action") -- Scarborough considered, but ultimately rejected, joining British Columbia Telephone Co. ("BC Tel") as a defendant -- The First Action alleged that the accident was caused by the ***negligence*** of the District in the improper design and construction of the roadway, improper signage, and failure to remove the loose gravel that accumulated on the road surface -- The matter proceeded to Nichols' Examination for Discovery -- At his Discovery, Nichols provided no evidence with respect to how the accident occurred -- Scarborough had by this time requested his partner, Herman, assist him with the file -- Both Scarborough and Herman formed the opinion that, in view of Nichols' evidence on Discovery, if the matter were taken to trial, the case would likely be lost on the issue of causation -- Counsel for the District took the same view and was in the process of setting the matter down for summary trial on the issue of causation -- Scarborough and Herman met with Nichols and provided their opinion -- They followed this meeting with a letter setting out the opinion in writing -- Counsel obtained instructions to settle the First Action on the best terms that could be obtained -- The First Action was ultimately settled for $5,000 -- The Firm wrote off the remaining disbursements and closed its file -- Afterwards, Nichols learned that another accident had occurred at the same location as his, after which, pursuant to an agreement between Telus and ICBC, the pole was removed in 2000 and improvements to the road were undertaken in 2002 -- That combination of events; another serious accident, the removal of the pole and improvements made to the road, caused Nichols to reconsider the adequacy of the representation he received in the First Action -- He then commenced his action against the Firm in which he alleged that it was negligent in its prosecution of the First Action on his behalf -- HELD: Action dismissed -- Nichols had not established that the opinion formed by the Firm was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care -- Accordingly, this opinion, even if mistaken, was not negligent -- The Firm took appropriate steps in the prosecution of the litigation -- They conducted appropriate investigations -- They identified the relevant issues and exercised their professional judgment with respect to those issues -- While other counsel may have come to a different conclusion with respect to that exercise, for example, with respect to the question of the significance of the pole, it had not been demonstrated that the view taken by Scarborough and Herman was one that a reasonable solicitor would not hold -- The Firm satisfied the duty of care owed to Nichols through the course of their retainer. |

**Counsel**

Counsel for the Plaintiff: Yan Gertsoyg, R. Terzian (A/S).

Counsel for the Defendants: Patrice M.E. Abrioux, T. Jespersen.

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| **ROSS J.** |

**INTRODUCTION**

**1**  On October 16, 1994 the plaintiff, Donald Wayne Nichols, was involved in a serious single vehicle accident that resulted in the loss of his leg. The accident occurred as he was riding his motorcycle along Old Yale Road in Chilliwack. Mr. Nichols was negotiating a curve at the intersection with Hopedale Road when he lost control of his motorcycle. His motorcycle left the road and struck a telephone pole. Mr. Nichols leg was severely injured in the crash. The injury was of such severity as to require amputation. This serious injury had particularly unfortunate consequences for Mr. Nichols. Mr. Nichols was a professional truck driver, but after he lost his leg, he could no longer pursue this occupation.

**2**  There were no witnesses to the accident. However, several people attended at the scene after the accident to assist Mr. Nichols. The police attended at the scene and prepared a report of the accident.

**3**  Mr. Nichols retained solicitors, the defendant firm Warner, Scarborough, Herman & Harvey, to commence an action for damages for injuries he suffered in the accident. He met first with the defendant Kent Scarborough. At the initial meeting, Mr. Nichols told Mr. Scarborough that he lost control of his motorcycle because of gravel that had accumulated on the road.

**4**  Mr. Nichols' father, Alex Nichols, was convinced that the corner where the accident occurred was dangerous because of road conditions and because of the presence of the pole. Alex Nichols was very active in the litigation, communicating his concerns about the road to counsel and to the experts who were ultimately retained, conducting his own investigations with respect to the site, and providing counsel with information about potential witnesses who could have evidence that would assist in the litigation.

**5**  The firm commenced an action on Mr. Nichols' behalf naming the District of Chilliwack (the "District") as the only defendant (the "First Action"). Mr. Scarborough considered, but ultimately rejected, joining British Columbia Telephone Co. ("BC Tel") as a defendant. The First Action alleged that the accident was caused by the ***negligence*** of the District in the improper design and construction of the roadway, improper signage, and failure to remove the loose gravel that accumulated on the road surface.

**6**  The matter proceeded to Mr. Nichols' Examination for Discovery. At his Discovery, Mr. Nichols provided no evidence with respect to how the accident occurred. Mr. Scarborough had by this time requested his partner, the defendant Stephen Herman, to assist him with the file. Both Mr. Scarborough and Mr. Herman formed the opinion that, in view of Mr. Nichols' evidence on Discovery, if the matter were taken to trial, the case would likely be lost on the issue of causation. Counsel for the District apparently took the same view and was in the process of setting the matter down for summary trial on the issue of causation.

**7**  Mr. Scarborough and Mr Herman met with Mr. Nichols and his father and provided their opinion. They followed this meeting with a letter setting out the opinion in writing. Counsel obtained instructions to settle the First Action on the best terms that could be obtained. The First Action was ultimately settled for $5,000. The firm wrote off the remaining disbursements and closed its file.

**8**  Alex Nichols remained concerned about the safety of the intersection. This continuing interest in the site resulted in a chance meeting with Michael Weightman who works for the Insurance Corporation of British Columbia ("ICBC"). Mr. Weightman was at the site following another accident that had occurred at that location. Eventually, pursuant to an agreement between Telus and ICBC, the pole was removed in 2000 and improvements to the road were undertaken in 2002.

**9**  That combination of events; another serious accident, the removal of the pole and improvements made to the road, caused Mr. Nichols to reconsider the adequacy of the representation he received in the First Action. He then commenced this litigation alleging that the firm was negligent in its prosecution of the First Action on his behalf.

**ISSUES**

**10**  An action alleging ***negligence*** on the part of solicitors in the prosecution of an action raises two sets of issues. The first matters to be determined relate to whether the firm discharged its duty of care to Mr. Nichols in relation to the First Action. The plaintiff alleges that the settlement of the First Action was improvident. The plaintiff makes a number of allegations of ***negligence*** in this regard which can be grouped into two central concerns. First, that the firm did not undertake an adequate investigation with respect to causation and that had an adequate investigation been done, causation could have been established. Second, the firm should have sued BC Tel and advanced allegations with respect to the pole.

**11**  If the plaintiff establishes that the defendant's conduct was negligent, he then needs to establish that the ***negligence*** caused him damage. The second set of issues relates to this question. This involves what is commonly described as a trial within a trial. In this trial within a trial, the likely outcome of the First Action had the additional investigations with respect to causation been undertaken and allegations made with respect to the pole will be addressed.

**FACTS**

**The Accident**

**12**  The accident that gives rise to this litigation occurred on October 16, 1994 when the motorcycle Mr. Nichols was riding left the road as it was taking a curve. The motorcycle struck a telephone pole that was located to the right of the roadside. This caused him to suffer a serious injury to his leg that required amputation.

**13**  The pole that Mr. Nichols struck was a support pole, the function of which was not to carry the telephone line, but to act as a tension support to the curving telephone line on the north side of Yale Road West. The pole was a lateral distance of 2.5 metres from the edge of the eastbound travel lane.

**14**  The accident took place on Yale Road West near the intersection of Yale Road West and Hopedale Road in Chilliwack. The road is a paved road located in a rural area. There is a gravel shoulder. The corner took the shape of an "s" curve. The curve starts west of the intersection with Hopedale Road, continues easterly, and ends on another tangent.

**15**  The posted speed limit was 60 km/hour. There was a curve warning sign located on the eastbound approach to the intersection. At the time of the accident, Mr. Nichols was travelling eastbound through the left hand curve.

**16**  At the time of the accident Mr. Nichols was 42 years old. He had class 1, 5 and 6 motor vehicle licences. Mr. Nichols was an experienced professional driver and a very experienced motorcycle operator. His motorcycle was in good operating condition. Mr. Nichols lived in Cultus Lake. He had separated from his wife in June 1993.

**17**  He testified that on the morning of the accident he had participated on his motorcycle in a charity toy run in Abbotsford, returning to Chilliwack at about 5:00 p.m. He stopped off at Dukes, a local pub, to have a beer with friends. He testified that he had one beer at the pub. His ex-wife entered the pub with her new boyfriend. Mr. Nichols became upset when he saw her and decided to leave. He agreed that he stayed at Dukes for about an hour.

**18**  There was a note in the RCMP file that Mr. Nichols told the nurse at the emergency room after the accident that he had two jugs of beer at the pub. He testified that he did not recall making that statement and that in any event, it was not true.

**19**  Mr. Nichols agreed that he was familiar with the road on which the accident occurred and generally familiar with the intersection where the accident occurred. He did not recall experiencing gravel at the intersection prior to the accident.

**20**  The weather conditions on the day of the accident were good. The day was clear and warm. The accident occurred at about 6:15 p.m., in pre-dusk daylight. The road surface was described in the police report as in good condition and dry.

**21**  Mr. Nichols testified that he recalled heading east on Yale Road West, taking the sharp corner at Addams Road. He testified that he recalled that as he approached the intersection of Yale Road and Hopedale Road, he was travelling at 60 km/hour, the posted limit. He testified that he throttled down for the curve, slowing his speed somewhat as he entered the curve so that he entered the curve at about 57 km/hour.

**22**  Mr. Nichols testified that he was travelling in the position he normally chose for that section of the roadway, away from the centre of the road, close to the shoulder on the right side and in the paved portion of the road. He agreed that there was a considerable width of the road that had no gravel, in the middle and toward the centre of the road. It was his testimony that he nevertheless avoided those areas because of a concern with approaching drivers crossing the centre line as they executed the curve.

**23**  He testified that as he was about half-way through the curve, he felt a shudder, tried to straighten out, but lost control and went into a skid. It was his testimony that he was on two wheels when he left the roadway and that this occurred past the apex of the curve.

**24**  Mr. Nichols could not recall the actual accident or much of what occurred at the scene or at the hospital. He did not recall making a statement to the police, the ambulance attendant, or to the RCMP. He did recall the RCMP officer stating that there would be no impaired charge. He could not recall, but did not deny, telling the RCMP investigating officer "I was daydreaming and I left the road." His evidence was that it ended up that that wasn't true.

**25**  It was his testimony that at the time he didn't know why he lost control and initially he was taking responsibility for it. He testified that the next day at the hospital he told his father to go to the scene to look for what could have happened. He agreed that he never suggested gravel to his father at the hospital. He stated that he later learned that gravel was the cause because of the physical evidence.

**26**  It was Mr. Nichol's testimony that he never knew the details of how he lost control and has never been able to say how the accident occurred.

**27**  A series of documents were admitted into evidence pursuant to an agreement that the documents constituted *prima facie* proof of what was said or recorded. The agreement does not extend to any expression of opinion in the documents. In that regard, these documents contain the following information that is of significance in relation to the accident:

1. Constable Moskaluk noted that there were no skid marks on the pavement, but noted furrow marks in the gravel and grass;
2. the police accident report makes no reference to gravel on the road or to road configuration factors as related to the cause of the accident;
3. there was no indication at the scene that alcohol was a contributing factor nor were there any physical symptoms of impairment;
4. the traffic accident worksheet sketch shows a skid mark on the gravel shoulder just after the intersection;
5. the officer at the scene noted that Mr. Nichols was eastbound on Yale Road West, approached a single slow left hand bend after approximately 5 kilometres of straight roadway, and that the tire marks indicated that the motorcycle went off the roadway well before the apex of the bend and straight along gravel shoulder;
6. CSO Moskolide spoke to Mr. Nichols who stated "I was daydreaming and I left the road. I wasn't even speeding";
7. photographs taken at the scene on the evening of the accident provide little assistance. They show many marks on the road and on the shoulder area at and near the scene. However, it is not possible to identify which, if any, of these marks were made by Mr. Nichol's motorcycle;
8. Mr. Nichols reported to the emergency room nurse during treatment that he had two jugs of draft at Dukes. Dukes was unable to provide any details due to a large number of motorcyclists at the pub following the yearly ride that Mr. Nichols had taken part in; and
9. Dr. Kousaie saw Mr. Nichols at the hospital following his admission. Dr. Kousaie records that Mr. Nichols told him that "the reason for the accident was an inattention. There was an emotional disturbance for him just prior to the accident and this is why the accident occurred." In his testimony at trial, Mr. Nichols accepted that was what he told the doctor at the time. He said that he believed that it was true at the time.

**28**  Todd Morrison did not witness the accident, but was the first on the scene. He testified that he was driving with his wife, and observed Mr. Nichols crawling in the tall grass. They drove to a farm and called 911 then came back to the scene to assist Mr. Nichols. In the process, they backed their vehicle right over the accident scene and were chastised by the police for disturbing the scene.

**29**  It was Mr. Morrison's testimony that he observed gravel on the road that evening. He stated that he also observed a skid mark or skid marks on the road in the area where he observed the gravel on the roadway. The mark or marks he observed, were heading east to the shoulder, ending at the shoulder. He identified the approximate location on photograph 8 of documents (marked Exhibit 12 in his video deposition and marked at trial tab 12 of Exhibit 2). Mr. Morrison agreed that he was making an assumption that the mark or marks he described in his testimony were caused by Mr. Nichols' motorcycle.

**30**  It was Mr. Morrison's testimony that there was always gravel on the road in that location. He testified that he observed the gravel swept off the road within a couple of days after the accident. It was his testimony that he had driven through the curve hundreds of times prior to October 1994. He agreed that if you entered the curve at an appropriate rate of speed, you could negotiate the curve without any difficulty.

**31**  He agreed that gravel shoulders are not at all unusual features of the roads in the community. He agreed that gravel gets onto the paved portion of the roadways in that area because of vehicles driving onto the gravel shoulder and spitting gravel onto the road.

**32**  Michael Heusken lived on the farm that surrounded the area of the intersection of Yale Road West and Hopedale Road. It was his testimony that over the years he has attended a number of accidents at this location, his estimate being over 20. He described attending at the scene of four previous motorcycle accidents at the site. It was his evidence that gravel was present on the roadway on these occasions.

**33**  Mr. Heusken testified that he attended at the scene of Mr. Nichol's accident to provide assistance. It was his testimony that he observed gravel on the road in the vicinity of the accident.

**34**  Mr. Heusken was an experienced motorcycle driver. It was his testimony that when he drove through the stretch of road where Mr. Nichol's accident occurred, he drove close to the centre because he knew that there was gravel on the road toward the shoulder and wanted to avoid it.

**35**  Mr. Heusken testified that prior to the accident the road was never swept of gravel. He testified that it was only after the accident that the District did start sweeping. It was his testimony that in the 20 or 30 years prior to the accident that he was not aware of the gravel ever having been swept from the road by the District. After the accident, the District swept the area frequently, for a time, and then eventually stopped again.

**36**  Montgomery Bradwell testified that he retrieved Mr. Nichols' motorcycle from the scene of the accident the following day. When he arrived at the scene in the early afternoon, he observed a grader and street broom cleaning the gravel off the area.

**The First Litigation**

**37**  Mr. Nichols retained the defendant firm in December 1994. At the initial interview he met with Kent Scarborough. Mr. Scarborough was called to the bar in 1986 following a career with the RCMP. He practises almost exclusively in the field of personal injury litigation.

**38**  Mr. Nichols testified that he told Mr. Scarborough in the initial interview that he lost control and that he had had one beer. They discussed gravel. In cross-examination he agreed that he told Mr. Scarborough at the first meeting that he lost control because of gravel. His explanation was that that was what he believed. Mr. Scarborough's recollection of the first meeting, consistent with his notes of the first meeting, was that Mr. Nichols told him that he hit some gravel and lost control, when the front tire slid out. I find that from the outset of the retainer, Mr. Nichols advised his counsel that the cause of the accident was that he hit gravel and lost control of his motorcycle.

**39**  Mr. Nichols advised Mr. Scarborough at the meeting that he estimated his speed was 60 km/hour. They discussed that there had been a history of problems at that corner. Mr. Scarborough advised Mr. Nichols from the outset of his opinion that the case would be difficult with respect to the issue of liability. They did not enter into a contingency agreement. Mr. Nichols was required by the terms of the retainer to fund disbursements. This was a consequence of the perceived difficulty of the case.

**40**  By letter dated December 6, 1994, the District was placed on notice of a claim. The letter states in part:

It is Mr. Nichols' position that the accident was caused both due to the improper design and construction of the roadway as well as due to a failure on the part of the District to remove loose gravel which had been allowed to accumulate on the road surface.

**41**  The First Action was commenced with the filing of a writ and statement of claim in January 1995. The action named the District as the only defendant. No allegations were made with respect to the pole. Apart from the instructions to commence the action, counsel did not obtain particular instructions from Mr. Nichol with respect to which defendants would be named and the nature of the allegations.

**42**  The statement of claim was not provided to Mr. Nichols for review prior to filing, although it was provided to him once it was filed. It contains an error in that it incorrectly identified the leg suffering the injury. Considerable time was devoted at trial to this no doubt embarrassing error. However, nothing turns on this error for purposes of this action since it was neither alleged or established that this error resulted in any damage or loss.

**43**  Mr. Scarborough testified that he turned his mind at the outset to the question of whether or not to make allegations with respect to the pole and to add the owner of the pole as a defendant. He concluded that the issue of the pole had to do with the amount of damage and not with how the accident occurred. He was of the opinion that the crux of the case was how the plaintiff left the roadway. In his opinion, the owner of the pole did not have an independent duty to the plaintiff. The pole was on a statutory right-of-way. As to the issue of potential liability under the ***Occupiers Liability Act***, *R.S.B.C. 1996, c. 337* (the "***Occupiers Liability Act"***) he did not see a basis for liability because in his opinion, there was no invitation to enter the premises. He decided not to name the owner of the pole or to make allegations about the pole. He did not discuss this with Mr. Nichols. He agreed that he did not conduct any legal research into the matter.

**44**  Alex Nichols, the plaintiff's father, was very much involved in dealing with the litigation. Mr. Scarborough recalled that he questioned counsel why the telephone pole was not being included. The plaintiff recalled his father raising the issue with counsel and recalled that counsel's reply was words to the effect of "first things first". It was his evidence that there was no discussion with counsel about the pros and cons of adding allegations with respect to the telephone pole.

**45**  Alex Nichols had provided information to Mr. Scarborough with respect to the history of the site, the presence of gravel, and names of witnesses.

**46**  In May 1995, Mr. Scarborough had a conversation with the adjuster on the file, Andrew Mitchell. Mr. Mitchell advised him of what he understood to be the circumstances, including that there was some evidence that Mr. Nichols had been drinking, that he left the pub emotionally distraught over the encounter with his wife, and that at least one witness reported that there was no gravel on the road that evening.

**47**  Mr. Scarborough took steps to obtain the accident records relating to previous accidents at the site and to obtain the District's documents. He retained Keith Godfrey, an accident analysis engineer, to provide a preliminary assessment of the claim. Mr. Godfrey did so by letter dated May 8, 1996 in which he identified three possible approaches:

1. that the District could have prevented gravel from accumulating by extending the paving on the southeast and southwest corners;
2. that the pole could have been eliminated and the north side pole supported directly;
3. that the corner could have been re-engineered to provide proper banking.

**48**  Upon receiving Mr. Godfrey's views, Mr. Scarborough reconsidered the question of bringing suit in relation to the pole. He consulted with his partner Karl Warner about the question. Mr. Warner shared his views that BC Tel did not have an independent duty to the plaintiff in the circumstances.

**49**  Mr. Scarborough then retained John Lisman, a highway and traffic safety engineer, to provide an opinion with respect to what part the condition and alignment of the roadway and traffic controls or other features may have played in the accident. Mr. Lisman was asked to assume that Mr. Nichols was travelling at an estimated speed of 60 km/hour and that he lost control on the loose gravel covering the road surface, causing the vehicle to fall over on its side. Mr. Lisman's report dated May 7, 1997 concludes:

Conclusions:

1. The inadequate superelevation of the eastbound lane decreased the safe speed at which the curve could be driven around to significantly less than the posted speed of 60 km/h, and increased the reliance on the surface friction factor to keep the vehicle safely in the curve.
2. The loose gravel lying on the curve road surface produced a low level of surface friction, causing the motor-cycle to skid, lose control and leave the paved lane.
3. The omission of the WA-7, 50 km/h speed tab from the WA-3L Curve Warning sign, would have led the motor-cycle driver to enter the curve at the too high speed of 60 km/h.
4. The location of the B.C. Tel. pole aggravated the severity of the crash and the injuries to Mr. Wayne Nichols' leg.

**50**  Having obtained the names of several potential witnesses from the plaintiff and his father, Mr. Scarborough retained an investigator to interview the witnesses both with respect to any information they might have with respect to the plaintiff's accident, but also with respect to any knowledge that they have about other accidents at the site. The investigators contacted Rita Grain who reported that gravel was a problem on that stretch of road, that there had been many accidents at the site, and that there was a lot of gravel on the road on the night of the accident. They tried to interview Delmar Maynard. Mr. Maynard's wife, however, reported that he had recently died. She said that she doubted that gravel was a factor in the accidents, but that she was aware of a number of accidents in that general location.

**51**  Mr. Scarborough secured documents, including transcripts from examinations for discovery, in relation to other accidents at the site. These, however, did not prove to be of assistance in relation to Mr. Nichols' case in that neither the presence of gravel nor the road configuration were noted as causal factors in any of those accidents. He testified that he was waiting until after examinations for discovery to obtain an accident reconstruction report.

**52**  Mr. Scarborough asked his partner, Stephen Herman, to assist with the file prior to the examinations for discovery. Mr. Herman was called to the bar in June 1986. He has carried on a civil litigation practise with about half of his work being in the area of personal injury litigation. Mr. Herman brought an additional aspect of expertise to the file in that he was a proficient and experienced motorcycle rider. He was a senior instructor with the BC Safety Council, and a certified licence examiner.

**53**  Mr. Herman testified that his invariable practice upon first involvement in a file is to review the entire contents of the file. I find that he did so in this case.

**54**  Mr. Herman testified that he contacted potential witnesses, Todd Morrison and Michael Heusken, and made notes of the conversations for the file. He believed that he had these conversations with the witnesses prior to the meeting with Mr. Nichols at which the firm's opinion was discussed.

**55**  It was Mr. Morrison's testimony in examination-in-chief, that he was never interviewed by anyone before being interviewed by counsel prior to giving his deposition in the second trial. He denied, in particular, having been interviewed by any representative of the defendant firm. In cross-examination, he agreed that he might have been interviewed by someone from a law firm acting for Mr. Nichols in the first litigation, but have forgotten about it. Mr. Heusken testified in examination-in-chief, that he had not been interviewed prior to the second litigation. He did not agree that he could have forgotten such an interview.

**56**  Mr. Herman has identified his handwritten notes of the conversations. I find that he did interview Mr. Morrison and Mr. Heusken, and that the witnesses' evidence to the contrary is mistaken. Mr. Herman's evidence was that, in his opinion, the evidence provided by these two witnesses was not going to resolve the issue with respect to causation of the accident.

**57**  Mr. Herman testified that having reviewed the file, including the comments of Mr. Godfrey and Mr. Lisman's report, he considered the question of the placement of the pole and the potential role of BC Tel in the litigation. He knew from his review of the pleadings that BC Tel had not been named. He was aware that his partner Karl Warner had also considered the issue, and was not impressed with the potential claim against BC Tel. In his view, what Mr. Lisman described was an aggravation of damages resulting from the pole. He concluded that he was satisfied that the plaintiff could blame the District and that the pole was not an issue that needed to be dealt with in the pleadings.

**58**  By this juncture, the police files and hospital records had been received. Mr. Scarborough testified that he was very troubled by the admissions against interest that these documents contained, which were inconsistent with what Mr. Nichols had told them about the accident. He arranged for a meeting with Mr. Nichols prior to the examination for discovery to discuss these concerns.

**59**  Mr. Herman testified that he shared these concerns at the time. He was concerned that there is an inference of ***negligence*** when a vehicle leaves the road in a single vehicle accident. Mr. Lisman had been asked to assume, for the purpose of his opinion, that Mr. Nichols had lost control because of gravel.

**60**  Mr. Scarborough testified that there was a meeting with Mr. Nichols prior to the discovery to discuss the concerns arising from the documents. It was his testimony that Mr. Nichols was told at the meeting that his evidence with respect to leaving the road because of gravel was crucial; that they were "dead in the water" without this evidence.

**61**  Mr. Herman testified that he believes, from a review of the file, that he had a meeting with Mr. Nichols in April, shortly after becoming involved in the file, and then a second meeting closer to the examination for discovery in June. He has no present recollection of the first meeting. However, the letter of April 1, 1998 to Mr. Nichols makes reference of concerns arising from the clinical records. He believes that consistent with his usual practice, he would have discussed the claim and the general process, as well as those records, at the meeting with Mr. Nichols.

**62**  Mr. Nichols agreed that his counsel reviewed various important documents with him in relation to the litigation, including the report from Dr. Kousaie and the police and hospital records. He could not recall that there was a meeting with counsel to discuss concerns arising from documents that counsel had received. He denied discussing his evidence prior to the discovery with Mr. Herman. He recalled no discussion with the lawyers about concerns arising from the documents. It was Mr. Nichol's evidence that never, either before nor after examination for discovery in the first litigation, did counsel ever tell him that it was crucial for him to be able to provide an explanation for how the accident happened.

**63**  I find that Mr. Nichols' recollection in this regard is mistaken. From the outset, Mr. Nichols had told his counsel that the accident occurred because of slipping on gravel. From the outset, his counsel had formed and communicated the view that the case, being a single vehicle accident with no witnesses, would be difficult on the issue of liability. The police files and clinical records contained admissions against interest that were contrary to what Mr. Nichols had told his counsel with respect to causation. They wrote to request a meeting to discuss these central concerns. I find that there was a meeting with counsel to discuss their concerns. I find further that Mr. Scarborough did advise Mr. Nichols of his view that without evidence from Mr. Nichols about the role of gravel, they would be "dead in the water". That was clearly Mr. Scarborough's view throughout, and I have no doubt that he expressed that view to Mr. Nichols.

**64**  Mr. Scarborough testified that at this juncture, prior to examination for discovery, the solicitor for the defendant showed an interest in settlement. Mr. MacMaster, the defendant's solicitor, had written seeking an early disclosure of the plaintiff's expert reports. It was Mr. Scarborough's view that this request was consistent with this interest.

**65**  In response to Mr. MacMaster's letter, Mr. Herman provided the letter prepared by Mr. Godfrey and Mr. Lisman's report. He testified that in his mind this was a difficult case. On the one hand, the damages were catastrophic, but on the other hand, liability would be very difficult. There was in his mind, in the circumstances, a real value to making an attempt to settle at an early stage.

**66**  It was Mr. Nichols' testimony that, apart from being shown a brief instructional video, there was no preparation for his examination for discovery. In particular, it was his testimony that counsel did not review his evidence with him before the discovery.

**67**  Mr. Herman testified that while he has no present recollection of a meeting with Mr. Nichols to prepare for his discovery, it was his invariable practice to meet with the client prior to an examination for discovery to prepare the client. He is certain that he would have followed his practice with Mr. Nichols. His practice was to show the client a video on discovery that had been produced by the Trial Lawyers Association, and then to meet with the client to explain the process and to review areas that were likely to be canvassed where preparation would be helpful. In this case, the particular areas of concern would be the circumstances of the accident and the admissions against interest. Mr. Herman was confident that these areas were canvassed with Mr. Nichols prior to the discovery.

**68**  While Mr. Herman had no present recollection of the meeting with Mr. Nichols, he testified that he does have a specific recollection that the evidence Mr. Nichols gave at his examination for discovery was inconsistent with the evidence that they had discussed before the discovery. Mr. Nichols had said prior to the discovery that he lost control because of the gravel. At the examination for discovery, his testimony was that he did not know why he went off the road.

**69**  I find that Mr. Herman did meet with Mr. Nichols prior to the examination for discovery, consistent with his invariable practice. Given his view that Mr. Nichols' evidence concerning the accident was the lynchpin of the litigation, and his concerns about the admissions against interest contained in the documents, I think it is inconceivable that he would have departed from his practice in this case.

**70**  Mr. Nichols did not recall much about his testimony at the examination for discovery. He agreed that at the examination for discovery in the original litigation, he could not say why he lost control. His explanation for the difference between what he said on discovery and what he told his counsel with respect to the cause of the accident was that he felt free to speculate with his counsel, but in the discovery, he was under oath and not prepared to speculate.

**71**  Mr. Scarborough recalled Mr. Herman discussing Mr. Nichols' evidence at the discovery. He recalled being upset because Mr. Nichols did not give evidence about his speed, the gravel, and the banking. Rather in his evidence at the discovery, Mr. Nichols provided no explanation for the accident, for what caused him to leave the road. It had been Mr. Scarborough's view from the outset that the case was based upon Mr. Nichols' evidence about how he left the road.

**72**  Following the examination for discovery, the attitude of the defendant's solicitor hardened. By letter dated November 19, 1998, Mr. MacMaster wrote to inquire if the plaintiff would abandon the claim. The letter states in part:

In my view, your client will not be able to prove on a balance of probabilities how the accident occurred and, therefore, his claim should be dismissed. Your client has no memory of any events leading up to the accident. He is completely unable to describe what occurred, what speed he was travelling, or anything else that pertains to the accident itself. There are no independent witnesses. There is nothing in your client's evidence or in any of the evidence which is currently known which would support the inference that some negligent act on the part of the District cause your client to go off the roadway.

Although your client wants the Court to infer that the presence of some gravel at the intersection prior to the accident scene caused him to lose control, on the evidence, it is just as reasonable to infer that your client went off the roadway because he was speeding, sleeping, emotionally distracted or because a dog or the proverbial black Chevrolet forced him off the road. Of course, when you combine your client's total absence of any memory in relation to how the accident occurred with the statements in the hospital records and to the police, to the effect that the accident occurred because your client was not paying attention, it creates a compelling case that your client is completely responsible for his injuries.

**73**  Mr. Herman testified that if he had felt that Mr. MacMaster had misstated Mr. Nichols' evidence, he would have written to correct the misstatement. He concludes from the fact that he did not write such a letter that Mr. MacMaster's summary of the evidence is accurate. I find that the letter contains an accurate summary of the evidence given by Mr. Nichols at his examination for discovery in the First Action.

**74**  Mr. Herman conducted an examination for discovery of the District's representative. He testified that he would have covered the areas of gravel, signage, elevation, banking, and the number of accidents at the corner. In preparation for the examination, he obtained a number of documents from the District including the District's policy with respect to grading, documents with respect to the history of accidents at the site, and documents with respect to the road configuration.

**75**  He recalled that he had not come away from the discovery with anything strong. The District had produced records of the accidents at the intersection. Pursuant to an internal policy, it would have followed up if the accidents reached a certain level. This intersection was, however, below that level. Mr. Herman recalls being disappointed to learn this.

**76**  Mr. Scarborough testified that after the examination for discovery, he concluded that it would be a waste to obtain an accident reconstruction report because they had no assumptions to provide upon which to base such a report. It was now his view that because the evidence he had anticipated Mr. Nichols would give did not materialize, the case had gone from being a difficult case to an impossible case. He stated that in his opinion, adding BC Tel would not have helped in that regard.

**77**  After a further discussion with his partners with respect to concerns about the issue of causation in light of the evidence given at the examination for discovery, Mr. Herman sought an opinion from Albert Roos, an experienced civil litigator, on the issue of causation. The opinion he received did not cause him to change his views with respect to the issue of causation. He believed that he could establish that there was gravel on the road at the time of the accident. However, he did not believe that there was evidence that could establish that Mr. Nichols lost control because of the gravel.

**78**  Mr. Nichols recalled that after the discovery, he met with counsel and was told that they did not think that he should carry on with the suit. He agreed that his father attended the meeting with him and that the meeting became somewhat heated when Mr. Scarborough took offence at Mr. Nichols father's suggestion that he was not fighting for his client. He denied that there was any discussion about pursuing a strategy to attempt to secure a settlement. He absolutely denied that there was any discussion of options. He denied that counsel ever told him that they were prepared to take the matter to trial if that was his wish. He did recall being told that if the case went to trial and he lost, he could face costs. He agreed that at some point counsel advised him that he was free to seek a second opinion.

**79**  Mr. Scarborough testified that following the examination for discovery, he and Mr. Herman met with Mr. Nichols and his father. The purpose of the meeting was to discuss the difficulties with the case in light of the evidence given at the discovery and the defendant's position. He recalled that they advised Mr. Nichols that he had not testified as they had anticipated. Now there was no evidence about how the accident had been caused, and no factual assumptions upon which to base the case with respect to causation. They discussed the recent correspondence from Mr. MacMaster. He recalled that they advised Mr. Nichols that the firm was prepared to take the case to trial, but that it was their opinion that the case could be lost at trial. They suggested a negotiation strategy to try to obtain the best settlement that could be achieved. They advised Mr. Nichols of his potential exposure to costs if the case was lost at trial. They advised Mr. Nichols that he could take his file to another firm for a second opinion. However, he chose not to do so.

**80**  Mr. Herman recalled meeting with his partner, Mr. Nichols, and his father. The purpose of the meeting was to make sure that Mr. Nichols understood what Mr. Herman viewed as the significant impediment to the successful prosecution of the claim. He recalled that they tried to explain the legal issue of causation and where they were left given the defendant's position and the state of the evidence. He recalled that there was a heated exchange between Alex Nichols and Kent Scarborough.

**81**  I find that the firm was prepared to take the case to trial. This is consistent both with the testimony of Mr. Scarborough and with the fact that subsequent to the meeting, the matter was set down for trial. I find that options were discussed with Mr. Nichols; that was the purpose of the meeting and in particular that a settlement strategy was discussed.

**82**  Following this meeting, Mr. Scarborough received a letter from Mr. Nichols' father. The letter states that the firm is dropping the case. Mr. Scarborough testified that this was an error. The firm was always prepared to take the case to trial if they received those instructions. He showed the letter to Mr. Herman who responded with a letter dated April 23, 1999 to Mr. Nichols that reiterated the concern that the case would likely be lost on the issue of causation if it went to trial. The letter recommended that efforts be made to secure a settlement, and sought instructions.

**83**  I find that Mr. Scarborough and Mr. Herman did not tell the plaintiff and his father that the firm was dropping the case. They did communicate their opinion that the case would likely be lost at trial on the issue of causation. They did explain the risk Mr. Nichols faced with respect to costs in the event of a loss at trial. This was upsetting news to both the plaintiff and his father.

**84**  Mr. Nichols recalled getting a letter although somewhat later than April 23, 1999, that he said he did not read. He agreed in cross-examination that he went along with a negotiation strategy.

**85**  Mr. Scarborough testified that following the letter of April 23, 1999, he received instructions from Mr. Nichols in a telephone conversation to negotiate with the District to try to obtain an offer of settlement. I find that Mr. Nichols instructed the firm to pursue a strategy of negotiation and that the firm did so.

**86**  In furtherance of these instructions, the matter was set down for trial and a without prejudice offer of settlement made to the District. However, the District rejected the offer on the basis that Mr. Nichols' claim would fail for want of any evidence on causation. Moreover, the District instructed its solicitors to set the matter down for summary trial pursuant to Rule 18A.

**87**  By letter to Mr. Herman dated September 20, 1999, in anticipation of the 18A application, Mr. MacMaster offered to recommend to the District a waiver of costs if the claim was discontinued. The letter states in part:

It is trite law that unsubstantiated theories of ***negligence*** do not ground a case against the defendant. We include the second case, ***Lee v. Chan***, as an example of how this proposition operates in relation to similar facts.

In ***Lee***, the plaintiff, who was a passenger in the defendant's vehicle during a single-car accident, brought on a summary trial application. The defendant could not explain why he drove off the road. He had no memory of the accident.

Madame Justice Loo noted that when a motor vehicle goes off the road or into the oncoming line of traffic, there arises a *prima facie* case that the driver was negligent which the driver must rebut. The defendant proffered a number of explanations as to what might have caused him to lose control of his vehicle. Madame Justice Loo termed these theories "pure speculation . . devoid of any evidentiary foundation" (at para. 30), citing Mr. Justice Hutcheon from ***Lee v. ICBC***, [*[1986] B.C.J. No. 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S097-00000-00&context=), to the effect that "the explanation must be based on evidence, not imagination" (ibid.). She found that the defendant had not met the *prima facie* case against him and awarded the plaintiff judgment.

While your client has a theory that the design or maintenance or both of the roadway caused his accident, the evidence supporting a deficiency in either respect is negligible. More importantly, however, there is no evidence that any such deficiency, if it existed, caused or contributed to your client's accident. He cannot recall what portion of the roadway he was travelling on, how fast he was going, what he was doing or even where he was looking at the time of the accident. In such circumstances, it is impossible to say what was the author of his crash. To suggest that the roadway was to blame is nothing more than speculation. Indeed, your client is not able to rebut the presumption that the accident was caused by his own ***negligence***.

As we are now incurring costs further to the preparation of our application materials, we would appreciate hearing how you intend to address this flaw in your client's case. If this matter is dismissed further to our application, we intend to bring this letter to the attention of the presiding justice in relation to the issue of costs.

|  |  |
| --- | --- |
| (emphasis added) |  |

**88**  Mr. Herman identified his handwritten note of a telephone conference with Mr. Scarborough and Mr. Nichols in which Mr. Nichols instructed the firm to discontinue, if that's what had to be done. The note stated that Mr. Nichols said that he had no money and could not afford the risk.

**89**  Following this conversation, Mr. Herman wrote seeking a contribution of $5,000 from the District toward out of pocket expenses. That offer was accepted by the District as evidenced by the letter of December 6, 1999 from Mr. MacMaster.

**90**  Mr. Nichols testified that some time later, he signed a release that he also did not read. In cross-examination, he could not recall reviewing a series of letters from counsel advising of the progress. He could not recall counsel seeking his instructions with respect to settlement. He could not recall giving any instructions, but did not dispute the accuracy of the notes recording the conversations.

**91**  In the result, the action was settled for $5,000 which was applied to disbursements. I find that this settlement was pursuant to instructions given by Mr. Nichols in the telephone conversation of October 19, 1999. The firm wrote off $4,700 in disbursements. The file, except for correspondence and memos, was returned to the plaintiff.

**92**  Some years after the litigation was settled, Mr. Nichols learned of further accidents at the same site and became concerned about the quality of his representation in the litigation. The present action was commenced.

**Subsequent Events**

**93**  In June 2000, there was a fatal single vehicle collision at the intersection of Yale Road West and Hopedale Road. Michael Weightman, the Regional Coordinator for Road Safety and Loss Prevention with ICBC attended at the scene a few days later to look at the intersection to see if he could determine any of the causal factors of the accident. He met Alex Nichols at the site. Mr. Nichols provided him with information he had collected with respect to the intersection, and with his opinion with respect to defects in the configuration of the road.

**94**  Alex Nichols also provided information that he had collected about accidents at the site to Peter Clough, a journalist with The Province newspaper. Mr. Clough wrote an article about the site that he titled "B.C.'s Most Dangerous Telephone Pole" that was published in the July 12, 2000 edition of The Province.

**95**  ICBC then partnered with Telus to see if the pole was required to be where it was located. In the result, ICBC and Telus shared the costs of the removal of two of the support poles at the intersection of Yale Road West and Hopedale Road, including the pole involved in Mr. Nichols' accident.

**96**  Gino De Bartolo, is a technician employed by Telus. He testified that he was requested by ICBC in the summer of 2000 to relocate a pole to correct a hazardous road condition. He testified that BC Tel would respond to any expression of concern with respect to the placement of its poles. To his knowledge, the request in 2000 was the first time any concern had been expressed to BC Tel or Telus with respect to the placement of the pole.

**97**  He removed the pole that was involved in Mr. Nichols' accident. It was his evidence that the pole had been replaced some time in the mid-1980s. It had been removed and replaced on December 15, 1999, as part of a maintenance renewal.

**98**  It was his evidence that the general policy with respect to the replacement of poles is to replace them where the old pole was located wherever possible.

**99**  It was his evidence that Telus does not keep track of accidents involving poles. He testified that with respect to the initial placement of poles, the policy is to try to set poles away from the road and curve so that trucks turning won't hit them.

**100**  In 2001, in conjunction with the City of Chilliwack, ICBC commissioned Delcan to undertake a traffic operations and safety review of certain identified curves and sections of rural roads on the outskirts of Chilliwack. This was part of an ongoing process of ICBC to attempt to improve highway safety. Mr. Weightman testified that a collision history creates the formula for cautionary benefits. However, not every section of road with a collision history receives any funds for improvements.

**101**  One of the sections included in the study was the Yale Road West curve at Hopedale Road. The report made several recommendations for improvements. These were subsequently implemented, with ICBC sharing in the costs. The improvements were raised pavement markings, an advance sign indicating Hopedale Road is intersecting with Yale Road, chevrons to indicate the curve, improved roadside delineation, and a section of the shoulder of Hopedale Road was paved.

**102**  Mr. Weightman testified that until June of 2000, to his knowledge, no one at ICBC was aware of any history of accidents at the intersection of Yale Road West and Hopedale Road. To his knowledge, no one at the District of Chilliwack was aware of a history of accidents. It was his evidence that Mr. De Bartolo, the Telus representative he dealt with in relation to the pole, was not aware of any history of accidents at the site. It was his evidence that in June 2000, he was aware of no central data bank that would track intersections throughout the province, or pole by pole through the province, by which a history of accidents at a particular location could be traced.

**THE FIRST ACTION - Were the Solicitors Negligent?**

**103**  The approach to be taken by the Court in a solicitor's ***negligence*** case was described by Madam Justice Satanove in ***Cridge v. de Vooght***, [*2004 BCSC 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S38W-00000-00&context=) [***Cridge***]. First, the Court is to determine if the solicitors breached their contract or duty of care to the plaintiff. If so, the Court must assess what, if any, damages were caused by the breach. The plaintiff must establish that the breach caused a loss and that the loss has a real value. In that regard, as Satanove J. stated the following at para. 9:

The courts have often referred to lawyers' ***negligence*** cases as containing a "trial within a trial". Simply put, in order to assess damages caused by a lawyer's ***negligence*** in the context of litigation, a plaintiff must show that if the lawyer had exercised a reasonable degree of skill and care the plaintiff would have had a reasonable prospect of success in the litigation (***Hagblom v. Henderson***, [*[2003] 7 W.W.R. 590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-F528-G23X-00000-00&context=) (Sask. C.A.); ***Gorieu v. Simonot***, [*[1982] 6 W.W.R. 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6W1-FBN1-20TR-00000-00&context=) (Sask. Q.B.); ***Prior v. McNab*** [*(1976), 16 O.R. (2d) 380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F60C-X3FY-00000-00&context=) (H.C.J.)).

**104**  These damages are measured by the value of the lost chance to recover more than the amount actually recovered in the original litigation. The purpose of the second trial is to establish if the plaintiff had a "reasonable probability of realizing an advantage of real monetary value": ***Cridge*** at para. 12 citing ***Pan-Asia Development Corp. v. Smith*** [*(1996), 31 C.C.L.T. (2d) 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61TS-00000-00&context=) (B.C.S.C.).

**105**  The standard of care of a solicitor was described by Justice LeDain, speaking for the Court, in ***Central Trust v. Rafuse***, [*[1986] 2 S.C.R. 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=) at para. 58 [***Central Trust***] as follows:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken: see ***Hett v. Pun Pong*** [*(1890), 18 S.C.R. 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3N1-FCYK-23NX-00000-00&context=) at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "Lawyers -- ***Negligence*** -- Standard of Care", 63 Can. Bar Rev. 221 (1985).

**106**  The jurisprudence with respect to the application of this standard to the conduct of counsel conducting civil litigation was summarized by Baker J. in ***Banay v. Christie & Co.***, [*2001 BCSC 1165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6174-00000-00&context=) at para. 24, [*[2001] B.C.T.C. 1165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6174-00000-00&context=) [***Banay***]:

In ***Brenner v. Gregory***, [*[1973] 1 O.R. 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0C6-00000-00&context=), [*30 D.L.R. (3d) 672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0C6-00000-00&context=), at p. 677 of the latter report, Justice Brenner said:

1. In an action against the solicitor for ***negligence*** it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it ...

To the same effect, see ***Graybriar Industries Ltd. v. Davis & Co.*** [*(1990), 46 B.C.L.R. (2d) 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0N4-00000-00&context=) (S.C.).

**107**  The allegations of ***negligence*** contained in the Third Amended Statement of Claim are as follows:

1. failure to commence proceedings against the B.C. Tel (now known as Telus);
2. failure to make allegations against the District of Chilliwack with respect to the issue of the placement of the pole;
3. failure to conduct adequate legal research into the liability of BC Tel;
4. failure to conduct a proper search of all relevant documents of the District of Chilliwack;
5. failure to interview all witnesses to the accident;
6. failure to adequately prepare the plaintiff for examination for discovery; and
7. negligently advised the plaintiff to accept an improvident settlement.

**Failure to Commence Proceedings against BC Tel and to Make Allegations against Chilliwack with Respect to the Pole**

**108**  The plaintiff submitted an expert report with respect to the standard of the ordinarily competent counsel from Gordon Turriff Q.C. Mr. Turriff opined that the ordinarily competent counsel would have provided a written opinion to his client about the prospects of suing the telephone company and sought instructions from his client about whether to commence proceedings.

**109**  It is clear although both Mr. Herman and Mr. Scarborough considered the issue and formed an opinion with respect to the issue of the pole, they did not provide this opinion in writing to Mr. Nichols and they did not seek instructions from him with respect to this specific issue. Rather, they sought instructions from Mr. Nichols to commence an action and proceeded on the basis that the choice of parties fell within the scope of their responsibility within that retainer.

**110**  The defence introduced no expert opinion and the substance of Mr. Turriff's opinion was not addressed in cross-examination. Counsel on behalf of the plaintiff submits that it therefore follows that the failure to seek instructions was negligent.

**111**  Counsel for the defendants submitted that Mr. Turriff's evidence as to the standard of care of a solicitor must be considered in the context of the limitations suggested in ***Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp***, [1978] 3 All E.R. 571 at 582 (Ch. Div.) [***Midland Bank***]:

... The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence of what amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the Defendants is of little assistance to the court, whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which is the court's function to decide.

**112**  The British Columbia Court of Appeal in ***R. & L. Contracting Ltd. v. A and B and others*** [*(1981), 28 B.C.L.R. 342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B05K-00000-00&context=) (C.A.), after citing this passage of ***Midland Bank*** with approval, concluded that it was not improper for a trial judge to arrive at an opinion with respect to the standard of care, independent of the expert opinion.

**113**  In ***Startup v. Blake***, [*2001 BCSC 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2SW-00000-00&context=) at para. 68 [***Startup***] Kirkpatrick J., as she then was, cited with approval the following description of the duties of counsel as summarized by Riley J. in ***Tiffin Holdings v. Millican*** [*(1964), 49 D.L.R. (2d) 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-F81W-219M-00000-00&context=) (Alta. S.C.) [***Millican***] as follows:

It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed.

....

**114**  At para. 67 of ***Startup***, Kirkpatrick J. approved of the following obligations of a lawyer enumerated in ***Millican***:

The obligations of a lawyer are, I think, the following:

1. To be skilful and careful.
2. To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
3. To protect the interests of his client.
4. To carry out his instructions by all proper means.
5. To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
6. To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

**115**  I agree with that formulation of counsel's duty. In the present case, counsel were retained to commence and prosecute the First Action. They did so. As stated earlier, counsel turned their minds to the issue of the pole and concluded that it was not appropriate to add BC Tel as a party or to make allegations concerning the pole. Counsel received instructions to commence an action and did so. Although plaintiff's counsel characterizes the ***negligence*** as failing to start an action within the limitation period, the First Action was commenced in a timely fashion.

**116**  The pole was clearly a matter that was on the mind of Mr. Nichols and his father. The experts that the firm consulted had raised it as a possible aspect of liability. In the circumstances, it would have been preferable for counsel to have reviewed their opinion on this issue with Mr. Nichols. Such a review need not have been a formal written opinion, but it would have been better practice for it to have been recorded, at least as a memo to file.

**117**  However, in my view, their failure to do so does not amount to ***negligence***. In my view, the decisions of which parties to name and which allegations to include in the action fell within the scope of the instructions the firm had received to commence an action. This was a matter that fell within the scope of discretion left to counsel. The decision of which parties to name is a matter of professional judgment. If it is the plaintiff's contention that it is counsel's duty to seek specific instructions from the client about which parties to name and then, to name those parties, I reject that contention as it negates the very thing the client seeks from counsel; namely, the application of professional judgment.

**118**  There is an additional difficulty faced by the plaintiff in this respect. Even if it is the case that the failure to provide their opinion in writing concerning the issue of the pole to Mr. Nichols was negligent, that ***negligence*** did not result in any loss or harm. The firm provided Mr. Nichols with the statement of claim. He was aware that the issue of the pole was not being pursued. There is no suggestion that receiving an opinion in writing that BC Tel not be named would have made any difference.

**119**  Although Mr. Turriff does not address the substance of the opinion he states should have been provided to Mr. Nichols, the plaintiff must be taken to submit that the opinion reached by the defendants with respect to the issue of the pole was one that a reasonably competent solicitor would not have held.

**120**  Plaintiff's counsel contends that BC Tel owed a duty to the plaintiff pursuant to the ***Occupiers Liability Act***. Counsel contends that this duty was breached because the pole was placed so that it constituted a danger to those, such as the plaintiff, who lost control of their vehicles and left the road on the curve. Counsel submits that the pole need not have been placed in that location to provide support for the telephone line. Thus, counsel submits, BC Tel should have been named. Had BC Tel been named, Mr. Nichols could have recovered for at least some portion of his loss even if the Court concluded that he was responsible for the accident.

**121**  Plaintiff's counsel relies upon the cases of ***Leischner v. West Kootenay Power & Light Co. Ltd.*** [*(1996), 70 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=) (C.A.) [***Leischner***] and ***Kennedy v. Waterloo County Board of Education*** [*(1999), 45 O.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4H3-00000-00&context=) (Ont. C.A.) [***Kennedy***] in support of this proposition.

**122**  The facts in ***Kennedy*** were summarized in the judgment of the Court of Appeal at paras. 1-2 as follows:

Gregory Kennedy, an 18-year-old student, left school on his motorcycle at lunch hour to buy some gum. He drove too fast out of the school parking lot along the driveway out to the road. He lost control of his motorcycle, hit the curb and went flying off. When he landed, his head hit a bollard situated on school property on the grass beside the sidewalk by the driveway. Although he was wearing a helmet, his impact with the bollard caused catastrophic injuries, including complete immobility and inability to communicate or to recall past events.

At trial the judge found that the accident (as opposed to the damage) was caused solely by Mr. Kennedy's ***negligence***. While that finding is not disputed on appeal, what is in issue is whether the Board's action in not removing the bollards was an actionable breach of duty to the appellant, as it contributed significantly to the damage he suffered in the accident. It is undisputed that had Mr. Kennedy hit the ground instead of the bollard, his injuries would have been much less severe because the catastrophic consequences of the accident were caused by his head hitting the bollard.

**123**  The bollards had been installed in 1977 together with chains to serve as a boundary to the schoolyard. The Court of Appeal described the installation as follows at para. 5:

In or around 1977 the Board erected a barrier on the grass around the school sports field adjacent to the sidewalk. The barrier bounded the roadway from the front of the school and the student parking lot and out to the public street. The barrier consisted of a row of 22 bollards, 15 feet apart and connected by chains. The bollards were made of steel encased in cement, each over three feet high as well as four feet below ground with a circumference of six to eight inches. Each was capable of stopping a moving vehicle.

**124**  In 1986 the chains were removed, leaving the bollards with no function. The Court of Appeal concluded that the trial judge had erred in dismissing the action against the School Board and that the Board should have removed the bollards when it removed the chains to discharge its duty to keep the premises reasonably safe under the ***Occupiers Liability Act***.

**125**  The first thing to note about ***Kennedy*** is that the Court of Appeal decision was pronounced in June 1999. Accordingly, had the defendants considered the case at the time they were coming to their opinion about the issues surrounding the pole, the reasons would have been those at trial where the court found no liability on the part of the School Board. There are, in addition, important distinctions with respect to the facts; in particular, that after 1986 the bollards served no purpose whatsoever.

**126**  There are likewise important distinctions surrounding the facts and basis for liability in ***Leischner*** notably the conclusion by the Court of Appeal that West Kootenay Power and Light Co. had a very strict duty of care because of the dangerous nature of its undertaking. ***Leischner*** concerned injuries suffered by the plaintiff when the mast on a sailboat touched a power line that hung 22 feet above a boat launching ramp.

**127**  Counsel for the defendants submits that BC Tel did not owe such a duty to the drivers of the errant vehicles that left the road through the ***negligence*** of the driver. I have concluded that it is not necessary to resolve this issue in this case.

**128**  I accept that the decisions relied upon by the plaintiff do suggest the possibility that BC Tel owed a duty under the ***Occupiers Liability Act***. These authorities suggest that the defendants' opinions with respect to this issue might not have been sound. However, as the authorities summarized by Baker J. in ***Banay*** demonstrate, a solicitor will be liable for an error in judgment or mistake in view of the law if an ordinarily competent solicitor would not have made or shown it. In my view, on the evidence and submissions in the case at bar, it appears that the questions of whether or not in all the circumstances allegations with respect to the placement of the pole should have been made against the District and whether or not to join BC Tel as a party were matters of judgment about which reasonable counsel could differ. The plaintiff has not established that the opinion formed by the defendants was one that would not have been held by a reasonably competent solicitor or one that breached the standard of care. It follows that this opinion, even if mistaken, was not negligent.

**Failure to Conduct Legal Research**

**129**  Justice LeDain in ***Central Trust*** at 208-209 provided the following clarification with respect to a solicitor's duty to know the law.

The requirement of professional competence that was particularly involved in this case was reasonable knowledge of the applicable or relevant law. A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. The duty in respect of knowledge is stated in 7 *Am Jur* 2d, Attorneys at Law para. 200, in a passage that was quoted by Jones J.A. in the Appeal Division, as follows: "An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." See Charlesworth and Percy on ***Negligence*** (7th ed. 1983), pp. 577-78 to similar effect, where it is said: "Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor." The duty or requirement of professional competence in respect of knowledge is put by Jackson and Powell, *Professional* ***Negligence*** (1982), at pp. 145-46 as follows: "Although a solicitor is not bound to know all the law,' he ought generally to know where and how to find out the law in so far as it affects matters within his field of practice. However, before the solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched" ...

**130**  The plaintiff relied upon Mr. Turriff's opinion that the ordinarily competent counsel would have done such research as required to enable him or her to give an opinion about the liability of the telephone company.

**131**  Mr. Scarborough and Mr. Herman agreed that they did not conduct legal research with respect to the issue of the possible liability of BC Tel or with respect to the District in relation to the issue of pole placement. Both defendants turned their minds to the issue and formed an opinion. In addition, they consulted with their senior partner, the defendant Karl Warner, seeking his opinion with respect to the issue. They were of the opinion that they did not require any additional research to permit them to form an opinion.

**132**  The plaintiff has not established, in my view, that the circumstances were such that the reasonably competent solicitor at the time would have been alerted that further research ought to have been conducted or, in Mr. Turriff's terms, that such research was required. The First Action was an area in which both Mr. Scarborough and Mr. Herman carried out the majority of their practice. They were alive to the issue. They concluded that research was not required. The plaintiff has not established that this was a conclusion that a reasonably competent solicitor would not have reached in those circumstances.

**Obtaining Documents**

**133**  This allegation was not pursued at trial. In any event, on the evidence I find that the defendants did take appropriate steps to obtain relevant documents from the District of Chilliwack.

**Failure to Interview Witnesses**

**134**  There are two primary definitions of the noun witness'. The first definition is a person who sees an event take place. There were no such witnesses to this accident other than Mr. Nichols. No one else observed the accident. Thus, accepting that a reasonably competent solicitor would ensure that the evidence of all witnesses to an accident was obtained, there were no such witnesses.

**135**  Mr. Turriff opined that ordinarily competent counsel would have "interviewed all persons who arrived at the accident scene." In cross-examination, Mr. Turriff clarified that what he intended to say was that counsel would "take all reasonable steps to locate and interview" such persons. He stated that what he was intending to convey was that reasonable efforts should be taken to determine who might have useful evidence and that those people should be interviewed.

**136**  The defendants obtained the names and contact information of persons who arrived at the scene and who might have useful evidence from the plaintiff and his father. An investigator was retained to conduct interviews. In addition, I have found that Mr. Herman interviewed Mr. Morrison and Mr. Heusken who attended at the scene. In my view, the defendants took reasonable steps, in the circumstances, to determine who might have useful evidence, and to locate and interview such persons.

**137**  Alex Nichols provided Mr. Scarborough with the names of several persons who were not interviewed. However, their evidence was not introduced at trial and there is, therefore, no basis to conclude that these persons would have had any useful evidence or that they were people who should have been interviewed.

**138**  At trial, the plaintiff was critical of the defendants for failing to obtain the evidence of "the best witness", Delmar Maynard. Mr. Maynard was on the list of persons the investigators had been instructed to interview. He died before they were able to obtain his evidence. There is no evidence that the defendants knew or ought to have known that Mr. Maynard was likely to die. Mr. Maynard was not a witness to the accident. His evidence would have been evidence in relation to the history of the site. However, the defendants were aware of that history and were taking steps to collect evidence in relation to that history. In my view, no breach of the standard of care has been established in relation to Mr. Maynard's evidence.

**139**  Finally, and in the alternative, the plaintiff was critical of the solicitors for failing to communicate with Mr. Morrison and Mr. Heusken "in any real sense". With respect to the evidence of Mr. Morrison, the criticism is in relation to an alleged failure to obtain a diagram of the scene and greater specification with respect to a skid mark or marks he saw at the scene. With respect to Mr. Heusken, the criticism is with respect to a failure to explore his evidence and opinions with respect to the history of accidents at the site.

**140**  The consideration of whether reasonable steps were taken by the solicitors to obtain evidence in the case at bar must take place in light of the fact that: there were no witnesses to the accident and the solicitors were aware of this; the solicitors were already aware of the history of accidents at the site and were taking steps to investigate and document that history; and the solicitors were aware through Mr. Godfrey and Mr. Lisman of concerns with respect to the configuration of the road and the placement of the pole. The development of evidence involves many choices and exercises of professional judgment. In my view, the judgements exercised by the defendants in the case at bar in this regard were reasonable and appropriate.

**141**  With respect to the evidence of Mr. Morrison, it must be noted that Mr. Morrison stated at trial that he observed a mark or marks on the road when he arrived at the scene and that he was assuming that this mark or marks had been caused by Mr. Nichols' motorcycle. At trial, it was not established that this was anything more than an assumption. In other words, the plaintiff did not establish that his motorcycle made the mark or marks observed by Mr. Morrison. There is no evidence that the defendants' opinion or advice would have changed had they obtained such evidence. Accordingly, even if the conduct of the solicitors with respect to Mr. Morrison's evidence fell below the standard of care, and I have concluded that it did not, the failure to obtain his evidence with greater precision did not cause any harm to the plaintiff.

**Preparation for Discovery**

**142**  I have found that Mr. Herman did meet with Mr. Nichols prior to his discovery to review his evidence and prepare him for discovery. This meeting followed an earlier meeting at which counsel discussed concerns related to Mr. Nichols' evidence arising from the hospital records and police files. I find that the defendants did conduct appropriate preparation of Mr. Nichols for his discovery.

**143**  Moreover, it is clear that the difficulties with Mr. Nichols' evidence at his examination for discovery had nothing to do with any preparation or lack thereof. The critical issue with respect to liability was causation. Mr. Nichols' evidence with respect to his recollection of how the accident came about was, therefore, the central liability issue to be explored in his discovery. Mr. Nichols testified that from the outset he has never had any recollection of how the accident occurred. It was his evidence that his statements to the defendants with respect to the role gravel played in the accident were his speculation. Under oath on discovery, he could not speculate. His evidence at his discovery was as summarized in Mr. MacMaster's letter; namely, that he had essentially no evidence with respect to that issue. Thus, this is not a situation in which additional or different preparation would have produced a different result in the examination.

**Negligent Recommendation with Respect to Settlement**

**144**  The plaintiff relies upon ***Fawell v. Atkins*** [*(1981), 28 B.C.L.R. 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2VP-00000-00&context=) (S.C.) [***Fawell***]. ***Fawell*** was a solicitor's ***negligence*** case arising from an action for damages resulting from a motor vehicle accident. Liability was very much at issue in the original action. Mr. Justice Verchere found at 35 that in the "state of the evidence the views of an independent witness would obviously be of great importance". Counsel were made aware of the existence of an independent witness to the accident who could corroborate the evidence of the plaintiffs, but did not follow up to interview her and obtain her evidence. The solicitors urged the plaintiffs to settle on the eve of trial. Verchere J. concluded that it was negligent of the solicitors to proffer their advice without having first obtained and considered the evidence of the witness.

**145**  In the present case, I have found that Mr. Herman did interview Mr. Morrison and Mr. Heusken. They were, however, not witnesses to the accident. Their evidence was not of a comparative level of "great importance" as that of the witness at issue in ***Fawell***. Moreover, the defendants were aware of the history of the site which is the nub of Mr. Heusken's evidence and they were aware that they had evidence which could establish the presence of gravel on the road that night.

**146**  While the defendants did not obtain a sketch from Mr. Morrison detailing the location of the mark he observed, it is clear that such a diagram would not have changed the solicitors' opinions with respect to the issue. Mr. Herman testified that he did not consider Todd Morrison's evidence was going to resolve what he considered to be the critical lynchpin. Mr. Herman's reservations with respect to the usefulness of this evidence in relation to causation were that it does not necessarily follow that if Mr. Nichols passed through gravel and lost control, that he lost control because of the gravel. He could have lost control on gravel, but not because of gravel. In addition, while Mr. Morrison stated that Mr. Nichols lost control on gravel, he did not observe the accident. He was not in a position to say that the mark he observed was made by Mr. Nichols' motorcycle.

**147**  There is a further distinguishing feature. In ***Fawell***, Verchere J. found at 38:

Insofar as it is necessary to consider the question of responsibility for the course that the plaintiffs took, I am satisfied from their evidence that they were ready and willing on the morning of the trial to proceed with their action; and further that if they had been fully, i.e., properly, advised of the effect of Miss Davidson's evidence they would not have agreed to settle despite the well-known difficulty in forecasting the outcome of litigation. In short, I am satisfied that if the plaintiffs had been fully and properly advised on the basis of all the evidence that was available to them and to their solicitors, they would not have undertaken the course that they followed.

**148**  In the case at bar, Mr. Nichols has testified about his financial difficulties at the time and his concerns with respect to the financial risk he faced if the case were lost at trial. It was his testimony that he accepted the $5,000 settlement because he did not want to risk owing any more money. Mr. Herman has testified that the recommendations with respect to settlement were based in part, on what Mr. Nichols had told them about his tolerance to risk. Given Mr. Nichols' level of tolerance to risk, in all of the circumstances, I am not satisfied that he would have instructed counsel to take the matter to trial even if he had been fully advised on all of the evidence that was available to his solicitors.

**149**  I conclude that Mr. Scarborough and Mr. Herman did have an adequate understanding of the evidence in relation to causation at the time they presented their opinion to Mr. Nichols. There was, in my view, no breach of the standard of care in this respect.

**Summary with Respect to the Allegations of *Negligence***

**150**  In the spring of 1999, solicitors for the District were bringing on an application pursuant to Rule 18A to have the claim dismissed on the basis that, given his evidence on examination for discovery, the plaintiff would be unable to discharge his burden of proof with respect to causation. Mr. Scarborough and Mr. Herman were of like mind.

**151**  Causation was clearly a central issue in the case. The solicitors sought a second opinion with respect to the issue. They were prepared to take the case to trial; however, they quite properly informed Mr. Nichols of their opinion with respect to the prospects of success and the risks of proceeding. They had conducted an adequate investigation prior to forming this opinion. They proposed a strategy to attempt to achieve a settlement. They provided Mr. Nichols with the opportunity to take his file to another firm and stated that they would cooperate with the new firm if he did so.

**152**  Mr. Nichols chose not to seek a second opinion. He instructed the firm to adopt the strategy of settlement. He did so on the basis of his assessment of the pros and cons of proceedings. The firm attempted to obtain an offer of settlement, consistent with these instructions. That strategy did not succeed, no doubt because the solicitor for the District took the same view of the evidence with respect to causation as did Mr. Herman and Mr. Scarborough. Counsel did persevere further and were able to obtain a modest contribution to disbursements.

**153**  The defendants took appropriate steps in the prosecution of the litigation. They conducted appropriate investigations. They identified the relevant issues and exercised their professional judgment with respect to those issues. While other counsel may have come to a different conclusion with respect to that exercise, for example, with respect to the question of the significance of the pole, it has not been demonstrated that the view taken by Mr. Scarborough and Mr. Herman was one that a reasonable solicitor would not hold. I have concluded that the defendants satisfied the duty of care owed to Mr. Nichols through the course of their retainer. The claim is therefore dismissed.

**THE FIRST ACTION - the Trial within a Trial**

**154**  In the event that I am wrong in my finding as to the ***negligence*** of the members of the firm, I will address the issues of the original claim.

**Causation**

**155**  When a motor vehicle goes off the road or into the oncoming line of traffic, there arises a *prima facie* case that the driver was negligent which the driver must rebut, ***Redlack v. Vekved*** [*(1996), 82 B.C.A.C. 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S10D-00000-00&context=) (C.A.) leave to appeal dismissed, [*[1996] S.C.C.A. No. 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-F8D9-M23S-00000-00&context=). The plaintiff submits that this inference has been rebutted in the case at bar by the process of elimination and by simple logic. The defendants submit that the plaintiff's case on causation amounts to nothing more than speculation and, citing ***Lee (Committee of) v. Chan*** [*(1997), 29 B.C.L.R. (3d) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21KJ-00000-00&context=) (S.C.), submits that such speculation is not sufficient to discharge the plaintiff's burden of proof.

**156**  The plaintiff submits that there are, in addition to road conditions, five possible causes of the accident. These are impairment, inattention, speeding, mechanical failure and driver inexperience. I agree with the plaintiff that mechanical failure and driver inexperience can be eliminated as possibilities. I will now consider the other possibilities in turn.

**Impairment**

**157**  The plaintiff submits that alcohol can be eliminated as a factor on the basis of Mr. Nichols' testimony that he consumed one or at most two beer, Constable Moskaluk's note of no noticeable odour of alcohol and no sign of impairment, and the fact that no impaired charge was laid. However, the police report also contains a note that Mr. Nichols told the nurse that he had two jugs of beer at Duke's. The ambulance crew report contains a note of the strong odour of alcohol on Mr. Nichol's breath.

**158**  I agree that it does not appear on the evidence that Mr. Nichols was impaired. I do not agree that, on the state of the evidence, alcohol can be entirely ruled out as a causative factor.

**Inattention**

**159**  The plaintiff submits that his admissions against interest with respect to the cause of the accident being inattention should be discounted as the product of shock and sedation. He submits that when he made the statements he did not know what caused the accident and was assuming responsibility. However, the police report states that he was coherent at the time he made the statement. Moreover, Mr. Nichols did not say to the police and doctor that he did not know what had happened; he said he was daydreaming.

**160**  It is clear that Mr. Nichols abruptly left Dukes in a state of emotional upset when his ex-wife arrived in the company of her new boyfriend. Thus there is, on the uncontraverted evidence, a basis or reason for lack of attention.

**161**  The plaintiff submits that, according to Mr. Nichols' evidence, he anticipated the curve; therefore, inattention could not have been the cause. In addition, the plaintiff submits that inattention can be ruled out by geometric considerations in that if Mr. Nichols had lost control before he engaged the curve, he would have continued in a straight line following that trajectory and would have missed the pole.

**162**  Mr. Nichols' evidence about the circumstances of the accident must, I think be viewed with some caution given the time that has passed since the accident and the fact that it appears from the summary of his evidence on discovery contained in Mr. MacMaster's letter, that his present evidence contains more detail about the circumstances than he was able to provide in 1998. For example, Mr. MacMaster states that on discovery Mr. Nichols was not, in 1998, able to say where he was on the roadway or how he left the roadway. I have concluded that Mr. MacMaster's summary of the evidence is accurate. The letter was written at a crucial time in the litigation. Mr. Herman would have taken prompt action to correct any misstatement of the evidence. The fact that no such correction was made, is consistent with the summary being an accurate description of Mr. Nichols' evidence.

**163**  The submission with respect to the "geometric considerations" must be viewed in light of Mr. Lisman's opinion that when vehicles leave the road due to driver inattention, they don't do it at the beginning of the curve because the curve hasn't had any effect on the vehicle, they do it in the latter part.

**164**  In my view, on a review of the evidence, inattention cannot be ruled out as a likely cause of the accident.

**Speed**

**165**  The plaintiff submits that speed can be ruled out as a factor on the basis of his evidence that he was travelling at 60 km/hr, the speed limit, and that he throttled down as he entered the curve. Again, the reliability of this recollection must be queried in light of the fact that on discovery in 1998 Mr. Nichols' evidence was, according to Mr. MacMaster, that he was completely unable to describe what speed he was going at the time of the accident.

**Road Conditions**

**166**  The plaintiff, relying upon the report of Mr. Lisman, submits that the only remaining possible cause of the accident is the gravel, which in combination with an inappropriate speed limit and improper banking of the road caused the loss of friction and resulting loss of control. The plaintiff submits that all of the assumptions made by Mr. Lisman have been established on the evidence.

**167**  Mr. Lisman prepared a diagram of the scene which contain a black line with arrows showing the assumed trajectory of Mr. Nichols to the pole. The evidence of Wayne Nichols given at trial is that he was riding adjacent to the shoulder to avoid oncoming traffic, which he testified often straddles the centre line at this location.

**168**  The fact that oncoming traffic often straddles the centre line is also confirmed by Michael Heusken, a farmer who has lived at this location for all of his life. However, it should be noted that Mr. Heusken also testified that as an experienced motorcycle driver, when he drove on that section of road, he drove close to the centre to avoid the gravel and debris that collected close to the shoulder.

**169**  The evidence of Michael Heusken and Todd Morrison, is that on the date of the accident there was indeed gravel on the darkened "loose gravel area" marked on the diagram prepared by John Lisman.

**170**  Photographs in Exhibit 2, Tab 5 and 11 showing copious amounts of gravel at the accident location, were shown to Todd Morrison and Michael Heusken who confirmed that these photographs are representative of the amount of gravel they saw at the intersection of Yale Road West and Hopedale Road on the night of the accident.

**171**  Furthermore, the evidence of Todd Morrison is that there was a skid mark which began in the middle of the loose gravel area and travelled for a distance of 20 or so feet towards the pole.

**172**  As a matter of simple logic then, the plaintiff submits, since:

1. the plaintiff was travelling adjacent to the shoulder;
2. that portion of the lane passed through gravel; and
3. there were skid marks through the gravel,

the plaintiff must have lost control on the gravel.

**173**  However there are, in my view, substantial difficulties with this submission. The police report contains the observation that the plaintiff lost control "well before the apex and straight along the gravel shoulder". This evidence is inconsistent with the evidence of Mr. Nichols concerning his path of travel. It is inconsistent with the evidence of Mr. Morrison with respect to the location of skid marks he observed.

**174**  While Mr. Morrison and Mr. Heusken have testified about the presence of gravel on the road at the time of the accident, the police report makes no reference of gravel being a contributing cause to the accident. In addition, there is no gravel on the road in the photographs taken of the scene on the night of the accident.

**175**  Mr. Morrison and Mr. Heusken were shown photographs of the road which showed gravel on the asphalt. They stated that the road was in similar condition at the time of the accident. However, they were not shown the photographs of the road taken on the night of the accident.

**176**  The plaintiff refers to the lay witnesses' testimony concerning other accidents at the site and that gravel was present on the road on those occasions. It is clear that there have been other accidents at that location. However, the documents introduced into evidence with respect to those accidents do not support a conclusion that road conditions, including the presence of gravel, were responsible for the accidents.

**177**  On a review of all the evidence, I have concluded that it is not possible to conclude that the mark or marks Mr. Morrison described were made by Mr. Nichols' motorcycle. Given the differences between the police report and Mr. Nichols' account of his path and where the loss of control occurred, it is not possible to conclude that the trajectory contained in Mr. Lisman's report is an accurate re-creation of the path taken by Mr. Nichols' motorcycle. Finally, even if Mr. Nichols' motorcycle travelled through gravel, it does not follow and, in my view, has not been established, that the gravel caused him to lose control.

**178**  On a review of the all the evidence, I have concluded that the plaintiff has not discharged his burden of proof with respect to the issue of causation. In my view, factors other than the road conditions, and in particular inattention, cannot be ruled out. Indeed, in my view inattention is, on the evidence, the most likely cause.

***Negligence* of the District of Chilliwack**

**179**  Chilliwack was clearly under a duty of care to maintain the roadways within its jurisdiction. The duty is to keep the roads in a reasonable state of repair such that those using them may, exercising ordinary care, travel upon them with safety. The standard of care is to be assessed in light of all the surrounding circumstances, including the nature of the road, where it is situated, the amount of traffic, the requirements of the public who use the road, budgetary constraints, and the availability of qualified personnel; see ***Housen v. Nikolaisen***, [*[1998] 5 W.W.R. 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-JXNB-63GD-00000-00&context=) (Sask. Q.B.) [***Housen***], ***Just v. British Columbia***, [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=) [***Just***].

**180**  The plaintiff submits that the evidence with respect to the ***negligence*** of the District is "uncontradicted". It is the plaintiff's submission that the road was not kept in reasonable repair because of the accumulation of gravel tracked onto the road from the unpaved shoulders, the absence of a warning sign, the low superelevation around the curve, and the location of the pole towards the end of the curve, which increased the probability of it being struck by a vehicle running off the roadway. The plaintiff submits further that, because the District subsequently took measures to correct many of the deficiencies, it cannot be argued that it was not within the scope of its duty to take these measures.

**181**  The position of the defendants is that the plaintiff lead no or insufficient evidence to establish the standard of care in the circumstances or that the road was not maintained in accordance with the principles set out in ***Just***.

**182**  The plaintiff sought to rely upon Mr. Herman's statement in his letter to Mr. Nichols of April 23, 1999, "I believe we can establish that the Municipality was negligent with respect to the maintenance and repair of the section of road where your accident occurred", as an admission against interest. While the plaintiff did not contend that the defendants were precluded from contesting liability with respect to this issue, the plaintiff submitted that this statement by Mr. Herman did constitute evidence going to the issue of the ***negligence*** of the District. In my view, that is not the case. The opinion expressed by counsel with respect to the merits is not evidence with respect to that issue.

**183**  With respect to the general condition of the roadway, although the lay witnesses who testified about the condition of the road suggested that the intersection had been a problem for years, no one had ever contacted Chilliwack to express any concerns prior to the accident. There is no evidence that the District was made aware of problems with the intersection prior to Mr. Nichols' accident.

**184**  Mr. Weightman's evidence was that general terrain and road configuration like that of the Yale Road West and Hopedale Road intersection is not unusual in this province. He testified further that to his knowledge there were hundreds, perhaps thousands of telephone and hydro poles adjacent to highways throughout the province. When he attended at the intersection, he found nothing particularly extraordinary about the curve. Based on his knowledge of travelling the roads of the province, this was a curve like hundreds of others on the roads throughout the province.

**185**  With respect to the issue of the build up of gravel, there is some evidence in the form of documents produced by the District that it had in place a policy of sweeping the roadway. It would appear that, consistent with this policy, the road was swept in the month prior to the accident. These documents cast doubt on the reliability of the evidence of the lay witnesses to the effect that the road was never swept until after Mr. Nichols' accident.

**186**  This part of Chilliwack is a farming community. Gravel shoulders are not unusual in the area. Mr. Morrison agreed that there are many intersections in the area at which gravel would likely be found on the side of the road. Mr. Bradwell agreed that, Chilliwack being a rural area, it is not uncommon to find debris on the road from time to time and not unusual for there to be gravel from the shoulders coming up on to the asphalt surfaces.

**187**  The plaintiff has alleged that failure to post a correct speed advisory is a breach of the duty of care on the part of the municipality, citing ***Housen***. In that case, the posted speed limit was 80 km/hr. The trial judge found that the curve could not be safely negotiated at speeds greater than 60 km/hr when conditions are favourable or 50 km/hr when wet. The trial judge also found that the curve in question constituted a hidden hazard. In the circumstances, the trial judge concluded that it was not reasonable to expect the authority to clear away all brush to improve sight distances or to construct such roads to conform to generally accepted design standards. However, where the brush obstructs the ability of a motorist to be forewarned of a hazard, it was reasonable to expect the authority to erect and maintain a warning sign. The authority should have erected such a sign in that case.

**188**  Mr. Lisman's opinion with respect to the speed and design issue was that if the road had been subject to the design process used by engineers in designing a new road, which he doubted it had, the curve in question would be designed for 49.5 km/hr. There was a curve sign on the approach to the curve; however, it was not the particular curve sign that Mr. Lisman would recommend.

**189**  Mr. Lisman clarified his opinion in the following exchange:

1. So the fact that this particular stretch of road in October, 1994 had a radius of this curve of 113 metres and that a safe design speed if you were constructing a new highway at that point now should have 135 meters, that wouldn't be unusual, would it?
2. Sorry. What would not be unusual?
3. Well, it would not be unusual that a road that had been constructed many, many years ago would have a - radius of 113 metres, for example, whereas the new design criteria called for 135?
4. Quite. Almost anywhere you travel in the province, Mr. Abrioux, when you go out and you see a curve sign, that's virtual admission that the - for the posted speed limited generally that that particular curve doesn't meet the good requirements and you've got to then slow down. So it hasn't been, as it were, if I may, you know, as they say, in brackets, been designed, and God alone knows when that would happen through all of the - you know, to complete the road system of B.C. and in what fashion. But if I may explain just one point here. In essence, what I was not doing here was, as it were, castigating or criticising the authority for not having, you know, redesigned or reconstructed this to meet the scientific requirements. The main purpose of this was to point that - out that given the physical circumstances, the limitations - not quite deficiencies, but the limitations, the physical limitations of the design, the inherent deficiencies or the limitations, that in that case certainly it behoved them, as they say, to make sure that there was no gravel and dirt and stuff tracking onto the road. It needed - it needed a bare pavement to be happily or successfully negotiated, especially by two-wheeled vehicles.
5. Thank you for that because I didn't want it to be taken from your report that you're advocating, if that's the right word, that the whole system of highways in British Columbia be upgraded to meet current design curve criteria.
6. No. In fact, that would be - that would almost disastrous. No. You would have a programme for prioritizing, as they say these days. And certainly coming to this particular case, the purpose of you know, these technical paragraphs is to indicate the need to keep the place clean, bare - not dry, clean and bare and provide the coefficient to friction presented by the paved surface without contamination.
7. And if I understand your evidence correctly, the mere presence of a sign warning of a curve, which we see in Exhibit -
8. Yes.
9. Whatever the exhibit was.
10. 5. Sorry. Pardon me.
11. Was it 7, I believe?
12. Which we saw earlier certainly, Mr. Abrioux. The curve sign that you made reference to before, that is, in fact, an indication to the public at large - they may not know it, but that's an indication to the public at large that the upcoming curve does not meet current design criteria?
13. Yes. They should adjust maybe path speed. They should be prepared to actually steer around it. If I can just develop that a little bit. That is probably more important than the speed reduction. It's realizing there's a curve there because people - sometimes there are situations where the curve is not really visible, you know. Given a combination of vertical and horizontal curvature, one might approach a curve not realizing that there's a curve there until it's somewhat too late.

**190**  While the plaintiff has placed considerable reliance upon the evidence of other accidents at this site, the evidence does not establish that these accidents were the result of any of the road conditions alleged to be the basis of fault in this case.

**191**  With respect to the issue of the post accident modification, such evidence is admissible to show what steps could have been taken to reduce risk. However, such evidence does not establish what should have been done at the material time. As Maczko J. noted in ***Rowe v. British Columbia*** [*(1989), 56 D.L.R. (4th) 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F81W-218H-00000-00&context=) (B.C.S.C.) [***Rowe***], it does not follow that because the road might have been improved that the municipality failed to discharge its duty. This is particularly so in my view where, as in this case, there is no evidence about the budgetary considerations faced by the District at the material time.

**192**  This was a rural road. While the road did not correspond to contemporary design specifications, this according to Mr. Lisman, represented more the likely norm. There was a sign indicating a curve. The curve in question was not a hidden hazard such as in ***Housen***. The presence of gravel was to be expected on such roads and the District had a policy of sweeping. The plaintiff led no evidence from the District with respect to budgetary constraints. The evidence does not suggest that the District had any notice of particular problems at this intersection.

**193**  I find on the whole of the evidence, that the plaintiff has not established that at the material time this road was not kept in a reasonable state of repair such that those using it may, exercising ordinary care, have travelled upon it with safety.

***Negligence* of BC Tel**

**194**  The plaintiff submits, relying upon ***Kennedy***, that because the pole was "unnecessarily placed", the pole constituted an unnecessary hazard that breached the obligations imposed by the ***Occupiers Liability Act***. However, ***Kennedy*** is not support for such a broad proposition in my view. In that case the bollards served no purpose whatsoever once the chains had been removed. In the present case, the pole served a support function, although by 2000 at least, that function could be discharged by using the nearby Hydro pole for support. Thus, while the pole at that location may not have been necessary, unlike the bollard, it was serving a function.

**195**  Counsel for the defendants submits the standard of care to be applied with respect to roadside obstructions that has been applied by the courts in this jurisdiction is that such an obstruction is to be placed so that it does not pose a hazard to vehicles approaching with ordinary care; see ***Rowe*** and ***McDonagh (Guardian ad litem of) v. Gavin***, [*2004 BCSC 1756*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0YN-00000-00&context=). I find that the plaintiff has not established that the placement of the pole was such that it posed a hazard to vehicles approaching with ordinary care.

**196**  The plaintiff, however, submits that consistent with ***Kennedy***, the duty is broader. I have concluded that it is not necessary to resolve this question of the scope of the duty, since on the evidence the plaintiff has not established a breach of the duty alleged.

**197**  In ***Leischner***, the Court of Appeal concluded that, absent some higher duty, the tests to be applied under the ***Occupiers Liability Act*** were the same as those in ordinary ***negligence***. In ***Kennedy***, the Ontario Court of Appeal relied on the reasoning of the Supreme Court of Canada in ***Veinot v. Kerr-Addison Mines Ltd.***, [*[1975] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0CK-00000-00&context=). In that case, Dickson J. (as he then was), writing for the court, considered the standard of care owed by occupiers and adopted the following passage from Lord Denning's judgment in ***Pannett v. McGuinness & Co. Ltd.***, [1972] 3 W.L.R. 387 (C.A.), which dealt with the standard of care required of occupiers:

The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should take steps to see that no one is injured by it. (2) You must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar. (3) You must also have regard to the nature of the place where the trespass occurs. An electrified railway line or a warehouse being demolished may require more precautions to be taken than a private house. (4) You must also take into account the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present. The more likely they are, the more precautions may have to be taken.

**198**  Considering s. 3(1) of the ***Occupiers' Liability Act***, R.S.O. 1980, c. 322, which is similar to that of the British Columbia statute, and like the British Columbia statute, includes the words "in all the circumstances", the court in ***Kennedy*** said at paras. 30 and 89 that budgetary considerations are relevant.

**199**  The duty imposed under the ***Occupiers Liability Act*** is:

3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

**200**  With respect to what would constitute reasonable care in the circumstances of this case, I note that there is no evidence with respect to the safety standards concerning pole placement that were in place either at the time of the accident or when the pole was originally placed other than Mr. De Bartolo's observation that in his experience poles are set away from the road and away from curves.

**201**  With respect to the issue of the pole placement, it is important to note Mr. Lisman's evidence with respect to the concept of a clear zone. The concept of a clear zone was derived from the knowledge that for various reasons, sometimes good, sometimes not, drivers leave the highway and become errant. Tests were conducted to work out how far drivers typically went off the highway in such cases. From these studies a set of standards were developed for a strip to parallel the alignment of the highway that should not contain fixed obstacles. This strip is called the clear zone. The size of the clear zone is based upon speed. In British Columbia for speeds of up to 60 km/hr the recommended clear zone is two meters.

**202**  Mr. Lisman testified further that the concept of the clear zone had been introduced in the last two or three decades with respect to design, but that it was now starting to affect the rehabilitation or improvement of highways. However, it was his evidence that these clear zone policies were not meant to be retroactive.

**203**  The telephone pole at issue in the present case was located 2.5 meters from the edge of the roadway; outside the recommended clear zone. The pole was in place in 1965. The evidence does not establish when a pole was first located at that site.

**204**  The plaintiff submits that BC Tel/Telus had actual notice of the pole being the site of numerous accidents on the basis of Mr. Heusken's evidence that the pole has been replaced three of four times because of accidents. The plaintiff submitted that BC Tel/Telus "ignores any notice of hazards posed, no matter how often notice is given".

**205**  That proposition is not consistent with the evidence. It is inconsistent with the documents produced by Telus that show that prior to July 19, 2000, when the pole was removed, the pole was removed and replaced on December 15, 1999 for "maintenance renewal", and on October 1, 1984 because of a "third party request". The initial pole was placed on July 1, 1965. The Telus document also contained the statement that it had no records of accidents at the site.

**206**  There is no evidence of any of the witnesses making a complaint to BC Tel or Telus about the placement of the pole.

**207**  Moreover, it appears on the evidence that the first time BC Tel/Telus became aware of concerns with respect to the pole, it responded and the pole was removed. A nearby Hydro pole was used for the support function that it had been the pole's purpose to provide. Mr. DeBartolo's evidence was that likely the Hydro lines had not been in place when the telephone poles were initially placed because if they had been in place at the time, the Hydro pole would likely have been used as an anchor.

**208**  I have concluded that this pole did not pose a hazard to vehicles approaching the intersection using ordinary care. Moreover, it has not been established that BC Tel or Telus failed to use reasonable care in the circumstances. No breach of duty has been established with respect to the placement of the pole.

**DISPOSITION**

**209**  I have concluded that the claim is to be dismissed on the basis that the plaintiff has failed to establish:

1. any ***negligence*** or breach of duty on the part of the defendants;
2. any ***negligence*** or breach of duty on the part of the District or BC Tel/Telus; and
3. that the accident in which he suffered injury occurred as a result of road conditions.

**210**  Unless the parties have additional submissions to make on the issue, the defendants are entitled to their costs at Scale B.

ROSS J.

**End of Document**

[***Accredit Mortgage Ltd. v. Ucluelet (District), [2013] B.C.J. No. 94***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M334-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

M.D. Macaulay J.

Heard: November 29, 2012.

Judgment: January 22, 2013.

Docket: 11-4995

Registry: Victoria

**[2013] B.C.J. No. 94** | 2013 BCSC 86 | 6 M.P.L.R. (5th) 89 | [2013] 3 W.W.R. 773 | 42 B.C.L.R. (5th) 160 | 226 A.C.W.S. (3d) 387 | 2013 CarswellBC 91

Between Accredit Mortgage Ltd., Claimant, and District of Ucluelet, Respondent

(41 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Third party procedure — Notice — Leave — Application by respondent municipality for leave to issue third party claims allowed in part — Main action was claim for *negligence* and misrepresentation arising out of issuance of building permits — Third party claim against respondent housing commission did not disclose reasonable cause of action — No duty of care between housing commission and municipality — No reasonable foreseeability that municipality would rely on representations of housing commission — Policy reasons militated against imposition of duty of care — Third party claim against respondent builder based on agreement and indemnity between respondent and third party disclosed reasonable cause of action.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Application by respondent municipality for leave to issue third party claims allowed in part — Main action was claim for *negligence* and misrepresentation arising out of issuance of building permits — Third party claim against respondent housing commission did not disclose reasonable cause of action — No duty of care between housing commission and municipality — No reasonable foreseeability that municipality would rely on representations of housing commission — Policy reasons militated against imposition of duty of care — Third party claim against respondent builder based on agreement and indemnity between respondent and third party disclosed reasonable cause of action.**

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| Application by the respondent, the District of Ucluelet (the "District") for leave to issue a third party notice against the British Columbia Housing Management Commission ("BCHMC") and Reef Point Cottages Ltd. ("Reef Point"). Accredit Mortgage Ltd. ("Accredit") claimed against the District in ***negligence*** and misrepresentation with respect to building permits issued for a construction project financed by Accredit. The predecessor to the BCHMC issued a compliance letter to the builder of the project, directing that the builder was not licensed under the Homeowner Protection Act (the "Act"). The BCHMC was responsible for ensuring compliance with the Act. The District claimed indemnity from Reef Point pursuant to an agreement and alleged ***negligence*** and misrepresentation by the BCHMC.  HELD: Application allowed in part.  The third party claim against BCHMC did not disclose a reasonable cause of action. The District was unable to establish that BCHMC owed it a duty of care. It was not reasonably foreseeable that the District would rely on BCHMC's representations. The Act did not create a relationship of proximity giving rise to a prima facie duty of care. There was no duty on BCHMC independent of the Act. Policy reasons militated heavily against imposing a duty of care. The claim against Reef Point was based on the language in the agreement and indemnity between the District and Reef Point. It disclosed a reasonable cause of action. |

**Statutes, Regulations and Rules Cited:**

Budget Measures Implementation Act, 2010, S.B.C., 2010, c. 2 s. 7

Homeowner Protection Act, [*SBC 1998, CHAPTER 31, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FP1-JKHB-60VH-00000-00&context=), s. 2(1) (a), s. 3(2), s. 11, s. 12, s. 12(g), s. 30, s. 30(2)

**Counsel**

Agent for Counsel for the Claimant: W. Johnson.

Counsel for the Respondent: A.M. Bookman and C. Alexander.

Counsel for Proposed Third Party: British Columbia Housing, Management Commission: K.L. Boonstra.

Agent for Counsel for Proposed Third Party: Reef Point Cottages Ltd.: C. McCool.

**Reasons for Judgment**

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| **M.D. MACAULAY J.** |

**1**   At issue is whether the respondent, District of Ucluelet's (the "District"), proposed Third Party Notice against the British Columbia Housing Management Commission and Reef Point Cottages Ltd. ("Reef Point") discloses reasonable causes of action. The District applies for leave to issue the Third Party Notice but the proposed third parties resist the application on the basis that the District's proposed claims have no reasonable prospect of success. I accept that I should only deny leave if the proposed claims have no reasonable prospect of success; otherwise, the matters should proceed to trial in the usual way.

**2**  I conclude that the proposed claim against Reef Point discloses a reasonable cause of action but the proposed claim against the British Columbia Housing Management Commission does not. Below, I set out the reasons for my conclusions, commencing with the latter.

**3**  The Commission is the statutory successor to the Homeowner Protection Office (the "HPO"). The HPO first came into existence pursuant to the *Homeowner Protection Act,* *S.B.C. 1998, c. 31* (the "*HPA*"). Pursuant to the *Budget Measures Implementation Act, 2010,* S.B.C. 2010, c. 2, the Commission and the registrar, appointed under s. 7, took over responsibility for the administration of the *HPA.* Accordingly, since April 1, 2010, the Commission has assumed all obligations and liabilities of the HPO. As the timeframe to which Accredit Mortgage Ltd.'s ("Accredit") claims against the District relate was before the transfer to the Commission, I will, for the most part, refer to the HPO instead of the Commission in these reasons.

**4**  In general terms, in 2006, the *HPA* required residential builders to be licensed under the Act and to arrange home warranty insurance coverage for all "new homes" as defined in the Act. Section 1 states, in part:

**"new home"** means a building, or portion of a building, that is newly constructed and intended for residential occupancy, and includes

1. a self-contained dwelling unit that is
2. detached, or
3. attached to one or more other self-contained dwelling units,
4. a building having 2 or more self-contained dwelling units under one ownership,
5. common property, common facilities and other assets of a strata corporation, and
6. any building or portion of a building of a class prescribed by the regulations as a new home to which this Act applies,

but does not include a manufactured home unless otherwise prescribed;

I will refer to other specific provisions later in my reasons.

**5**  As background, it is necessary to describe Accredit's claims set out in its Notice of Civil Claim against the District. Accredit alleges that in December 2006 the District issued a building permit to Reef Point for the construction of a multi-unit building containing four residential rental units. Accredit provided financing for the construction of the project. In February 2010, the HPO issued a compliance letter to the builder directing compliance with the *HPA* because the builder was not licensed under the *HPA* and home warranty insurance had not been obtained. In the result, Accredit alleges future sales of the project were no longer possible; the construction financing went into default; and Accredit foreclosed. Although Accredit has an order for conduct of sale of the property, it is not able to sell because of the non-compliance with the *HPA.*

**6**  The specific Accredit claims against the District sound in ***negligence*** and misrepresentation. The alleged duty of care is as follows:

1. The District owed a duty of care to Accredit to ensure that the District, Owner and McCool [the builder] adhered to the terms of the *HPA* and the [Building Bylaw] when it issued Permits with respect to the Project and to ensure that the Permits were not issued unless it was lawful to do so.

The alleged duty is important because the District argues that there are parallels between the claims that Accredit advances against it and those that the District proposes to advance against the HPO.

**7**  In its Response to Civil Claim, the District, among other things, denies that the *HPA* applies to the project and that it owed any duty of care to Accredit. In support of the latter, the District also denied that there was "a relationship of proximity" between it and Accredit "sufficient to create a duty of care" but, if there was, such duty "ought to be negated by reason of the policy consideration of indeterminate liability in the circumstances".

**8**  By the foregoing, the District is apparently adverting to the two stage *Anns* test (*Anns v. Merton London Borough Council*, [1978] A.C. 728), as reformulated by the Supreme Court of Canada in *Cooper v. Hobart,* [*2001 SCC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=) ("*Hobart*"), and applied recently in *R. v. Imperial Tobacco Canada Ltd.,* [*2011 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XK-00000-00&context=) ("*Imperial Tobacco*"). The reformulated *Anns* test applies, where there is no settled category giving rise to a duty of care, to determine whether the pleaded facts give rise to a *prima facie* duty of care and, if so, whether policy considerations negate or limit the *prima facie* duty. The District has never, however, applied to strike out Accredit's claims.

**9**  Apart from both the Accredit and the proposed third party claims against the HPO being novel, there are few, if any, other parallels, as I will later discuss. In particular, I do not accept that the alleged duty of care on the part of the HPO, as set out in the proposed Third Party Notice, parallels Accredit's allegation against the District. The reformulated *Anns* test will not necessarily lead to the same conclusion in each case. Accordingly, my decision respecting the present application is not, in any way, a determination whether the pleaded facts in Accredit's claims give rise to a *prima facie* duty of care, and, if so, whether policy considerations negate or limit the duty.

**10**  The additional factual allegations of significance in the proposed Third Party Notice are as follows:

1. The HPO is responsible for ensuring that new construction falling within the scope of the *HPA* complies with both the *HPA* and the Regulations thereto. The HPO employs Compliance Officers to monitor construction projects in specific regions across British Columbia and provide education and advice to local municipalities pertaining to the interpretation and application of the *HPA.*
2. In or about April 2003, the HPO advised the District that the Ravens Motel, a hotel/motel construction project on Peninsula Road in Ucluelet, was exempt from the requirements of the *HPA* because it was not strata titled and no licensed builder or other HPO forms were needed.
3. In or about June 2006, the HPO advised the District that a planned project on Reef Point Road in Ucluelet which would result in the construction of an Inn with four detached cottages on a single non strata titled lot, like the Project, was exempt from the *HPA* and no licensed builder or other forms were needed.
4. On or about December 14, 2006, the District issued a building permit (the "Building Permit") for the Project which was to consist of one building with four vacation rental suites consistent with the District's CS-5 zoning requirements on the basis of its understanding that the Project was exempt from the requirements of the *HPA.*
5. Prior to commencement of construction of the Project, Clifford McCool and/or Reef Point had licensed residential builder status. Pursuant to the *HPA,* Clifford McCool and/or Reef Point were not a licensed residential builder when construction of the Project was commenced.
6. Reef Point commenced construction of the Project without the Project having new home warranty insurance in place.
7. The Building Permit and accompanying Building Permit application constitute a contract in writing between the District and Reef Point. In consideration of issuing the Building Permit:
8. Reef Point agreed to release and indemnify the District, its board members, employees and agents from and against all liability, demands, claims and actions, suits judgments, losses, damages, costs, expenses of whatever kind which Reef Point or any other person, partnership or corporation or its respective heirs, successors, administrators or assignees may have or incur in consequence of or incidental to the granting of the Building Permit, or any inspection, failure to inspect, certification, approval, enforcement, or failure to enforce the Building Bylaw of the District or the British Columbia Building Code (the "the Agreement, Release and Indemnity"); and
9. Reef Point covenanted and agreed that the District owed Reef Point no duty of care in respect of the matters referenced in the Agreement, Release and Indemnity.
10. In issuing the Building Permit, the District relied on the representations and assurances (collectively, the "Assurances") of the HPO that:
11. HPO documentation including new home warranty insurance was not required for non-strata titled hotel/motel construction (the "Exemption");
12. the Exemption extended to vacation rental suites or cottages such as those within the District's commercial GH and CS-5 zones;
13. accordingly, the *HPA* did not apply to the Project as the Project consisted of a building with four vacation rental suites on land zoned for commercial uses only; and
14. no licensed builder or other HPO forms were required for buildings subject to the Exemption.
15. The HPO was in a relationship of proximity to the District and it expected and intended that the District would rely on the Assurances when deciding whether or not to issue the Building Permit and, as such owed the District a duty of care to exercise reasonable professional judgment when giving the Assurances, such that harm would not come to the District.
16. On or about February 10, 2010, by way of letter (the "Alleged Compliance Direction"), the HPO took the position that the Project and a number of other structures within the District's CS-5 zone are subject to the *HPA.* The Alleged Compliance Direction directed that McCool and/or Reef Point
17. comply with the *HPA;*
18. obtain a residential builder license from the HPO; and
19. obtain new home warranty insurance for the Project in accordance with the *HPA.*

The Claims against Reef Point and the HPO are set out in Part 3 as follows:

1. The District claims indemnity from Reef Point pursuant to the provisions of the Agreement, Release and Indemnity.

Claim against the HPO

1. While denying the Plaintiff has sustained any damage, loss or expense as claimed in the Notice of Civil Claim, if the District is found liable to the Plaintiff, then:
2. the District relied to its detriment on the Assurances; and
3. such liability on the part of the District was caused or contributed to by, the ***negligence*** and negligent misrepresentations of the HPO.
4. The particulars of the ***negligence*** and negligent misrepresentations of the HPO include the following:
5. failing to educate and properly advise the District as to the application of the Exemption;
6. misrepresenting through implication or otherwise that the *HPA* and Regulations thereto did not apply to the Project;
7. misrepresenting that new home warranty insurance for the Project was not necessary;
8. misrepresenting that the builder of the Project was not required to obtain a residential builder license; and
9. such further and other particulars as may become known to the District.
10. The District claims indemnity or, in the alternative, contribution from BC Housing pursuant to the provisions of the ***Negligence*** *Act*, and shall at the trial of this action seek apportionment.

**11**  The importance of the pleadings is addressed in the extracts from *Imperial Tobacco* referred to immediately below. New developments in the law often surface for the first time on applications to strike so it is not determinative that the law has not previously recognized the particular claim. Instead, as set out in *Imperial Tobacco,* at para. 21:

[21] ... The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

The focus on the pleadings necessitates that they be prepared with care because there will not be another chance. As further set out:

[22] ... A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

In the result, the question on an application to strike, and, by extension, on the present application to issue the proposed Third Party Notice, is "whether, considered in *the context of the law and the litigation process,* the claim has no reasonable chance of succeeding" [emphasis in original] (para. 25).

**12**  According to the District's submission, Accredit's claims against the District are also novel but the District accepts that those claims "require a full evidentiary determination before a Court can assess whether a duty of care exists." The District goes on to say that if it should not have issued the building permit, the compliance officer of the HPO "who provided advice to the District about the applicability of the *HPA* to construction within the District" is blameworthy. The District further submits that if it failed to adhere to the *HPA,* "such failure was the direct result of the actions of the HPO."

**13**  On the fundamental question whether the claims have a reasonable prospect of success, the District attempts to answer the contention of the HPO that there is no duty of care in its submission, as follows:

The District has sympathy for the HPO's position. In this case and in the Whiskey Dock proceedings [where comparable issues are raised as between Accredit and the District], a lender is seeking to impose a duty of care on the District for its alleged failure to adhere to the *HPA* at the building permit stage. The District views Accredit's claims in these actions as attempts to establish a novel duty of care. However, the District has concluded that a motion to strike is not appropriate and instead the cases must be assessed on the basis of the applicable common law. In this case, where the District alleges that its actions resulted from information received from the HPO, it is the District's position that if the circumstances at issue give rise to the District owing a duty of care to Accredit, then the same circumstances will give rise to the HPO owing the District a duty of care.

And later in its submission:

The District anticipates that the HPO's argument regarding its liability, or lack thereof, to Accredit is the same argument the District will make at the trial of these proceedings.

The District supplemented these submissions by focusing on the perceived need for evidence to address the policy issues that must be addressed in both stages of the reformulated *Anns* test.

**14**  In my view, the District's analysis is illogical and results in an approach that is inconsistent with the passages in *Imperial Tobacco* to which I have referred. The narrow question on the present application is whether, assuming the facts pleaded are true, there is any reasonable chance of success of the claims set out in the proposed Third Party Notice.

**15**  Whether or not Accredit's claims against the District have any reasonable prospect of success is not at issue here. Nor, as I have already stated, would the outcome of an application to strike Accredit's claims necessarily determine the outcome of the present application for the simple reason that the parties and pleadings are not mirror images.

**16**  I accept the HPO submission that requiring it to wait until trial to address whether the claim has any reasonable prospect of success would render meaningless the District's obligation to properly plead a cause of action against it.

**17**  The HPO reasonably characterizes the four claims against it as:

1. Negligent failure to educate and properly advise the District as to the application of an exemption;
2. Negligent misrepresentation "through implication" that the *HPA* did not apply to the project;
3. Negligent misrepresentation that new home warranty insurance for the project was not necessary; and
4. Negligent misrepresentation that the builder of the project was not required to obtain a residential builder license.

I agree with the HPO that the last two are, in effect, subsets of the second claim because they relate to the specific statutory requirements if the *HPA* did apply to the project. Accordingly, my focus will be on the first two claims.

**18**  The District agrees with the HPO that its proposed claims do not fall within a settled category. The first question under the reformulated *Anns* test is whether or not the alleged facts disclose a relationship of proximity in which a failure to take reasonable care might foreseeably cause loss to the District. If so, a *prima facie* duty of care arises. As set out in *Imperial Tobacco,* at para. 41:

... Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

Proximity and foreseeability give rise to "heightened concerns" when the claim is for economic loss attributable to negligent misrepresentation, as here (para. 42).

**19**  To establish a duty of care with respect to its claim of negligent misrepresentation, the District must demonstrate a special relationship where the HPO ought reasonably to foresee that the District would rely on the HPO's representation and that the reliance would, in the particular circumstances of the case, be reasonable (para. 52). The provisions of the *HPA* are an important consideration in this regard.

**20**  The purposes of the *HPA* are set out in s. 2 and include strengthening consumer protection for buyers of new homes; improving the quality of residential construction; and supporting research and education respecting residential construction in British Columbia. More specifically, the purposes of the HPO, according to s. 3(2), are to license residential builders and other persons required to be licensed under the *HPA;* carry out research and education respecting residential construction in British Columbia; and to administer the reconstruction program established for the purpose of providing financial assistance to eligible homeowners for home reconstruction.

**21**  None of the provisions in s. 3(2) support the District's assertion that the HPO ought reasonably to foresee that the District would rely on the HPO's representations. In my view, there is nothing in the *HPA* that creates a private relationship of proximity that gives rise to a *prima facie* duty of care.

**22**  Nor, upon considering the provisions of the *HPA,* does proximity arise from the alleged specific interactions between the HPO and the District.

**23**  There is not, in my view, any potential source of duty independent of the *HPA.* Paraphrasing paragraphs 13 to 15 of the Statement of Facts in the proposed Third Party Notice, the full text of which is set out earlier in my reasons, the District alleges that the HPO:

1. Has a statutory duty to monitor construction projects and provide education and advice to local municipalities, including the District, respecting the interpretation and application of the *HPA;*
2. Advised the District that a particular project was exempt from the requirements of the *HPA* because it was not strata titled; and
3. Advised the District that another planned project for an Inn with four detached cottages on a single non-strata titled lot, similar to the Reef Point project, was exempt from the requirements of the *HPA.*

I observe that the District does not allege that the advice respecting either of the two projects was incorrect; nor does the District allege that the HPO provided any advice respecting the Reef Point project.

**24**  At the material time, s. 11 of the *HPA* established a research and education division. The purposes of the division were set out in s. 12, as follows:

12 The purposes of the division established under section 11 are as follows:

1. to establish and maintain expertise in building science, especially as it applies to British Columbia and the British Columbia Building Code;
2. to advise on necessary and appropriate amendments to the British Columbia Building Code;
3. to advise the City of Vancouver on necessary and appropriate amendments to the City of Vancouver building by-laws;
4. to provide advice and assistance to those charged with the responsibility of preparing periodic revisions of the National Building Code of Canada;
5. to conduct research into cost effective building techniques, processes and materials appropriate for use in British Columbia;
6. to cooperate with other organizations to establish what constitutes the best practice for building and retrofitting housing in British Columbia;
7. to support consumer education;
8. to perform other functions consistent with this Part.

The education function identified in subsection (g) is specifically for consumers and obviously flows from one of the purposes of the legislation, namely to strengthen consumer protection for buyers of new homes (s. 2(1)(a)).

**25**  Even if the obligation to support consumer education for the public could be transposed into an obligation to advise the District, on the second stage of the reformulated *Anns* test, policy considerations would strongly militate against a finding of sufficient proximity between the HPO and individual local governments. I will return to this later.

**26**  I conclude that s. 12(g) does not provide any statutory foundation for the alleged duty to advise the District respecting the interpretation and application of the *HPA* to specific projects. The District did not identify, and I do not see, any other arguable statutory support in the section, or elsewhere, for the alleged duty.

**27**  As to the allegations that the HPO provided advice respecting two other projects, there is no allegation that the advice was erroneous. Even if the advice rendered was erroneous, the courts have consistently declined to recognize that public officials owe a duty to interpret or apply the law correctly so long as the official has not acted carelessly or in bad faith. This is aptly illustrated by *Inland Feeders Ltd. v. Virdi* [*(1981), 129 D.L.R. (3d) 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X219-00000-00&context=) (B.C.C.A.), in which the Court of Appeal reversed the trial judge's finding that the municipality should be liable for damages sustained by a citizen who relied to his detriment on a municipal employee's erroneous assurance, given within the scope of his responsibilities.

**28**  The pleadings in the present case do not provide a sufficient basis for concluding that it would be just and reasonable to impose an obligation on the HPO to take reasonable care not to injure the District in making its statements respecting other projects.

**29**  Under s. 30 of the *HPA,* the District had independent statutory duties to fulfill. Absent evidence that the project complied with the statute, the District was bound not to issue a building permit for the Reef Point project. It is not reasonable for the District to rely on previous statements respecting other projects in order to meet its own statutory obligation respecting the Reef Point project.

**30**  I am not persuaded that the District established a *prima facie* duty of care. Even if it has, policy reasons militate heavily against imposing a duty of care on the HPO in the circumstances. As stated in *Hobart,* at para. 37, broad policy reasons may suggest that the court should not recognize a duty of care. There are three such reasons in the case at bar.

**31**  First, the imposition of a duty of care on the HPO to correctly advise the District might permit recovery against the HPO for losses attributable to the failure of the District to meet its own statutory obligations. The HPO has no means of educating or advising municipalities, in general, or the District, in particular, so as to prevent them breaching their obligations with respect to building permit applications.

**32**  Under s. 30(2) of the *HPA,* municipalities are immune from lawsuits for damages resulting from issuing a building permit in good faith on evidence that the applicant provides. Accordingly, municipalities are protected from liability so long as they exercise their statutory obligations in good faith. It should not be the obligation of the HPO to indemnify or contribute if a municipality does not act in good faith or otherwise fails to meet its statutory obligations. In general, a person under a legal duty to use care should not be permitted to rid himself or herself of responsibility by delegating performance of the duty to another. See *Cassidy v. Ministry of Health* (1951), 2 K.B.Y. 3 at 363.

**33**  Second, indeterminate liability would result. The HPO does not have any control over the number of building permit applications or the extent of economic loss associated with failure by municipalities or districts to meet their statutory obligations under the *HPA.* In *Imperial Tobacco,* at paras. 100-101, the Supreme Court of Canada concluded that if the Government of Canada owed a duty to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate, and, as a result, the claims should fail because Canada was not in control of the extent of its potential liability.

**34**  The District acknowledged in argument that there is a potential for indeterminate liability and stated that it had similar concerns respecting Accredit's claims against it. The District suggests, as I understand it, that the court should simply treat the potential as an issue to be determined after a full trial. For the reasons already expressed, I do not accept that as a valid approach.

**35**  Finally, where a statutory duty is predominantly owed to the public generally, the court should not find proximity to individuals. In determining a lack of proximity in a statutory context, in *Fullowka v. Pinkerton's of Canada Ltd.,* [*2010 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1H4-00000-00&context=), at para. 39, the Supreme Court of Canada re-affirmed the following as first articulated in *B.D. (Litigation guardian of) v. Halton Region Children's Aid Society,* [*2007 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19J-00000-00&context=):

The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered.

The fact that an alleged duty of care is found to conflict with an overarching statutory or public duty may provide a policy reason for refusing to find proximity. Both *Cooper* and *Edwards*, [*[2001] 3 S.C.R. 562*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49K-00000-00&context=), are examples. In *Cooper*, a duty to individual investors on the part of the Registrar of Mortgage Brokers potentially conflicted with the Registrar's overarching public duty; in *Edwards*, the proposed private law duty to the victim of a dishonest lawyer potentially conflicted with the Law Society's obligation to exercise its discretion to meet a myriad of objectives.

Those extracts are apposite here.

**36**  I agree with the HPO that the proposed claims against it have no reasonable prospect of success. Accordingly, the application to add the HPO as a third party is dismissed. The District shall pay costs on Scale B to the HPO.

**37**  The proposed claims against Reef Point do not present the same problems as above. In short, the District alleges that the building permit application and ensuing building permit created a contract between the District and Reef Point.

**38**  For present purposes, the terms of the alleged contract require Reef Point to indemnify the District for all liability for any "losses" which any "corporation" may incur "in consequence of or incidental to the granting of the building permit." Accordingly, the District seeks indemnification from Reef Point in the event that Accredit, a corporation, succeeds on its claim for damages attributable to the alleged negligent issuing of the building permit.

**39**  Contractual claims for indemnification do not raise novel issues respecting the owing of a duty of care. Reef Point's opposition to the application is, with respect, based entirely on its opposition to the claim on its merits and does not address, as it should, that the claim against it, even if true, has no reasonable prospect of success.

**40**  For the limited purpose of the present application, I must assume that all the District's pleadings of fact are true. If they are eventually established on the evidence, the claim for indemnification, as pleaded, has a reasonable prospect of success.

**41**  Accordingly, I grant the application to issue the Third Party Notice against Reef Point. The costs of the application in that regard will be in the cause.

M.D. MACAULAY J.

**End of Document**

[***Anderson v. Kozniuk, [2011] B.C.J. No. 2367***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22RH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: October 24-25 and 27, 2011.

Judgment: December 8, 2011.

Docket: M092616

Registry: Vancouver

**[2011] B.C.J. No. 2367** | 2011 BCSC 1678 | 25 M.V.R. (6th) 71 | 209 A.C.W.S. (3d) 987 | 2011 CarswellBC 3333

Between Wayne Wilfred Anderson, Plaintiff, and Jacklyn Kozniuk, Defendant

(80 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Duty of care — Motor vehicles — Pedestrians — Motor vehicles — Pedestrians — Rules of the road — Action for damages resulting form a motor vehicle accident allowed in part — Plaintiff was found 30 per cent liable — Plaintiff crossed street at an intersection on marked crosswalk but then left crosswalk to cut across — Defendant hit plaintiff as he crossed street — Defendant breached her duty to maintain a proper look-out so that she could anticipate risk, even where she had not seen the plaintiff prior to impact — Plaintiff was negligent on leaving the area of the crosswalk.**

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| Action for damages resulting form a motor vehicle accident. The plaintiff was on his way to work. He saw his bus coming and crossed the street at an intersection where there was a marked and an unmarked crosswalk. The plaintiff testified that he noticed a car coming way up the hill. He crossed in front of a stopped northbound car and then cut the corner and made an arc to his left to walk to the bus stop, thereby leaving the crosswalk. The defendant, as she came through the intersection, hit the plaintiff. The defendant did not see the plaintiff prior to the impact.  HELD: Action allowed in part.  The plaintiff was found 30 per cent liable. There was a common law, as well as a statutory, duty on a driver to maintain a proper look-out so that she could anticipate risk, even where that driver had not seen the hazard. The very presence of the marked crosswalk should have been an indication to the defendant of the possible presence of pedestrians in the area. Had the defendant maintained a careful look-out and lightly reduced her speed, it was possible she would have seen the plaintiff before the last second, when it was too late to avoid him. The plaintiff also had the obligation to take care for his own safety in his use of the road. Had he crossed in either the lighted crosswalk or within the informal boundaries of the unmarked crosswalk, it was possible the defendant would have seen him. By leaving the crosswalk, the plaintiff was also entering a darker area of the street, thus heightening his own risk as a pedestrian that the oncoming driver might fail to see him. His awareness of the presence of an approaching vehicle ought to have alerted him to the necessity of checking its proximity to him. The plaintiff's failure to take care for his own safety was a proximate cause of the accident. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 119*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5GBY-CM31-JYYX-633F-00000-00&context=)(b), s. 179(2), s. 180, s. 181

**Counsel**

Counsel for the Plaintiff: D.C. Creighton, H. Faramarzi, Articled Student.

Counsel for the Defendant: H. Grewal.

**Reasons for Judgment**

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| **L.D. RUSSELL J.** |

**Introduction**

**1**  Mr. Anderson's claim arises out of a pedestrian-motor vehicle accident which occurred on January 9, 2008. The trial before me dealt with a determination of liability only. If necessary, the damages phase will continue in February.

**2**  Rather than setting out all the individual accounts given before me, I have set out my factual findings below after considering the entire body of evidence. I have chosen not to more than mention the evidence of Dr. Douglas and Nurse Braacx, as I did not find their evidence particularly probative or helpful.

**Facts**

**3**  On Wednesday, January 9, 2008, the plaintiff, Wayne Anderson, was on his way to work. He left his apartment at 420-11th Avenue, New Westminster at about 7:00 a.m. to catch his bus on 12th Street to travel to work at Oakridge Centre in Vancouver. He was employed at The Book Company, a division of Indigo/Chapters.

**4**  Mr. Anderson worked Tuesday to Saturday and started work at 9:00 a.m. every day except Wednesday when he began at 8:00 a.m. Hence his early start to catch his bus on the day of the accident.

**5**  His evidence was that it usually takes about 50 minutes to get to his place of work. Mr. Anderson does not drive and has never had more than a Learner's License, which he had when he was 16 years old. He is currently 46 years old.

**6**  Mr. Anderson walked down the lane behind his apartment building to Llewellyn Street, turned left onto 5th Avenue and crossed 5th from north to south. He waited on the southeast corner of 12th Street to cross it from east to west.

**7**  Twelfth Street runs approximately north-south. Fifth Avenue runs approximately east-west.

**8**  By the time Mr. Anderson arrived at the corner, it was approximately 7:05 a.m. It was still dark at that time in the morning. The streets were wet, but it was not raining at the time. The cars he noticed had their headlights on.

**9**  Mr. Anderson was wearing a brown leather jacket, beige pants, brown shoes and had no hat on. He was carrying a dark nylon briefcase with a strap over his right shoulder and an umbrella in his left hand.

**10**  At the intersection of 5th Avenue and 12th Street, there is a marked crosswalk and an unmarked crosswalk. The marked crosswalk is illuminated by a lit sign above the crossing and a street lamp. To the south of that marked crosswalk, there is an unmarked crosswalk. The unmarked crosswalk is not as well-illuminated as the marked crosswalk, but it is lit by a street lamp on the southeast corner. Some illumination may also be provided by the lit restaurant sign on the southeast corner of the intersection, in front of which is the street lamp.

**11**  Twelfth Street is a reasonably busy route in the morning, busier going north, but still busy going south. Mr. Anderson believes that one north-bound car stopped for him on 12th Street. He looked to his right and proceeded to cross.

**12**  Mr. Anderson saw his bus a block away at 12th Street and 6th Avenue. It was loading passengers. It is important that he catch this bus to be on time. He is a punctual person, according to his supervisor, Mr. Higgins. He usually arrives at work on time or a bit early, unless he runs into a transit problem. Certainly, he has never been cautioned about being late for work. However, seeing the passengers loading gave him some assurance he did not have to run across the street to reach his bus stop, which was located to his left and down 12th Street.

**13**  By Mr. Anderson's description, the bus stop is about 100 to 120 feet from the southeast corner of 12th Street, on the south side of 12th Street.

**14**  Mr. Anderson states that as he moved across the street, when he looked up to his right and saw the bus, he also noticed a car some way up the hill, which would also be to his right.

**15**  Mr. Anderson described the way he crossed the street: he crossed in front of the stopped northbound car and then "cut the corner" and made an arc to his left to walk to the bus stop. If he had made it to the curb, the greater part of his walk to the curb would have occurred outside what could be considered the unmarked crosswalk.

**16**  He states he was walking at a normal pace.

**17**  The independent witness, Mr. Lemay, whose evidence I discuss in more detail below, said he was walking "briskly" with his head down.

**18**  It appears that after Mr. Anderson cut the corner, his back would have been to the uphill slope and to the defendant's car proceeding downhill towards the intersection.

**19**  From the position of his body as he angled toward the bus stop, I find it is unlikely he looked back behind himself to check again whether the street remained clear of approaching cars and, in particular, where the one car was that he had noticed coming down the hill.

**20**  Jacklyn Kozniuk was driving south on 12th Street after leaving her home at about 7:00 a.m. She had her headlights on and was driving about the speed limit of 50 km/h in her 2002 Chevrolet Cavalier.

**21**  She stopped at the light at 12th Street and 6th Avenue. She does not remember if there was a bus in the southbound curb lane beside her.

**22**  She proceeded down 12th Street. She came to the intersection at 5th Avenue, went through the intersection and hit Mr. Anderson.

**23**  Mr. Anderson hit the hood of her car on the passenger side and rolled onto the ground on the right front of the passenger side. His injuries were to the left side of his body: his pelvis and shoulder.

**24**  A passerby called an ambulance and Mr. Anderson was taken to Royal Columbian Hospital.

**25**  In the course of examining him, a nurse, Ms. Braacx, noted that his breath smelled of alcohol.

**26**  Mr. Anderson does not dispute that at the time of the accident, he was a regular imbiber. There is a dispute about the amount of alcohol he told the orthopaedic consultant, Dr. Douglas, he consumed on a daily basis. This could go to his credibility. However, in terms of actual consumption, I find it does not make much difference whether he regularly drank 6-8 bottles of beer every evening or 10-12 bottles of beer. I find it probable he would drink about 8 bottles of beer every evening and he likely did so on the evening of January 8, 2008.

**27**  He says he retired about 10:00 p.m. the night before the accident and got up at 6:00 a.m. I find it likely he would still have smelled of alcohol the next morning, although his supervisor at work had never noticed an odour of alcohol on his breath. The supervisor, Mr. Higgins, testified that his employer would take disciplinary steps were an employee to show up hung over or smelling of alcohol. Mr. Higgins never took any such step with the plaintiff.

**28**  Notwithstanding the inference the defendant asked me to draw that the plaintiff was still impaired the next morning as a result of his substantial consumption of beer the evening before, the only evidence concerning his consumption is the odour on his breath. I have no expert evidence to inform me of whether the effect of consumption of 8 bottles of beer ending at about 9:30 the previous evening would cause impairment to continue to 7:15 the next morning.

**29**  Furthermore, there is no evidence of actual impairment. At the hospital, Mr. Anderson was fully oriented as to time and place. There is no note he was slurring his speech or exhibiting other signs of impairment.

**30**  I do not find Mr. Anderson to have been impaired the morning of January 9, 2008.

**31**  Mr. Anderson was discharged from the hospital the same day as the accident.

**32**  Ms. Kozniuk described her journey down 12th Street as uneventful until the plaintiff suddenly appeared in front of the right front of her car and she hit him. Until the moment of impact, she did not see him.

**33**  Ms. Kozniuk states that her car was in good repair. She was awake and alert and had not consumed any alcohol or drugs the night before or the morning of the accident. She does not have any restriction on her driver's license which requires that she use corrective lenses. She has been driving since she was 16.

**34**  She lives nearby with her parents and knows the area well having grown up in New Westminster. The intersection of 12th Street and 5th Avenue is 5 minutes from her home. She is 29 years old.

**35**  Ms. Kozniuk was on her way to pick up a paycheque at work. She was not working that day and was not in a hurry. Her evidence was that she was travelling at the speed limit. Mr. Anderson agreed that when he first noticed a car descending the 12th street hill, it did not appear to be speeding.

**36**  Ms. Kozniuk was aware there was a bus stop in the area and she was also aware of the lighted crosswalk at the intersection of 5th Avenue and 12th Street.

**37**  As she drove down the hill on 12th, there were some cars behind her but none in front. She often uses this route and acknowledged that it was reasonably busy in the morning.

**38**  Her headlights were on, as were those of the cars behind her, because it was dark at that time in the morning.

**39**  Ms. Kozniuk noticed a few cars coming north up the hill on 12th Street. She did not see a car stopped at the intersection of 12th and 5th heading north.

**40**  As the defendant came down the hill, she did not see anyone in the lighted crosswalk. She continued on her route and saw no one in the unmarked crosswalk.

**41**  On the west side of the street there is a grocery store on the south west corner. To the west of that store there are some blue bins and an office with a sign out front which says "Liberty Tax Centre". The blue bins sit between the grocery store and the front of the office.

**42**  She stated that the plaintiff "Came out of nowhere". By her description, the plaintiff was walking quickly towards the bus stop and was well outside the unmarked crosswalk. She hit him when she was south of the unmarked crosswalk in the area between the shops and in front of the blue bins. (See Exhibit 1, tab 9, 10).

**43**  When she first saw the plaintiff he was about one foot in front of her car. She says she had no opportunity to stop or to sound her horn, although she applied her brakes.

**44**  The plaintiff made contact with the right front of her car, rolled up onto the hood and then off onto the ground on the passenger side of her car. After the impact, Ms. Kozniuk saw the plaintiff hit the ground, jump to his feet and then, on instruction from people on the sidewalk, he lay down on the sidewalk, presumably awaiting the arrival of an ambulance.

**45**  By then, she had left her car, and gone towards the plaintiff. He was conscious and lying on the sidewalk. Once the police arrived, she described what had happened. She was not charged as a result of the accident.

**46**  Ms. Kozniuk made an estimate of the distance from the crosswalk to where she hit the plaintiff, but did not take steps to actually measure the distance from the unmarked crosswalk to where impact occurred. There is a large disparity between her estimated distance and the actual distance between the unmarked crosswalk and the impact. She explained the disparity by saying she had no ability to accurately determine the distance and just did her best to guess.

**47**  At 5:30 pm on the day of the accident, she emailed the RCMP with a crude diagram of the scene containing what she now says was an erroneous estimate of the distance from the unmarked crosswalk to where she hit the plaintiff.

**48**  Ms. Kozniuk agreed she kept a lookout for pedestrians in the area and if she had seen anyone walking in the crosswalk, she would have stopped. She said the unmarked crosswalk to the south was darker than the marked and illuminated crosswalk to the north on 12th Street. The location of the bus stop and that area of the street are not illuminated by a lamppost.

**49**  Immediately after the accident, after she had left her car, the driver of a car proceeding northbound on 12th Street approached her. This was Mr. Robin Lemay, who gave evidence for the defence.

**50**  Mr. Lemay was driving his service van north on 12th Street on January 9, 2008, on his way to a jobsite just after 7:00 a.m. He described the morning as having "low light" and being "cloudy". He knows the route and said it could be busy in the morning. However, on that morning the traffic was moderate.

**51**  Mr. Lemay had his headlights on, was alert, not using his cell phone and not drinking coffee. His recollection was that there was no vehicle in front of him.

**52**  As Mr. Lemay came up 12th Street, he saw a pedestrian crossing the street south of the intersection of 12th and 5th. He was south of the intersection crossing on an angle walking in the general direction of the bus stop. Mr. Lemay knows the intersection from having travelled 12th Street frequently and stated the pedestrian was not in the intersection when he was hit.

**53**  Mr. Lemay estimated the pedestrian (the plaintiff) was walking quickly approximately 70 to 80 feet below the marked intersection with his head down. He said the pedestrian was "Making a beeline for the bus stop". Mr. Lemay did not see the pedestrian look behind himself to check for cars. He estimated that this would have been about 50 to 75 feet from the closest corner (the southwest corner).

**54**  Mr. Lemay apprehended the impact as he saw the pedestrian walking on the diagonal as the defendant's car approached. He realized that if the plaintiff maintained the diagonal on which he was walking, he would be hit by the southbound car approaching.

**55**  Mr. Lemay said the impact with the plaintiff occurred opposite the edge of the grocery store and in the vicinity of the blue bins. He stated that the place of impact was different from where the plaintiff was lying on the sidewalk post-impact. After the accident, the plaintiff was lying on the sidewalk further south, close to the transition from commercial buildings to residential, within about 20 feet of the first house.

**56**  He did not talk to the plaintiff following the accident, but told the defendant that he saw the accident and it was not her fault because the pedestrian had walked in front of her. He provided Ms. Kozniuk with his phone number.

**57**  Mr. Lemay had not met Ms. Kozniuk before the accident.

**58**  Carl Richmond took the photographs of the scene which are part of Exhibit 7. He agreed that the photographs taken at night tend to distort the difference between the illumination of the grocery store and the darkness around, making the light brighter and the darkness darker. However, he also stated that the accuracy of the photographs compared to human visibility is good.

**Issues**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | i |  | Is the defendant's ***negligence*** the cause of the accident? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | ii |  | If so, was the accident partly attributable to the plaintiff's ***negligence***? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | iii |  | If the accident were partly attributable to the plaintiff's ***negligence***, how should fault be apportioned between the plaintiff and the defendant as required by s. 1(1) of the ***Negligence*** *Act,* R.S.B.C. 1996, c. 333? |  |

**Analysis**

**59**  As noted by counsel for Ms. Kozniuk, the relevant statutory provisions are as follows: ss. 119, 179-181 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* (the "*Act"*)

**60**  The applicable provisions of these sections are:

**Definitions**

**119** (1) In this Part:

...

"crosswalk" means

...

1. the portion of a highway at an intersection that is included within the connection of the lateral lines of the sidewalks on the opposite sides of the highway, or within the extension of the lateral lines of the sidewalk on one side of the highway, measured from the curbs, or in the absence of curbs, from the edges of the roadway;

...

**Rights of way between vehicle and pedestrian**

**179** ...

1. A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

...

**Crossing at other than crosswalk**

**180** When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

**Duty of driver**

**181** Despite sections 178, 179, and 180, a driver of a vehicle must

1. exercise due care to avoid colliding with a pedestrian who is on the highway,
2. give warning by sounding the horn of the vehicle when necessary, and
3. observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

**61**  The parties are agreed that the duties stated in these sections of the *Act* are supplementary to the common law duties of care imposed on users of the road, both drivers and pedestrians. The duty of care owed was stated succinctly in *Little Plume v. Weir*, [*1998 ABQB 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JC5P-G1XM-00000-00&context=) at para. 61:

[61] These statutory provisions relating to duty of care are supplementary to the common law duty of care ... Both Mr Little Plume and Mr. Weir have the duty to exercise due care with respect to each other and others using the highway, including that degree of care which ordinarily prudent drivers and pedestrians would use in similar circumstances. [Citations omitted.]

**62**  This duty, accompanied by other useful observations about the respective duties of drivers and pedestrians, was recently restated by Dickson J. in *Hmaied v. Wilkinson*, [*2010 BCSC 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20XW-00000-00&context=) at paras. 22 - 24:

[22] When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way. Generally speaking, the party with the right of way is entitled to assume that other highway users will obey the rules of the road .... In particular, drivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way ....

[23] Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards .... Depending upon the circumstances, from a driver's perspective one such hazard may be a jaywalking pedestrian .... If it is reasonably foreseeable or apparent that a pedestrian will disregard the law and thus create a hazardous situation, a driver is obliged to take all reasonable steps to avoid a collision. In such circumstances, if the driver has a sufficient opportunity to avoid the collision, but does not take appropriate evasive action, the driver will be found negligent ....

[24] The standard required of drivers in responding to pedestrian-created hazards such as jaywalking is not one of perfection .... The applicable standard of care is one of reasonable prudence in all the circumstances. [Citations omitted.]

**63**  In *Hmaied,* Dickson J. was considering the respective liability of a driver who failed to keep a proper lookout and was speeding and a jaywalking pedestrian who leaned over mid-crossing to pick up his dropped cell phone, ignoring the approaching traffic.

**64**  Dickson J. found that both parties had failed to meet the requisite standard of care and the result was the accident which ensued. She also found that the defendant had established not only that the plaintiff pedestrian had failed to take proper care for himself, but had also demonstrated that his want of care was a proximate or effective cause of his own loss.

**65**  In the result, she found each party 50% liable on the basis that despite the plaintiff having had prior entry to the intersection, he was jaywalking in the face of oncoming traffic. Furthermore, halfway across the street he turned back to retrieve his cell phone without even looking to see how close the oncoming vehicle was. He exposed himself to the risk of being struck and was struck. Thus, his negligent actions were a proximate cause of the accident: at paras. 34, 36.

**66**  With respect to the defendant, Dickson J. found that he had the right of way, but failed to take reasonable precautions in response to the obvious hazard presented by a jaywalking teenager. The defendant ought to have foreseen that the young jaywalker would not behave predictably and he ought to have taken the simple step of slowing down and changing lanes as soon as he saw the plaintiff. The defendant in this case was also negligent: at paras. 34 - 35.

**67**  Following the jurisprudence in this province, it appears that there is a common law, as well as a statutory duty on a driver to maintain a proper look-out so that he/she can anticipate risk, even where that driver has not seen the hazard: *Nelson (Public Trustee of) v. Shinske* [*(1991), 62 B.C.L.R. (2d) 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-619X-00000-00&context=) (B.C.S.C.), Fraser J.

**68**  There is also a corresponding duty on a pedestrian as expressed by Fraser J. He states simply that there is a duty upon motorists and pedestrians alike to be vigilant for a reasonably apparent potential hazard.

**69**  When a driver approaches a crosswalk where she has some degree of knowledge and experience that pedestrians approaching the bus stop or the grocery store may be crossing, she should take the precaution of maintaining a careful look-out and slightly reducing her speed. The very presence of the marked crosswalk should have been an indication to her of the possible presence of pedestrians in the area. Had Ms. Kozniuk taken these steps, it is possible she would have seen the plaintiff before the last second, when it was too late to avoid him.

**70**  Her evidence was that her attention was focused directly ahead on the roadway. While the standard required of a driver is not that of perfection, she ought to have been able to glance to the periphery to check that there were no pedestrians in the roadway.

**71**  Mr. Anderson also had the obligation to take care for his own safety in his use of the road that morning. Had he crossed in either the lighted crosswalk or within the informal boundaries of the unmarked crosswalk, it is possible Ms. Kozniuk would have seen him. As well, had he remained in the boundaries of the crosswalk, his journey to the curb on the opposite side of the street would have been shorter and he may have been able to avoid the car entirely. By angling across towards the bus stop, as he did, the plaintiff was on the roadway for a longer period of time than he would otherwise have been the case.

**72**  By leaving the crosswalk, the plaintiff was also entering a darker area of the street, thus heightening his own risk as a pedestrian that the oncoming driver might fail to see him. He failed to even glance over his shoulder as he left the confines of the crosswalk to locate the car he had earlier noticed approaching from the north on 12th. His awareness of the presence of an approaching vehicle ought to have alerted him to the necessity of checking its proximity to him.

**73**  Mr. Lemay's first reaction was likely an honest one; after the impact, he went to Ms. Kozniuk and told her it was not her fault because the plaintiff had walked directly in front of her.

**74**  While Mr. Lemay could not know of the duties of a driver, his reaction to the accident was to perceive that the plaintiff had put himself at risk by failing to look for the approaching car when he was well outside the crosswalk.

**75**  I find that both parties bear fault in this accident. Ms. Kozniuk had reason to look for pedestrians in the area of the crosswalk and the bus stop and she failed to keep a proper lookout. Therefore, her ***negligence*** resulted in hitting the plaintiff.

**76**  The plaintiff left the relative safety of the crosswalk to jaywalk towards the bus stop at a quick pace on a dark, wet street without looking over his shoulder to locate the oncoming vehicle which he had earlier noticed as he began crossing. The defendant has satisfied me that the plaintiff's failure to take care for his own safety was a proximate cause of the accident.

**Conclusion**

**77**  The apportionment of liability required by s. 1(1) of the ***Negligence*** *Act* is fact-driven. I must determine "the degree to which each person was at fault".

**78**  In reviewing the cases put before me by counsel, including *Karran v. Anderson*, [*2009 BCSC 1105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624K-00000-00&context=), *Beauchamp v. Shand*, [*2004 BCSC 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3N8-00000-00&context=), *Wong-Lai v. Ong,* [*2011 BCSC 1260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6270-00000-00&context=), I have determined that the relative degrees of blameworthiness should be as follows: 30% to the plaintiff and 70% to the defendant.

**79**  I have not been asked to award damages and have not heard the medical evidence in this matter. I trust that my determination of liability will assist the parties in reaching a settlement.

**80**  I will await submissions on costs. Should it be necessary for counsel to appear before me, they may make arrangements through the Registry.

L.D. RUSSELL J.

**End of Document**

[***Arbutus Bay Estates Ltd. v. Davis & Co., [2001] B.C.J. No. 1365***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63S6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Dorgan J. (In Chambers)

Heard: March 13 and 14, 2001.

Judgment: June 15, 2001.

Victoria Registry No. 98/0538

**[2001] B.C.J. No. 1365** | 2001 BCSC 887 | 106 A.C.W.S. (3d) 351 | [2001] B.C.T.C. 887

Between Arbutus Bay Estates Ltd. and Paula Buchholz, plaintiffs, and Davis & Company, defendant

(42 paras.)

**Case Summary**

**Barristers and solicitors — *Negligence* — Standard of care — Particular negligent acts — Re conduct of trial — Practice — Dismissal of action — Grounds.**

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| --- |
| This was an application by the defendant Davis lawyer for an order dismissing Buchholz's action against him. Davis represented Buchholz in an action in which she was a defendant. The action involved a road which ran across Buchholz's land. Davis argued that Buchholz's affidavit should be declared inadmissible or that portions of it should be struck as it contained argument, hearsay, emotional reactions, inflammatory assertions and unsubstantiated sources of information. Buchholz argued that she was representing herself when she prepared the affidavit and that she was responding to an affidavit which contained hearsay and argument. Buchholz argued that it was not appropriate to determine the matter by way of a summary trial on affidavit evidence as there were conflicts in the affidavit material. Davis argued that the allegedly conflicting evidence was discreet and readily resolved. Buchholz argued that Davis should have pleaded a constitutional argument at trial and on appeal, and that failure to do so amounted to ***negligence***. Davis argued that decisions were made after the trial that the constitutional argument had no chance of success given the findings of fact made by the trial judge. Davis also argued that Buchholz was made aware of the decisions through regular correspondence before the appeal was heard.  HELD: Application allowed.  Given that Buchholz was representing herself, the court was satisfied that no prejudice would flow from the court receiving her affidavit and disabusing itself of irrelevant or obviously inadmissible assertions. The evidentiary conflicts were discreet and had little bearing on the issue. The issue related to an undisputed fact that the constitutional argument was not included in the pleadings at trial or on appeal. It was therefore appropriate to determine the matter by way of summary trial. All of the evidence integral to the constitutional argument was before the trial judge who made findings of fact based on that evidence. The Court of Appeal did not interfere with those findings. The outcome would not have been different if the constitutional argument had been included in Buchholz's factum or raised at the appeal. Buchholz had therefore failed to show that Davis's conduct of the litigation had fallen below the standard of care. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.

Highways Establishment Protection Act, s. 2.

**Counsel**

James Legh, for the plaintiff, Paula Buchholz. G. Bruce Butler, for the defendant.

|  |
| --- |
| **DORGAN J.** |

INTRODUCTION

**1**  The defendant, Davis & Company, applies for an order dismissing the plaintiffs' solicitors' ***negligence*** action, pursuant to Rule 18A. Counsel for the defendant submits that this case is appropriate for disposition by summary trial. Further, the defendant asks that Ms. Buchholz' claim be dismissed on its merits or, alternatively, that it be dismissed for her failure to produce a list of documents in accordance with the terms of this Court's order dated June 9, 2000.

**2**  The plaintiffs, Arbutus Bay Estates Ltd. and Ms. Buchholz ("Ms. Buchholz"), allege professional ***negligence*** against Davis & Company on the basis that, as former solicitors, they did not advance a specific argument at trial and on appeal (the "Constitutional Argument"). Ms. Buchholz claims damages as a result.

**3**  The writ and statement of claim were filed February 9, 1998. The statement of defence was filed November 30, 1998. The plaintiffs have not taken any significant steps in this action since the writ was filed. No discoveries have been scheduled or held and a trial date has not been set.

**4**  Counsel for Ms. Buchholz submits that Rule 18A is inappropriate for this case because of the conflict between her evidence and that of Mr. Michael Carroll, Q.C., her former counsel. She submits that the conflict is such that justice cannot be achieved through this summary trial process.

HISTORY OF THE PROCEEDINGS

**5**  Davis & Company acted for Ms. Buchholz, [*[1995] B.C.J. No. 1917*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B14B-00000-00&context=) (B.C.S.C.) ("the Underlying Action") in which Ms. Buchholz and Arbutus Bay Estates Ltd. were defendants. The plaintiffs in the Underlying Action ("Emmett and Eddy") were the registered owners of two parcels of land adjacent to land owned by Ms. Buchholz on Mayne Island.

**6**  At issue in the Underlying Action was the nature of Horton Bay Road. It runs across land owned by Ms. Buchholz, and is the only road leading to the lots owned by Emmett and Eddy. Emmett and Eddy sought a declaration that Horton Bay Road was a public highway, at least to the boundary of their property line. Ms. Buchholz claimed that Horton Bay Road was private and refused Emmett and Eddy access to their land. There was some confusion during the course of trial as to the exact location of the property line, but as will become apparent in these reasons, that mistake is of no consequence to the resolution of the current application.

**7**  At trial, Huddart J., as she then was, reviewed two methods by which private land could become public; by operation of statute or at common law: see Emmett v. Arbutus Bay Estates Ltd. (30 January 1992), Vancouver Registry No. C902649 (B.C.S.C.), [*[1992] B.C.J. No. 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61GC-00000-00&context=).

**8**  The Highways Establishment Protection Act (the "Highways Act"), in effect from 1905 to 1945, provided in s.2 that:

All existing travelled roads not established prior to the passing of this Act by notice in the British Columbia Gazette or otherwise dedicated to the public use by a plan deposited in the Land Registry Office for the District in which the roads are situated respectively, on any portion of which public money has been expended shall be deemed and are hereby declared to be public highways.

|  |  |
| --- | --- |
| (Emphasis Added) |  |

**9**  The Highways Act was amended in 1945 with the removal of the phrase "on any portion".

**10**  At common law, a roadway becomes a public highway if it is dedicated for public use and is used by the public. The dedication and use factors only apply to the segment or portion of a disputed roadway that is so dedicated and so used.

**11**  The essence of the Constitutional Argument is that the provincial statute, the 1905 Highways Act and its 1945 successor, were not applicable because the Federal Crown owned the property on which Horton Bay Road is located from 1919 to 1945. Therefore, the roadway could not have been made public between 1919 and 1945 by operation of the provincial statute because that statute has no applicability to federally owned land.

**12**  The plaintiffs, Eddy and Emmett, contended that, notwithstanding the Federal Crown ownership of the land in issue, the road could become a public road or highway at common law through dedication to public use and subsequent use by the public.

**13**  Huddart J. found that public money had been expended on Horton Bay Road up to an including a culvert, but not as far as the Emmett's and Eddy's property line. Since the statutory basis on which the road was found to be public covered only a portion of the road, Huddart J. then considered whether, by operation of the common law, the remaining portion of Horton Bay Road had become public through dedication and use, and concluded at p. 20:

The evidence as to use before 1919 and the circumstances of its making also permits the inference that James Robson dedicated the road as far as the culvert for public use as a highway in the early years of this century.

**14**  The practical result of the trial decision was that approximately 80 feet of road leading to Emmett's property and 15 feet of road leading to Eddy's property were held to be private. The mistake in the location of the property line appears to be a result of the historical use of gates and geographical features such as the culvert and a creek, by which former property owners described the boundaries of their land.

**15**  In finding that portions of Horton Bay Road were public based on the Highways Act and the common law, Huddart J. did not consider the Constitutional Argument, stating at p. 20:

Having reached these conclusions, I need not concern myself with the potential constitutional argument raised by the defendant.

**16**  Emmett and Eddy appealed the trial decision. The defendant's defence to the appeal was that the portion of Horton Bay Road between the culvert and Emmett's property line was not a "travelled road" and therefore could not be public. A cross-appeal was launched to argue that the trial judge was wrong in deciding that Horton Bay Road was public to the culvert. The Constitutional Argument was not included in the defendant's appeal.

**17**  Legg J.A., speaking for the court, found for Emmett and Eddy that all of Horton Bay Road was public based on his interpretation of the Highways Act: see [*(1994), 88 B.C.L.R. (2d) 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S19T-00000-00&context=), [*[1994] B.C.J. No. 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S19T-00000-00&context=), leave to appeal to S.C.C. dismissed December 8, 1994, [*[1994] S.C.C.A. No. 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-F1H1-21YX-00000-00&context=) . In effect, since public money was expended on a part of Horton Bay Road, the entire road was found to be public. The trial judge's finding regarding the common law method of proving the public nature of Horton Bay Road was also discussed by Legg J.A. at p. 86:

... The learned judge found the evidence of the use of the road before 1919 and the circumstances of the making of the road entitled her to infer that the owner of Section 2, James Robson, had dedicated the road as far as the culvert for public use. I am not persuaded that she erred in that finding and as I have indicated earlier, that finding amounts to a finding that the owner of Section 2 had acquiesced in the use and construction of the road before 1919.

**18**  Legg J.A. concluded at p. 86:

... In my opinion, Horton Bay Road became a public road which extended to the boundary between Section 1 and Section 2 by virtue of: (a) it having become a travelled road before 1945; and (b) public funds having been expended on the road before 1945. As a result, under the pre-1945 legislation the portions of the road which were part of the travelled road beyond the culvert to the boundaries between Section 1 and Section 2 were part of that public road.

**19**  After judgment in the appeal was handed down, the plaintiff retained new counsel and applied to the Court of Appeal requesting that the case be remitted back to trial for consideration of the Constitutional Argument. In dismissing the plaintiff's application, Legg J.A. issued Supplementary Reasons: see [*(1994) 95 B.C.L.R. (2d) 339*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S33W-00000-00&context=), [*[1994] B.C.J. No. 1919*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S33W-00000-00&context=). Legg J.A. stated that the Constitutional Argument had not been raised until after the evidence was concluded at trial and that, since some witnesses had died since trial, it would be unfair to Emmett and Eddy to grant the application. Commenting on the facts found at trial, Legg J.A. stated at p. 345:

In my opinion there was sufficient evidence to prove that there was a travelled road past the culvert before the federal Crown received title in 1919.

**20**  Ms. Buchholz then applied to have the defendant's bill reviewed. The solicitors' bills (Ms. Buchholz applied for a review of both Davis & Company and her previous lawyers) were allowed by the master. An appeal from the review of the defendant's bills was heard February 6, 1997, [*[1997] B.C.J. No. 294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-2195-00000-00&context=), and the matter remitted back to the reviewing master for further consideration. An appeal to the Court of Appeal has been filed and adjourned by reasons of Finch J.A., as he then was, March 18, 1999, [*[1999] B.C.J. No. 620*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-225S-00000-00&context=), pending resolution of the solicitors' ***negligence*** action before this court.

ISSUES

**21**  There are two issues in this application:

1. Is this an appropriate case for disposition pursuant to Rule 18A; and
2. Is the defendant liable for negligent conduct in conducting the litigation.

Issue 1 - Rule 18A

**22**  Two sub-issues require determination; a ruling on the admissibility of Ms. Buchholz' affidavit and a ruling on the conflict in the evidence.

**23**  Davis & Company argues that significant portions of Ms. Buchholz' affidavit, filed August 21, 2000, are inadmissible in that they contain "argument, hearsay, emotional reactions, inflammatory assertions and unsubstantiated sources of information". Accordingly, the defendant applies to have the affidavit declared inadmissible or, in the alternative, to have significant portions of it struck.

**24**  In response, Ms. Buchholz argues that she was representing herself and had no input from counsel when she prepared the affidavit. Ms. Buchholz also submits that as matters proceeded, she did not have the opportunity to amend her affidavit and that, in any event, it responds to the Carroll affidavit, filed April 17, 2000, which also contains hearsay and argument.

**25**  If the court embarked on a process of striking portions of Ms. Buchholz' affidavit, it would also have to consider the Carroll affidavit in the same fashion, as they are both affidavits in response. In my view, given that Ms. Buchholz was representing herself and drew the affidavit without input from counsel, I am satisfied that no prejudice will flow from this court receiving her affidavit and disabusing itself of irrelevant or obviously inadmissible assertions contained within. Accordingly, I decline to either strike the affidavit in its entirety or in part.

**26**  As to the suitability of proceeding under Rule 18A on the basis of affidavit evidence, Mr. Legh conceded there was likely no additional evidence that could be called if the action proceeded in the normal fashion; that is, a trial of the solicitors' ***negligence*** action would consist of calling all the evidence heard at the trial before Huddart J. and reading in from the transcript the evidence of those witnesses who testified but are now dead. There is, in this case, a finite number of witnesses with evidence regarding use of the disputed portion of the road and facts relating to the public expenditure.

**27**  The second sub-issue concerns a potential conflict in the affidavit material, and whether such conflict can be resolved on a Rule 18A application.

**28**  The defendant contends that its actions do not amount to ***negligence*** and that such a finding can readily be made in this summary trial. Davis & Company further submit that the allegedly conflicting evidence is discreet and readily resolved.

**29**  Counsel for Ms. Buchholz asserts that the issues in the solicitors' ***negligence*** action, which require determination and, it is argued, make it unsuitable for a summary trial, are:

1. To determine what the instructions were;
2. To determine whether Davis & Company followed Ms. Buchholz' instructions; and
3. To ascertain if there a reasonable possibility that the constitutional argument, had it been dealt with differently, would have changed the result at trial and/or on the appeal and cross-appeal.

**30**  I am satisfied that the conflicts that exist in the material are discreet and have little bearing on the application before me. The issue before me relates to an undisputed fact, that is, that the Constitutional Argument was not included in the pleadings at trial or on appeal, although it was raised during oral submissions at trial. Nothing in the evidence that is in conflict alters those facts that are at the heart of Ms. Buchholz' solicitors' ***negligence*** action.

**31**  As a result, I find that this case is appropriate in all the circumstances for determination pursuant to Rule 18A.

Issue 2 - Solicitors' ***Negligence***

**32**  Ms. Buchholz contends that the defendant should have pleaded the Constitutional Argument at trial and on appeal, and that the defendant's failure to do so amounts to ***negligence***. She also asserts that the appeal factum filed on her behalf should have included reference to the Constitutional Argument.

**33**  In support of her allegation of ***negligence***, Ms. Buchholz relies in large part on Legg J.A.'s Supplementary Reasons. I believe Legg J.A. put her case at its highest in commenting, at p. 344, that: [*[1994] B.C.J. No. 1919*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S33W-00000-00&context=)

Notwithstanding the decision of the trial judge that it was unnecessary to decide the constitutional issue, it was incumbent upon the applicants on the hearing of the appeal to seek leave to put that question in issue on the appeal or the cross-appeal. If the constitutional issue had been raised by the applicants on the appeal, this court could have ruled then whether it could be raised and, if so, on what terms. We are informed that at that time, Mr. Fred Bennett was still alive and the court might have considered it appropriate to hear his evidence.

**34**  However, Legg J.A. ultimately accepted the findings of fact made at trial concerning use of Horton Bay Road prior to 1919, noting at p. 343:

The argument of counsel for the applicants that there was no evidence to support a finding of fact that prior to 1919 there was a travelled road over these lands east of the culvert cannot be accepted. In my view there was sufficient evidence to support such a finding.

**35**  The defendant submits that the requisite standard of care was not breached in conducting the litigation as it did on behalf of Ms. Buchholz. Decisions were made after the trial that the Constitutional Argument had no chance of success, given the findings of fact made by Huddart J. The defendant asserts that Ms. Buchholz was made aware of these decisions through regular correspondence before the appeal was heard. Specifically, in a letter from Davis & Company to Ms. Bucholz dated August 30, 1993, Mr. Carroll wrote:

...

I have also not incorporated the constitutional argument. The reason for this is that there is evidence of Mr. Bennett concerning the use of the road after the Japanese left. ... The constitutional argument is therefore bound to fail based on the evidence before the Trial Judge.

**36**  Following the Court of Appeal's decision, there was another round of correspondence between Ms. Buchholz and the defendant concerning the defendant's responsibility to raise the Constitutional Argument. In a letter to Ms. Buchholz dated October 13, 1994, Mr. Carroll wrote:

... I am sorry you were under the impression that the Constitutional argument had been made in the Court of Appeal. You were present in the Court when the argument was being made and must have undoubtedly heard the exchange between Justice Legg and myself. He asked me whether we were making an issue of the Constitutional argument. I confirmed that we were not since there was some evidence that work had been carried out on the road up to the culvert (but not past the culvert) both prior to 1919 and after 1945.

**37**  Further context is given to the defendant's choices in conducting the appeal in paras. 46-47 of the defendant's outline of argument:

1. In short, the decision of Madam Justice Huddart made little sense either practically in light of the dedication argument or legally in light of the argument based on the Act. The Constitutional Argument was thus irrelevant. The only way that the Plaintiffs could possibly have succeeded in the Underlying Action was if the court could be persuaded that the use of the roadway was not a public use. In other words, that the roadway was not "travelled freely by the public". This argument (the "travelled road argument") was advanced before the Court of Appeal.

Affidavit of Michael Carroll, Q.C. sworn February 29, 2000, para. 42

1. On appeal, Mr. Carroll argued that the evidence of travel on the road prior to 1919 was insufficient to make the road public all the way to the property boundary. Given the findings of the trial judge, this was the only argument that might have succeeded. If it was successful the finding of public dedication of the road prior to 1919 would have been overturned. Further, the Highways Act argument would have failed because the road would not have been "travelled". If the travelled road argument did not succeed, the findings would have prevailed and the Constitutional Argument would have been of no assistance.

**38**  Having considered the evidence regarding the defendant's conduct in preparing for trial and on appeal, I am not persuaded that the defendant acted in a manner that breached the standard of care required of solicitors in not pursuing the Constitutional Argument in the manner desired by Ms. Buchholz.

**39**  The Constitutional Argument was simply that, an argument. I am satisfied that all the evidence integral to the Constitutional Argument was before the trial judge, who made findings of fact based on this evidence. The Court of Appeal did not interfere with those findings. Pleading the Constitutional Argument would change nothing. As a result, I am satisfied that had the Constitutional Argument been included in the appellant's factum or raised at the appeal, the outcome would not have been different.

**40**  Even if Ms. Buchholz could adduce additional evidence to support the Constitutional Argument, Huddart J. found at trial that Horton Bay Road was public, before 1919, by virtue of the common law requirements of dedication and usage, at least to the point of the culvert. Accordingly, I must conclude that the Constitutional Argument is bound to fail.

CONCLUSION

**41**  The burden is on Ms. Buchholz in this action. Mr. Carroll made considered decisions which are required of counsel in any litigation. Ms. Buchholz has failed to demonstrate why Mr. Carroll's choices in how he conducted the litigation fell below the standard of care he owed to his client. Her action is accordingly dismissed.

**42**  Costs follow the event unless there are specific matters which bear on this issue, in which case counsel may set it down.

DORGAN J.

**End of Document**

[***Bain v. Shafron, [2009] B.C.J. No. 806***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M24J-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

B. Fisher J.

Heard: March 30, 31, April 1, 2009.

Judgment: April 22, 2009.

Docket: S73461

Registry: New Westminster

**[2009] B.C.J. No. 806** | 2009 BCSC 543

Between David Ian Bain, Plaintiff, and Annette Shafron, Defendant

(53 paras.)

**Case Summary**

**Tort law — *Negligence* — Ultimate *negligence* — Avoidability of *negligence* — Motor vehicles — Rules of the road — Action by plaintiff for damages for personal injuries sustained in collision with defendant dismissed — Defendant was dominant vehicle in intersection waiting to proceed when light turned red — While defendant failed to keep proper lookout for oncoming cars after light turned red, plaintiff failed to show defendant could have avoided being struck by plaintiff when he proceeded at 50 kph through intersection — Plaintiff unreasonably relied on other cars moving in deciding to proceed through intersection at that speed.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Intersections — *Negligence* — Yielding — Right of way — Action by plaintiff for damages for personal injuries sustained in collision with defendant dismissed — Defendant was dominant vehicle in intersection waiting to proceed when light turned red — While defendant failed to keep proper lookout for oncoming cars after light turned red, plaintiff failed to show defendant could have avoided being struck by plaintiff when he proceeded at 50 kph through intersection — Plaintiff unreasonably relied on other cars moving in deciding to proceed through intersection at that speed.**

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| Action by Bain against Shafron for damages for personal injuries sustained in a motor vehicle accident. The front of Bain's vehicle struck the passenger side of Shafron's vehicle just after Bain entered an intersection on a green light. Shafron was attempting to clear the intersection when the impact occurred. Shafron died of cancer in the eight years between the accident and the trial. Evidence she gave at an examination for discovery in another action relating to the same accident was admitted at trial. She had stated she had proceeded into the intersection on a green light but had yielded to a bus that was turning left in front of her. After the bus made its turn, Shafron stated she proceeded on an orange light. The light turned red before she cleared the intersection. Bain testified he entered the intersection on a green light, after seeing two cars to his left starting to move. He struck Shafron's vehicle and caused considerable damage to her car. Independent witnesses testified Shafron's vehicle was proceeding very slowly after the bus made its turn. Neither Bain nor Shafron saw each other's vehicle prior to the impact.  HELD: Action dismissed.  Because she was already in the intersection, Shafron was the dominant driver and had a statutory right of way. Shafron lawfully entered the intersection. She was travelling very slowly at the time of the impact, having just started to move from a full stop. She was only halfway through the intersection when her light turned red. Bain was likely traveling at 50 kph when he struck Shafron's vehicle. Given this speed, it was not reasonable for Bain to have relied on the other vehicles next to him proceeding through the intersection in assuming it was safe to proceed through the intersection. Neither Bain nor Shafron had an obstructed view of the other. Bain should have seen Shafron's vehicle. Shafron should have been watching for a vehicle coming from her left as she moved through the intersection on a red light. However, given Bain's speed, there was nothing Shafron could have done to avoid the collision. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 127*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F4-00000-00&context=)(1)(a)(iii)

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1)

**Counsel**

Counsel for the plaintiff: D. Chadwick.

Counsel for the defendant: M.H. Wright, K.P. Serne.

**Reasons for Judgment**

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| **B. FISHER J.** |

**1**   This action arises from a motor vehicle accident that occurred on October 10, 2000 at the intersection of Oak Street and West Broadway in Vancouver. The front of the plaintiff's vehicle struck the front passenger side of the defendant's vehicle just after the plaintiff had entered the intersection on a green light. The defendant was in the intersection and attempting to clear it at the point of impact.

**2**  The only issue for determination at this stage is liability.

**Background of the action**

**3**  The accident in this case occurred well over eight years ago. Unfortunately, the defendant, Annette Shafron, has since died from unrelated causes.

**4**  The delay in bringing this matter forward lies at the feet of the plaintiff, David Bain. He was self-represented for a period of time and found it difficult to cope with the litigation. The trial was scheduled for 20 days with a jury. It was adjourned several times. The plaintiff made his last application to adjourn on February 12, 2008. I granted the adjournment on a number of conditions. One of the conditions was that the defendant was given liberty to enter the transcript of Ms. Shafron's examination for discovery from a related action involving the same accident in lieu of her *viva voce* evidence at trial. At that time, Ms. Shafron was gravely ill with cancer.

**5**  On October 16, 2008, the defendant applied to sever the issues of liability and damages, proposing that the issue of liability would proceed before judge alone. I granted that application.

**The nature of the evidence**

**6**  This case is an example of one that does not improve with age. Both parties were affected by the delay in bringing the case to trial.

**7**  The defendant was obviously limited in the evidence that could be adduced on her behalf. Her evidence consisted of a transcript from her examination for discovery in an action she brought against the plaintiff and others arising from the same accident. This evidence was ruled admissible in accordance with the liberty granted in my order of February 12, 2008. It was also admissible hearsay, being both necessary due to Ms. Shafron's unavailability and sufficiently reliable, being sworn testimony under oath. I have taken the nature of her evidence into account in assessing the weight it should be accorded.

**8**  The witnesses who testified for the plaintiff found it difficult to recall the details of what they saw that day.

**9**  Mr. Bain's credibility was in issue. He was cross-examined about the details of the accident as well as other matters pertaining to information he provided to the insurance adjuster. Some of his evidence was inconsistent with evidence he gave at his examination for discovery. Some of his explanations regarding issues pertaining to his income were unsatisfactory.

**10**  However, it was not necessary to make specific findings of credibility in coming to my conclusions on the issue of liability. As I have already indicated, there were problems with all of the evidence due to the delay in bringing this matter to trial. I have assessed all of the evidence and considered it as a whole in coming to my conclusions.

**Legal principles**

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| **1.** | **Liability** |  |

**11**  As I explain below, I have found that Ms. Shafron lawfully entered the intersection of Oak and Broadway. Accordingly, she had a statutory right of way under s. 127(1)(a)(iii) of the ***Motor Vehicle Act*** and Mr. Bain was obligated to yield to her right of way when he entered the intersection:

**127** (1) When a green light alone is exhibited at an intersection by a traffic control signal,

1. the driver of a vehicle facing the green light
2. must yield the right of way to vehicles lawfully in the intersection at the time the green light became exhibited ...

**12**  Ms. Shafron as the driver of the vehicle with the right of way was the dominant driver and Mr. Bain was the servient driver. A dominant driver does not lose that position by unreasonable actions but the existence of a right of way does not entitle the dominant driver to disregard an apparent danger: ***Atchison v. Kummetz***, [*(1995), 59 B.C.A.C. 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X1K0-00000-00&context=) at para. 19, ***Abbott Estate v. Toronto Transportation Commission***, [*[1935] S.C.R. 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1C4-00000-00&context=). There is a duty of care to avoid a collision when the dominant driver sees or ought to see that the other driver is not yielding the right of way: ***Bedwell v. McGill***, [*2008 BCCA 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3JN-00000-00&context=). In order for the plaintiff in this case to prove that the defendant was negligent, Mr. Bain must establish that Ms. Shafron should have become aware that he was not yielding and that she had a sufficient opportunity to avoid the collision. Any doubts should not be resolved in favour of the plaintiff: ***Walker v. Brownlee***, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.) at para. 50, ***Brewster (Guardian ad litem of) v. Swain***, [*2007 BCCA 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21PV-00000-00&context=), ***Kerr (Litigation Guardian of) v. Creighton***, [*2008 BCCA 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1MK-00000-00&context=).

**13**  The standard of care of a driver is not one of perfection, but whether the driver acted in a manner which an ordinarily prudent person would act: see ***Hadden v. Lynch***, [*2008 BCSC 295*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S21H-00000-00&context=) at para. 69 and the cases cited therein.

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| **2.** | **Apportionment** |  |

**14**  If I determine that the defendant was partially at fault for the collision, I must apportion liability between the parties on the basis of the degree to which each person was as fault: ***Negligence Act***, s. 1(1). In this context, "fault" means blameworthiness. I am required to assess the amount by which each party "fell short of the standard of care that was required of that person in all the circumstances": ***Cempel v. Harrison Hot Springs Hotel Ltd.*** [*(1997), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (C.A.) at para. 19. The Court of Appeal described this assessment process in ***The Alberta Wheat Pool v. Northwest Pile Driving Ltd.***, [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=) at para. 46:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

**15**  In assessing the relative degrees of fault, a number of factors may be considered. These factors were summarized by Groves J. in ***Aberdeen v. Langley (Township)***, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=), citing ***Heller v. Martens***, [*2002 ABCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=) at para. 34 and Chefetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book, 1981), at 102-104:

1. The nature of the duty owed by the tortfeasor to the injured person.
2. The number of acts of fault or ***negligence*** committed by a person at fault.
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose ***negligence*** comes as a result of the initial fault.
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. ... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis.
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy.
6. The gravity of the risk created.
7. The extent of the opportunity to avoid or prevent the accident or the damage.
8. Whether the conduct in question was deliberate, or unusual or unexpected.
9. The knowledge one person had or should have had of the conduct of another person at fault.

**16**  One of the most significant factors in this case is that the plaintiff, as the driver in the servient position, will normally bear a greater degree of responsibility: ***Bedwell*** at paras. 59-61.

**The evidence**

**17**  Ms. Shafron was driving a Mercedes sedan southbound on Oak Street at approximately 3:50 pm on October 10, 2000. She said that she stopped at a red light at West Broadway and proceeded into the intersection when the light turned green. She stopped to yield to a northbound bus that was turning left on Broadway. When the bus completed its turn, the light was "orange". Ms. Shafron tried to clear the intersection. Before she was able to do so, the light turned red.

**18**  Mr. Bain was driving a pick-up truck eastbound on Broadway. He was in the curb lane, having just exited a parkade that was about 175 feet from the corner of Broadway and Oak. He said that as he approached Oak Street, the light turned green. He saw two cars in the lanes to his left start to move, so he proceeded into the intersection. As he did so, he drove into the front passenger side of Ms. Shafron's vehicle, causing considerable damage.

**19**  The parties primarily dispute the details of the movements of these two vehicles, whether each should have been visible to the other and whether Ms. Shafron could have avoided the collision.

**20**  Ms. Shafron said that while she was waiting for the bus to turn, she was blocking at least one lane of traffic westbound on Broadway. At that time she could see the eastbound curb lane on Broadway for about two car lengths and saw no cars. She did not see any of the eastbound cars begin to move as she proceeded through the intersection. She said she was 80% of the way though the intersection when her light turned red. She estimated her speed at 20 to 25 kph.

**21**  Heather Coon was driving a westbound trolley bus in the curb lane on Broadway. She was stopped at a red light at Oak Street. She saw Ms. Shafron's Mercedes in the lane in front of her bus, waiting for a northbound bus to make a left turn onto Broadway. She thought the Mercedes was going to turn left. She saw the bus clear the intersection when the Oak light turned yellow. She saw the Mercedes move after the bus completed its turn. She thought it was traveling at about one-half the regular speed, perhaps 15 kph. Ms. Coon thought her light turned green about two seconds after the Mercedes started to move. She heard the impact about two to three seconds after the Mercedes started to move. She did not see the collision. She did not remember when the light on Oak turned red.

**22**  Leslie Piche was driving a northbound bus in the centre lane on Oak Street. He was stopped at the intersection of Oak and Broadway, waiting for the bus in front of him to turn left onto Broadway. The Oak light was green. He thought the bus waited for a vehicle to clear and he thought the Oak light turned red around the time the bus completed its turn. He noticed the Mercedes in the intersection after the Oak light had turned red. He thought it was travelling quite slowly.

**23**  Colin Nicols was the first vehicle stopped at the red light at Oak Street in the eastbound middle lane on Broadway. He said he had a view of the entire intersection. He saw the Mercedes not fully in the intersection, behind another vehicle that was turning left. He remembered the Mercedes "creeping ahead" against a yellow light. He thought it was going to turn left. His light turned green. He advanced but then stopped when he realized the Mercedes was going through the intersection. He thought that Mr. Bain's truck went past him a second or two after he had stopped. Mr. Nicols could not estimate the speed of either vehicle, but he thought the Mercedes was going quite slowly and he was quite certain that the truck was going faster, perhaps at the speed limit of 50 kph.

**24**  Mr. Bain testified that he was travelling at about 15-20 kph as he approached the intersection at Oak Street. There were no cars ahead of him but several cars to his left. He said that the light turned green about five to six seconds before he reached the intersection. He did not see the Mercedes in the intersection. He noticed the cars to his left start to move so he felt it was safe to proceed. He saw the Mercedes in the corner of his eye just before the collision. He thought it was going fast. He said that he had no time to react.

**25**  According to City of Vancouver Engineering department, the lights at the intersection of Oak and Broadway had a designated sequence and timing on October 10, 2000. The north and southbound green lights on Oak Street and the east and westbound red lights on Broadway had a duration of 23 seconds. The Oak lights then turned yellow for 3.5 seconds while the Broadway lights remained red. The lights in all directions were then red for a further 1.5 seconds.

**The plaintiff's position**

**26**  The plaintiff submitted that the defendant was negligent by yielding to the left turning bus when the bus was required to yield to her and by continuing through the intersection when it was not safe to do so. Mr. Chadwick says that Ms. Shafron could have and should have stayed where she was or alternatively, made a left turn. Had she done either of those things, the collision would not have occurred.

**27**  The plaintiff also submitted that the defendant was no longer lawfully in the intersection as a result of her ***negligence*** and therefore the principles applicable to the dominant and servient drivers should not apply. In the alternative, the plaintiff says that Ms. Shafron ought to have seen him and was unable to avoid the collision because she was travelling too quickly in the circumstances.

**28**  The plaintiff says that his view was partly obstructed, he did everything he could reasonably have done to determine that the intersection was clear, and he should not be found partly at fault for the collision.

**The defendant's position**

**29**  The defendant submitted that the plaintiff was wholly responsible for the collision because he failed to yield to the defendant's right of way and he failed to prove when the plaintiff ought to have become aware that he was failing to yield and had sufficient opportunity to avoid the collision. Ms. Wright says that the defendant was lawfully in the intersection and was in plain view.

**30**  In the alternative, the defendant submitted that if she is found partly at fault, the plaintiff should bear at least 90% of the responsibility due to his servient position and his failure to keep a proper lookout.

**Analysis and findings**

**31**  The weather on October 10, 2000 was apparently clear and the roads were dry. The collision occurred during normal rush hour traffic.

**32**  I find that Ms. Shafron lawfully entered the intersection on a green light with the intention of proceeding straight through. She was unable to clear the intersection before her light turned red because she yielded to a left-turning bus. While Ms. Shafron waited for the bus to turn, her vehicle was blocking one lane of westbound traffic on Broadway. When the bus completed its turn, Ms. Shafron's light was yellow.

**33**  Ms. Shafron's evidence about this was consistent with the evidence of Ms. Coon and Mr. Piche. Ms. Coon had the best view of the Mercedes when it entered the intersection. She saw it directly in front of her bus in the westbound curb lane of Broadway. Both Ms. Coon and Mr. Piche noticed the left turning bus complete its turn at the earliest when the Oak light turned yellow. Mr. Piche thought the light had turned red, but his memory was not very clear. He was clear, however, that he saw Ms. Shafron's Mercedes in the intersection after the Oak light had turned red.

**34**  Mr. Nicols recalled the Mercedes entering the intersection on a yellow light. He thought he could see the crosswalk and bumper lines across Oak Street and he said only the front tires of the Mercedes were across these lines. I do not accept his evidence on this point. Mr. Nicols was not paying close attention to the Mercedes before it began to move towards his lane of traffic. He did not remember seeing the left turning bus or the bus behind it that was driven by Mr. Piche. He thought that the Mercedes was behind another vehicle that was turning left eastbound on Broadway. According to Ms. Shafron, there was no other left turning vehicle in front of her.

**35**  I do not accept Ms. Shafron's evidence that she was 80% through the intersection when her light turned red. I find that she was near the mid-point of the intersection. Mr. Nicols had the best view of the Mercedes after it began to move through the intersection as he was the first car in the middle lane of traffic eastbound on Broadway. Ms. Shafron passed right in front of him as he began to move forward on a green light. Considering that the lights in both directions were red for 1.5 seconds, this puts the Mercedes back near the centre line when her light turned red.

**36**  All three witnesses described the Mercedes travelling quite slowly but none were very certain about her speed. Ms. Shafron had to move from a stopped position on a yellow light. She had to be moving quite slowly to be near the centre line when her light turned red and in front of Mr. Nicols' vehicle after his light turned green. The length of the intersection north to south was approximately 84 feet. From where Ms. Shafron was stopped while waiting for the bus, it was approximately 23 feet to the centre line and 51 feet to the middle of Mr. Nicol's lane of traffic. She had less than 5 seconds to start to move and to travel 51 feet. Based on the amount of feet travelled per second at speeds of 10, 15 and 20 kph (9.11, 13.67 and 18.23 respectively), I find that Ms. Shafron was travelling at approximately 15 kph.

**37**  Ms. Shafron did not see Mr. Bain's vehicle. She said that while she was stopped for the bus she could see the eastbound curb lane on Broadway for about two car lengths and saw no cars. More significantly, she said that from that point to the time of impact, she did not notice the east-west traffic on Broadway because she was watching the light. This establishes that Ms. Shafron was not watching for eastbound traffic once she began to proceed through the intersection against a yellow and then red light. There is no evidence to suggest that her view of the eastbound vehicles in the curb lane was obstructed as she proceeded through the intersection.

**38**  Mr. Bain did not see Ms. Shafron's vehicle. He said that he noticed a truck in the left turn lane on Broadway as he was turning out of the parkade, which partially blocked his view of the intersection. He did not remember seeing a bus in the intersection. He relied on the movement of cars to his left to decide that it was safe to proceed.

**39**  No one else noticed a truck in the left turn lane on Broadway. While it is possible that there was a truck, I find it difficult to believe that Mr. Bain could have noticed this as he was turning out of the parkade. He noticed cars start to move on the green light but he did not notice that Mr. Nicols' vehicle stopped almost immediately. I do not accept his evidence that his view of the intersection was obstructed such that he would not have been able to see Ms. Shafron's vehicle.

**40**  It is not possible to determine Mr. Bain's precise speed, but I do not accept his evidence that he was travelling only 15 to 20 kph. While Mr. Nicols could not recall Mr. Bain's speed, he was quite certain that the truck was travelling faster than Ms. Shafron's Mercedes, and he said that the truck passed him a second or two after he had stopped. Mr. Bain said that he was 5 to 6 seconds from the intersection when his light turned green. If he had been travelling at only 15 to 20 kph, he would not have reached the point of impact when he did.

**41**  Moreover, if Mr. Bain had been travelling that slowly, it is likely he would have seen Mr. Nicols' vehicle stop and it is also likely he would have seen Ms. Shafron's vehicle, which was there to be seen. I find that Mr. Bain was travelling faster the Ms. Shafron, likely close to the speed limit of 50 kph. In these circumstances, it was not reasonable, in my view, for Mr. Bain to simply rely on the rather fleeting movement of other eastbound traffic to assume it was safe to enter the intersection.

**Application of legal principles**

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| **1.** | **Liability** |  |

**42**  Plaintiff's counsel argued that Ms. Shafron was negligent in yielding to the left turning bus, given that she had the right of way. While Ms. Shafron was not obligated to yield to the bus, I do not agree that doing so constituted a breach of the standard of care. In any event, the fact that she did so in the circumstances has no bearing on the liability issues in this case. She did not lose her dominant position as a result: see ***Atchison*** at para. 19.

**43**  The plaintiff relies on ***Atchison***, where the driver in the dominant position was found 100% at fault for a collision. There, the eastbound dominant driver (the defendant) entered an intersection on a yellow light, waited for two vehicles to make left turns and proceeded quickly past six lanes of traffic after his light had turned red. The northbound plaintiff entered the intersection a number of seconds after her light had turned green. A semi-trailer obstructed each party's view of the other. The trial judge found that the defendant proceeded too quickly and without a genuine concern that his action could be done safely, particularly since his view of northbound traffic was partly obstructed. The judge found that the plaintiff had no reason to suspect that the defendant was in the intersection when she proceeded after the light had changed in her favour and after seeing the semi-trailer start to move forward.

**44**  In this case, I have found that neither party's view of the other was obstructed. In these circumstances, it was not reasonable for Mr. Bain to rely on the brief movement of the vehicles to his left as he proceeded into the intersection. He had a duty to check himself: see, for example, ***Hiscox v. Armstrong***, [*2001 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X308-00000-00&context=). In any event, had he been more observant, he would have seen Mr. Nicols' vehicle come to a stop almost immediately after it began to move forward. Ms. Shafron's Mercedes was right there to be seen.

**45**  Ms. Shafron, on the other hand, was not proceeding quickly. As the dominant driver with the right of way, she had a duty to avoid a collision if she was able to do so. She should have been watching the eastbound traffic as she moved through the intersection on a red light. I find that she failed to keep a proper lookout.

**46**  However, that finding is not sufficient to find Ms. Shafron liable for ***negligence***. Mr. Bain has the burden of proving on a balance of probabilities when Ms. Shafron ought to have seen that he was not yielding and that she had a sufficient opportunity to avoid the collision: ***Walker***. Otherwise, Ms. Shafron's failure to keep a proper lookout did not cause or contribute to the accident: see, for example, ***Pakosh v. Kwok***, [*[1994] B.C.J. No. 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S1S6-00000-00&context=) (S.C.) and ***Coty v. McGeer***, [*[1984] B.C.J. No. 1544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M3B0-00000-00&context=) (C.A.).

**47**  The plaintiff submitted that Ms. Shafron ought to have stayed where she was or made a left turn, instead of proceeding through the intersection in the circumstances. While either of these actions was open to Ms. Shafron, her failure to do one or the other does not, in my view, constitute ***negligence*** given that the standard of care does not require perfection but ordinary prudence. Notably, the plaintiff did not argue that Ms. Shafron would have been able to stop in time to avoid the collision had she seen Mr. Bain while she was approaching the south side of the intersection.

**48**  From where she was stopped on the north side of the intersection, Ms. Shafron could see two car lengths down the eastbound curb lane. There was no evidence led about the precise distance of a car length. However, given what she could see from that position, she ought to have seen Mr. Bain's truck when it was nearing the intersection. Given Mr. Nicols' evidence that Mr. Bain passed him "a second or two" after he stopped and Mr. Bain's speed at close to 50 kph, I find that Ms. Shafron would not have been able to see him before she passed in front of Mr. Nicols' vehicle. Ms. Shafron was about one second from impact at that point. The evidence does not establish that she would have been able to react and stop within that short window to avoid the collision.

**49**  I note that there was no evidence before me about reaction times or stopping times. Even if Ms. Shafron ought to have seen Mr. Bain a second or so sooner, the evidence does not establish how long it would have taken her to react and actually bring her vehicle to a stop.

**50**  In these circumstances, it is my view that Mr. Bain has not met his burden of proving that Ms. Shafron had an opportunity to avoid the collision. Accordingly, he has failed to prove that Ms. Shafron's failure to keep a proper lookout caused or contributed to the accident and his action must be dismissed.

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| **2.** | **Apportionment** |  |

**51**  If I am wrong on the issue of liability, I will address apportionment.

**52**  I have found that both Mr. Bain and Ms. Shafron failed to keep a proper lookout and that each party ought to have seen the other. Given that Mr. Bain was in the servient position, he should have a greater degree of responsibility for the collision. I would apportion the degree of fault 75% to Mr. Bain and 25% to Ms. Shafron. In doing do, I would consider the following factors:

1. each party's negligent act consisted of a failure to keep a proper lookout;
2. each party's negligent act occurred within seconds of the other;
3. neither party's conduct was a deliberate departure from the safety rules, but Ms. Shafron's conduct was less blameworthy in that it was more an imperfect reaction to a potentially critical situation;
4. although she was travelling at a cautious speed, Ms. Shafron created a risk by proceeding through the intersection against a red light without watching the traffic to her immediate right and Mr. Bain created a serious risk by relying only on his brief view of the movement of vehicles to his left rather than watching for other vehicles in the intersection;
5. Ms. Shafron had the right of way;
6. Mr. Bain had a better opportunity to avoid the collision.

**Conclusion**

**53**  I conclude that the plaintiff has failed to prove that the defendant's failure to keep a proper lookout caused or contributed to the accident. The action is dismissed, with costs to the defendant.

B. FISHER J.

**End of Document**

[***Barber v. Jack, [2014] B.C.J. No. 2810***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4NP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack, British Columbia

A. Saunders J.

Heard: August 12 and 13, 2014.

Oral judgment: August 13, 2014.

Dockets: 21365 and S21371

Registry: Chilliwack

**[2014] B.C.J. No. 2810** | 2014 BCSC 2142

Between Toni-Lynn Michelle Barber, Plaintiff, and Rebekah Leigh Jack, Daniel Aaron Jack, Insurance Corporation of British Columbia, John Doe or Jane Doe, Defendants And between Beth-Anne Simpson, Plaintiff, and Rebekah Leigh Jack, Daniel Aaron Jack, Insurance Corporation of British Columbia, John Doe or Jane Doe, Defendants

(30 paras.)

**Case Summary**

**Insurance law — Automobile insurance — Compulsory government schemes — Claims against parties unknown — Action by plaintiff to determine liability for motor vehicle accident allowed — Collision occurred when defendant's vehicle crossed median and collided with plaintiff's vehicle — Court accepted defendant's claim that she took emergency evasive manoeuvre to avoid collision with vehicle driven by unidentified driver that crossed into her lane — She acted as she did because of *negligence* of unidentified driver — Defendant was not at fault — Judgment was granted against Insurance Corporation of British Columbia for liability of unidentified driver.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Action by plaintiff to determine liability for motor vehicle accident allowed — Collision occurred when defendant's vehicle crossed median and collided with plaintiff's vehicle — Court accepted defendant's claim that she took emergency evasive manoeuvre to avoid collision with vehicle driven by unidentified driver that crossed into her lane — She acted as she did because of *negligence* of unidentified driver — Defendant was not at fault — Judgment was granted against Insurance Corporation of British Columbia for liability of unidentified driver.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Lane changing — *Negligence* — Liability — Civil actions — *Negligence* — Defences — Emergencies — Action by plaintiff to determine liability for motor vehicle accident allowed — Collision occurred when defendant's vehicle crossed median and collided with plaintiff's vehicle — Court accepted defendant's claim that she took emergency evasive manoeuvre to avoid collision with vehicle driven by unidentified driver that crossed into her lane — She acted as she did because of *negligence* of unidentified driver — Defendant was not at fault — Judgment was granted against Insurance Corporation of British Columbia for liability of unidentified driver.**

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| Action by Barber to determine liability for a motor vehicle accident. Barber's vehicle collided with a vehicle driven by the defendant Jack, which had crossed over a narrow grassy median. Barber did not see Jack's vehicle until the collision was imminent. She could not offer any evidence to explain how Jack's vehicle crossed the median. Jack was determined to be negligent and the burden was on her to explain that the accident happened through no fault on her part. Jack claimed that the accident occurred because she, through no fault on her own, attempted to avoid a collision with a car that travelled beside her to her right. That vehicle suddenly changed lanes and moved into her own lane of travel. In an attempt to avoid a collision she moved to the left onto the paved shoulder. Her left tires crossed over into the grass of the median and she lost control. The identity of the driver of the vehicle that forced Jack to take evasive action was unknown.  HELD: Action allowed against the defendant Insurance Corporation of British Columbia regarding the liability of the unidentified driver.  Jack was an experienced driver who was familiar with roadway and who travelled at highway speed with two young children strapped in the back of the car. She drove along the shoulder and she was caught by the grass because of an evasive manoeuvre that she took. She was not inattentive. Jack conducted an emergency evasive manoeuvre and she did so because of ***negligence*** of an unidentified driver. Jack was not at fault for the accident. She acted as any reasonable driver would under the circumstances. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 150*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5GBY-CM31-JYYX-633H-00000-00&context=), s. 164(1)

**Counsel**

Counsel for the Plaintiff in both actions: D.C. Sliman.

Counsel for the Defendants R. and D. Jack in both actions: J.P. Cahan.

Counsel for Insurance Corporation of British Columbia in both actions: M. von Antal.

**Oral Reasons for Judgment**

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| **A. SAUNDERS J. (orally)** |

**1**   This trial concerns liability for a motor vehicle accident that occurred on July 11, 2008.

**2**  The plaintiffs were proceeding eastbound on Highway 1 to the east of Chilliwack, at a location where the eastbound and westbound lanes are divided by a narrow grassy median. They collided with a vehicle operated by the defendant Rebekah Jack, that had been westbound. Ms. Jack's vehicle crossed the median and impacted the plaintiffs' vehicle. The damage was horrific. Both vehicles ended up overturned, severely crumpled and deformed. That no one was killed is a testament to the strides that have been made by motor vehicle manufacturers in safety design.

**3**  Neither plaintiff saw the Jack vehicle until it was approaching them and collision was imminent. They can offer no evidence as to how the Jack vehicle came to be crossing the median. Nevertheless, a *prima facie* finding of ***negligence*** on the part of the defendant Ms. Jack is established by the circumstances, and the burden lies on Ms. Jack to persuade the Court that the accident likely happened through no fault on her part.

**4**  Ms. Jack seeks to persuade the Court that the collision occurred because she, through no fault on her own part, had been seeking to avoid a collision with a car travelling beside her to the right, in the right-hand westbound lane, that suddenly changed lanes, moving into her own lane of travel. She says that in an attempt to avoid colliding with that vehicle, she moved to the left onto the paved shoulder (which is from the photographic evidence very narrow). Her left tires crossed over into the grass of the median and she lost control.

**5**  The plaintiffs say that Ms. Jack's evidence of there having been what I will call a third vehicle, and her evidence of the circumstances of the accident, are at least equally consistent with the loss of control having been caused by inadvertence on Ms. Jack's part.

**6**  Furthermore, if I accept Ms. Jack's evidence that there was a third vehicle, and if I find fault on the part of the driver of that third vehicle, the plaintiffs say that Ms. Jack should also be found liable. They say I should find some degree of fault on Ms. Jack's part and make a finding of joint and several liability between both Ms. Jack and an unidentified driver, leading to joint and several tort liability on the part of Ms. Jack and statutory liability on the part of the defendant Insurance Corporation of British Columbia ("ICBC").

**7**  Ms. Jack's evidence is that to the east of the scene of the collision, traffic had been in only one lane because of construction. When they were past that bottleneck, she moved out from behind a truck into the passing lane where she remained. She said the traffic was heavy. At some point, she was abreast of what I have referred to as the third vehicle. They were travelling at the speed limit of 100 kilometres an hour. The third vehicle, she testified, then moved very quickly into Ms. Jack's lane.

**8**  It was put to Ms. Jack on cross-examination that the third vehicle made that manoeuvre "gradually," that it gradually forced her over to the side, but Ms. Jack disagreed with the use of that word. She said that the front of the third vehicle was possibly slightly ahead of her, but not enough for her to simply brake and get around behind it. Ms. Jack testified that she tried to avoid that vehicle by going over onto the left hand shoulder. When she did so, she found that there was only a narrow shoulder, not wide enough to fit her car. The third vehicle came to be entirely in her lane. She says that she then braked. She acknowledges she did not "hammer down" on the brake, and it is the case that there is no evidence of skid marks, but she says her two left tires came to be in the grassy median and she lost control.

**9**  Asked on cross-examination how long it took from the time she saw this third vehicle until she went off the road, all she could say in terms of a specific time period was "less than 30 seconds." Asked to offer her best estimate, she could only say, "very quickly." She said that her sense of time would probably be a bit warped.

**10**  She did not sound her horn when the other vehicle began to change lanes. She testified to feeling that if she took her hand off the wheel she would not be able to control the car. She described her situation as "precarious." She says that she felt panicked.

**11**  The accident was investigated by Constable Small, now a retired member of the RCMP Traffic Services Division. He testified at trial. He testified that a driver in the position of Ms. Jack would not have been able to safely pull onto the shoulder. He explained that the grade of the median is steep, that the grass is soft and that it tends to pull vehicles into the centre of the median. He testified to his knowledge of that having been a common problem and of other accidents having occurred in this vicinity as a consequence. He said this was regarded as a high frequency collision area. The median has since been altered with the installation of a wire safety barrier.

**12**  Ms. Jack ended up upside down with her head protruding through the windshield, cuts to her scalp, and blood in her eyes. Her neck was fractured. Her two young children were in the back seat of her car. She testified that it took some time for a crew to arrive with the equipment needed to cut her out. She was eventually airlifted to Royal Columbian Hospital.

**13**  Ms. Jack says that there was a male paramedic whom she was with for about 45 minutes when she was still in the vehicle. She testified that most of the discussion she had with him was about her injuries, but that she did ask him if the other vehicle had stopped. This witness was not produced.

**14**  If any inference could be drawn from any delay on the part of the plaintiff in having made a claim that another driver was at fault, I do not have the testimony of this paramedic to rebut that inference. Nevertheless, it is conceded that by 3:43 p.m., with the accident having happened just after 12:00 noon, Ms. Jack did tell a police officer who was interviewing her in the hospital that she had been cut off by another driver. She reiterated that claim some days later when she was formally interviewed by Constable Small.

**15**  The plaintiff testified as to the steps taken after the accident to locate witnesses. ICBC did not defend this claim on the grounds of a failure to have taken any such steps or adequate steps in that regard. There was a plea that the unidentified driver's identity was ascertainable, but that plea was withdrawn.

**16**  Constable Small did issue the plaintiff with a moving violation ticket. He does not remember when he did so. The ticket was for having failed to keep right on a divided highway and the ticket itself references s. 164(1) of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*. Ms. Jack did not contest the ticket and is therefore deemed by law to have entered a guilty plea.

**17**  As for the rule in *Hollington v. F. Hewthorn and Co. Ltd.*, [1943] 1 KB 587 (Eng. C.A.), and the cases that follow from it, the evidence of conviction is admissible and can raise a presumption of ***negligence***. However, as counsel for the plaintiffs rightly pointed out, the applicable section for failing to keep to the right is s. 150 of the *Motor Vehicle Act.* Section 164(1), which was cited on the ticket, deals with something different: controlled access to a highway.

**18**  I do not have evidence of what Ms. Jack was formally convicted of so I cannot draw any conclusions at all with respect to the formality of her having been deemed to have been found guilty or having entered a guilty plea.

**19**  It is also the case generally that evidence of an accused's failure to dispute a charge may be taken as evidence of a guilty mind. Ms. Jack however did offer an explanation. She says that it did not seem to her that there was any point in disputing the ticket because, regardless of the reasons, it was a fact that her car did not keep to the right.

**20**  The inference I drew from Ms. Jack's testimony was that she had understood this to be a situation involving what a lawyer would classify as strict liability. I accept the explanation she gave; I do not infer civil liability or her belief as to her civil liability from her having failed to dispute the ticket and from being deemed to have pleaded guilty.

**21**  Overall, I was struck by the sincerity of Ms. Jack's evidence. She gave her testimony in a calm, understated, thoughtful manner. It was put to her in cross-examination that her story of a third vehicle being involved was concocted. Her denial was emphatic and in my view compelling.

**22**  In cases where there is no corroborating evidence of the involvement of an unidentified driver, it is not enough to decide a case solely on the basis of a party's demeanour. As Justice O'Halloran famously said in *Faryna v. Chorny* (1952),[*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=), the evidence must be tested against the preponderance of probabilities which would be recognized as reasonable in a specific place and specific conditions. In that respect, I have had regard to the factors enumerated by the Court of Appeal in *Vanderbyl v. ICBC* [*(1993), 79 B.C.L.R. (2d) 156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M37V-00000-00&context=).

**23**  With respect to those circumstances, the plaintiffs point most emphatically to Ms. Jack's failure to have called evidence from the attendant who spoke to Ms. Jack at the scene. I do not attach any weight to this. In the emergent circumstances described by Ms. Jack, I would tend to think it unlikely that the attendant would have been keeping a thorough record of every utterance made by Ms. Jack. The emphasis would naturally have been on her physical well-being and any testimony from an attendant that no such statement was made by her would have to be regarded with a great deal of skepticism given that some six years have gone by.

**24**  Ms. Jack did make a statement that afternoon at the hospital that there had been a third vehicle involved, and inasmuch as *Vanderbyl* might be considered as laying out a series of criteria, I regard that as sufficient on the part of Ms. Jack, sufficient that is to negate any inference or suggestion that her story has changed or that the involvement of a third vehicle was a concoction on her part after the fact.

**25**  Looking at the preponderance of the evidence as to the circumstances, there is no apparent explanation as to how this accident could have occurred without the fault of a third unidentified driver other than through inadvertence on Ms. Jack's part. The plaintiffs emphasize that it was a bright, sunny day. The evidence is that the driving conditions were good.

**26**  It seems to me that a mother of two young children who is an experienced driver and familiar with the roadway, and who is travelling at highway speed with two young children strapped in the back, in the circumstances of this case is more likely to end up driving along the shoulder and being caught by the grass as a result of an evasive manoeuvre rather than through no reason other than her own inadvertence or inattentiveness. I accept that Ms. Jack was conducting an emergency evasive manoeuvre and that she did so as a result of ***negligence*** on the part of an unidentified driver.

**27**  I reject the submission that the collision was contributed to by any fault on Ms. Jack's part. I accept her explanation for not sounding the horn. I have no basis on the evidence for concluding that Ms. Jack ought to have applied the brakes more forcefully. In the limited amount of room she had, it seems to me that her choice of avoidance and controlled or more gradual braking was more likely to keep her car under safe control given her speed and given the traffic.

**28**  Some submissions were made and some authorities were cited in respect of the concept of the agony of collision. In my view, that body of law is better applied to situations where a driver engages in conduct that would otherwise be found to fall below the standard of care, but where the normal standard of care is relaxed in view of the emergent circumstances and in view of a driver having to act more of an instant than through the process of more deliberate reasoned judgment.

**29**  I am not satisfied on the evidence that Ms. Jack failed to act as any reasonable driver would have in the circumstances. Alternatively, if there were what would normally be regarded as ***negligence*** on her part, I would find her to be relieved of liability in view of the agony of collision. I find that in the emergent circumstances that confronted her, Ms. Jack's conduct is not subject to being second-guessed. I find no liability on her part.

**30**  Judgment will go against ICBC in respect of the liability of the unidentified driver.

A. SAUNDERS J.

**End of Document**

[***Bingo City Games Inc. v. British Columbia Lottery Corp., [2005] B.C.J. No. 42***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0VD-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

Rogers J.

Heard: September 7 - 10, 13 - 17, 20 - 24 and 27

- 30, and October 1, 4 - 8, 12 - 15, 18 - 21, 27 and

28, and November 2 - 5, 15 - 19, 22 - 24 and 29 - 30,

and December 1 and 13 - 17, 2004.

Judgment: January 6, 2005.

Prince George Registry No. 16861/02

**[2005] B.C.J. No. 42** | 2005 BCSC 25 | 85 L.C.R. 89 | 2005 CarswellBC 57 | 136 A.C.W.S. (3d) 1164

Between Bingo City Games Inc. and Frank Valentini, plaintiffs, and British Columbia Lottery Corporation and Her Majesty The Queen in Right of the Province of British Columbia, defendants

(256 paras.)

**Case Summary**

**Administrative law — Judicial or quasi-judicial powers or function — Boards and Tribunals — Policy directives — Government law — Crown — Authority — Policy statements — Actions by and against Crown — Tort law — *Negligence* — Duty of care — Standard of care — Evidence and proof — Interference with economic relations — Contracts — Breach of — Torts by the Crown — *Negligence*.**

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| Action by the plaintiff, Bingo City Games, against the defendants, British Columbia Lottery Corp (BCLC) and the British Columbia Government (the Government), for damages arising from interference in economic relations, ***negligence***, and expropriation. Bingo City was a bingo service provider to an association of charities, GTBA. Shortly after Bingo City applied to relocate, the Government implemented a new policy regarding bingo halls. Bingo City became unable to contract with GTBA but contracted with the BCLC. Charities no longer had licences to operate bingo. The policy removed a guarantee to protect the bingo halls from falling below a given minimum revenue. During the policy changes, the Government implemented a freeze, and did not accept relocation applications after a certain date. Bingo City claimed that a rival, who relocated to Bingo City's old hall, should not have had its relocation application accepted. Bingo City also objected because BCLC permitted the rival to be open longer. Bingo City never made a profit at its new location and its business suffered. The rival's business was successful.  HELD: Action dismissed.  It was not reasonably foreseeable that the Government's change in policy would have wrecked Bingo City's venture or that a contract with BCLC would have been worse than a contract with GTBA. The Government did not have a duty of care to publish its planning process. The Government acted reasonably in implementing the freeze. Bingo City's claim for damages for unlawful interference with economic relations was dismissed. Upon the clear language of s. 4(d) of the Lottery Corporation Act, the legislature did not intend to restrict BCLC's involvement to electronic bingo. Therefore, Bingo City's claim that the paper bingo operations were illegal failed. The claim that the Government expropriated Bingo City's goodwill without compensation also failed. Bingo City still was able to contract and provide bingo services. The Government did not negligently process the rival's relocation application. The decision maker exercised a statutory power of decision and was quasi-judicial in nature. Therefore, the decision was not the subject of a civil action for damages. BCLC was acting under the authority of government and was not able to be sued for implementing Government policy. BCLC's policy directive was to make profit from bingo, and this did not include preserving inefficient bingo halls. The policy was not justiciable. Increasing the rival's opening hours also increased profits, and satisfied the policy. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, ss. 207, 207(1), 207(1)(a), 207(1)(b), 207(4), 207(4)(c), 462.31

Judicial Review Procedure Act, ss. 1, 1 "statutory power of decision"

Lottery Corporation Act, ss. 2.1, 4(d)

Miscellaneous Statutes Amendment (No. 2) S.B.C. 1993 c. 55, ss. 17, 18, 19, 20

Society Act

**Counsel**

Counsel for the plaintiffs: R. Stewart, Q.C.

Counsel for the defendant, British Columbia Lottery Corporation: L. Backman, Q.C. and L.S. Marchand

Counsel for the defendant, Her Majesty the Queen in Right of the Province of British Columbia: J.L. Maxwell, L.D. McBain and K. Dann

Counsel for the Intervenor, Association of Registered Gaming Management Companies of British Columbia: G.B. Butler

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| **ROGERS J.** |

INTRODUCTION

**1**  In 2001 and 2002 Mr. Valentini and his company Bingo City Games Inc. (BCG) tried to make money as a landlord and a bingo service provider to an association of charities called the Good Time Bingo Hall Society in Prince George. That effort failed completely. Rather than making money, Mr. Valentini and his company lost a lot of it. This suit is their effort to make Her Majesty the Queen (HMTQ) or British Columbia Lottery Corporation (BCLC) pay for that loss. The plaintiffs have multiple theories for their claims. Against HMTQ, the plaintiffs say that they are entitled to damages because:

1. the Government breached a duty to warn the plaintiffs that the Government was planning changes to the gaming industry which, when implemented, would eliminate the GTBA's license to conduct and manage bingo games;
2. the Government illegally interfered with the plaintiffs' economic relations;
3. the Government negligently processed a rival's application to relocate its premises; and
4. the Government expropriated the plaintiffs' business without compensating the plaintiffs for that taking.

**2**  Against BCLC, the plaintiffs say that they are entitled to damages because:

1. the BCLC negligently authorized expanded hours for a rival;
2. the BCLC breached a duty of care in the pursuit of profit;
3. the BCLC failed to protect the plaintiffs' commercial interests when negotiating a contract with the plaintiffs; and
4. the BCLC unlawfully interfered with the plaintiffs' economic relations.

**3**  HMTQ and the BCLC deny wrongdoing, but argue if they were at fault the plaintiffs were negligent as well. They say, too, that if the plaintiffs suffered a loss, that loss was caused or contributed to by ***negligence*** of the GTBA.

**4**  For the reasons that follow none of the plaintiffs' claims can succeed.

THE FACTS

General Facts Concerning Bingo Operations

**5**  The plaintiffs' claims stem in large part from a massive change in the bingo industry wrought by the Government commencing in September 2001 and culminating in January 2002. That change altered the plaintiffs' position in the industry and underpins most of the plaintiffs' complaints. Understanding the plaintiffs' position and causes of action requires an understanding of at least some elements of the bingo industry pre- and post January 2002.

**6**  Bingo is a kind of lottery. It is illegal to operate a lottery in Canada - s. 207 of the Criminal Code says so. But, of course, lotteries abound in this country. How so? Because s. 207 of the Criminal Code stipulates an exception to the general prohibition; viz: s. 207(1)(a) permits lotteries conducted and managed by a Provincial Government, and s. 207(1)(b) permits lotteries that are conducted and managed by a Government-licensed charity provided the proceeds of the lottery are used for charitable purposes. Further, any form of lottery involving a computer or video device is exclusively in the purview of a Provincial Government (s. 207(4)(c)).

**7**  At some point in the distant past (the exact date does not matter for the purpose of this suit) the Provincial Government decided to permit lottery and casino gaming in B.C. The Government licensed charities to conduct and manage paper bingo and casino games. The proceeds of those games had, according to the Criminal Code, to be used for charitable purposes. The Provincial Government was not, therefore, supposed to get its mitts on the gaming revenue. The Provincial Government did, however, tightly control how gaming was conducted and managed, and the minimum level of gambling revenue that had to go to the charities. The Government exercised equally tight control over the uses to which gaming revenue could be put by the licensed charities.

**8**  The Government also wished to have electronic lotteries in the Province. The Government could not license charities to run electronic lotteries. That is because, as noted above, s. 207(4)(c) permits only Governments to conduct and manage electronic gaming. So the Government created the BCLC. For the purpose of this suit, it suffices to say that the BCLC was the Crown's agent for electronic bingo (although it did many other things for the Government as well). The BCLC did not have its own halls for electronic bingo, so it operated electronic bingo games in halls run by charities. The BCLC paid the operator of the hall a commission calculated on a percentage of the gross electronic gaming revenue. All proceeds from electronic bingo after paying prizes and cost of operation (including operator commissions) were paid into the Government's consolidated revenue fund. The Government committed itself to distribute all net electronic bingo revenue to the charities licensed in the hall where the electronic bingo games were run.

**9**  In or about 1998, the Government decided that charities would no longer conduct and manage casino games. The Government cancelled all s. 207(1)(b) casino licenses issued to charities. Naturally this reduced the amount of money available to the affected charities to do their good works. Casino gaming did not go away, however. The Government directed that the BCLC should take over the conduct and management of all casino gaming in B.C. pursuant to s. 207(1)(a) of the Criminal Code. So, casino gaming revenue formerly going directly to charities went instead to the BCLC and from it to the Government's consolidated revenue fund.

**10**  If before 1998 the licensed charities community got revenue from both paper bingo and casino gaming, and if after 1998 that community got revenue only from paper bingo, it follows that, post-1998, gaming revenues available to licensed charities decreased overall. The Government responded to that decrease by announcing a policy called the "Charitable Guarantee".

**11**  The Charitable Guarantee was a policy that the total amount of money available annually to licensed gaming charities in B.C. would be a minimum of $125 million. That amount would be indexed annually. For the purposes of this case, indexed increases to the guarantee are not relevant. The $125 million was comprised of three money sources. The first source was net paper bingo revenue. The second source was the net electronic bingo revenue deposited in the Government's coffers by the BCLC. The third source was Government money in whatever amount was necessary to bring the total of the first and second sources up to $125 million. For example, if in any given year overall provincial paper bingo revenue equalled $90 million and overall electronic bingo revenue equalled $15 million (making total gaming revenues of $105 million) the Government would contribute $20 million. In that way the $125 million guarantee would be reached.

**12**  Having determined the method by which $125 million came to be available to licensed gaming charities, we must turn now to how it was paid out.

**13**  First we must understand how bingo was conducted and managed under Government license. Around 1999 the Provincial Government decided that individual charities licensed to operate bingos could band together in associations, and that the associations could, under license from the Government, conduct and manage bingos. Those associations had to be incorporated under the Society Act. The individual charities maintained their licenses to operate bingo, and the associations got a bingo operation license to conduct and manage the bingo games on their behalf. The associations were responsible for, among other things, ensuring that members of the charities actually attended the hall to perform the conduct and management tasks required of them under the terms and conditions associated with the license. The associations collected and managed bingo revenue for the individual charities. The associations also distributed the bingo revenue to the charities. The Government stipulated that the charities must receive a certain minimum percentage of gross bingo revenue, and the associations were charged with ensuring that the charities received at least their minimum share. For their trouble the Government allowed the associations to take 1% of the gross bingo revenue. The 1% was to pay primarily for the associations' administrative costs.

**14**  Also, we must understand that in 1999 the Government adopted a policy that it would ensure revenue in halls would not fall below a given minimum figure. The minimum figure was an average of the hall's best years of performance in the mid-1990's. An example: if a hall's best mid-1990's annual net-of-prizes paper and electronic bingo revenue was, say, $5 million, then the guarantee for that hall was set at $5 million. If the hall ran 1,000 bingo events a year, then the guarantee would work out to $5,000 net-of-prizes per event. If there were 20 charities licensed at the hall, and each charity conducted an equal number of bingo events, then each charity would conduct 50 events and each charity's guaranteed annual net-of-prizes revenue would be $250,000. This was called the facility level guarantee. Payments the Government made under the facility level guarantee were called top-up.

**15**  The minimum distribution to charities, as a percentage of gross revenue, naturally fluctuated in correlation with gross revenue. On good nights the minimum distribution plus electronic bingo might equal or exceed the Facility Level Guarantee, in which case no top-up would be paid.

**16**  On poor nights when gross revenue was low, the minimum distribution might be substantially less than the Facility Level Guarantee and top-up would be paid in an amount necessary to bring the charity's revenue up to the facility level guarantee.

**17**  Working once more with the earlier example, assume that a charity conducted a paper bingo event and the net-of-prizes revenue from an event was $3,000, but the facility level guarantee was $5,000 per event. Assuming that the BCLC generated, say, $500 net-of-prizes from electronic bingo during the same event, then the charity's revenue for the event would total $3,500. That figure is below the per event facility level guarantee of $5,000. In that case the Government would contribute $1,500 to top-up the charity's take to the guaranteed amount of $5,000.

**18**  The final pieces in the arcane world of the bingo revenue distribution puzzle were the terms and conditions associated with the charity license and the governance manual the Government required bingo participants to follow. Participants in the gaming industry were required by the licenses and other permissions issued to them by the Government, to comply with the terms and conditions and governance manuals the Government published from time to time. The participants were also required to comply with any policies or directives the Government might issue from time to time. Pursuant to those terms and conditions and pursuant to the governance manual, a minimum amount of bingo revenue had to be distributed to the individual charities. This was the minimum distribution mentioned earlier. The minimum distribution amount was fixed by a table of percentages contained in the terms and conditions and the governance manuals. At all material times the minimum distribution table from the governance manual looked like this:

|  |  |  |
| --- | --- | --- |
| Calculation of Minimum Amount |  |  |
| to Licensees On Gross Monthly |  |  |
| Sales Up To: | Plus: |  |

|  |  |  |
| --- | --- | --- |
| Nil | 15% of excess up to |  |
|  | $150,000 |  |

|  |  |  |
| --- | --- | --- |
| $150,000 is $22,500 | 16% of excess up to |  |
|  | $200,000 |  |

|  |  |  |
| --- | --- | --- |
| $200,000 is $30,500 | 17% of excess up to |  |
|  | $250,000 |  |

|  |  |  |
| --- | --- | --- |
| $250,000 is $39,000 | 18% of excess up to |  |
|  | $300,000 |  |

|  |  |  |
| --- | --- | --- |
| $300,000 is $48,000 | 19% of excess up to |  |
|  | $350,000 |  |

|  |  |  |
| --- | --- | --- |
| $350,000 is $57,500 | 20% of excess up to |  |
|  | $400,000 |  |

|  |  |  |
| --- | --- | --- |
| $400,000 is $67,500 | 21% of excess up to |  |
|  | $450,000 |  |

|  |  |  |
| --- | --- | --- |
| $450,000 is $78,000 | 22% of excess up to |  |
|  | $500,000 |  |

|  |  |  |
| --- | --- | --- |
| $500,000 is $89,000 | 23% of excess up to |  |
|  | $550,000 |  |

|  |  |  |
| --- | --- | --- |
| $550,000 is $100,500 | 24% of excess up to |  |
|  | $600,000 |  |

|  |  |  |
| --- | --- | --- |
| $600,000 is $112,500 | 25% of excess up to |  |
|  | $650,000 |  |

|  |  |  |
| --- | --- | --- |
| $650,000 is $125,000 | 26% of excess up to |  |
|  | $700,000 |  |

|  |  |  |
| --- | --- | --- |
| $700,000 is $138,000 | 27% of excess up to |  |
|  | $750,000 |  |

|  |  |  |
| --- | --- | --- |
| $750,000 is $151,500 | 28% of excess up to |  |
|  | $800,000 |  |

|  |  |  |
| --- | --- | --- |
| $800,000 is $165,500 | 29% of excess up to |  |
|  | $850,000 |  |

|  |  |  |
| --- | --- | --- |
| $850,000 is $180,000 | 30% of excess up to |  |
|  | $900,000 |  |

|  |  |  |
| --- | --- | --- |
| $900,000 is $195,000 | 31% of excess up to |  |
|  | $1,000,000 |  |

|  |  |  |
| --- | --- | --- |
| $1,000,000 is $226,000 | 32% of excess up to |  |
|  | $1,100,000 |  |

|  |  |  |
| --- | --- | --- |
| $1,100,000 is $258,000 | 33% of excess up to |  |
|  | $1,200,000 |  |

|  |  |  |
| --- | --- | --- |
| $1,200,000 is $291,000 | 34% of excess up to |  |
|  | $1,300,000 |  |

|  |  |  |
| --- | --- | --- |
| $1,300,000 is $325,000 | 35% of excess |  |

**19**  I take from the terms and conditions and the governance manual the proposition that the Government required charities to receive their 'cut' after paying prizes but before any other deductions. Any other interpretation would devalue the word 'minimum' in those documents. That is because other deductions for, say, bingo expenses taken from the net-of-prizes pot could, if they were large enough, reduce the pot's remainder below the minimum percentage that had to be paid to the charities.

**20**  Therefore, the correct approach to distributing bingo revenue (using figures drawn from the plaintiffs' actual operations in December 2001) was:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Item | Sample Monthly Amount |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Gross Bingo Revenue | $479,571 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Less: First Priority - Prizes |  |  |
|  | (in this case 58.2% of gross) | -$279,155 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Net of Prize Revenue | $200,416 |  |

Less: Second Priority - Minimum Distribution to Charities

|  |  |  |  |
| --- | --- | --- | --- |
|  | $78,000 + (22% of $29,571) | -$ 85,505 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Leaving: Amount Available for |  |  |
|  | Other Purposes (including bingo |  |  |
|  | operation expenses and the |  |  |
|  | association's 1%) | $115,910 |  |

**21**  In this example the amount of money available for bingo operation expenses should have been limited to $115,910. We shall see later that the GTBA did not necessarily follow this distribution scheme. We shall also see that the cost of operation, including the plaintiffs' charges to the GTBA for the facility and bingo services, exceeded $115,910.

**22**  A corollary of the fact that charities were required to conduct the actual bingo events was that the Government had to regulate on what day and at what time of the day those events took place. Accordingly, the terms and conditions and the governance manuals stipulated that the Government had the authority to regulate how many bingo events a charity could operate in a given year.

**23**  A question arose in this suit over who was obliged to pay the operator's expenses: the individual charity organization or the charitable bingo association. The terms and conditions draw a clear distinction between a licensee and a charitable bingo association. A licensee is defined:

"licensee" is a charitable or religious organization or the board of a fair or exhibition and its officers, employees, agents, members or volunteers, which has been licensed by the Commission to conduct and manage licensed gaming events.

and a charitable bingo association is defined:

"charitable bingo association" (formerly "bingo association") is an association of charitable and religious organizations that have been issued charitable bingo participant licences by the Commission, is incorporated under the Society Act of British Columbia and has been issued a charitable bingo manager licence by the Commission.

**24**  Where the two are referenced in the same paragraph, the individual charity is called the licensee and the association is the association (e.g.: clause 2.1.1). The terms and conditions authorize the charitable bingo association to sign contracts with bingo service providers, but they do not actually authorize the association to use bingo proceeds to pay the provider. That responsibility rests and remains with the individual charities. Clause 2.9 of the terms and conditions says that a licensee may pay operation expenses:

|  |  |  |  |
| --- | --- | --- | --- |
| 2.9 |  | Expenses |  |

The licensee may pay expenses (except for wages for volunteers) directly related to the conduct and management and/or operation of the licensed gaming event. These funds shall be accounted for as an expense of the gaming event.

**25**  Therefore, if an association pays the provider it must be acting as agent for the individual charities, spending their money on their behalf in accord with a contract the association made for their benefit.

**26**  Another issue in this case was whether top-up could be used by the charities to pay bingo expenses. Mr. Sturko, assistant deputy minister responsible for gaming in B.C., testified that top-up money could not be used by licensed charities to pay bingo expenses. The Crown also put into evidence a bingo bulletin from September 2000. That bulletin describes a procedure for bingo halls that close down. It says:

When an Association terminates its bingo program, the Commission's objectives are to ensure that:

1. The association knows the process for termination of the bingo program and the bingo manager licence;
2. Bingo revenues are properly accounted for and are only used to settle bingo expenses and costs;
3. Net bingo proceeds are distributed to the licensed charities;
4. Government "top-up funds" are distributed to the licensed charities and are not used to pay bingo expenses and costs;

**27**  The plaintiffs argued to the contrary. They said that top-up funds were not impressed by any particular restriction on use.

**28**  The requirement to make minimum distributions to licensed charities was in the terms and conditions as early as 1998. This pre-dated the Facility Level Guarantee and its imbedded top-up program. Nothing in the Facility Level Guarantee and top-up programs changed the requirement that bingo proceeds be paid first to prizes, second to the minimum distribution, and finally to other uses including bingo expenses.

**29**  The Governance Manual describes 'net proceeds' for the purpose of calculating the Facility Level Guarantee. Net proceeds are:

"Net proceeds" is the revenue from paper, linked and electronic bingo that is distributed to the licensees after prizes and allowable expenses. This does not include the operator's commission from linked and electronic bingo. (Governance Manual page 82)

**30**  For the purposes of calculating and paying top-up, then, the Government stipulated that bingo expenses had to be paid first. If bingo expenses are paid first, then logically a licensed charity cannot use top-up to pay them again. The drill for determining top-up was, then, to take the net-of-prizes pot, pay the minimum distribution to charities, then pay the bingo expenses. The remainder of the pot after bingo expenses went to the charities or to the bingo association under the available funds program described immediately below. If the minimum distribution plus the remainder of the pot (if any) totalled less than the charity's facility level guarantee then the Government would make up the difference with a top-up payment.

**31**  The available funds program was created to assist charity associations to develop and promote bingo. The Government's July 9, 2001 bulletin to charitable bingo associations and bingo operators defined available funds thus:

"Available funds" is the amount by which the proceeds from bingo for a month (gross bingo revenue for a month minus prizes paid to players and expenses and costs incurred to earn the bingo revenue for the month) exceed the required minimum distribution to the licensees for that month. In accordance with the provisions of the Code, available funds are either funds to be distributed to licensees as proceeds from licensed bingo or funds to be used for costs or expenses incurred to earn bingo revenue. Available funds may be retained or accumulated for future expenditures under an approved business plan.

**32**  Available funds comprised the remainder of the pot after paying prizes, the minimum distribution to charities, and bingo expenses. Those funds could only be put to charitable use and so, absent some dispensation to the contrary, had to be distributed to the charity organizations. The available funds program was such a dispensation to the contrary. Under the available funds program, if the Government was satisfied that a charitable bingo association had a business plan that appropriately allocated funds to development and promotion of bingo gaming, then the Government could at its discretion permit the charitable bingo association to keep those funds and spend them according to the business plan. In essence, the Government decided to define promotion of bingo a cost associated with bingo gaming, and authorized the charitable bingo association to spend monies surplus to prizes, minimum distribution, and operation expenses, for such promotion.

The Facts: Mr. Valentini, BCG, & the GTBA

**33**  Mr. Valentini is a man in his mid-50's. He graduated grade 12 and took some courses at university. In the 1970s he worked as an instructor at a college in Grande Prairie, Alberta. Mr. Valentini assisted some other citizens of Grande Prairie in their application for a radio broadcasting license. The application succeeded and Mr. Valentini began to work for the new radio station.

**34**  Mr. Valentini continued to work in the broadcasting industry until 1991. In that year he was working for a radio station in Prince George. That station was sold to a new owner. Mr. Valentini decided to leave the station and start his own business as a media consultant. Mr. Valentini operated his consulting business under his own name until 1994. He then incorporated Frank R. Valentini Media Management Inc. (Media Management) and carried on under that name. Media Management developed marketing strategies for clients in the Prince George area, and brokered print and broadcast advertising for those clients. Media Management was moderately successful.

**35**  Around 1991 Mr. Valentini joined the Yellowhead Rotary club in Prince George. That club had a license to conduct and manage bingo. The club relied on bingo for some of its funding. The club ran its bingo events at the Good Time Bingo Hall. Mr. Valentini volunteered for the club at some, but not all, of the club's bingo events.

**36**  The Good Time Bingo Hall was located at 490 Vancouver Street. The landlord was Good Time Bingo Inc., a company owned and operated by Mr. John Major. The physical facility was a former grocery store, renovated to accommodate several businesses including the 600 seat bingo operation. Eighty odd charities in the Prince George area had banded together to incorporate a society called the Good Time Bingo Association, and the GTBA contracted with Mr. Major's company to run the charities' bingo operations at the hall. The bingo services Mr. Major supplied included things like the people hired to open the doors; buying, setting up, and organizing and maintaining the physical bingo plant such as tables and chairs, microphones, amplifiers, loudspeakers, gaming equipment, and etc..

**37**  The GTBA's agreements with Mr. Major were set to expire on September 30, 2001. In late 2000, the GTBA began to assess its options for continuing its business. In November and December 2000, the GTBA tried to negotiate new lease and services agreements with Mr. Major. That effort failed. In late 2000, the GTBA decided to publish a request for proposals for a facility and for bingo services. At their annual general meeting in January 2001, the GTBA's member charities endorsed the RFP process. The RFP was assembled primarily by the association's president Mr. Perry Slump. The RFP was released to the public on March 9, 2001. It stipulated that proposals should be received by April 6.

**38**  Mr. Valentini prepared and submitted a response to the RFP. On April 30 the GTBA told Mr. Valentini it accepted his proposal. Mr. Valentini knew that if he was to be a bingo services provider in new premises he needed to secure those premises. To that end Mr. Valentini contacted Mr. Kandola. Mr. Valentini convinced Mr. Kandola to buy a movie theatre at 355 Vancouver St., level the interior floors, and lease the building to Mr. Valentini. Mr. Valentini planned to sub-let the renovated building to the GTBA. Mr. Kandola purchased the theatre building on June 29 and took possession on August 1. In the meantime the GTBA, knowing that the Valentini proposal required them to move from 490 Vancouver to 355 Vancouver, applied to the Gaming Commission for authorization to make that move.

**39**  On May 11 the GTBA submitted its relocation application along with the required $2,000 fee to the Gaming Commission. Upon receipt of the application, the Gaming Commission engaged a six-step process to evaluate the relocation. That process was:

1. Proposal submission and evaluation process.
2. Preliminary review and interim approval.
3. Evaluation by a three member panel.
4. Local Government review and decision.
5. Final review.
6. Final approval.

**40**  The GTBA thought that the four-and-a-half months from May 11 to September 30 would be sufficient time to complete the renovations and the six-stage relocation application.

**41**  The GTBA sailed through stages 1 and 2 of the relocation procedure. Somehow stage 4 took place before stage 3, but nothing appears to turn on that reversal. Stage 4 was review by local Government, in this case the City of Prince George. On June 4, 2001, the City Council considered the GTBA relocation application and adjourned it to June 21. The Council directed that in the meantime city staff prepare a report concerning parking issues at the new hall. The staff report was prepared on June 18. On June 21 City council conducted its hearing of the GTBA application and approved it.

**42**  Stage 3, which is evaluation by a three-member panel of the Gaming Commission, was achieved in a sort of two-step process. Three members of the Gaming Commission convened a hearing in Prince George on June 28. They heard representations from concerned parties, concluded the hearing, and adjourned to consider their report and recommendation. However, before they could render their decision the Government dismissed the members of the Gaming Commission and appointed Ms. Alison MacPhail as the sole member and chair of the Gaming Commission. That happened on July 13. The three members of the GTBA review panel no longer had any status to write a report on the hearing they had conducted. On August 14 the Government instituted a new relocation procedure. This procedure was called the 'Interim Revised Relocation Procedure', and under it stage 3 became a panel convened by the sole chair of the Gaming Commission. Ms. MacPhail appointed Ms. Shelagh Glibbery to complete the stage 3 review that had been started back on June 28. Ms. Glibbery submitted a report on August 22 but she made no recommendation. Instead, she allowed an interested party some further time to make representations. That time ran out on September 4, 2001. On September 25 Ms. Glibbery submitted her final report and recommendation to Ms. MacPhail. Ms. Glibbery recommended that the Gaming Commission approve the relocation. So, on September 25, stage 3 was finally complete.

**43**  Meanwhile, the GTBA and Mr. Valentini negotiated and signed two contracts. The first contract was the facilities contract. It does not have a date on it, but the evidence established that the GTBA and Mr. Valentini signed it in early June 2001. The parties expected that Mr. Valentini or a company he would later incorporate would be obligated by the contract. The facilities contract contained a number of terms. Mr. Valentini was described as the landlord of the premises at 355 Vancouver Street. The GTBA agreed to rent the premises from Mr. Valentini for 10 years commencing October 1, 2001 at an annual rent of $450,000, payable at $8,653.85 plus GST weekly. The GTBA was to pay Mr. Valentini for all property taxes, utilities, maintenance, bingo equipment, and parking associated with the building. The contract provided that ownership of the bingo equipment would revert to the GTBA at the end of the contract's tenth year (this is an awkward term - the GTBA never owned the equipment in the first place, so to say ownership would 'revert' to it is nonsensical).

**44**  Another bit of strangeness is the fact that Mr. Valentini's proposal included an offer to pay $100,000 toward tenant improvements, but the contract the parties signed is entirely silent about that. The GTBA offered no explanation for having given up the $100,000 without negotiating at least a concomitant reduction in rent. As to the improvements, the GTBA decided to pay for them on its own. It planned to use money from the available funds program to pay for the improvements. On August 8 The GTBA prepared and submitted a business plan for those expenditures. I conclude that the GTBA's failure to realize a benefit from Mr. Valentini's offer to pay $100,000 toward improvements was a product of the association's unsophisticated nature. The offer simply 'fell through the cracks'.

**45**  When he signed the facilities contract Mr. Valentini was not actually entitled to occupy 355 Vancouver St. He and Mr. Kandola had an agreement to agree to lease the property, but they did not actually sign the lease until August 23, 2001. That head-lease was made between Mr. Kandola's company 411056 B.C. Ltd. as landlord and BCG and Mr. Valentini as tenants. It provided that the tenants should pay the landlord an annual rent of $335,000 plus GST for 10 years commencing October 1, 2001. The rent was payable monthly at $27,916.67 plus GST. In addition, the tenants were obliged to pay all taxes, utilities, maintenance, and insurance.

**46**  Under the facilities contract, then, Mr. Valentini was to receive rent of $450,000 per year and was to be reimbursed for taxes, utilities, maintenance, and parking. He was to pay Mr. Kandola's company $335,000 per year and reimburse it for taxes, utilities, maintenance, and insurance. Mr. Valentini expected to net roughly $100,000 per year from this arrangement.

**47**  Mr. Valentini incorporated BCG on July 3. The second contract between the GTBA and BCG was a management services contract. It was signed around July 30, 2001, and was for a term of 10 years commencing October 1, 2001. The management services contract was a cost-plus agreement. By the contract's terms BCG was to hire and manage personnel and pay them wages in amounts fixed by the GTBA; develop and implement bingo games complying with the Government rules and policies in effect from time to time; provide equipment necessary to run bingo games; promote bingo gaming at 355 Vancouver St.; supply bingo paper; manage money; and provide security and various other management functions. The GTBA was obliged to reimburse BCG for all costs associated with running the bingo operation including personnel, security, janitorial, bingo paper, and equipment and was to pay, in addition, management fees of $48,000 per year.

**48**  The GTBA and Mr. Valentini never did sign a contract for a third element of the services that Mr. Valentini proposed to supply. That third element was food concession. Mr. Valentini's proposal described how he would operate a concession at 355 Vancouver St. For the first three years he would give the GTBA 15% and for the last 7 years 20% of the profit from the concession.

**49**  The GTBA supplied the facility and the management services contracts to the Gaming Commission for review. The purpose of the review was to ensure that the contracts complied with certain minimum elements of the terms and conditions and governance manuals. Those minimum conditions included things like separating rent from management fees and payment of the minimum distribution to the charities. The Gaming Commission's review was not designed to ensure that the contracts made good business sense for the parties signing them.

**50**  Commencing early August 2001 Mr. Kandola began renovations at 355 Vancouver St. The old theatre seats had to be removed and considerable work had to be done to level the floors. It wasn't until the second or third week of August that the building reached a state where Mr. Valentini and the GTBA could begin the renovations they needed to do in order for the building to be used as a bingo hall.

**51**  On August 15 the GTBA hired Mr. Tom Masich as its construction supervisor. I accept Mr. Masich's evidence that by then it was too late and there was too much work to be done for BCG and GTBA to realistically expect to commence bingo operations on October 1, 2001. The evidence satisfied me that the GTBA and Mr. Valentini proceeded with all due dispatch in doing the necessary renovations. Had they got possession of the building and commenced renovations in early July it is more likely than not that they would have had the work finished by October 1. As it was, they simply got into the building too late.

**52**  I find that Ms. Glibbery was slow in submitting her report to the Gaming Commission but the timing of her report had no impact on how quickly the renovations progressed. That is to say: neither Mr. Valentini or the GTBA waited around for Ms. Glibbery's report before committing to any particular aspect of the renovation. Nothing the Gaming Commission did or did not do impeded the GTBA or BCG occupation of 355 Vancouver St..

**53**  On September 10, 2001 the Province's Gaming Audit and Investigation Office issued a certificate confirming that BCG was on that date a registered bingo gaming service provider. That registration was absolutely necessary for BCG. Without it, the company could not have performed the services required by the management and services contract.

**54**  The renovations were finally finished on November 8. On November 9 the Gaming Commission issued final stage 6 approval of the GTBA relocation to 355 Vancouver St. BCG and the GTBA commenced bingo operations at the new hall on that day.

The Facts: HMTQ & The Core Review

**55**  Another series of events run parallel to the GTBA's effort to relocate. That story concerns the Provincial Government and its review of its role in the gaming industry. The facts of that narrative are relevant because the plaintiffs assert that the Government breached a duty of care to warn them that the Government was planning to cancel the GTBA's ability to perform the contracts between the GTBA and the plaintiffs.

**56**  In May 2001 the B.C. Liberal party defeated the NDP in a provincial election. One of the new Government's first acts was to announce a core review of all Government operations. The core review included gaming. The Government decreed that the objective of the gaming review was to determine whether the Province should be involved in the gaming industry, and if so, whether the Government's methods were efficient and effective. If the review concluded that the Government's methods were not efficient and effective, then the review should make recommendations for changes to achieve those objectives.

**57**  In May 2001 the Provincial Government regulated and managed gaming through several agencies, including:

1. The Gaming Policy Secretariat, which managed the general over-arching policy for all gaming in the province;
2. The B.C. Gaming Commission, which published terms and conditions for, among other things, paper bingo. Gaming Commission also administered payment of Government gaming funds;
3. The Gaming Audit and Investigation Branch, which enforced gaming regulations;
4. The B.C. Racing Commission, which operated horse racing; and
5. The BCLC, which ran electronic lotteries, electronic bingo and casinos.

**58**  The Gaming Policy Secretariat was selected to spearhead the gaming core review. Mr. Sturko was the executive director of the Secretariat. He participated in the review and was responsible for conveying the review's findings and recommendations to his master the Solicitor General.

**59**  The gaming core review began in June 2001. By mid-July Mr. Sturko had submitted various progress reports on the core review. The Gaming Policy Secretariat gradually settled on recommending a profound change in the provincial gaming industry. With increasing certainty the Gaming Policy Secretariat recommended to the Government that it should reduce the number of gaming agencies from five to two. The Gaming Policy Secretariat recommended that the Government should consolidate all gaming operations under the BCLC. This would result in the BCLC having conduct and management of all lotteries including all paper and electronic bingo. The Gaming Policy Secretariat recommended that the Government should consolidate all regulatory and enforcement functions under a new agency ultimately called the Gaming Policy and Enforcement Branch.

**60**  The Secretariat's recommendation was revolutionary. For the previous two decades paper bingo had been conducted and managed by Government licensed charities or associations like the GTBA under s. 207(1)(b) of the Code. According to that section bingo proceeds had to be used entirely for charitable purposes. The Secretariat's recommendation, if implemented, would terminate the charities' licenses to operate paper bingo, and would terminate the flow of bingo revenue to the charities. If the BCLC were to conduct paper bingo, then all revenue from paper bingo formerly going to charities would instead become Provincial Government revenue. The Government could, of course, devote those funds to whatever purpose it chose.

**61**  In July 2001, the Government began to instruct the very upper echelons of its bureaucracy to make plans to effect those changes. Those instructions included instructions to Mr. Sturko and to the BCLC to prepare plans to consolidate gaming into two entities. The proposal was to eliminate the Gaming Commission, the Racing Commission, and the Gaming Policy Secretariat. The BCLC was to assume conduct of all lotteries, including paper bingo then operated by charities under license. The Audit and Investigation office was to morph into the new Gaming Policy and Enforcement Branch.

**62**  At this stage these plans were, of course, nothing more than preparations contingent upon the Government actually adopting the Secretariat's proposals. The Government had not then and would not until September 14, 2001 actually decide to proceed as the Secretariat suggested.

**63**  Sometime around July 3 to July 5, the Solicitor General had a meeting with Mr. Sturko and others. During that meeting the Solicitor General suggested to Mr. Sturko that because the gaming core review was underway, perhaps the Government ought to impose a freeze on gaming relocation applications. Given the possibility that the Government might decide to do nothing, fiddle slightly, totally revamp, or abandon the gaming industry altogether, Mr. Sturko thought that a freeze on relocations was a good idea and advised the Solicitor General so.

**64**  On July 6, 2001 the Government decreed a freeze on gaming premises relocation applications. The decree was conveyed to the BCLC and the Gaming Commission by a letter from the Solicitor General's Acting Deputy Minister Ms. MacPhail. Ms. MacPhail's letter said that the freeze was imposed in the context of the Government's policy of "no Gaming Expansion". No evidence was led at trial that this was, in fact, the reason for the freeze. The only evidence on that topic was from Mr. Sturko who testified that the freeze was instituted because the core review was underway and while no specific outcome of the review had yet been determined, many outcomes remained possible. He said that the Government imposed the freeze in order to be fair to participants in the gaming industry.

**65**  In her July 6 letter Ms. MacPhail expressed the Government's direction that only applications that had been formally initiated by July 6 were to proceed, all others would not proceed. The Government gave Mr. Sturko authority to determine which applications had been formally initiated by July 6. Ms. MacPhail's letter did not set out any particular criteria for Mr. Sturko to apply to his decision of whether a given relocation application had been formally initiated by July 6.

**66**  Between July 6 and July 19, Mr. Sturko corresponded with Mr. Hoskins, Mr. Smith, and Mr. Parks about the status of relocation applications in the Province at that time. Mr. Hoskins was the registrar of the Gaming Commission and was responsible for gathering up and distributing documents to the Commission's members. Mr. Hoskins also arranged hearings and other official business for the Commissioners. Mr. Smith was the Gaming Commission's man responsible for managing gaming premises relocations. Mr. Parks was the senior public servant at the Gaming Commission. Those three gentlemen arranged for Mr. Sturko to receive information and documents pertaining to such relocation applications as were underway as of July 6. Those applications included applications by the GTBA and also by the Bonanza Charity Association, about which more follows.

**67**  On July 13, 2001, the Government announced that the appointments of the commissioners of the B.C. Gaming Commission were rescinded and that in their stead Ms. Allison McPhail was appointed chair and sole member of the Commission. Further, Mr. Sturko was transferred from the Gaming Policy Secretariat to become the Chief Executive Officer of the Gaming Commission.

**68**  On July 24 the Government issued a notice to all licensed charities and charitable associations to advise that the available funds program was cancelled. The Government cited the gaming review as the context for cancellation, and the cancellation was immediate. This cancellation ought to have had a profound effect on the GTBA. That is because the GTBA was counting on the available funds program to pay the lion's share of the cost of improvements in the new hall.

**69**  On September 14, 2001, the Government decided to implement the changes recommended to it by the Gaming Policy Secretariat. The Government issued an announcement that on December 1, 2001 all charitable gaming licenses in the province would be cancelled and that all gaming, including all forms of bingo, would be consolidated under the aegis of the BCLC. All policy, regulation and enforcement of gaming would be consolidated under a new agency called the Gaming Policy and Enforcement Division (later the Gaming Policy and Enforcement Branch).

**70**  Later in the fall, the December 1 transition date was put back to January 15, 2002. The transition from the old to new policies was effected on that latter date.

The Facts: BCA Effort to Relocate

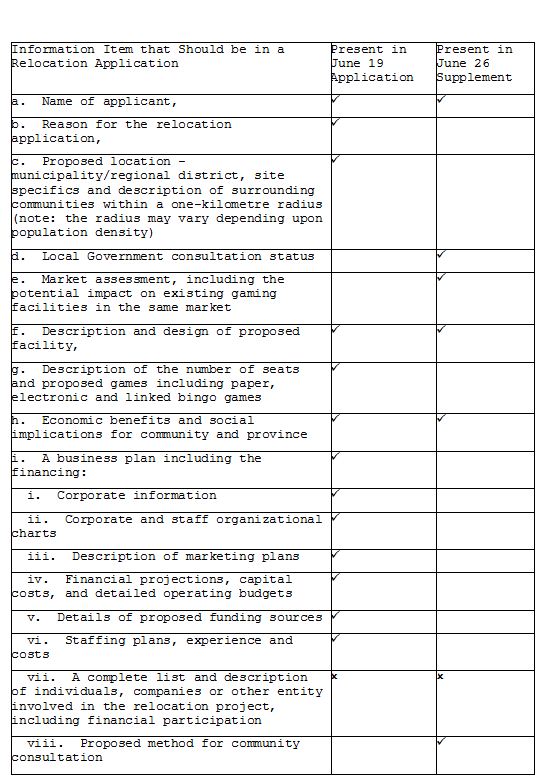
**71**  At all material times Prince George had another charitable bingo association besides the GTBA. That other charitable bingo association was the Bonanza Charity Association (BCA). The BCA had about 30 member charities. The BCA carried on bingo at the Diamond Bingo Hall located on 6th Avenue in Prince George. A company controlled by Mr. Major owned and operated the Diamond Bingo Hall. When the GTBA decided to move out of the premises at 490 Vancouver Street, Mr. Major and the BCA decided that the BCA should abandon the Diamond hall and move into 490 Vancouver Street. The plaintiffs assert that the BCA application was not complete as of the July 6 freeze and that the Government was negligent when it accepted the BCA relocation application and allowed it to proceed.

**72**  The BCA initially thought that it could simply reassign its license from the 6th Avenue to the Vancouver St. hall. The BCA sent a letter to the Gaming Commission on June 1, 2001 setting out its request for that reassignment. The BCA also delivered a cheque to the Gaming Commission for $2,000 representing the fee it understood the Commission charged for such an application. The letter and fee were received and considered. Mr. Hoskins, the Commission's registrar, replied to the BCA. By his letter of June 6 Mr. Hoskins advised the BCA that the Commission considered the BCA plan to be a relocation rather than a reassignment. Mr. Hoskins advised the BCA that it had to apply to relocate to 490 Vancouver pursuant to the interim relocation procedure. This was the same procedure the GTBA had engaged a month earlier for its own planned move. After giving this advice the Commission deposited the $2,000 cheque to the BCA's credit and awaited further developments.

**73**  On June 19 Mr. McMillan, president of the BCA, met with Mr. Hall, regional manager of the Gaming Commission, in Prince George. Mr. McMillan revised his June application by stroking out the word 'reassignment' wherever it appeared and substituting 'relocation'. The BCA delivered those letters to the Prince George Gaming Commission office on June 21 or 22.

**74**  On June 26, the BCA submitted a supplement to its relocation application. The supplement contained a variety of information relating to the application. On July 6, the Government imposed the freeze on relocation applications, and Mr. Sturko was given authority to determine which applications had been formally initiated by that date. On July 9, three days after the relocation freeze, Mr. Major sent a letter to the Gaming Commission describing his projection of the financial results for the first year if the BCA were allowed to move to 490 Vancouver.

**75**  When the BCA submitted its relocation request on June 19 the interim relocation procedures were in effect. By July 6, when the relocation freeze was imposed, the BCA had paid the $2,000 relocation fee and BCA's application and supplement had supplied information on the following elements of stage one of the relocation procedure:



**76**  Mr. Major delivered his July 9, 2001 letter to the Gaming Commission after the freeze. Mr. Major's letter contained an estimate of operating results for the BCA in the 490 Vancouver St. premises and expressed his opinion of various possible adjustments to bingo gaming in Prince George if one or both the BCA and GTBA relocations proceeded. The BCA had already provided information (albeit somewhat different information) on these topics in its June 19 and June 26 materials.

**77**  As described earlier, shortly after the freeze was announced Mr. Sturko asked Mr. Hoskins and Mr. Smith at the Gaming Commission's Victoria office for information about all relocations applications in the Province. Mr. Smith in turn directed Mr. Hall in Prince George to apprise him of the details and history of the BCA's effort to relocate. Mr. Hall replied to Mr. Smith's query by email on July 9. In that email Mr. Hall told Mr. Smith that the BCA had initially asked for reassignment of their license, but then on June 21 or 22 the BCA delivered letters to the Commission's office in Prince George in which it asked for permission to relocate. Mr. Hall also reported to Mr. Smith that the BCA delivered a supplement to the application on June 26. Finally, Mr. Hall told Mr. Smith that the BCA's operator Mr. Major was preparing a financial package that was to be dropped off at the Prince George office on July 10.

**78**  About the same time, that is around July 9 or 10, Mr. Hoskins asked Mr. Hall to telefax copies of all the BCA documents to him in Victoria. Mr. Hall testified that he waited to send that fax until after he received the submissions he expected from Mr. Major. He testified he waited because he wanted to send Mr. Hoskins a complete package of the BCA relocation materials, and that the package was not, in his view, complete until Mr. Major's letter was in hand. On July 16, Mr. Hall telefaxed the BCA relocation materials to Mr. Hoskins in Victoria.

**79**  Mr. Hoskins compiled a report to Mr. Sturko about the relocations underway in the Province as of July 6. On July 17 he had that report sent by email to Mr. Sturko. Mr. Hoskins identified four applications involving five charitable bingo associations, including the applications from the GTBA and the BCA.

**80**  Mr. Hoskins' email reported to Mr. Sturko that the BCA wrote a letter on June 1 seeking reassignment and that the Commission received that letter on June 13. He reported that on June 19 Mr. Hall met with the BCA and told it that its application had to be for a relocation. He reported that the BCA submitted a letter dated June 19 stating that it acknowledged that its application was for relocation pursuant to the relocation procedures.

**81**  Mr. Sturko also received the BCA documents from Mr. Hoskins. Mr. Sturko did a cursory review of the documents. He did not examine them in detail. Mr. Sturko did not compare the content of the documents against the items enumerated in stage one of the relocation procedure. Mr. Sturko was aware that both the GTBA and the BCA halls were run by service providers, and that the charities comprising the two associations relied upon the halls for revenue. Mr. Sturko was aware, too, that the BCA relocation application would place it a block or two from the new GTBA location. He had been advised by the Gaming Commission communications officer Ms. Davis that this might result in transfer of patrons from one hall to another. That is to say: Mr. Sturko was aware that the decision the Solicitor General asked him to make would likely impact the charities that relied on bingo for their revenues, the associations to which those charities belonged, and the service providers running the halls in question. That impact could work to the advantage or disadvantage of the charities, the associations, and the service providers. In the case of the BCA, he was aware that if the relocation went ahead there was some prospect of it benefiting the BCA and its provider while visiting a concomitant cost on the GTBA and its provider. There can be no question, then, that the decision Mr. Sturko was asked to make would affect the rights, obligations, and prospects of the BCA directly, and would have implications in those areas for the GTBA as well.

**82**  By his review and by the information he received from Mr. Hall via Mr. Hoskins and Mr. Smith, Mr. Sturko satisfied himself that the BCA had formally initiated its relocation application in advance of the July 6 freeze.

**83**  On July 19 Mr. Sturko advised the BCA of his decision. Mr. Sturko sent a copy of that advice to the Gaming Commission. The Gaming Commission then continued with its assessment of the BCA application.

**84**  After July 19 Mr. Hoskins wrote several letters about the BCA application. On August 21 he wrote in his capacity as the Commission's registrar to Mr. Kinsley, Mayor of Prince George, and to Mr. Batey, Executive Director of the Gaming Audit and Investigation office. On August 24 he wrote to Mr. Poleschuk, President of the BCLC. Each letter is essentially a copy of the other, and in each Mr. Hoskins refers to the BCA application as having been received by the Commission on July 10. Mr. Hoskins testified that July 10 was a reference to the letter Mr. Major sent which was titled 'Relocation Application' and which was received by the Commission on July 10.

**85**  Mr. Hoskins also prepared some opening remarks for Mr. Morfitt. Mr. Morfitt convened the Commission's hearing on the merits of the BCA application. Mr. Hoskins had Mr. Morfitt say that the BCA relocation application was commenced on July 9. Mr. Hoskins testified that he did not know where he got the July 9 date from and that it was his mistake to put that date in Mr. Morfitt's remarks.

**86**  Further, Mr. Hoskins confirmed that stage one of the relocation procedure stipulated that an application 'should' contain the information tabulated in paragraph 75. He testified that the relocation process was ongoing, and that relocation applications often developed over time as the Commission requested or the applicant volunteered additional information. Mr. Hoskins confirmed that the Commission engaged stage two of the procedure after an application had been submitted. Stage two was a survey for completeness and adequacy of information. That is to say: an application might be incomplete in some particulars and yet be sufficient to trigger a stage two analysis.

**87**  Eventually the City convened a hearing to consider the BCA application. Later the Gaming Commission held its hearing with Mr. Morfitt presiding. Both the City and the Gaming Commission approved the BCA's relocation.

**88**  On November 9, 2001, the GTBA moved out of 490 Vancouver Street and the BCA immediately moved in.

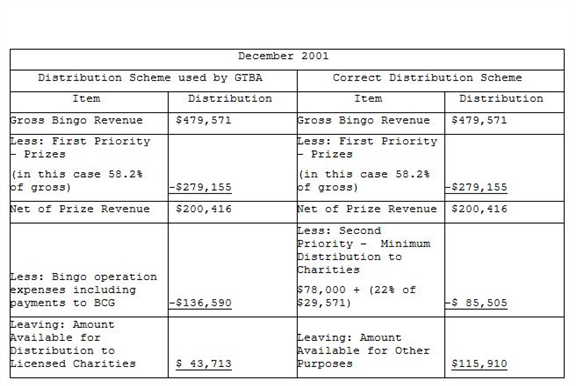
The Facts: GTBA & BCG Operations November 9, 2001 to January 14, 2002

**89**  BCG alleges that it suffered damage as a consequence of the Gaming Commission accepting the BCA relocation application in July 2001. BCG also alleges that it suffered damage after January 2002 when the original contracts were, it says, illegally abrogated by the defendants. BCG's revenues between November 9 and January 15, 2001 are, therefore, relevant as a yardstick of the harm (if any) cause by those alleged wrongs.

**90**  Bingo patronage at 355 Vancouver Street did not live up to Mr. Valentini's and the GTBA's expectations. Mr. Valentini testified that between November and January revenue in the new hall was only 55 - 60% of his forecast. The GTBA's reports to the Gaming Commission during that period confirm Mr. Valentini's estimate.

**91**  December 2001 was the only full month in which the GTBA and BCG operated. The GTBA's figures for December are representative of both the volume of business and the way the Commission allowed the GTBA to distribute gross bingo revenues.

**92**  At paragraph 20 are a set of figures drawn from the GTBA's December 2001 report. Contrary to the terms and conditions and the governance manual, the GTBA reversed the priority of payment of the minimum distribution to licensed charities and payment of costs and expenses. The table below contrasts the GTBA's method to the correct method.



**93**  The Gaming Commission accepted the GTBA's assertion that only $43,713 was available for distribution to its licensed charities. The Commission divided that fund among the Association's 80-odd charities and added electronic bingo revenue accruing to the charities from the BCLC. Then the Gaming Commission calculated top-up in order to bring the licensed charities' revenue up to the Facility Level Guarantee of $3,107.10 per event for the hall.

**94**  To put numbers to that proposition, the Gaming Commission calculated the GTBA per event income and distribution in December as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Item | Amount | Amount |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Net paper bingo income |  |  |  |
|  | ($43,713 / 88 events): | $ | 496.75 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Net linked bingo income: | $ | 29.06 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Top-up: | $2,581.29 |  |  |
|  | All Government |  |  |  |
|  | contribution per event |  |  |  |
|  | (linked + top-up): | $2,620.35 | $2,610.35 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total distribution per |  |  |
|  | event: | $3,107.10 |  |

**95**  Had the GTBA followed the terms and conditions and the governance manual, it would have made the minimum distribution to the licensed charities before it paid bingo costs and expenses. In that case, the licensed charities would have received net paper bingo proceeds totalling $115,910. The top-up chart would have been quite different (and the cost to the Government in top-up would have been considerably less):

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Item | Amount | Amount |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Net paper bingo income |  |  |
|  | ($115,910 / 88 events): | $1,317.16 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Net linked bingo income: | $ | 29.06 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Top-up: | $1,760.88 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Government contribution |  |  |  |
|  | per event (linked + top-up): | $1,789.94 | $1,789.94 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total distribution per event: | $3,107.10 |  |

**96**  The Government spent $72,190.08 more in top-up than it ought to have (($2,581.29 - $1,760.94) \* 88 events). Some of that extra money went, of course, to pay BCG in preference to the licensed charities. I find that by using this method, the Gaming Commission allowed GTBA's charities to subsidize bingo expenses with top-up funds. That practice contravened the governance manual's stricture against using top-up to pay expenses.

**97**  The corollary of this finding is that the BCG hall did not generate enough revenue in December to cover its expenses. The actual bingo expenses were $136,590, but only $115,910 was available to pay those expenses. Instead of being paid in full, BCG ought to have been short $20,680 for that month.

**98**  After reviewing the financial information tendered in evidence at trial, I have concluded that the BCG hall never did generate enough revenue exclusive of top-up to pay prizes and minimum distribution and still have enough left over to pay the full amounts owing under the facility and management services contracts. I find that BCG would never have been paid all the money it was entitled to under the contracts.

The Facts: Transition: January 2002

**99**  The Government formulated a policy for the operation of paper bingo under the BCLC's tutelage. BCLC's instructions from Government were to conduct paper bingo under contracts with service providers commencing January 15, 2002. The contracts were to have identical terms. The Government instructed BCLC that the compensation scheme for all bingo service providers would be the same. The service providers' compensation would be on a commission, or percentage, basis. The Government decided that the under the new policy the total Province-wide compensation paid to bingo service providers must not exceed the total amount of money charities and associations had been paying for bingo services under the old policy. Essentially the Government instructed the BCLC to write the new service contract on terms that would see at least as much bingo revenue coming to the Government as had gone to the Charities. The Government further instructed BCLC that it must not buy or lease gambling premises. These instructions were wholly within the Government's right to give. That is because under s. 207(1)(a) of the Code the Government was the only entity in the Province able to conduct and manage paper bingo.

**100**  BCLC is a Crown corporation. It was the Government's agent for the purpose of conducting and managing paper bingo in B.C. As an agent the BCLC had no discretion to ignore its principal's instructions. The BCLC did not, therefore, have free will in the transition from charity-run to Government-run bingo.

**101**  Before January 2002, a paper bingo game could not proceed unless it was conducted and managed by a licensed charity. The Government defined conduct and management in the terms and conditions and the governance manual. In order for a bingo to proceed, the charity running it had to provide volunteers to do the following things (from 7.1(2) of the terms and conditions):

1. verify the opening and closing float;
2. verify the opening and closing bingo paper inventory;
3. verify bingo sales;
4. conduct prize payouts,
5. verify the closing reconciliation of bingo paper and cash,
6. verify the bingo records; and,
7. all other responsibilities determined by the Charitable Bingo Association and/or the Commission.

**102**  After January 15, 2002, a bingo game could proceed without participation of any charity volunteers. A charity could qualify for a grant of money from the Government in one or both of two ways. A charity could apply for and obtain a certificate of affiliation with a hall, and promote its purpose by attending at the bingo hall for a certain number of hours, and by promoting its purpose in other venues. The other way a charity could get a grant of money post-January 2002 was to simply apply to the Government. In either case under the new policy the charity's activity was not essential to the conduct of bingo games.

**103**  The Government announced that all paper and electronic bingo revenue would be paid to the Government's consolidated revenue fund. It announced that the total value of the grants it made to affiliated or other community organizations would be equal to the total value of net paper and electronic bingo revenues in the province and would not (initially) be less than the indexed $125 million fund.

**104**  There was a significant difference between the old and the new policies in that the cohort of groups that could receive grant money was larger under the latter than the former. Under the old policy, bingo revenue could go only to charities and could only be used for charitable purposes. Under the new policy bingo revenue could go to anyone the Government chose. In fact, the set of organizations that could receive grants under the new policy was much larger than under the old policy. That is because the Government decided that a recipient could be a 'community organization'. A community organization does not necessarily have to have a charitable purpose. In fact, a community organization could be decidedly non-charitable and still receive a grant under the new policy.

**105**  Another significant difference lay in the use to which the gaming revenue could be put. Under the old policy, gaming revenue could only be used for charitable purposes. Under the new policy, gaming revenue could be used for any legitimate Government purpose. The Government could use that money to pay for roads and bridges, support charities, or community groups, or any other legitimate purpose.

**106**  The standard contract the Government instructed the BCLC to make with all bingo service providers was the Bingo Operation Services Agreement (BOSA). As noted earlier, the Government instructed the BCLC to craft the BOSA on terms such that the overall cost to BCLC of running paper bingo under the BOSA would not exceed the overall price the charity associations had been paying for bingo services. The Government reserved to itself the right to approve or reject the BCLC's work on the new service contract. In October and November the BCLC fleshed out the potential terms of the BOSA 2001. The BCLC proposed those terms to the Government on November 28. The Government approved the terms. After one or two subsequent alterations, also approved by the Government, the BOSA ultimately contained terms that could achieve the Government's goals.

**107**  During December the BCLC distributed the BOSA to bingo service providers throughout the province. Mr. Valentini got his copy on or around December 20.

**108**  Up to that point, that is December 20, Mr. Valentini had somehow managed to convince himself that the BCLC would simply step into the GTBA's shoes and would carry on with the contracts he had with the GTBA. The BOSA, when he saw it, gave Mr. Valentini a shock. BCG's original facility contract was for a fixed rent and the management services contract was cost-plus that provided for a fixed fee plus overhead. On the other hand, under the BOSA facility rent and management fees would be a set percentage of the bingo revenues after prizes were paid. Mr. Valentini considered the original contract to be basically risk-free to him while the BOSA represented considerable risk to him. This was for Mr. Valentini an unwelcome revelation.

**109**  Mr. Valentini asked for and got two meetings with BCLC representatives to discuss the BOSA. Mr. Valentini attended those meetings after receiving advice from his accountant on his financial position, and from two lawyers on his legal position. In the course of those two meetings Mr. Valentini successfully negotiated a variation in the compensation BCLC would pay him under the BOSA. He demanded and got a 6-month exemption from the percentage based rent provision in the BOSA. He convinced the BCLC to pay BCG during those six months the full amount of rent the GTBA was to pay under the original facility contract. Mr. Valentini remained unhappy that the BOSA was not a cost-plus agreement like the original GTBA services contract. He did not like having to pay all the business' overhead out of the percentage BCLC would pay him. Although Mr. Valentini was still not wholly satisfied by the BOSA, on January 14, 2002 he signed it anyway.

The Facts: Extension of Bingo Hours, April 2002

**110**  The number of hours of operation and the number of bingo events per day in each hall under the old bingo regime were strictly regulated by the Gaming Commission. Under the old scheme, a licensed charity or the association to which it belonged had to apply to the Gaming Commission for permission to increase the number of bingo events held at a hall. This degree of control was a necessary adjunct of the license scheme required by s. 207(1)(b) of the Code.

**111**  During the pre-BCLC era, i.e.: between November 9 and January 15, the new BCG hall operated the same hours as the GTBA had in the old hall. Those hours were from 10:00 a.m. to 1:00 a.m., 7 days per week. The GTBA charities conducted 3 bingo events per day. Bingo events started at approximately noon. The GTBA had an evening event around 6:30 p.m. and a night event at 10:00 p.m. During the same period the BCA hall at 490 Vancouver operated the same hours and events it did when it was on 6th Avenue. The BCA hall was open fewer hours during the day and had one fewer bingo event per day than did the GTBA. The most significant difference between the two halls was that the BCA did not have a late night bingo.

**112**  The GTBA, BCG, and Mr. Valentini considered their longer hours and extra bingo event per day to be competitive advantages over the BCA. They were anxious to preserve that advantage. So the GTBA, BCG, and Mr. Valentini objected when Mr. Major applied to the BCLC in early January 2002 to be open from 9 a.m. to 2 a.m. They argued to the BCLC that revenues at the GTBA hall would fall if the BCA were open the same hours as they were.

**113**  Under the new policy there was no longer a need to track how many bingo events took place during a hall's opening hours. This was because all revenue was going to the Government via the BCLC. Consequently, there was no need to attribute particular revenues to particular charities. However, the BCLC did maintain control over the opening hours of bingo halls. It did so in order to have some idea of how many bingos a hall could run in a given month. With that knowledge the BCLC could model the hall's expected revenue and use that model as a check against the hall's reported revenue.

**114**  That said, the Government's policy was to increase bingo revenues in the Province, and to that end the BCLC was authorized to allow bingo halls to be open from 9:00 a.m. to 2:00 a.m. every day.

**115**  Mr. Hamilton considered Mr. Major's request for additional hours. He was director of bingo operations for the BCLC. In early January, Mr. Hamilton discussed the request with the GTBA and Mr. Valentini. He told them that during BCLC's first 60 days of paper bingo tenure he would not make any decisions that would affect Prince George's bingo market. He said that he would analyze that market before he decided whether to grant Mr. Major's request.

**116**  During February and March 2002, Mr. Hamilton did indeed look at the Prince George bingo market. He did not do an in-depth analysis of all aspects of bingo. He looked at the gross revenue generated by the two halls during their relatively brief histories in their new halls. Mr. Hamilton forecast that if the BCA hall were open for the same number of hours as GTBA then GTBA's revenues would likely fall and BCA's revenues would likely rise. He predicted that overall bingo revenues in the area would increase. That latter result would be in concord with the Government's policy and direction to the BCLC to increase overall bingo revenues.

**117**  On April 18, 2002, Mr. Hamilton authorized Mr. Major to operate from 9:00 a.m. to 2:00 a.m. Mr. Major did not have to ask to increase the number of bingo events held during those hours - under the new policy he could have as many events during open hours as he liked and thought the market could bear. On April 18, 2002, BCG applied for similarly expanded hours. On April 24, Mr. Hamilton authorized BCG's expansion. From that date forward both halls were able to open identical hours.

**118**  In the thirteen weeks between January 15 and April 20, 2002 BCG's gross bingo revenue was on the order of $88,000 per week. This was substantially less than the $170,000 per week Mr. Valentini had forecast in his response to the GTBA RFP back in April 2001. In the thirteen weeks after Mr. Major's hours of operation increased, BCG's gross revenues were on the order of $56,000 per week. Overall, the combined bingo revenues from the two halls increased. The experiment was, from the BCLC's point of view, a success - it achieved its mandated purpose of increasing bingo revenues in Prince George. The experiment was a success for Mr. Major's hall too - his gross revenues went up. The experiment was not a success for BCG's hall - its revenues decreased.

The Facts: Business Failure

**119**  In the summer of 2002 BCG convinced the BCLC to extend the interim BOSA for another 6 months. This extension had the effect of putting more money in BCG's pocket than would have been the case if BCLC had required BCG to agree to the standard BOSA with its percentage based operator's compensation. This was still not enough for BCG to be profitable.

**120**  In December 2002 the BCLC made it clear to BCG that it would not allow a further extension of the special terms of the BOSA.

**121**  Patrons stayed away from the BCG hall from the time that it opened its doors to when it closed up. The BCG hall never achieved the level of trade that the GTBA had enjoyed when Mr. Major was running its bingos at 490 Vancouver. The evidence at trial was not adequate for me to conclude why that was so. But that evidence did lead me to the conclusion that, for whatever reason or reasons, bingo players simply preferred to spend their money at Mr. Major's operation at 490 Vancouver Street. That was the case under the old bingo policy from November 9, 2001 to January 14, 2002, under the new policy but old hours of operation from January 15 to April 20, 2002, and under the new policy and expanded hours of operation from April 21, 2002 to January 9, 2003 when BCG abandoned the bingo business and vacated the premises.

CAUSES OF ACTION AGAINST HMTQ

Failure to Warn

**122**  The plaintiffs assert that the Government owed them a duty of care to warn of the pending policy changes in the gaming industry. The plaintiffs say that the Government breached that duty of care when it:

1. did not tell the plaintiffs that the BOSA would not take into account BCG's long term fixed costs; and
2. accepted and processed the GTBA's relocation application without telling the plaintiffs that the new policy would render the plaintiff's contracts with the GTBA void.

**123**  This latter alleged breach is really two breaches: the first being that the Government allowed the Gaming Commission to continue with the GTBA's relocation process in the face of the new planned policy; the second being that the Government failed to tell the plaintiffs that the new policy was afoot. The plaintiffs say that in all cases the relevant period of time for this duty of care and its breach is June - August 2001.

**124**  The first question to ask is whether a duty of care exists under these circumstances. Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.(E.)) is the law on this point in Canada. It has been followed innumerable times, as for example by the Supreme Court of Canada in Cooper v. Hobart, [*[2001] 3 S.C.R. 537*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=). In Cooper the court articulated the duty of care test thus:

30 . . . At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care ... we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

Failure to Warn: Foreseeability

**125**  Was it foreseeable that the plaintiffs would suffer harm from the change of policy the Government contemplated? In June 2001 the Government knew that BCG's facility contract with the GTBA stipulated payment of fixed rent over a period of 10 years. The Government did not know whether that rent would cover BCG's cost of occupying 355 Vancouver Street, and so it could not have known whether changing that rent figure by any given amount would help or harm BCG. By early August, the Government knew that BCG's management services contract was on a cost-plus basis. It would be a new hall in a new location with an entirely new bingo service provider. The Government had no way to know or forecast whether revenues in the new hall would be sufficient for the GTBA to meet its obligations under the management services contract. The Government could not reasonably foresee that this would be a successful venture in the first place, much less foresee that policy which was then in its development stage would wreck that venture.

**126**  Further, in order to foresee new policy harm to BCG, the Government would have to have been foreseen that the terms of the contract BCLC would offer BCG would be worse than the terms BCG had with the GTBA. That was not possible to foresee because the terms of the BOSA were completely unknown in the summer of 2001.

**127**  The plaintiffs argued that harm to BCG can be found in the simple fact the new policy would abrogate its contracts with the GTBA. That is, in my view, too restrictive a view. It ignores the fact that at all material times the Government planned to offer bingo service providers like BCG the first right of refusal to enter into a BOSA with the BCLC. So, again, in order for the Government to foresee that the new policy would harm BCG, the Government had to have reasonably anticipated that the BOSA on offer under the new policy was a worse deal than BCG's deal with the GTBA. In the summer of 2001, the Government could not have reasonably anticipated that the GTBA contracts would work out well for the plaintiffs, and it could not have reasonably anticipated that the BOSA would work out worse.

**128**  For these reasons, in the summer of 2001 the Government could not have reasonably foreseen that the new policy would harm the plaintiffs. The plaintiffs' claims for failure to warn do not, therefore, survive the first stage of the Anns test for duty of care.

Failure to Warn: Second Stage

**129**  The second stage of the Anns test asks whether there are "residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care"?

**130**  The plaintiff seeks here to impose a duty on the Government to warn individuals of its plans to alter policy. The Government has a duty to develop policy and to make plans to govern the province. There are very good public policy reasons to preserve the Government's right to keep its deliberations private. Those reasons include but are not limited to not upsetting its employees or the public with trial balloons, keeping land values in check when expropriation is in play, or the need to negotiate in private with other levels of Government in order to achieve a certain purpose.

**131**  To require the Government to reveal its planning process at any stage earlier than formal adoption of a policy would surely chill the Government's willingness to consider unpopular changes. The Government has a responsibility to govern the best way it sees fit, and in the execution of that duty it must be free to consider any and all possibilities however outlandish or unpopular. To require the Government to publish its planning process would certainly fetter its freedom to investigate alternative ways of performing its governing function.

**132**  On this subject, I adopt the comments of Hutcheon J.A. in Laurie's Caterers v. North Vancouver (District) [*1985 64 B.C.L.R. 134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61DC-00000-00&context=), where he said:

1. Firstly, in the absence of an express statutory requirement, there does not appear to be any obligation on a municipal council to give notice of its intention to exercise any of its legislative powers to persons whose interests may or will be affected thereby: Rogers, The Law of Canadian Municipal Corporations (2nd ed.) p. 437.

**133**  This principle applies equally to Provincial Governments.

**134**  I find that the Government owed no duty of care to publish its planning process at any time before September 13 or 14 when it actually decided what its gaming policy would be.

Failure to Warn: The Freeze

**135**  Having said all that, the fact remains that in July 2001 the Government did take a positive action in the context of the new policy. That step was to impose a freeze on new relocation applications submitted after July 6. The plaintiffs say that by taking that step the Government assumed a position of proximity with participants in the paper bingo industry. They say that the Government imposed the freeze because, in the words of Mr. Sturko, it seemed the fair thing to do in light of the significant policy changes then under consideration. The Government must, therefore, have foreseen that absent a freeze some parties might suffer harm as a consequence of the new policy.

**136**  There is no merit in the plaintiffs' position concerning the freeze. For the reasons articulated at paragraphs 125-128 the Government could not have reasonably foreseen harm as a consequence of the freeze in the context of the gaming review.

**137**  I may be wrong, however; perhaps harm to the plaintiffs was foreseeable. Assuming that it was, then having taken a positive step it was incumbent on the Government to take that step with reasonable care.

**138**  The next question is what to standard of care the Government ought to have adhered in imposing the freeze. The plaintiffs say that the reasonable thing for the Government to have done is to impose a universal freeze on July 6. A universal freeze would have halted all relocation applications regardless of their progress through the system.

**139**  The plaintiffs' argument assumes that the Government owed a duty of care to them and them alone. The plaintiffs' position is unreasonably egocentric. The court cannot ignore the fact that when the Government considered the freeze it owed a duty to all parties affected by it. That included the GTBA and the four other charity associations that had submitted applications by July 6. It was entirely reasonable for the Government to have considered that some of those parties would suffer much greater harm by being frozen out of relocation than by relocating and operating under the new policy. The GTBA is a case in point. In July 2001 the Government knew that the GTBA's lease and management contract at 490 Vancouver Street would expire on September 30. A freeze that had the effect of keeping the GTBA out of new premises would have had the effect of terminating the GTBA charities' revenue.

**140**  Leaving aside the particulars of any other applications underway in July, in the context of this action a universal freeze on July 6 might have helped the plaintiffs but would have been at considerable cost to the GTBA charities. The standard of care the plaintiffs promote would put the Government in an impossible conflict. That is to say: by acting to protect the plaintiffs the Government would have harmed the GTBA.

**141**  In my view, the standard of care the plaintiffs propound is unreasonable. It would put the Government in a no-win situation, and would expose the Government to liability whatever it did.

**142**  Given the fact that the Government intended for bingo service providers to remain in the industry under contract with the BCLC, and the charity associations' legitimate expectation that the Government would process their relocation applications in a timely way so as to not frustrate their goals, it was, in my view, reasonable for the Government to limit the freeze to relocation applications posted after July 6.

**143**  The plaintiffs' claims for failure to warn cannot succeed.

Unlawful Interference with Economic Relations

**144**  The essential elements of the tort of interference with economic interests are that the defendant deliberately used unlawful means with the object and effect of causing damage to the plaintiff's economic interests (Powder Mountain Resorts Ltd. v. British Columbia, [*(1999) 47 C.L.R. (2d) 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G163-00000-00&context=); No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corporation of British Columbia, [*[2000] B.C.J. No. 1634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22PC-00000-00&context=), [*2000 BCCA 463*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22PC-00000-00&context=) per Lambert J.A. para. 110).

Unlawfulness

**145**  The plaintiffs say that the change from the old to the new bingo policy was unlawful because:

1. The Government had no authority to cancel the charity and charity association bingo operation licenses in January 2002;
2. The Government relied on s. 4(d) of the Lottery Corporation Act to authorize the BCLC to make agreements with bingo service providers but that sub-section does not actually give the Government authority to do what it did; or
3. Under the new policy Government is conducting charitable bingo gaming and that is something it cannot do owing to the provisions of s. 207(1)(a) and (b) of the Criminal Code.

**146**  HMTQ says that it is wholly vain to analyze this issue in any detail because even if the plaintiffs are right and the Government did act illegally, that act cannot bottom a civil claim for damages. HMTQ argues that in the absence of bad faith or irrationality the Government cannot be held liable in a civil court for an act that turns out to have been beyond its power. HMTQ points out that the plaintiffs have neither alleged nor proved Government bad faith or irrationality. The Crown relies on a number of Supreme Court of Canada decisions to support it position, the most recent of which is: Enterprises Sibeca Inc. v Frelighsburg (Municipality), [*[2004] S.C.J. No. 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGN1-F5KY-B014-00000-00&context=), [*2004 SCC 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B123-00000-00&context=) where Deschamps J. said:

20 The public law rules applicable to public bodies exercising a legislative power have been considered in numerous decisions of this Court. Welbridge Holdings Ltd. v. Greater Winnipeg, [*[1971] S.C.R. 957*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JBDT-B566-00000-00&context=), remains one of the leading cases. In that case, a real estate developer had sued a public body, asserting that there was a duty of care in making a zoning by-law. After the by-law was declared invalid, the developer claimed that the public body was liable in damages. Laskin J., speaking for the Court, laid down some clear basic principles (at pp. 966 and 968-70):

It is important to emphasize in this case that a duty of care of the defendant to the plaintiff cannot be based merely on the fact that economic loss would foreseeably result to the latter if By-law No. 177 should prove to be invalid.

. . .

. . . A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability".

. . .

. . . If, instead of rezoning the land involved herein to enhance its development value, the defendant had rezoned so as to reduce its value and the owners had sold it thereafter, could it be successfully contended, when the rezoning by-law was declared invalid on the same ground as By-law No. 177, that the owners were entitled to recoup their losses from the municipality? I think not, because the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care.

21 The adoption, amendment or repeal of a zoning by-law does not in itself trigger a municipality's liability even if the effect of that action is to reduce the value of the lands affected. In exercising its regulatory power, a municipality enjoys broad discretion in public law.

**147**  I accept the principle laid down in Enterprises Sibeca Inc., viz.: absent bad faith or irrationality a federal, provincial, or municipal Government cannot be civilly liable for foreseeable harm occasioned by an exercise of a power in excess of its authority. The plaintiffs' claim for damages for unlawful interference with economic relations must be dismissed.

**148**  I may, however, be wrong on this point. I will go on, then, to consider the three elements of unlawfulness the plaintiffs allege.

Unlawful Interference: Minister's Direction was New Law

**149**  The plaintiffs' argument hinges on s. 2.1 of the Lottery Act. The relevant portions of that section read:

2.1(1) The Lieutenant Governor in Council may license persons to conduct and manage lottery schemes in British Columbia.

1. The Lieutenant Governor in Council, by order, may delegate, to an authority specified in the order, the discretion under subsection (1) to license persons to conduct and manage lottery schemes in British Columbia.

**150**  The plaintiffs say that this section allows the Government or its delegate to issue licenses but does not allow it to cancel those licenses. The plaintiffs argue that in order to cancel the charity bingo licenses the Government needed to first pass some legislative provision specifically giving itself that power.

**151**  This argument does not require much discussion. In Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries Land & Oceans), [*[1997] 1 S.C.R. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3T4-00000-00&context=), the Supreme Court of Canada held that where the minister has a discretion to issue an authorization, the minister has an equal discretion to revoke that authorization even if there is no statutory language concerning revocation. Ergo: the power to cancel charity licenses is implicit in the power to issue those licenses. The plaintiffs' argument on this point must fail.

Unlawful Interference: Lottery Corporation Act s. 4(d)

**152**  The Solicitor General relied upon s. 4(d) of the Lottery Corporation Act RSBC when he directed that the BCLC assume conduct and management of charitable bingo in B.C. That section reads:

|  |  |  |  |
| --- | --- | --- | --- |
| 4 |  | The objects of the corporation are the following: |  |

. . .

1. if authorized by the minister, to enter into agreements with a person regarding any lottery conducted or managed on behalf of the Government;

**153**  The plaintiffs allege that s. 4(d) does not accurately express the Legislature's intent when it passed that provision. The plaintiffs argue that s. 4(d) is meant to limit the BCLC's authority to make agreements not with any person and with respect to any lottery, but rather with only licensed bingo charities and with respect to only electronic bingos. If that is true, and s. 4(d) is so limited in scope, then the plaintiffs say that the Solicitor General did not have authority to employ s. 4(d) beyond that scope. The plaintiffs say that the Solicitor General did not, therefore, have authority to direct the BCLC to make agreements with bingo service providers with respect to paper bingo operations.

**154**  Section 4(d) was added to the Lottery Corporation Act by an amendment contained in the Miscellaneous Statutes Amendment (No. 2) S.B.C. 1993 c. 55 ss. 17-20.

**155**  The issues here are twofold:

1. Whether all the evidence (comprising the plain wording of the section and certain extrinsic evidence of legislative history) establishes as a fact that the Legislature's intent was to limit the BCLC's involvement in bingo gaming as the plaintiff alleges; and
2. If the Legislature's intent was to limit the BCLC's participation to electronic bingo, whether s. 4(d) of the Lottery Corporation Act can be interpreted in accord with that intention.

**156**  An analysis of the Legislature's intent begins with the statute. Section 4(d) simply permits the BCLC to make agreements with any person regarding any lottery conducted or managed on behalf of the Government. The scheme of the Lottery Corporation Act is to authorize the BCLC to act as an agent of the Government to carry out lottery gaming in B.C. pursuant to s. 207(1)(a) or s. 207(4) of the Criminal Code. The plain meaning of s. 4(d) is wholly consistent with the scheme of the Act. The plain wording of the statute and the section itself do not raise questions, nor do they leave the reader in doubt. The section is not at odds with any other portion of the Act. I conclude, therefore, that s. 4(d) is not ambiguous. The plain wording of the section does not suggest that the Legislature's intent was to limit its application in the way the plaintiffs urge.

**157**  What, then, of the section's legislative history? Does that history reveal the Legislature's intent, and if it so, does the section conflict with that intention? On that question the plaintiffs produced two bits of evidence: testimony from Ms. Boone who was the Government Minister responsible for the BCLC in 1993; and the transcript of the House debate concerning s. 4(d).

**158**  Ms. Boone testified that the impetus for introducing s. 4(d) was that during the four years leading up to 1993 forty-five charities in Vancouver enjoyed revenues from an electronic bingo pilot project. Those charities wished to continue to receive that revenue. Then, as now, the Criminal Code stipulated that only Governments can operate electronic bingo. Obviously those charities were not the Government. The Government apprehended that this charity-operated electronic bingo game might be illegal. The Government temporarily fixed the problem by appointing the charities as Government agents for the purpose of operating the electronic bingo. The Government made those appointments on a month-to-month basis. The Government was not prepared to continue that regime. The Government wished to regularize the situation and give it a long-term solution. The Government decided to accomplish that solution by adding s. 4(d) to the Lottery Corporation Act.

**159**  I accept Ms. Boone's evidence that her intent in introducing s. 4(d) was to address the electronic bingo pilot project. Ms. Boone testified that the July 28, 1993 Hansard transcript accurately recorded the debate in the House concerning the Miscellaneous Statutes Amendment. It was that Miscellaneous Statute that contained s. 4(d) of the Lottery Corporation Act. That transcript reveals that Ms. Boone was questioned closely by MLA K. Jones.

K. Jones: It is my belief that this is broad enough to include other types of agreements, with the intent of widening the scope of lotteries and gaming in the province. It could be the intent of the minister to bring this through by this means. Could the minister tell us all of the purposes that are intended to be utilized by this clause?

Hon. L. Boone: Yes. I'll be very straightforward. As I stated earlier, it's strictly to deal with the issue around bingo and video bingo as it exists right now with the Starship community association. They've been operating on a month-to-month basis as an agent of the Crown. This enables the Lottery Corporation to enter into an agreement with Starship charities and the corporation to provide the video bingo. This section only deals with video bingo.

. . .

K. Jones: Does this also provide for the establishment of a casino-style agreement with regard to bingo operations in British Columbia?

Hon. L. Boone: No. I think this is the third time I've answered this. It enables the corporation to enter into an agreement with an organization that already has a licence to have paper bingo. If they have a paper bingo licence, whether they be an aboriginal community or an organization elsewhere, then it enables the corporation to enter into an agreement with that organization to operate video bingo.

K. Jones: Perhaps the minister should read the piece of legislation put forward here. In this section it says: "... enter into agreements with a person regarding any lottery conducted or managed on behalf of the Government ...." There is no restriction as to what she is claiming to be the case.

Hon. L. Boone: As I said earlier, they must have a licence to conduct a bingo game. The Lottery Corporation cannot enter into an agreement with them unless they have that licence.

K. Jones: Could the minister tell us in what part of the legislation it states that a licence is required? It says only: "... a person regarding any lottery conducted or managed on behalf of the Government ...."

Hon. C. Gabelmann: Given that there are some issues here that deal with the Criminal Code, I thought it might be useful to back up and take a minute to explain why, from a legal perspective, this particular section is included.

Traditionally, the province has had bingo operations which have been exclusively paper operations. Those operations have been licensed by the Gaming Commission of the province. The recent -- four years ago -- advent of electronic bingo, where instead of using paper you use the modern technology, has meant that we are moving away from .... The Criminal Code requires the Government to operate and license those kinds of gaming operations.

The Starship operation, which is the experimental program in Vancouver, is operating, in effect, outside the law as it stands now. In order to allow it to operate legally, the Government, through the Lottery Corporation, has to enable it to operate electronically. That's what this provision will do. It simply extends the opportunity for paper bingos, where they are licensed by the Gaming Commission, to move into electronic bingo if the Lottery Corporation establishes an agreement with a licence holder to do that particular electronic activity. That's what we are talking about here. So it's simply dealing with the modern technology combined with the Criminal Code to ensure that the Code is complied with and that the Government, through the Lottery Corporation, conducts the activity, which is required by the Criminal Code.

. . .

K. Jones: Might I remind the minister that if she would read this clause that is supposedly put forward in her name, she would see that it relates to lotteries conducted or managed on behalf of the Government. That includes breakopen lotteries. Perhaps she doesn't understand that, but it does, and we are talking directly to that item. She is not answering that question. She refused to answer the questions regarding this area during estimates, and now she is implementing the thing without being open and upright about what's happening in an area of very serious concern to people throughout British Columbia.

R. Neufeld: I have one quick question. I heard the minister quite clearly say that this covers video bingo. The second line in (c. 1) includes the words "with a person regarding any lottery." That leads me to believe that it means any kind of lottery. If it's specific to only one kind of lottery, why would it not be named?

Hon. L. Boone: It's because lottery is defined in the Criminal Code.

**160**  The plaintiffs argue that because Ms. Boone proposed s. 4(d) her intention must be the Legislature's intention. The plaintiffs further argue that because Ms. Boone was a member of the ruling party at the time, and the ruling party passed the amendment, her intention was her party's intention, and was, ipso facto, the Legislature's intention.

**161**  I do not accept that tautology. Simply put, the views of the proponent of a Bill do not determine the Legislature's intent. The proponent's views are just some evidence of the purpose and intent of the measure. That evidence may pale to insignificance in the face of other evidence. Such other evidence might be, for example, crystal clear wording of the measure itself.

**162**  But back to Hansard: the debate reveals that MLAs Jones and Neufeld read the amendment. They articulated the fact that the amendment applies to 'any lottery'. They identified for the Legislature that the words 'any lottery' comprise many gaming activities beyond video games alone. Ms. Boone said otherwise. The Legislature passed the amendment as written. I conclude that if anyone in that debate expressed the Legislature's intent in passing s. 4(d) it was Messrs Jones and Neufeld. They understood that s. 4(d) could give the BCLC authority to make agreements with respect to any lottery, including, I assume, paper bingo operations. I have to conclude that when the Legislature passed s. 4(d) into law it recognized that Ms. Boone's statement that the amendment was limited in application to video lotteries did not accurately describe the purpose and intent of the amendment. I have to conclude that the Legislature accepted Mr. Jones' and Mr. Neufeld's observation that the section applied to all lotteries operated by the Government. I have to conclude that the Legislature did not accept Ms. Boone's answer to Mr. Neufeld's question:

R. Neufeld: I have one quick question. I heard the minister quite clearly say that this covers video bingo. The second line in (c. 1) includes the words "with a person regarding any lottery." That leads me to believe that it means any kind of lottery. If it's specific to only one kind of lottery, why would it not be named?

Hon. L. Boone: It's because lottery is defined in the Criminal Code.

**163**  The Legislature is presumed to know the law. The Legislature knew, therefore, that s. 207(4)(c) of the Criminal Code defines electronic lotteries, and it knew that if s. 4(d) was supposed to be confined to electronic bingo then the section could have been drafted using that definition. Ms. Boone is not presumed to know the law. In this case, and with the greatest of respect to her, she did not know the law concerning electronic gaming.

**164**  Extrinsic evidence like Hansard can help the court resolve ambiguity by illuminating the issue that motivated the Legislature to act. Given that understanding, the court can then interpret the statute so as to give effect to the act's actual purpose. However, when a statute is unambiguous (as is the case here), extrinsic evidence is of very little use. That is especially so when the extrinsic evidence comprises parliamentary exchanges - a type of evidence notoriously unreliable due to its partisan nature.

**165**  The court must weigh the probative value of evidence before it. In this case the probative value of the clearly worded provision is high. The probative value of parliamentary debate and viva voce evidence from a former Government Minister is low, particularly when the Minister's words demonstrate that she does not understand what she is talking about.

**166**  On the whole of the evidence I cannot conclude that when the Legislature passed s. 4(d) it intended one thing but accomplished another. The answer to the question whether "the Legislature's intent was to limit the BCLC's involvement in bingo gaming to electronic bingo?" is no.

**167**  If I am wrong in that conclusion, I must move to the second issue, viz: if the Legislature's intent was to limit the BCLC's participation to electronic bingo, must s. 4(d) of the Lottery Corporation Act be interpreted to accord with that intention?

**168**  The answer to this question lies in R. v. Daoust, [*[2004] 1 S.C.R. 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10B-00000-00&context=), [*2004 SCC 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10B-00000-00&context=). There the provision at issue was s. 462.31 of the Criminal Code. The English version of that section was written to criminalize a larger group of actions than the French version. The court accepted as a fact that Parliament's intent was to capture that larger group and that by error the French version was different and more restrictive than the English. The question for the court was whether the court should read into the French version sufficient words to make the French conform to the English. The court held that it could not do that. Bastarache J. wrote:

The Attorney General argues that the legislative history shows that the English version reflects Parliament's true intent. There are several reasons why I cannot accept this position. First, the Court cannot use the history of a clearly drafted statute as a basis for changing it or completely disregarding its meaning.

**169**  Bastarache J. went on to discuss rules of interpretation that apply to penal statutes and to competing language versions. While those discussions were necessary in the context of Daoust, they do not diminish the court's first principle, viz: that the court cannot use legislative history to change or completely disregard the meaning of a clearly drafted statute.

**170**  So, even if I concluded that the legislature's purpose and intent in passing s. 4(d) was to limit the BCLC's participation as the plaintiffs say, the fact remains that section is clearly drafted. If I were to give effect to the plaintiffs' position, the section would be read as follows:

[Editor's note: In the following quoted text, square brackets indicate where material has been struck through.]

|  |  |  |  |
| --- | --- | --- | --- |
| 4 |  | The objects of the corporation are the following: |  |

1. if authorized by the minister, to enter into agreements with [a person] licensed charitable organizations regarding [any lottery] electronic bingo conducted or managed on behalf of the Government in or at a premises where a licensed charitable organization conducts and manages paper bingo gaming pursuant to s. 207(1)(b) of the Criminal Code of Canada.;

**171**  That interpretation would stray too far from and do too much violence to the statute. The plaintiffs' argument on this point must fail.

Unlawful Interference: Section 207(1) of the Criminal Code

**172**  The plaintiffs say that the new policy established a scheme of charitable bingo gaming managed and conducted by the Government. They argue that s. 207(1)(a) and (b) of the Code must be read restrictively. If s. 207(1)(b) confers on charities the right to use the proceeds of bingos conducted and managed by them, and if s. 207(1)(a) is silent about charities, then the Code must mean that a Provincial Government cannot conduct and manage a bingo the proceeds of which are put to charitable purposes. Equally, the plaintiffs say that if the Government sets charities up in the role of conducting and managing bingos then the Government is effectively running the games under s. 207(1)(b) and that, too, is verboten.

**173**  In support of their position the plaintiffs say that because the new policy requires that a charity must spend a few hours promoting its purposes at a bingo hall in order to qualify for a Government grant, and because the BCLC allows unpaid individuals (some of whom might be members of charities) to do work at bingos, the new policy adds up to charities conducting and managing bingos.

**174**  The flaw in the plaintiffs' argument is that in the context of gaming, to 'conduct' and 'manage' means to be the operating mind of the operation (Great Canadian Casino Co. v. Surrey (City), [*[1998] B.C.J. No. 904*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S2HJ-00000-00&context=) (S.C.), aff'd [*[1999] B.C.J. No. 2495*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22JP-00000-00&context=) (C.A.)). There is a vast gulf between members of a charity controlling a gambling enterprise as the plaintiffs allege, and what the charities actually do at a bingo hall under the new policy. To conduct and manage, a charity would, at a minimum, propose the time of day and type of game offered at the hall, be responsible to execute fiscal accounting and control procedures, and have hands-on control of money at the outset and conclusion of the gambling events. Under the new policy charities have absolutely none of these management functions over gambling.

**175**  The plaintiffs have misapprehended what, exactly, charity attendance at bingo halls under the new policy is all about. The charities must spend a certain, nearly token, number of hours at a bingo hall in order to qualify for a Government grant. Their time at the hall has nothing whatsoever to do with the bingo event itself. In fact, the evidence was clear that if a charity does not show up at a hall its absence will have no impact at all on the bingo games. The gambling will proceed whether a charity is there or not.

**176**  The only consequence for a charity not promoting itself at a hall might be its disqualification from grant money. That consequence might be contrasted with the consequence of a charity not showing up for a bingo event under the old policy. Under the old policy a bingo game simply could not proceed without charity representatives performing certain mandated conduct and management functions at the hall.

**177**  Further, the plaintiffs' interpretation of the Criminal Code is incorrect. Section 207(1)(a) prescribes who may conduct and manage lotteries. It does not prescribe where the proceeds of gaming will go. The Code does not pretend to direct the Government to spend gaming profits in any particular way. The Government can apply gaming funds in whatever fashion it likes. It could give all the proceeds to charities - the Code does not prevent that - or it could, if it wished, devote those proceeds for any other proper government expense.

**178**  The plaintiffs' causes of action against HMTQ and the BCLC based on the assertion that paper bingo operations in B.C. post-January 2002 are illegal, must fail.

Expropriation

**179**  The plaintiffs say that the Government's cancellation of the GTBA's member charity bingo licenses effectively expropriated their business goodwill. That goodwill was the value of the plaintiffs' business under the facility and the management services contracts. They assert that absent statutory authority to expropriate without compensation, the Government must pay a party for the taking of that party's property.

**180**  The plaintiffs rely on the Supreme Court of Canada's decision in Manitoba Fisheries Ltd. v. Canada, [*[1979] 1 SCR 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-253N-00000-00&context=). In that case the plaintiff had a thriving business buying and selling fish. Its business existed because it had a common-law right to make contracts with who ever and on whatever terms it could. The Government decided that the industry would be better served by a single enterprise having a monopoly over the fish trade. The monopoly was created by statute. In the result the plaintiff's business was lost. The question for the Supreme Court of Canada was whether goodwill was property for which compensation must be paid. The court said it was.

**181**  Manitoba Fisheries is distinguishable from the present case. In Manitoba Fisheries what was taken was the plaintiff's right to make contracts with its customers. The plaintiff was entitled to compensation for the loss consequent to the taking, and that loss was measured by the value of the business' goodwill.

**182**  In the present case, on January 14, 2002, BCG was a registered bingo gaming services provider. On January 15 it was still a registered bingo gaming services provider. As far as the plaintiffs' ability to participate in the bingo industry was concerned, the new policy changed nothing. What the new policy did was alter with whom BCG could contract to provide services. Under the old policy it could contract with the GTBA. Under the new policy it could contract with the BCLC. But in either case its right to participate in the industry was unaltered.

**183**  It is worth noting that throughout the Manitoba Fisheries trial and appeal decisions the court commented that the monopoly-creating statute allowed the Government to issue certain licenses. With such a license an outfit like Manitoba Fisheries Ltd. could have carried on business, albeit with one customer (the monopoly) instead of the many it had before. The parties agreed and the court noted that no such license had been issued to the plaintiff. Absent a license, the parties agreed and the court accepted that the plaintiff's business was kaput. The flip-side of that observation is that if a license had been issued, then the plaintiff would not have been out of business and it would not have had a claim for compensation for expropriation. All that would have happened is that its customer base would have been altered. BCG's position in the present case is precisely that - the new policy substituted one contracting party and contract for another.

**184**  The plaintiffs relied as well upon Casamiro Resource Corp. et al. v. The Queen in right of British Columbia [*80 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1JC-00000-00&context=) (B.C.C.A.). In that case the plaintiff owned several mineral grants issued to it by the Provincial Government. The mineral grants were located inside a Provincial park. In order for the plaintiff to realize value from those grants it had to be able to access the surface of the land. The Provincial Government refused to allow the plaintiff access to the surface. As Southin J.A. put it, the Government's refusal "reduced the Crown grants to meaningless pieces of paper". The Court of Appeal concluded that the Government's action expropriated the plaintiff's interest in the mineral grants notwithstanding the fact that the grants themselves continued to vest in the plaintiff's name. The Court went on to allow as how:

By legislative act they (the grants) could be turned back into pieces of paper with meaning but no such legislative act has occurred.

**185**  I take from the Casamiro decision the proposition that the act of expropriation is not necessarily limited to depriving a person of title to his property. Expropriation may be accomplished as well by creation of a regulatory regime such as to completely frustrate a person's opportunity to enjoy his property.

**186**  The plaintiffs here argue that the new bingo policy rendered its GTBA contracts 'meaningless pieces of paper'. I agree that cancelling the charities' bingo licenses created a situation in which the GTBA could not legally run bingos and BCG could not legally provide bingo services to the GTBA. But the big difference between BCG's and Casamiro's positions is that in the present case BCG could still provide bingo services to an entity willing to purchase those services from it. Casamiro, on the other hand, was completely unable to extract any value from its mineral grants.

**187**  BCG experienced a change in its regulatory regime that altered with whom it did business but that allowed it to do business nonetheless. On the other hand, Casamiro experienced a regulatory change that utterly deprived it of the practical opportunity to use its property. In my view, the former was a proper exercise of Government authority to regulate BCG's position in an industry that existed by solely by virtue of that regulation. That exercise was not expropriation.

**188**  If there was a taking that amounted to expropriation in this case, it was the cancellation of the GTBA member charities' licenses to operate bingos. Obviously, the plaintiff has no standing to claim compensation for some other outfit's loss.

**189**  In summary the new policy rendered the plaintiffs' contracts with the GTBA unenforceable. The plaintiffs cannot say their position is the same as Manitoba Fisheries Ltd. or Casamiro's because unlike Manitoba Fisheries Ltd. and Casamiro, BCG could and did carry on in the bingo business.

**190**  The plaintiffs' claim for compensation for expropriation is dismissed.

Negligently Accepting BCA Application

**191**  Here the plaintiffs say that the Government is liable because its employee Mr. Sturko was negligent in the performance of his duty to decide whether the BCA application was formally initiated on or before the July 6, 2001 relocation freeze. The plaintiffs allege that Mr. Sturko was negligent because he did not compare the BCA application to the applicable standards for relocation applications. The plaintiffs also say that other members of the Gaming Commission indicated that the BCA application was not complete until July 9 or 10. The plaintiffs argue that those statements establish as a fact the application was not complete on July 6. Therefore, according to the plaintiffs, it was wrong for Mr. Sturko to conclude otherwise, and it was negligent for the Government to allow the BCA application to proceed.

**192**  The Government says that Mr. Sturko's decision is not justiciable because it was an exercise of a statutory power of decision, and is, therefore, proof against a civil ***negligence*** suit. If that position fails, then the Government argues that the Government owed BCG no duty of care with respect to the BCA relocation and that the facts of the case establish that the application was formally initiated by July 6, 2001.

Statutory Power of Decision

**193**  Section 1 of the Judicial Review Procedure Act decrees that a statutory power is a right or power conferred by an enactment to exercise a statutory power of decision. A statutory power of decision includes the power to make a decision deciding the eligibility of a person to receive a license. A license is defined to mean an approval or similar form of permission required by law.

**194**  In this case the BCA needed to get the Gaming Commission to approve its application for its relocation from 6th Avenue to 490 Vancouver Street. A first step in that process was to get the Government to decide that it had formally initiated its application before the July 6 freeze.

**195**  The plaintiffs say that Mr. Sturko's decision to accept the application in the form it was on July 6 was an operational decision as opposed to an exercise of a statutory power. If it was operational in character then the plaintiffs assert that it can be the subject of a civil suit as per the ratio of Kamloops (City of) v. Neilsen [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=).

**196**  At all material times in 2001, by s. 207(1)(b) of the Criminal Code the Province had authority to license charitable organizations to conduct and manage bingo. At all material times the Province delegated authority to establish and administer that licensing scheme to the Gaming Commission and the Gaming Audit and Investigation Office. At all material times Mr. Sturko had the power to decide whether an application was complete enough to survive the freeze.

**197**  Was Mr. Sturko's decision a statutory power of decision? It was. Regulation of the gaming industry was reserved to the Province. The authority to regulate that industry was expressed in the Lottery Act. The Solicitor General held that power. The Solicitor General delegated to Mr. Sturko the power to decide which applications should survive and which should die in the freeze. It was a decision that affected the right of a charitable association to make a relocation application. As such Mr. Sturko was in a position to require a party to refrain from doing what it would otherwise be entitled to do. This is the kind of decision under a statutory power contemplated by the Judicial Review Procedure Act:

statutory power means a power or right conferred by an enactment

1. to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

**198**  Was Mr. Sturko's decision quasi-judicial in nature? That begs the question: what is a quasi-judicial decision? In Harrington v. Pappachristos [*[1992] B.C.J. No. 2600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2FW-00000-00&context=) B.C.S.C. Callahan J. described the hallmarks of a quasi-judicial decision:

In determining whether the actions of the Board and supervisors were quasi-judicial, a convenient place to commence this discussion would be with the definition of quasi-judicial as found in Black's Law Dictionary, 5th ed. Quasi-judicial is defined as:

A term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

. . . Halsbury's Laws of England, 4th ed., Volume 1, in considering quasi-judicial functions, succinctly put it this way at pp. 329-330:

Besides judicial persons and bodies strictly so called, there are many other persons and bodies who have authority or discretion to decide upon matters affecting other persons such as licensing justices, local authorities hearing applications for music and dancing licences, justices hearing applications for cinematograph licences ...

**199**  In order to make his decision Mr. Sturko had to gather information from available sources. He had to come to conclusions about the facts relating to the applications in play. For example, he had to decide whether a given letter from a given charitable association was or was not an application to relocate and when it was delivered. Mr. Sturko had to act fairly and consistently in his decisions. He had to apply the same rationale and criteria to the facts of each application in order to arrive at defensible conclusions. Mr. Sturko did not have to convene a hearing or supply reasons for his decision. Those are common but not essential elements of a quasi-judicial decision. The essential elements here are that Mr. Sturko was charged with making a decision within a statutory scheme, that the decision required him to gather information, make findings of fact, and render a decision that affected the rights and obligations of, among others, the BCA.

**200**  Callaghan J. concluded that the actor in Harrington was exercising a quasi-judicial function, and said:

Persons exercising such quasi-judicial powers, and all parties, advocates, and witnesses before them, in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decision or by words used in the course of the proceedings.

**201**  That is precisely the conclusion I must reach in this case concerning Mr. Sturko. His finding that the BCA application was formally initiated before July 6 was quasi-judicial in nature and was an exercise of a statutory power of decision. The plaintiffs did not allege fraud or bad faith, and the decision cannot, therefore, be the subject to a civil action for damages.

***Negligence***

**202**  If I am wrong and Mr. Sturko's decision was not an exercise of a statutory power reviewable under the Judicial Review Procedure Act alone, then is it actionable in ***negligence***? To be actionable, the plaintiffs must prove that the Government owed them a duty of care and that the Government breached the applicable standard of care.

**203**  Again, for the reasons set out in paragraphs 125 - 128, it was not reasonably foreseeable that Mr. Sturko's decision would cause harm to the plaintiffs.

**204**  And again, on the theory that I may be wrong, I will go on to consider the appropriate standard of care. The plaintiffs argue that the standard of care Mr. Sturko should have applied was to compare the BCA application to the requirements of stage 1 of the revised relocation procedures. By his own admission Mr. Sturko did not examine the BCA application and complete an inventory of the matters it contained. Neither did he compare the content of the BCA application to the formal requirements of stage 1.

**205**  The plaintiffs also argue that Mr. Hall would not have delayed sending the relocation application to Victoria until after getting Mr. Major's financial forecast on July 9 unless he thought that the forecast was an essential element of the application. The plaintiffs say that Mr. Hall knew the relocation procedure better than Mr. Sturko did, and Mr. Hall's opinion of what comprises a complete application should prevail over Mr. Sturko's.

**206**  Lastly, the plaintiffs argue that Mr. Hoskins would not have written that the BCA application was commenced or received on July 10th unless it were true.

**207**  Oddly, the plaintiffs did not prepare an inventory of the alleged shortcomings of the BCA application as it stood on July 6. If they had they would have found, as I did, that the BCA application hit all but one of the necessary heads prescribed by stage 1 of the revised relocation procedures. The missing element is a complete list of entities participating in the relocation and a description of their financial involvement. This is not, in my view a serious failing. The Government knew who all the BCA charities were, and it knew who the service provider was. Other sections of the application assert that any financial cost of the move would be born by Mr. Major, so it would be logically redundant for the BCA to also assert that no one else would financially participate in the relocation. The information Mr. Major supplied on July 10 had to do with projected revenues and expenses in the first year of operation at 490 Vancouver Street. The BCA had already supplied some numbers on that topic in their original materials. Mr. Major's information may have contained different numbers than the BCA letters, but they were on a topic already covered by the BCA.

**208**  On July 6, 2001, the BCA relocation application substantially if not fully complied with the requirements of stage 1 of the revised relocation procedures. In this case the plaintiffs did not prove that the application was, in fact, incomplete; they only proved that Mr. Sturko did not check to see that it was.

**209**  Mr. Hall's desire to send a complete package to Victoria and his decision to wait until after he got Mr. Major's materials was simply a reflection of his wish to do a good job. He was not instructed to send only stuff received on or before July 6 - he was simply asked to send everything he had on the BCA relocation. The BCA application satisfied the requirements of stage 1 of the relocation procedures before Mr. Major's information arrived. Nothing turns on Mr. Hall's decision to wait a day or two to get Mr. Major's letter before faxing the whole package to his superiors at the Gaming Commission in Victoria.

**210**  Mr. Hoskins adequately explained why he wrote that the BCA application was commenced on July 9 or 10. He simply looked at the last piece of correspondence received on the file, saw that it was Mr. Major's letter entitled "Relocation Application", and reproduced that appellation in his own correspondence. Mr. Hoskins was not in a position to decide when the application was in fact submitted or complete. References to commencement dates in Mr. Hoskins' writings are either mistaken or irrelevant. The court cannot find as a fact that the BCA was not formally initiated on July 6, 2001 on the basis of Mr. Hoskins' mistakes and in the face of clear evidence to the contrary.

**211**  In summary, if the Government did owe a duty of care to the plaintiffs with respect to the BCA relocation then it complied with the standard of care it owed to the plaintiffs. The BCA application was, in fact, complete before July 6. It would have been better, perhaps, for Mr. Sturko to have made a formal inventory of the content of that application as I did. However, the result for the plaintiffs would not have been different if he had.

CAUSES OF ACTION AGAINST BCLC

**212**  The plaintiffs allege that three separate acts of ***negligence*** by the BCLC caused them harm.

Negligent Imposition of the BOSA

**213**  The plaintiffs articulate their cause of action under this head of loss thus:

1. It was within the reasonable contemplation of BCLC that, if it acted carelessly in the exercise of discretion under a statutory duty to implement the Policy respecting control and management of bingo gaming through the BOSA, it could cause damages to the Plaintiffs. In such circumstances there existed a duty of care owed by BCLC to the Plaintiffs to take reasonable care, in the circumstances, when exercising discretion under such a duty.

157A. The Defendant BCLC breached the duty of care to act reasonably in the implementation of that Policy when, knowing of the pre-existing obligations of BCG to the Landlord, and the long term fixed costs associated with the Lease and other contractual obligations of BCG, imposed the BOSA, which by its terms failed to take into account BCG's long term fixed costs under the Lease and other contracts.

**214**  The plaintiffs do not rail against the BOSA's regulation of bingo operations. Their complaint is solely with the BOSA compensation scheme. The plaintiffs say that because the BCLC knew that BCG had certain fixed costs, the BCLC owed BCG a duty of care to create the BOSA so as to ensure that BCG could meet those costs. Essentially, BCG is suing the BCLC for crafting the BOSA on terms that did not ensure that BCG would be profitable.

**215**  The BCLC is a Crown corporation. The BCLC prepared the BOSA in accord with a policy decision taken by the Government. The elements of that policy relevant to this claim were that there was to be a single contract for all bingo service providers in the province, the compensation scheme under the uniform contract was to be common for all providers, and the compensation was to be calculated as a percentage of revenues at the operator's hall. The Government decreed that the total compensation paid to bingo operators under the new scheme would not be greater than the price the charities had paid to their operators under the old scheme. The BCLC had little discretion, then, in fixing the maximum percentages allowable in the BOSA. Based on Mr. Penrose's evidence (Mr. Penrose is the BCLC's Vice President of Finance and Corporate Services), I conclude that the BCLC in fact set the percentages at the maximum. I say this because when the Government finally approved the BOSA the BCLC's figures showed that the total compensation paid under it would be on par with the overall compensation paid under the old scheme. That is to say: the BCLC gave as many percentage points to the operators as Government policy would allow. Further, the Government decided that the BCLC should not own or lease real estate at which gambling took place.

**216**  Only the Government can regulate bingo operations. The decisions the Government took concerning the size and shape of the BOSA were pure policy. The BCLC simply implemented those decisions. Absent bad faith or irrational conduct the Government and its agent the BCLC cannot be held civilly liable for policy decisions.

**217**  In any event, even if this were not a matter of public policy but rather a simple commercial relationship, no suit could lie for what amounts to negligent negotiation of a contract. In Midwest Management (1987) Ltd. v. British Columbia Gas Utility Ltd., [*[2000] B.C.J. No. 2204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1JY-00000-00&context=), the court considered whether a party could owe a duty of care in ***negligence*** for pre-contract bargaining. The Court said:

12 . . . It is to be noted that the plaintiff has not pleaded any intentional conduct on the defendant's part that might found a claim in fraud, nor has the plaintiff alleged ***negligence*** on the defendant's part either in the tender documents, by way of representation, or otherwise. The plaintiff simply asserts that the defendant owed a duty of fairness independent of any contract that might arise in the tendering process.

13 Whether such an independent duty of fairness exists is a pure question of law. The learned trial judge said he knew of no "free-standing enforceable duty of fairness simpliciter". Counsel did not refer us to any authority where such a duty has been held to exist. Such a duty is quite inconsistent with an adversarial, competitive tendering process. To find such a duty would cause great uncertainty in this area of the law.

14 In my respectful view, the learned trial judge erred in law in holding that this claim might possibly succeed. As no such duty exists in law, the claim based on its alleged breach was bound to fail.

**218**  The plaintiffs' claim for this cause of action cannot succeed.

Negligent Pursuit of Profit Policy

**219**  The plaintiffs say that the BCLC was negligent in its implementation of the Government's policy directive to increase revenue from bingo gaming in B.C. The plaintiffs do not attack the policy itself, only the way the BCLC pursued it.

**220**  Specifically, the plaintiffs say that during the days leading up to January 15, 2002 the BCLC knew that BCG was a new entrant in the bingo market, that its position in the market was fragile, that patrons were tending to go to 490 Vancouver Street rather than the new BCG hall at 355 Vancouver Street, that BCG had a long term lease at a fixed rent, and that it depended upon its contracts with the GTBA for its survival. In the context of all that information, the plaintiffs allege that the BCLC was negligent in not taking steps in the course of implementing the profit policy that would ensure BCG's survival and profitability. The plaintiffs say that the BCLC ought to have taken over BCG's lease with Mr. Kandola's company, or it ought to have agreed to pay as much for rent as the GTBA was paying, or it ought to have agreed to increase the percentage of revenues paid to BCG so as to ensure that BCG's overhead was covered, or it ought to have wrought a deal with BCG on the same cost plus terms as the original GTBA contract, or some combination thereof.

**221**  The difficulty with the plaintiffs' argument is that it presumes that part of the Government policy was to preserve unsuccessful halls and inefficient bingo service providers. That was not the Government policy at all. The Government wished to increase bingo revenues so that the amount of money flowing into the Government's consolidated revenue fund would increase. It instructed the BCLC to take steps to achieve that goal. A necessary adjunct of that policy was to weed out failing halls and inefficient bingo operators. After all, if inefficient halls and operators were allowed to continue in the industry, then their operations would continue to depress overall bingo revenues.

**222**  The Government gave the BCLC clear guidelines on how it was to go about increasing bingo revenue. It was to create and execute a BOSA agreement with each bingo service provider. The BOSA was to be on common terms throughout the industry. The common terms were to govern how bingo was conducted and the compensation a service provider would receive. The Government allowed the BCLC to adjust the compensation somewhat for the first 6 - 12 months of the BOSA, but after that the Government decreed that the compensation schemes of all the BOSAs in the Province would to be identical. The Government directed that the compensation scheme was to be geared to bingo revenues - both rent and services were to be paid as a percentage of after-prize revenues. The Government instructed the BCLC that it was not to own, occupy, or become financially responsible for gambling premises.

**223**  What bottoms the plaintiffs' cause of action is their belief that the Government's policy gave the BCLC the power to keep inefficient bingo operators in the industry, and their belief that the BCLC was negligent in not exercising that power for the plaintiffs' benefit. In fact, the Government's policy was to increase bingo revenue. A necessary aspect of that policy was that, in some cases, poor operators should be removed from the market so that others might take their place. The Government was prepared to give poor operators an opportunity to become efficient; that was what the 6 - 12 month special BOSAs were all about. However, it was never the Government's policy, and it was never in the BCLC's power, to keep a bingo hall open that people did not want to go to, or to keep an inefficient operator like BCG in business.

**224**  Contrary to the plaintiffs' assertion, the BCLC had no real discretion to exercise in the plaintiffs' favour when it implemented the Government's profit policy. It could not offer to take over BCG's lease. It could not offer special remuneration for management fees or rent for longer than 6 months at a time for a maximum of one year. It could not offer to pay a long-term fixed amount for rent. It could not offer BCG a cost-plus contract for services. For the plaintiffs to suggest that the BCLC could accommodate BCG's special circumstances is to attack the Government's profit policy itself, not just how the BCLC went about implementing it. In essence, the plaintiffs argue that the BCLC was negligent for following the policy, and that is tantamount to an attack on the policy itself.

**225**  The plaintiffs cannot point to anything that the BCLC could have done for them that would have also been proper for the BCLC to do given the constraints of the Government's instructions. When viewed in that light, the plaintiffs' argument really is that the BCLC was negligent in complying with the Government's policy to increase bingo gaming profit. The policy is not justiciable, and neither is the BCLC's adherence to that policy.

**226**  The plaintiffs' claims for negligent pursuit of the profit policy must be dismissed.

Negligent Expansion of Hours

**227**  The plaintiffs say that in the spring of 2002 the BCLC knew that BCG was not prospering under the new policy. They allege that the BCLC owed BCG a duty of care to preserve it from further deterioration by not granting Mr. Major's request for expanded gaming hours at the 490 Vancouver Street hall.

**228**  The BCLC was aware that attendance at the BCG hall was not on par with the attendance the GTBA had enjoyed before it move to 355 Vancouver Street and took Mr. Valentini on as its service provider. The BCLC knew or ought to have known that in the bingo industry profit tends to be directly proportional to attendance. The BCLC should, therefore, have foreseen negative consequences for BCG from any decision it might make that would further erode attendance at the BCG hall. By the spring of 2002 the BCLC and BCG were contracted to each other, so the two were certainly sufficiently close to one another to satisfy the proximity aspect of the Anns test for a duty of care.

**229**  However, as with the plaintiffs' complaint over the relocation freeze, what the plaintiffs propose here is an unworkable standard of care. That standard of care would require the BCLC to act only for BCG's benefit regardless of the violence that stricture did to the BCLC's prime directive and regardless of its cost to another bingo service provider.

**230**  The BCLC's prime directive was to increase overall bingo revenues in the Province. To achieve that end the Government directed the BCLC to permit bingo halls to be open from 9:00 a.m. to 2:00 a.m. unless those hours were contrary to municipal regulations. The BCLC took the perfectly reasonable view that bingo operators were in the best position to know what hours of operation best suited their markets. Accordingly, commencing in January 2002 the BCLC's practice was to authorize bingo halls to be open such hours as they desired so long as those hours were between 9:00 a.m. and 2:00 a.m. and they complied with relevant local regulations. The principle governing the BCLC's approach to hours of operation was not to protect any particular hall or operator but to encourage a competitive environment in which well-run halls could attract patrons, prosper, and eventually put more money in the Government's pocket.

**231**  The competitive bingo environment under the new policy was quite a change from the environment that prevailed under the old policy. Under the old policy the Government was concerned that individual charities should receive some reasonably fair share of bingo revenues generated in the communities they served. Under the old policy, history was relevant to determining what was fair. The Gaming Commission regulated the bingo marketplace so as to distribute a market's potential revenue in a manner consistent with the charities' expectations. Those expectations were built upon years of having received a certain proportion of gambling revenue in a given market. In the result the old policy fostered a regime in which the Gaming Commission's decisions tended to preserve the status quo vis-à-vis market-share, and tended, therefore, to protect charity associations holding a dominant position in the market. Bingo service providers contracted to those dominant associations tended to profit from that protectionist policy.

**232**  The new policy shattered the old regime. Under the new policy all bingo revenues flowed to a single repository. There was no longer a desire or a need to protect one hall at the expense of another. The old protectionist regime was gone - replaced by a different philosophy that encouraged competition and development of competitive advantage.

**233**  This competitive environment was a direct and inevitable product of the Government's policy to increase overall bingo revenues. After all, the Government could not force the public to enrich it by press-ganging folks off the street and forcing them to lose their money in bingo halls. The Government believed that competition among bingo halls would achieve that end by expanding the marketplace. The Government, therefore, directed the BCLC to manage the bingo industry so as to foster competition.

**234**  I have no doubt that when he decided to become the GTBA's bingo service provider Mr. Valentini thought that the protectionist tendency under the old policy would reduce his business risk. The duty of care the plaintiffs propound in this cause of action is, in my view, rooted in the plaintiffs' belief that the protectionist philosophy of the old regime governs the new regime as well. The plaintiffs say that the BCLC ought not to have taken the decision to expand Mr. Major's hours of operation because that decision eroded BCG's position in the Prince George market. The plaintiffs assert that the BCLC owed BCG a duty to protect it at Mr. Major's expense. That argument might have had some effect under the old bingo policy. Under the new policy it has none.

**235**  The Government had every right to decree that bingo operations in the Province would carry forward on a competitive basis post-January 2002. The BCLC was charged with creating that competitive atmosphere. For the plaintiffs to suggest that the BCLC should have acted contrary to the Government's policy is to argue that the policy itself is wrong. The policy cannot be the subject of a civil suit, and neither can the BCLC's adherence to it.

**236**  In any event even if the question of Government policy is left out of the discussion, the plaintiffs' claim here cannot succeed. That is because the standard of care the plaintiffs suggest would put the BCLC in such an irreconcilable conflict as to render the standard unreasonable.

**237**  That is so because if, as the plaintiffs say, the BCLC owed BCG a duty to protect BCG's business interests then BCLC must have owed Mr. Major a similar duty. The BCLC must, therefore, have owed Mr. Major a duty to take decisions that would benefit Mr. Major's business and opportunity to profit. Obviously if Mr. Major was given the freedom to be open for business more hours per day, then his opportunity to engage the Prince George bingo market and to prosper would be likewise enhanced. Given that duty, the plaintiffs' argument would result in the BCLC being liable to Mr. Major if it failed to reasonably exercise its discretion in his favour.

**238**  But wait - the plaintiffs say that the BCLC owed them a duty too. The plaintiffs say that the BCLC owed them a duty to not expand Mr. Major's hours because to do so would erode their position in the marketplace. The plaintiffs believe they should prevail. The plaintiffs must believe, then, that it was more reasonable for them to hang on to a given market share and than it was reasonable for Mr. Major to acquire it.

**239**  The plaintiffs adduced absolutely no evidence to support that proposition. The plaintiffs did not show that their enterprise was somehow better or more deserving of success than Mr. Major's. Neither did the plaintiffs adduce evidence that some greater social good would be achieved by their success and Mr. Major's stagnation.

**240**  In my view the standard of care the plaintiffs promote is unreasonable because it would put the BCLC in a conflict every time the BCLC had to make a decision that favoured one hall over another in a multi-hall market. Alternatively, even if the BCLC were required to comply with the plaintiffs' standard of care, the plaintiffs have not proven that it was reasonable for the BCLC to act for the plaintiffs' benefit when that same act was to Mr. Major's detriment.

**241**  The plaintiffs' claim under this cause of action cannot succeed.

CAUSATION

**242**  For each cause of action the plaintiffs must show that some action by a defendant caused it harm. In this case liability was severed from quantum and was heard first. The evidence in the liability trial showed that BCG's revenues never reached the level projected by Mr. Valentini in his proposal to the GTBA. The plaintiffs did not adduce clear evidence to show why that was so.

**243**  There was, however, indirect evidence on the issue. The GTBA enjoyed very good attendance at 490 Vancouver Street when it was a tenant there. Attendance at the BCA's 6th Avenue hall was historically never more than a fraction of the GTBA's. Until November 2001 Mr. Major provided bingo services for both GTBA and BCA. On November 9 the GTBA moved into the new BCG hall at 355 Vancouver Street while the BCA moved into the newly vacated hall at 490 Vancouver Street. Mr. Major continued to provide bingo services at 490 Vancouver and Mr. Valentini's BCG commenced servicing the GTBA hall. The overall result of these moves and changes was that more patrons went 490 Vancouver Street and fewer went to the BCG hall.

**244**  I infer from this evidence that the bingo playing public simply preferred to gamble at 490 Vancouver Street. Relatively few patrons liked the location, parking, atmosphere, service personnel, prizes, or a combination thereof, at the BCG hall.

**245**  Had 490 Vancouver Street remained empty of bingo operations after November 9, I find it more probable than not that the BCG hall would have enjoyed higher patronage and revenues than it did. Therefore, to the extent that the Government may be liable for BCA's occupation of 490 Vancouver Street on November 9, it is also liable for the diminution of BCG's revenues associated with that occupation. The evidence at trial was wholly inadequate to put a number to that diminution. In the event BCG obtains liability judgment against the Government for the BCA relocation, I conclude that there is some evidence of loss caused by that fact and the parties will have to litigate the quantum of that loss in the second stage of this trial. It will be an open question in that leg of the trial to what degree the BCA relocation reduced patronage, what amount of revenue was lost due to reduced patronage, and whether that loss of revenue amounts to a loss of profit or merely an increase of deficit.

**246**  Assuming that the Government is not liable for the BCA relocation, then given the fact that had the GTBA complied with the minimum distribution to charities rule there would not ever have been enough money for the GTBA to fully pay BCG, I find that any damage BCG may have suffered as a consequence of torts committed against it after November 9, 2001 is limited to going further into the red than would have been the case if those torts had not been committed.

**247**  Ultimately, if the Government is liable for the BCA relocation then the alleged post-November 2001 torts could, possibly, have reduced BCG's profit as opposed to increasing its deficit.

**248**  If necessary, one or more of these scenarios will have to be the subject of the second stage of this trial concerning quantum.

CONTRIBUTORY ***NEGLIGENCE***

**249**  The defendants argue that if they were negligent and therefore liable to the plaintiffs, then the plaintiffs were partially responsible for their loss. The defendants say that Mr. Valentini was negligent by entering into a long-term relationship with the GTBA despite his knowledge that the GTBA's license to conduct bingo was to expire in September 2002, that BCG's own registration as a bingo service provider was for a five-year term, that the bingo industry was totally regulated and subject to change or eradication by Government fiat, that the Government had eliminated charitable casino gaming in 1998, and could do the same to bingo gaming if it wished, that he ignored the import of the new Government's a gaming policy review while he clinched the GTBA contracts, and that he ignored the import to his business of the BCA relocation application.

**250**  In my view Mr. Valentini took reasonable and appropriate steps to become a bingo service provider for the GTBA. For the Government to say that Mr. Valentini was negligent for entering the business on the strength of Government licenses is to say that any enterprise is negligent for taking a risk that its licenses will be renewed from time to time. That is simply a factor that an entrepreneur will take into account when assessing his risk. It was not negligent for Mr. Valentini to take a risk that the GTBA and BCG would continue to have the right to carry on in the bingo business.

**251**  Neither was it negligent for Mr. Valentini to continue preparations to enter the bingo industry while the Government gaming review and the BCA relocation were pending. He could not have known what was afoot in the policy review, and he could not have predicted whether the BCA would be permitted to relocate. Indeed, had the Government's gaming policy not undergone radical change on September 14, it is quite possible that the precepts of the old policy would have resulted Gaming Commission refusing the BCA relocation.

**252**  The defendants also alleged that ***negligence*** by the GTBA caused or contributed to the plaintiffs' loss. Although the defendants adduced some evidence going to the GTBA's lack of business acumen and the tendency of its directors to act without necessarily having proper authority, that evidence did not go so far as to establish that the plaintiffs were harmed thereby.

CORPORATE & PERSONAL CLAIMS

**253**  Throughout these reasons I have referred to the plaintiffs collectively. I did so in order to make it clear that my conclusions apply to equally to both plaintiffs. In my view, though, Mr. Valentini ought not to have been a party to these proceedings. I accept the BCLC's argument on this point. I cannot improve upon that argument and I will reproduce here:

1. Mr. Valentini's personal loss is as an employee. His loss arises solely because of his contractual relationship with BCG Inc. His loss is purely economic and is "relational economic loss". Contractual relational loss is not recoverable in tort. (Paras. 43-51 D'Amato).
2. In D'Amato, [*[1996] 2 S.C.R. 1071*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3RK-00000-00&context=), a claim for damages was made by a company whose employee was injured causing the company economic loss. There was no direct injury to the company; its claim was consequential. The Supreme Court of Canada dismissed the action. On stage two policy grounds, the Court held that indeterminacy prevents recovery.
3. In our case, Mr. Valentini makes a claim for loss as a consequence of the loss of his employment contract with BCG Inc. This is the other side of coin from the facts in D'Amato, but the application of the rule is the same. His personal claim is not recoverable; it is contractual relational economic loss.
4. If it were otherwise, the spectre of indeterminate liability would arise. All of BCG Inc.'s other employees, shareholders, suppliers and lenders would also have claims against BCLC.

**254**  Regardless, then, of the success or failure of BCG's claims, Mr. Valentini's claims are dismissed.

COSTS

**255**  Neither defendant asked for costs against the plaintiffs. There will, therefore, be no order for costs.

SUMMARY

**256**  All causes of action in this matter are dismissed. The parties will bear their own costs.

ROGERS J.

**End of Document**

[***British Columbia v. Canadian Forest Products Ltd., [2016] B.C.J. No. 2343***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M77-J9C1-JN14-G095-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B.M. Greyell J.

Heard: October 21, 2016; written submissions

for Canadian Forest Products

Ltd. and Barlow Lake Logging Ltd., October

11, 2016; written submissions for

the plaintiff, October 19, 2016.

Judgment: November 10, 2016.

Docket: S124299

Registry: Vancouver

**[2016] B.C.J. No. 2343** | 2016 BCSC 2079

Between Her Majesty the Queen in Right of the Province of British Columbia, Plaintiff, and Canadian Forest Products Ltd. and Barlow Lake Logging Ltd., Defendants, and Barlow Lake Logging Ltd. and Canadian Forest Products Ltd., Third Parties

(49 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Assessment or fixing of costs — Tariffs — Particular circumstances — Complex, novel or test case — Where success divided — Offers to settle — Amount of offer v. award — Discretion — Judgment on costs following decision dismissing claim and counterclaim — Defendants awarded 75 per cent of costs; plaintiff awarded 25 per cent of costs — Action and counterclaim arose from wildfire that consumed Crown forest and caused $5.5 million damages — Hotly contested trial lasted 33 days with numerous witnesses — Defendants successful on majority of issues, but plaintiff successful at resisting counterclaim, which took significant time — Costs taxable on scale C — While plaintiff would have been better off accepting defendants' $750,000 offer to settle, it was not unreasonable in refusing given its expert evidence and complexity of matter.**

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| Judgment on costs following the decision dismissing the claim and counterclaim. The issue at trial was a wildfire that grew out of control and consumed 6,100 hectares of Crown forest, causing $5.5 million damages. The fire began on a cutblock under license to one defendant, which was being logged by the other defendant. The plaintiff province commenced the action against the licensee, alleging breach of contract and ***negligence***, and against the logging contractor for ***negligence***. The plaintiff asserted the fire was caused by the defendants' logging operations, particularly negligent operation of a feller buncher and lack of proper fire watch. The defendants denied liability and claimed contributory ***negligence*** and failure to mitigate. The defendant licensee filed a claim against the plaintiff for failing to properly respond to the fire, which was consolidated with the main action and became a counterclaim. Following 33 days of evidence, with seven expert witnesses, 24 lay witnesses and voluminous documentary evidence, it was concluded that the fire was more probably than not caused by lightning and not forestry activity or failure to conduct a fire watch. The plaintiff was found not to have breached its public duty in response to the fire. The result was that the claim and counterclaim were both dismissed. The defendants sought costs on scale C to the date of their offer to settle and double costs thereafter. The defendants accepted that the plaintiff should get costs for defending the counterclaim, but argued they should be limited given the amount of overlap. The plaintiff argued the parties should bear their own costs or they should be apportioned equally.  HELD: The defendants were entitled to 75 per cent of their costs and the plaintiff to 25 per cent of their costs.  The parties agreed that costs should be taxed at scale C given the complexity of the case. The defendants were successful on the majority of issues, but the plaintiff was successful in resisting the counterclaim, which did not take an insignificant amount of time. The defendants' joint offer to settle was for $750,000 plus costs and disbursements. The plaintiff clearly would have been further ahead had it accepted the offer. The offer was to settle the matter, so this included both the claim and counterclaim. The defendants' employees made statements to the plaintiff's investigator shortly after the fire, and the offer was open until the evidentiary portion of the trial concluded, so the parties had full opportunity to assess their respective cases. Nonetheless, the issues were highly contested and the offer, while not nominal, was not unreasonably declined in light of the plaintiff's expert evidence. To find the plaintiff was unreasonable in not accepting the offer would be to engage in hindsight analysis. Double costs were not awarded. |

**Statutes, Regulations and Rules Cited:**

Forest Act, *R.S.B.C. 1996, c. 157*,

Forest Practices Code of British Columbia Act, *R.S.B.C. 1996, c. 300*,

Forest and Range Practices Act, *S.B.C. 2002, c. 69*,

Rules of Court, Rule 57(9), Rule 57(15)

Supreme Court Civil Rules, Rule 14-1(9), Rule 14-1(15)

Wildlife Act, *S.B.C. 2004, c. 31*,

Wildlife Regulation, [*B.C. Reg. 38/2005*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5N1-DYFH-X0KN-00000-00&context=),

**Counsel**

Counsel for the Plaintiff: J.D. Eastwood, Q.C., M.N. Weintraub.

Counsel for the Defendant and Third Party, Canadian Forest Products Ltd.: M.S. Oulton, S.P. Ramsay.

Counsel for the Defendant and Third Party, Barlow Lake Logging Ltd.: E.E. Vanderburgh, H.A. Bromley.

**Reasons for Judgment Re: Costs**

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| **B.M. GREYELL J.** |

**1**   These reasons concern how costs should be apportioned between the parties following the issue of my reasons (the "Liability Reasons") indexed as [*2016 BCSC 1261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K86-HW41-JC0G-642Y-00000-00&context=).

**2**  The Liability Reasons were issued July 19, 2016 following a hard-fought trial with some 33 days of evidence, including seven expert witnesses and twenty-four lay witnesses followed by the submission of written argument and five days of oral argument.

**3**  The issues at trial concerned the cause of the Greer Creek wild fire (the "Fire") which was detected on June 18, 2010 and which subsequently grew out of control, consuming some 6,100 hectares of Crown forest land before it was extinguished.

**4**  The Fire started on a cut block under license (the "Licence") to Canadian Forest Products Ltd. ("Canfor") from the Province of British Columbia (the "Province") which was being logged by Canfor's contractor, Barlow Lake Logging Ltd. ("Barlow").

**5**  The parties agreed the loss caused by the Fire was $5.5 million. The Province commenced these proceedings against Canfor alleging breach of contract (of the License) and ***negligence*** and against Barlow alleging ***negligence***. The Province asserted the Fire was caused by the defendant's logging operations and in particular by the negligent operation of a feller buncher and by the lack of a proper fire watch as required under the *Wildfire Act*, *S.B.C. 2004, c. 31*, and *Wildfire Regulation*, [*B.C. Reg. 38/2005*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5N1-DYFH-X0KN-00000-00&context=). Canfor and Barlow denied liability and claimed, in the alternative, the Province was contributorily negligent and had failed to mitigate its loss.

**6**  Shortly after the Province commenced its action (but had not served it), Canfor, to protect its claim from an applicable limitation period, filed a notice of civil claim against the Province claiming the Province was negligent in failing to respond to the Fire by failing to take proper steps in allocating/deploying proper resources to fight the Fire and generally in breaching the standard of care it alleged the Province owed it to properly fight the Fire.

**7**  The two actions were consolidated by consent. Canfor's claim became a Counterclaim in the consolidated proceedings. The Province filed a consolidated notice of civil claim against both defendants on November 22, 2013 claiming 34 separate acts of ***negligence*** on behalf of Barlow and 47 against Canfor as well as asserting breaches of its Licence and the *Forest Act*, *R.S.B.C. 1996, c. 157*, the *Forest Practices Code of British Columbia Act*, *R.S.B.C. 1996, c. 159*, the *Ministry of Forests and Range Act*, *R.S.B.C. 1996, c. 300*, the *Forest and Range Practices Act*, *S.B.C. 2002, c. 69*, and the *Wildfire Act*, and under the indemnity clause contained in the Licence.

**8**  Barlow and Canfor filed separate consolidated responses. Both denied they had committed any act which caused or contributed to the ignition of the Fire and each pled they had taken appropriate steps to control, suppress and extinguish the Fire. Each took the position the Province had failed to take reasonable steps to extinguish, control and/or suppress the Fire. Both Canfor and Barlow pled they were not in breach of the provincial statutes as alleged by the Province. Canfor pled it was not in breach of its Licence and that the indemnity clause contained in the Licence did not apply. Canfor alleged, as a further alternative ground, that the Province had failed to mitigate its loss.

**9**  Canfor also filed a counterclaim against the Province in which it recited the facts set out in its consolidated response and sought general damages against the Province for failing to take reasonable steps to extinguish, control and/or suppress the Fire, alleging, *inter alia*, the Province failed to provide timely fire response, control and/or suppression efforts; failed to marshall and deploy sufficient personnel and/or equipment in a timely manner to fight the Fire; and failed to provide timely and/or adequate aerial water bombing to control/suppress the Fire.

**10**  In the Liability Reasons I concluded that the Fire was, more probably than not, caused by lightning and was not caused as a result of forestry activity being carried out on the cut block or as a result of the failure of Barlow to conduct a fire watch as it was required to do. I also determined the Province was not in breach of its public duty in its response to the Fire. I made a number of other determinations on issues raised in the pleadings. In the end, the result was that the Province's claim was dismissed, as was the defendant Canfor's counterclaim.

**The Position of Canfor and Barlow on Costs**

**11**  Canfor and Barlow submit that they should be awarded their costs of defending the Province's action on Scale C to August 31, 2015 and double costs thereafter given the defendants offer to settle made on that date. The defendants say such an order is consistent with the ordinary rule that costs should be awarded to the successful party.

**12**  Canfor and Barlow accept the Province should be awarded its costs of defending the counterclaim to be set off against the costs payable by the Province to Canfor and Barlow. Canfor says, however, such costs payable to the Province should be "limited to only those amounts by which the counterclaim increased the costs of the proceedings": Canfor says the evidence relevant to its counterclaim "almost entirely overlapped with the action" and that the "evidence and argument relating solely to the counterclaim occupied very little trial time". Canfor's position is that "[a]ll of the evidence regarding the applicable standard of care was integral to Canfor's plea of contributory ***negligence*** as part of its defence to the action" and that "the counterclaim here did not involve allegations of a serious nature".

**The Position of the Province on Costs**

**13**  The Province submits there is a "compelling reason" to depart from the ordinary cost rule because Canfor's unsuccessful counterclaim and the defendants' joint plea of contributory ***negligence*** "significantly, and unnecessarily, increased the length and cost of the proceeding".

**14**  The Province says that much of the defendants' evidence about their own efforts to contain and suppress the Fire was unnecessary given the Province's admission that it was not taking issue with the conduct of the defendants' employees after they arrived at the site of the Fire commencing on the late afternoon of June 18, 2010, several hours after the Fire was first spotted.

**15**  The Province submits this was "an exceptional case" in which "the manifestly just and fair result" would be for the parties to each bear their own costs pursuant to the *Supreme Court Civil Rules*, R. 14-1(9) or alternatively, the court should order costs should be apportioned evenly between the Province and the defendants pursuant to rule 14-1(15).

**Analysis**

**16**  Rules 14-1(9) and 14-1(15) reads:

**Costs to follow event**

1. Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

...

**Costs of whole or part of proceeding**

1. The court may award costs
2. of a proceeding,
3. that relate to some particular application, step or matter in or related to the proceeding, or
4. except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

**17**  The general principles governing the approach the court should take in awarding costs were recently reviewed in *Gichuru v. Smith*, [*2014 BCCA 414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FX0-KKR1-JCBX-S2K8-00000-00&context=) at paras. 99-100:

[99] While R. 14-1(15) authorizes a judge to assess costs, the *Rules* are silent as to when and how a judge should exercise that authority. These questions are inter-related and should be dealt with together.

[100] At the outset, it is important to emphasize that in exercising the power to fix costs a judge cannot act arbitrarily or capriciously. He or she must act in a manner consistent with the *Rules* and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B)* [*(1989), 38 B.C.L.R. (2d) 307*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B06C-00000-00&context=) (C.A.) at 310, Lambert J.A. articulated the limits on a judge's power to award costs:

...Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Insurance Co.* [*(1981), 28 B.C.L.R. 230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B028-00000-00&context=), [*[1981] 5 W.W.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B028-00000-00&context=), [*21 C.P.C. 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B028-00000-00&context=), [*[1982] I.L.R. 1-1459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81K1-JKHB-63FD-00000-00&context=), [*124 D.L.R. (3d) 455*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B028-00000-00&context=) (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

**18**  Under the *Rules*, costs must be awarded to the "successful party"; rather than following the event, as provided in the former Supreme Court Rule 57(9). The "successful party" was defined in *Loft v. Nat*, [*2014 BCCA 108*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61VB-00000-00&context=) at para. 46 as:

... the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case...

**19**  At para. 49 of *Loft*, the court outlined the circumstances under which a judge could exercise his/her discretion to "otherwise order" a different allocation of costs:

The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, [*2002 BCCA 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61D4-00000-00&context=), [*97 B.C.L.R. (3d) 246*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61D4-00000-00&context=). Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, [*2013 BCCA 515*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S48M-00000-00&context=). Such an order is not a regular part of litigation and should be confined to relatively rare cases*: Sutherland v. Canada (Attorney General),* [*2008 BCCA 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208R-00000-00&context=), [*77 B.C.L.R. (4th) 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208R-00000-00&context=)*; Lewis v. Lehigh Northwest Cement Limited,* [*2009 BCCA 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B20D-00000-00&context=), [*97 B.C.L.R. (4th) 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B20D-00000-00&context=). Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

**20**  A party seeking a departure from the usual rule that the successful party should be awarded costs bears the burden of demonstrating that special circumstances exist to warrant such departure. The onus is a substantial one and deviations from the general rule must be "carefully constrained": *Giles v. Westminster Savings and Credit Union*, [*2010 BCCA 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-223T-00000-00&context=) at para. 75; *Gill v. Canada, (Minister of Transport*), [*2014 BCSC 2235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FX0-KKR1-JCBX-S2KC-00000-00&context=) at paras 15 and 17; and *Westsea Construction Ltd v. 0759553 B.C. Ltd.*, [*2013 BCSC 1352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B24V-00000-00&context=) at para. 112.

**21**  The parties agree with the principles expressed above concerning the assessment of costs. They disagree with how those principles should be applied in the present case.

**22**  The parties agree costs should be taxed at Scale C because of the complexity of the case.

**23**  In order to address the issues raised by the parties, and particularly the apportionment argument raised by the Province, it is necessary to describe the complexity of the litigation, the issues raised for determination during the trial and my findings on those issues.

**24**  At para. 63 of the Liability Reasons I outlined the principal issues to be determined:

[63] The following is the list of issues which must be addressed in this case:

1. What was the most likely cause of the Fire?
2. Was early shutdown or a fire watch required on June 18, 2010?
3. What are the duties of a fire watch under the *Regulation*?
4. What was the probable time of detection of the Fire by a fire watcher had one been posted?
5. Could a person properly carrying out the duties of a fire watcher have extinguished, contained or reported the Fire in a manner that would have either eliminated or significantly reduced the damages to the Province?
6. What, if any, liability does Canfor or Barlow have to the Province in ***negligence***?
7. What, if any, liability does Canfor have to the Province under breach of contract?
8. What, if any, liability does the Province have to Canfor in ***negligence*** for its response to the Fire?
9. If the Province and/or the defendants are found at fault, what is the apportionment of damages?

**25**  There were number of subsidiary issues to be determined relating to the principal issues including: the steps taken by Canfor, Barlow and the Province to prepare for the suppression of wildfires; the maintenance and monitoring of Canfor's weather stations; the quality of the readings from Canfor and the Provinces weather stations; the relevance of such readings to the cut block; and the nature of the fuels on or near the cut block, including the effect of pine beetle infestation on fire preparation and suppression.

**26**  The parties produced voluminous documentation. The Province produced over 6,800 discrete documents in 37 Amended Lists of Documents; Canfor produced in excess of 4,700 pages of documents in 14 Amended Lists of Documents and Barlow produced close to 1,400 pages of documents in seven Amended Lists of Documents. Many of these documents were filed as exhibits at trial. There were lengthy interrogatories and examinations for discovery. Some 14 expert reports were prepared and delivered by the parties in June and July 2015. Several reports and rebuttal reports dealt with the cause and spread of the Fire and the standard of care of the firefighting agency.

**27**  Canfor and Barlow were successful on Issue 1 as I determined the cause of the Fire was lightning. On Issue 2, Canfor and Barlow admitted a fire watch was required and was not posted. I found an early shutdown was not required. The Province was successful on Issue 3 as I did not accept the evidence of Canfor and Barlow concerning industry practice under the *Regulation*. On Issue 4 I did not accept the evidence of the expert called by the Province as to the probable time of detection of the Fire. Canfor and Barlow were successful on Issue 5, again based on the time the fire watch would have left the cut block and the fire watchers' opportunity to observe a fire started by lightning. Canfor and Barlow were also successful on Issues 6 and 7. The Province was successful on Issues 8 and 9 in defeating Canfor's counterclaim.

**28**  Each of the above issues, as might be expected, did not take equal trial time. The major issues were the cause of the Fire, the fuel in which the Fire was burning and inferences which should have been drawn therefrom on the Fire's behavior, whether the Fire could have been detected earlier than it was (that is, by a fire watch) and the efforts by the parties, including the Province, to suppress and contain the Fire.

**29**  A considerable amount of trial time and a considerable number of the documents produced at trial concerned the organization of the Wildfire Protection Branch, the deployment of both air and available manpower resources by the Province and the use of such resources once deployed to the Fire. While I am satisfied a portion of this evidence was to enable Canfor to advance its defences of contributory ***negligence*** and mitigation, much of the evidence and time spent at trial also dealt with Canfor advancing its counterclaim against the Province.

**30**  In *Sutherland v. The Attorney General of Canada*, [*2008 BCCA 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208R-00000-00&context=), the Court of Appeal stated at paras. 30-31, addressing the predecessor to R. 14-1(15), Rule 57(15) of the previous *Supreme Court Rules*:

[30] *British Columbia v. Worthington (Canada) Inc.* [*[1988] B.C.J. No. 1214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2NF-00000-00&context=), is the leading case with respect to the application of Rule 57(15). It affirms that under Rule 57(15) the Court has full power to determine by whom the costs related to a particular issue are to be paid. As Esson J.A. states in *Worthington*, the discretion of trial judges under Rule 57(15) is very broad, and must be exercised judicially, not arbitrarily or capriciously. There must be circumstances connected with the case which render it manifestly fair and just to apportion costs.

[31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:

1. the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
2. there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
3. it must be shown that apportionment would effect a just result.

**31**  It is not possible in this case, with any mathematical precision, to determine the amount of trial time devoted to the determination of the issues upon which can four and Barlow were successful and the issues upon which the Province was successful. Canfor and Barlow were successful on the majority of the issues. The Province, however, was successful in resisting Canfor's counterclaim. I disagree with Canfor's submission that the time taken at trial with evidence and argument relating to the counterclaim was "occupied very little trial time". The deployment of air and ground forces and the use of ground forces once they arrived at the Fire by the Province, while part of Canfor's defence that the Province was contributorily negligent, also formed a substantial part of Canfor's counterclaim.

**32**  In my opinion, in view of the parties' divided success on the issues and upon weighing the importance of the issues in terms of the divided success of each party, Canfor and Barlow should be awarded 75% of their costs and the Province 25% of its costs assessed at Scale 3.

**Canfor and Barlow's Joint Offer to Settle**

**33**  Rules 9-1(4) - (6) reads:

**Offer may be considered in relation to costs**

1. The court may consider an offer to settle when exercising the court's discretion in relation to costs.

...

**Considerations of court**

1. In making an order under subrule (5), the court may consider the following:
2. whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
3. the relationship between the terms of settlement offered and the final judgment of the court;
4. the relative financial circumstances of the parties;
5. any other factor the court considers appropriate.

**34**  Canfor and Barlow submit they should be awarded double costs under R. 9-1(4) after they delivered an offer to settle on July 28, 2015.

**35**  As the court retains discretion whether to award double costs, I will review some of the circumstances relevant to whether such an order should be made in the circumstances of the present case.

**36**  As noted earlier in these reasons, the parties underwent a substantial disclosure of documents, interrogatories, retained numerous experts on the significant issues and lengthy examinations for discovery.

**37**  The parties underwent mediation on July 23, 2015 prior to which they exchanged mediation briefs.

**38**  On July 28, 2015, the Province delivered a formal offer to settle under R. 9-1 jointly to Canfor and Barlow for the total sum of $3.5 million plus taxable costs and disbursements.

**39**  On August 26, 2015, the parties entered into an agreement on the quantum of the Province's losses arising from the Fire in the total amount of $5,522,465. The parties also agreed that had the Fire been contained on June 19, 2010, the cost, including all heads of damage and mop-up costs, was $428,281.

**40**  On August 31, 2015, Canfor and Barlow delivered a joint offer to settle under R. 9-1 of $750,000 plus taxable costs and disbursements. On November 23, 2015, the defendants advised the Province the defendants' offer would remain open for acceptance until November 24, 2015 at 5:00 p.m. at which time it would be withdrawn. The Province did not accept the defendants' joint offer.

**41**  Clearly, had the Province accepted the defendants' offer it would have been much further ahead than the judgement issued in the Liability Reasons in which its claim for damages was dismissed. The Province says it was reasonable for it to reject the defendants offer. Firstly, the Province says the defendants' offer was silent as to the counterclaim. Secondly, the Province says the offer was "a nominal offer" given it "represented only a small fraction of the Province's loss". Thirdly, the offer contained no rationale and no reference to the specific evidence that Barlow intended to lead at trial that the Fire was caused by lightning and not by the harvesting operation. The Province also submits it had not heard the evidence of the Barlow employees who testified about the lightning strike the evening prior to the date of the Fire and was not in a position to evaluate the effects such evidence would have on the outcome of the case. The Province also submits the expert opinion evidence was sufficiently strong favoring its position on the cause of the Fire it was not unreasonable for the Province to refuse to accept the offer.

**42**  The Province relies on *Hutchinson v. Ridyard*, [*2016 BCSC 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J6J-RHK1-FGCG-S0R8-00000-00&context=), *British Columbia v. Salt Spring Ventures Incorporated*, [*2015 BCCA 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GM0-J411-JJYN-B3XY-00000-00&context=), Giles, supra, and *Zhao v. Yu*, [*2015 BCSC 2342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HR4-FPP1-JG02-S2B1-00000-00&context=).

**43**  In *Giles*, Mr. Justice Frankel stated at paras. 88-89:

[88] I appreciate there are no mandatory factors under Rule 37B(6) and that trial judges have discretion to take into account whatever factors they consider appropriate in a given case. However, the ultimate discretion as to double costs must be exercised in a just, principled, and consistent way. One of the goals of Rule 37B is to promote settlement by imposing consequences on parties who have refused to accept an offer that ought reasonably to have been accepted. While it may not invariably be the case, I consider that it would be generally antithetical to that goal to penalize an unsuccessful plaintiff with double costs for proceeding to trial in the face of an unreasonable offer. Virtually all litigation comes with a degree of risk. When faced with settlement offers, plaintiffs must carefully consider their positions. However, they should not to be cowed into accepting an unreasonable offer out of fear of being penalized with double costs if they are unable to "beat" that offer. Put somewhat differently, plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances. In this case, the Credit Union and Mr. Thomas have not pointed to anything that would support a finding that the plaintiffs' decision to refuse their offer was, at the time of the refusal, an unreasonable one.

[89] I am also of the view that when an offer made by a defendant for the purpose of achieving a pre-trial settlement is reasonably refused, the mere fact that the action is ultimately dismissed in its entirety is not a consideration with respect to double costs. To take the disposition of the action into account would result in the "hindsight analysis" that Mr. Justice Hinkson, as he then was, cautioned against in *Bailey v. Jang*, [*2008 BCSC 1372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PW-00000-00&context=), [*90 B.C.L.R. (4th) 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PW-00000-00&context=) at para. 24. See also: *Dodge v. Shaw Cablesystems Ltd.*, [*2009 BCSC 1765*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0WD-00000-00&context=) at para. 17. While I acknowledge that the relationship between the offer and the result at trial is specifically mentioned in subrule 37B(6)(b), I consider it to have no relevance in circumstances such as the present.

**44**  In *Zhao,* Madam Justice Baker stated at paras. 13-14:

[13] While in hindsight the Defendant's Offer was indeed reasonable, that is not the test. Rule 9-1(5) and 9-1(6) were not intended, in my view, to punish parties merely because the party's assessment of the value of the claim proves incorrect, unless that assessment was based on irrelevant considerations; a clearly inadequate review of the available evidence and applicable authorities, or was, in view of the facts known at the time, unreasonable.

[14] Here, the parties differed, as did some of the expert witnesses, about the Plaintiff's prognosis; and the extent to which the injuries resulting from the accident, would affect his capacity to earn income in future. While the Plaintiff did not succeed on this issue, I cannot say it was unreasonable for him to pursue the claim; or to believe that there was some prospect of success, even if there was a risk he would not succeed. I note also the Plaintiff's submission, which I consider persuasive, that even a slightly higher award for special costs or non-pecuniary damages would have resulted in an awarded that exceeded the Defendant's Offer.

**45**  I do not accept a number of the Province's submissions which I have set out above. In particular I do not accept it could not have assessed the evidence of the Barlow employees concerning lightning. Each of those employees gave a statement to the Province's investigators shortly after the Fire. I also do not accept another argument made by the Province that the court should consider the "defendants' wrongdoing in failing to carry out a fire watch" as a factor the court should consider. In the Liability Reasons I found there was no causative relationship between the failure to carry out a fire watch and detection of the Fire.

**46**  I also do not accept the defendants' joint offer did not include Canfor's counterclaim. The August 31, 2015 joint offer was "to settle this matter". At the time the offer was made, the "matter" was the consolidated claim which included the counterclaim.

**47**  The joint offer was open until November 25, 2015. The evidentiary portion of the trial concluded November 24, 2015. Both parties had a full opportunity to assess their respective cases after hearing the examination and cross-examination of the Barlow employees as well as the expert witnesses. The parties were aware when they commenced this litigation the main issue between them was whether the Fire was caused by the negligent operation of the feller bunch, as asserted by the Province, or by lightning, as asserted by Canfor and Barlow, and if caused by either whether the Fire could have been detected by a fire watch.

**48**  Notwithstanding, the issues raised were very live issues in a highly contested trial. In my view while the offer made by the defendants was not a nominal offer, it cannot be said the Province, in the light of the evidence of its expert witnesses, acted unreasonably in failing to accept the offer. I am unable to conclude the offer was one that "ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any other date" such as to warrant an award of double costs as such an award would involve a "hindsight analysis".

**49**  Accordingly, I decline to award double costs.

B.M. GREYELL J.

**End of Document**

[***Bush v. Vancouver (City), [2006] B.C.J. No. 1816***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3FY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Allan J.

Heard: June 8 and 9, 2006.

Judgment: August 4, 2006.

Vancouver Registry No. S046741

**[2006] B.C.J. No. 1816** | 2006 BCSC 1207 | 272 D.L.R. (4th) 281 | [2007] 1 W.W.R. 178 | 58 B.C.L.R. (4th) 299 | 143 C.R.R. (2d) 44 | 151 A.C.W.S. (3d) 703 | 2006 CarswellBC 1990

Between Murray Douglas Bush, Plaintiff, and City of Vancouver, Her Majesty the Queen in right of the Province of British Columbia, as represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General, Sergeant Gatto, and other unidentified members of the Vancouver Police Department and Jail Staff of the Vancouver Jail, Defendants

(61 paras.)

**Case Summary**

**Constitutional law — Canadian Charter of Rights and Freedoms — Remedies for denial of rights — Specific remedies — Damages — The plaintiff journalist's claims for damages for *negligence* and breach of his ss. 7, 8 and 9 Charter rights arising out of his arrest and subsequent detention were statute-barred and his action was dismissed — The plaintiffs' claims were claims for damages in respect of injury to a person based on statutory duty and were governed by a two year limitation period under s. 3(2) of the Limitation Act, which had not been followed — Furthermore, the plaintiff's challenge to the constitutionality of the Limitation Act was dismissed, as s. 9 of the Act only purported to extinguish claims for damages, and other remedies survived — Limitation Act, s. 9 — Canadian Charter of Rights and Freedoms, ss. 7, 8 and 9.**

**Limitation of actions — General principles — Legislation — Canadian Charter of Rights and Freedoms — General — The plaintiff journalist's claims for damages for *negligence* and breach of his ss. 7, 8 and 9 Charter rights arising out of his arrest and subsequent detention were statute-barred and his action was dismissed — The plaintiffs' claims were claims for damages in respect of injury to a person based on statutory duty and were governed by a two year limitation period under s. 3(2) of the Limitation Act, which had not been followed — Furthermore, the plaintiff's challenge to the constitutionality of the Limitation Act was dismissed, as s. 9 of the Act only purported to extinguish claims for damages, and other remedies survived — Limitation Act, s. 9 — Canadian Charter of Rights and Freedoms, ss. 7, 8 and 9.**

**Limitation of actions — Extension, suspension and inapplicability of limitation periods — General — The plaintiff journalist's claims for damages for *negligence* and breach of his ss. 7, 8 and 9 Charter rights arising out of his arrest and subsequent detention were statute-barred and his action was dismissed — The plaintiffs' claims were claims for damages in respect of injury to a person based on statutory duty and were governed by a two year limitation period under s. 3(2) of the Limitation Act, which had not been followed — Furthermore, the plaintiff's challenge to the constitutionality of the Limitation Act was dismissed, as s. 9 of the Act only purported to extinguish claims for damages, and other remedies survived — Limitation Act, s. 9 — Canadian Charter of Rights and Freedoms, ss. 7, 8 and 9.**

**Limitation of actions — Topics — Torts *Negligence* — The plaintiff journalist's claims for damages for *negligence* and breach of his ss. 7, 8 and 9 Charter rights arising out of his arrest and subsequent detention were statute-barred and his action was dismissed — The plaintiffs' claims were claims for damages in respect of injury to a person based on statutory duty and were governed by a two year limitation period under s. 3(2) of the Limitation Act, which had not been followed — Furthermore, the plaintiff's challenge to the constitutionality of the Limitation Act was dismissed, as s. 9 of the Act only purported to extinguish claims for damages, and other remedies survived — Limitation Act, s. 9 — Canadian Charter of Rights and Freedoms, ss. 7, 8 and 9.**

**Tort law — *Negligence* — Fiduciary duty — The plaintiff journalist's claims for damages for *negligence* and breach of his ss. 7, 8 and 9 Charter rights arising out of his arrest and subsequent detention were statute-barred and his action was dismissed — The plaintiffs' claims were claims for damages in respect of injury to a person based on statutory duty and were governed by a two year limitation period under s. 3(2) of the Limitation Act, which had not been followed — Furthermore, the plaintiff's challenge to the constitutionality of the Limitation Act was dismissed, as s. 9 of the Act only purported to extinguish claims for damages, and other remedies survived — Limitation Act, s. 9 — Canadian Charter of Rights and Freedoms, ss. 7, 8 and 9.**

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| The plaintiff's claims were statute-barred and his action was dismissed -- The plaintiff journalist brought an action for damages for ***negligence*** and breach of his ss. 7, 8 and 9 Charter rights arising out of his arrest and subsequent detention -- The defendant city of Vancouver presently brought an application to have summarily dismissed the plaintiff's claims for failure to commence the action within the appropriate two-year statutory limitation period -- The plaintiff argued the claims were not statute-barred, and alternatively, that s. 3(2) (a) of the Limitation Act and s. 294(2) of the Vancouver Charter were of no force and effect as they were unconstitutional as they were inconsistent with his claim for damages under s. 24(2) of the Canadian Charter of Rights and Freedoms -- HELD: The plaintiff's claims were statute-barred and the action was dismissed -- The plaintiffs' claims were claims for damages in respect of injury to a person based on statutory duty and were governed by a two year limitation period under s. 3(2) of the Limitation Act, which had not been followed -- There were no acts that demonstrated a breach of his Charter rights independent of any damage he suffered to his person or property arising from the tort of breach of statutory duty, and thus they were subject to s. 9 of the Limitation Act -- Furthermore, the plaintiff's challenge to the constitutionality of the Limitation Act was dismissed -- Section 9 of the Act only purported to extinguish claims for damages, and other remedies survived. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A

Canadian Charter of Rights and Freedoms, s. 7, s. 8, s. 9, s. 24

Constitution Act, 1982, s. 52, s. 92(13), s. 92(14)

Criminal Code, s. 503(1)

Limitations Act, R.S.B.C. 1996, c. 266, s. 3(2)(a), s. 3(5), s. 6, s. 9, s. 51, s. 52

Vancouver Charter, [*S.B.C. 1953, c. 55, s. 294*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5JKN-R7N1-FBN1-20DP-00000-00&context=)(2)

**Counsel**

Counsel for the Plaintiff: A. Cameron Ward

Counsel for the City of Vancouver & Sgt. Gatto: Tom Zworski

Counsel for HMTQ in right of the Province of B.C.: Natalie Barnes

Counsel for the Attorney General of B.C.: Bryant Mackey

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| **ALLAN J.** |

**INTRODUCTION**

**1**  Mr. Zworski, counsel for the defendants, the City of Vancouver (the "City") and Sergeant Gatto, brings an application under Rule 18A of the British Columbia, ***Rules of Court*** ("Rule 18A"), for an order that the claims of the plaintiff, Mr. Bush, be dismissed for failure to commence his action within two years as provided by the ***Limitations Act***, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=). Ms. Barnes, counsel for the defendant, Her Majesty the Queen in Right of the Province of British Columbia (the "Province"), brings a similar application. Additionally, Mr. Zworski submits that Mr. Bush's claim against the City is statute-barred because of his failure to comply with the provisions of the ***Vancouver Charter***, *S.B.C. 1953, c. 55*.

**2**  Mr. Ward, counsel for Mr. Bush, argues that the claims are not statute-barred. In addition, he has filed a notice under the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982 (U.K.)***, 1982, c. 11 (the "***Constitution Act, 1982***"), for an order declaring that s. 3(2)(a) of the ***Limitation Act*** and s. 294(2) of the ***Vancouver Charter*** are inconsistent with a claim for damages brought pursuant to s. 24(1) of the ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act, 1982*** ("the ***Charter***") and are, to the extent of that inconsistency, of no force or effect. Mr. Mackey, counsel for the defendant, the Attorney General of British Columbia (the "AGBC"), appears for the purpose of upholding the constitutionality of s. 3(2)(a) of the ***Limitation Act***.

**THE PLAINTIFF'S CLAIMS**

**3**  Mr. Bush's action is for damages for ***negligence*** and breach of his rights under ss. 7, 8, and 9 of the ***Charter*** in relation to his arrest and subsequent detention at the Vancouver Jail on October 3 and 4, 2002. Mr. Ward issued the writ on December 3, 2004, 26 months after those incidents.

**4**  In response to the defendants' motions on this Rule 18A application, Mr. Bush relies solely on his claims under ss. 8 and 9 of the ***Charter***. He is not pursuing his claim that Sergeant Gatto was negligent and that the City was negligent for its failure to train, instruct, and supervise Sergeant Gatto and other police officers.

**5**  If Mr. Bush is successful on the defendants' application, Mr. Ward intends to set down a Rule 18A application to determine the issues relating to the ***Charter*** breaches. If he is successful on that application, Mr. Bush does not intend to pursue the ***negligence*** issues. However, if the action proceeds to a ten-day trial, presently set for April 23, 2007, Mr. Bush intends to litigate all of the issues raised in his statement of claim.

**BACKGROUND**

**6**  Mr. Bush is a 50-year-old journalist with no criminal record. On October 3, 2002, he attended at the Brittania Community Centre in Vancouver with the intention of taking photographs of a demonstration that was being held to protest government cuts to daycare. Premier Campbell was expected to attend.

**7**  Mr. Bush deposes that the following events occurred:

1. at least 50 members of the Vancouver Police Department ("VPD") attended;
2. a number of people, including Mr. Bush, were arrested;
3. Mr. Bush was handcuffed and taken into custody at approximately 3:30 p.m.;
4. his request to contact a lawyer was ignored;
5. he was taken to a parking lot, removed from the police wagon in handcuffs, videotaped, and subjected to a frisk search by uniformed members of the VPD;
6. he co-operated with the officers, provided his address and identification that verified his address, a few blocks from that location, and asked again to contact a lawyer. That request was ignored;
7. he was taken by police wagon to the Vancouver Jail at 265 East Cordova, a shared facility operated by the City and the Province;
8. he was obliged to remove all of his clothes and then subjected to a strip-search in the presence of a number of uniformed members of the VPD. He was told to face the wall, spread his buttocks and lift his testicles;
9. he was then allowed to dress and taken to another area to be photographed and fingerprinted;
10. he made at least six more requests to telephone his lawyer but those requests were ignored;
11. he was kept in cells with no clocks or toilet paper and the lights remained on at all times;
12. after 26 hours, he was given his belongings and released on a recognizance and an undertaking to appear in court.

**8**  In his affidavit, Mr. Bush deposes that after the strip-search he felt "extremely vulnerable, powerless and humiliated" and described his detention as "a very uncomfortable, disquieting and frightening experience."

**9**  On October 16, 2002, Mr. Bush was charged with a number of offences arising from the events of October 3: unlawful assembly, causing a disturbance, and assaulting a police officer. He retained Mr. Ward as counsel on October 21, 2003. Mr. Ward requested that the Crown disclose relevant documents and he received them in December 2003. Those documents revealed that Sergeant Gatto was on duty at the Vancouver Jail on October 3, that Mr. Bush was arrested at 16:34 that day, and that he was released the following day at 18:37. He was not taken before a justice of the peace or provincial court judge within 24 hours as mandated by s. 503(1) of the ***Criminal Code.***

**10**  Mr. Bush attended his 20-day trial (with other accused) in Provincial Court between December 1, 2003 and June 24, 2004. He heard Sergeant Gatto testify that the strip-search was a matter of routine for all new prisoners (with some exceptions that were not applicable to Mr. Bush). It was clear from the officer's testimony that there were no reasonable grounds for strip-searching Mr. Bush. On the last day of the trial, Judge Smyth gave reasons for judgment, [*[2004] B.C.J. No. 1317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44G-00000-00&context=), concluding that Mr. Bush's "unduly prolonged detention" of 26 hours contravened s. 9 of the ***Charter*** and his strip-search, which was done "as a matter of routine", contravened s. 8 of the ***Charter***. One of the charges against him was dismissed and two of them were judicially stayed. Judge Smyth's decision followed a series of decisions of the Provincial Court commencing in August 2003 that were critical of the Vancouver Jail's procedures regarding detention and strip-searches.

**11**  Mr. Ward gave notice to Crown counsel and to the AGBC that he would be bringing this action on August 17, 2004. He gave similar notice to the City on September 14, 2004. Mr. Bush complains that the defendants did not raise any limitation issue in their replies to his notice. Mr. Ward filed the writ in these proceedings on December 3, 2004.

**THE ISSUES**

**12**  The parties have raised the following issues:

1. When did the plaintiff's cause of action arise?
2. Does the ***Limitation Act*** apply to claims for damages for alleged breaches of ***Charter*** rights?
3. If so, what is the applicable limitation period?
4. Was the limitation period postponed?
5. Is s. 3(2)(a) of the ***Limitation Act*** inconsistent with a claim for damages brought pursuant to s. 24(1) of the ***Charter*** and hence, to the extent of the inconsistency, of no force or effect?
6. If the defendants are unsuccessful on those points, the final issue for determination is whether the plaintiff's failure to give notice under the ***Vancouver Charter*** bars his action against the City and Sergeant Gatto.

**When did the Plaintiff's Cause of Action Arise?**

**13**  It is settled law that a cause of action arises when all the facts or combination of facts necessary to a right to sue first exist: ***Long et al. v. Western Propeller Co. Ltd. et al.*** [*(1986), 67 D.L.R. (2d) 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X2RC-00000-00&context=) (Man. C.A.). The defendants say that all the facts necessary to constitute all four causes of action alleged by Mr. Bush were present in October 2002 when he was arrested, detained, and strip-searched.

**14**  Mr. Ward disagrees and submits that there are a number of dates from which Mr. Bush's causes of action arose:

1. on June 24, 2004, Mr. Bush's causes of action arose when Judge Smyth delivered his reasons for judgment in the criminal trial, making findings of fact with respect to the ***Charter*** breaches relating to Mr. Bush's unlawful detention and strip-search (this is the date pleaded by Mr. Bush in his statement of claim);
2. in December 2003 Mr. Bush's s. 9 claim arose when Mr. Ward received the Vancouver Jail records from the Crown indicating that Mr. Bush had been detained for 26 hours;
3. during the criminal trial Mr. Bush's s. 8 claim arose when the VPD officers testified that the only reason they had strip-searched Mr. Bush was procedure or routine; or
4. in August 2003 Mr. Bush's s. 8 claim arose when the first case in Provincial Court raised the issue that the Vancouver Jail's strip-search procedure violated a detained person's ***Charter*** rights.

**15**  In my opinion, Mr. Bush's submissions on this point are without merit. Mr. Bush's causes of action did not arise at any of the times suggested by Mr. Ward. They arose on October 3 and 4, 2002, when the events he complains of occurred. All of the elements of his causes of action were present and Mr. Bush was fully aware of them. He knew on October 4 that he had been arrested, denied counsel, strip-searched, and detained for a lengthy period of time.

**Does the *Limitation Act* Apply to Claims for Damages for Alleged Breaches of *Charter* Rights?**

**16**  Section 3(2) of the ***Limitation Act*** provides a two-year limitation period in relation to all claims based on injury to person or property:

After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

1. subject to subsection (4)(k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

(emphasis added)

**17**  Mr. Ward submits that Mr. Bush's claims do not fall within s. 3(2)(a) because they are not claims for "damages in respect of injury to person or property". Instead, he says, Mr. Bush's claims are for "damages *per se*" for breaches of his s. 8 ***Charter*** right to be secure against unreasonable search and his s. 9 ***Charter*** right to not be arbitrarily detained or imprisoned. Mr. Ward suggests that because the ***Charter*** - the supreme law of Canada - does not contain any limitation on when actions for remedies pursuant to s. 24(1) may be brought, provincial legislation cannot provide such a limitation. Alternatively, Mr. Ward submits that the claims in this case arise directly from the ***Charter*** and constitute "any other action not specifically provided for" within the wording of s. 3(5) of the ***Limitation Act*** and are therefore subject to a six-year limitation period.

**18**  The phrase "injury to person" in s. 3(2)(a) was interpreted in ***Zurbrugg v. Bowie***, [*[1992] B.C.J. No. 1162*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M105-00000-00&context=) (C.A.), to mean damage sustained by "an extrinsic act" or "an identifiable external event". In that case, the court held that any damage suffered from allegedly substandard dental work was the result of defects in the bridge and crown materials and the plaintiff's action was not governed by a two-year limitation period. The court emphasized that s. 3(2)(a) refers to direct damage to person or property.

**19**  Courts in British Columbia have not considered the issue of whether claims for damages pursuant to s. 24(1) of the ***Charter*** are claims for "damages in respect of injury to person ... based on ... statutory duty". However, in ***Nagy v. Philips*** [*(1996), 137 D.L.R. (4th) 715*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JTNR-M4P8-00000-00&context=) ("***Nagy***"), the Alberta Court of Appeal considered a similar case to the one at bar, both on the facts, and on the limitation statute at issue.

**20**  In ***Nagy***, the plaintiff alleged that she had suffered damage in the form of pain, suffering, and humiliation, as well as psychological and mental distress following a strip-search by Canada Customs and the Edmonton City Police at the Edmonton International Airport, and an internal search at the Grey Nuns Hospital by doctors and nurses employed at the hospital. She claimed damages for trespass, assault and battery, ***negligence***, unlawful detention, and violation of her s. 8 ***Charter*** rights.

**21**  Sections 51 and 52 of the ***Limitation of Actions Act***, R.S.A. 1980, c. L-15, provided:

51 ... an action for

1. trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from ***negligence*** or from breach of a statutory duty,
2. false imprisonment,

...

may be commenced within 2 years after the cause of action arose, and not afterwards.

1. This Part applies to every action in which the damages claimed consist of or include damages in respect of injury to the person, whether the action is or may be founded on tort, breach of contract or breach of statutory duty.

**22**  There was no dispute that the limitation periods prescribed by that Act applied to the plaintiff's claims in tort. However, she argued that the Act should not apply to her claim against the defendants for damages for injuries resulting from a breach of her ***Charter*** rights. She did not impugn the constitutional validity of the Act.

**23**  Hetherington J.A. held at p. 719:

A claim for damages for injuries resulting from a breach of a right can only succeed if the person against whom the claim is made is under a duty to refrain from breaching the right. The [plaintiff's] claim under the *Charter* is therefore a claim for damages in respect of injuries arising out of a breach of a duty to refrain from breaching the *Charter*. That duty must arise from the *Charter*. Such a claim is clearly covered by s. 52 of the *Limitations of Actions Act*. Part 9 of the Act therefore applies to this claim, and in particular ss. 51 and 55, which are in Part 9.

**24**  I find the reasoning in ***Nagy*** persuasive and applicable to the proper interpretation of s. 3(2)(a) of our ***Limitation Act***. I conclude that Mr. Bush's claims relating to alleged ***Charter*** breaches are for "damages in respect of injury to person ... based on ... statutory duty" and are therefore governed by a two-year limitation period.

**25**  It is true that a claim for damages based on s. 24(1) of the ***Charter*** will not always constitute a claim for damages in respect of injury to person or property. Such was the case in ***Ravndahl v. Saskatchewan***, [*[2004] S.J. No. 374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F873-B4GY-00000-00&context=), [*2004 SKQB 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F873-B4GY-00000-00&context=) ("***Ravndahl***"), where the plaintiff claimed that her s. 15 ***Charter*** rights had been violated when her monthly pension, which she had been receiving since the death of her husband, was cut off when she remarried.

**26**  In this case, however, Mr. Bush's claims all stem from his arrest and detention by the VPD and the Vancouver Jail staff. His claims are properly classified as tort claims or claims for breach of statutory duty. The plaintiff has not pointed to any act by any of the defendants that constitutes a breach of his ***Charter*** rights independent of any damage he suffered to his person or property arising from tort or breach of statutory duty.

**27**  In ***St-Onge v. Canada***, [*[1999] F.C.J. No. 1842*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M461-JJ1H-X23V-00000-00&context=) (T.D.), affirmed by the Court of Appeal, [*[2001] F.C.J. No. 1569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M491-JC5P-G37F-00000-00&context=) ("***St-Onge***"), the court also concluded that general limitation statutes apply to claims of alleged ***Charter*** breaches. Hugessen J. explained the rationale at [paragraph] 4-5:

... In my view, there is absolutely no doubt that an action in tort based on delicts which are at the same time infringements of rights guaranteed by the *Charter* is subject to the prescription generally applicable to any action of a delictual nature. The *Charter* was adopted in a context which already included two well-developed systems of civil law with sophisticated rules of procedure and the appropriate courts to give effect to them. The *Charter* contains no purely procedural provisions and no rule governing prescription.

Clearly, it does not follow from this that the *Charter* has completely destroyed existing legal systems and created a system in which no procedure or prescription exists. On the contrary, existing legislation and procedures continued to apply except where they were clearly inconsistent with the *Charter* itself. A prescription deadline which generally applies to all actions of the same nature and does not in any way discriminate against certain groups of litigants does not in any way contravene the *Charter.*

**28**  It is beyond dispute that ss. 92(13) and (14) of the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, confer on the provinces the power to make laws in relation to "property and civil rights" and in relation to the "administration of justice in the province". This power expressly includes "the constitution, maintenance, and organization of provincial courts, both civil and criminal jurisdiction" and "procedure in civil matter in those courts".

**29**  I agree with the defendants' assertion that, notwithstanding the fact that Mr. Bush's claims are framed as breaches of the ***Charter***, they are in fact claims for damages that are subject to s. 9(1) of the ***Limitation Act***. That section provides:

On the expiration of a limitation period set by this Act for a cause of action to recover ... damages ..., the right and title of the person formerly having the cause of action and of a person claiming through the person in respect of the matter is, as against whom the cause of action formerly lay and as against the person's successors, extinguished.

**30**  In ***Castillo v. Castillo***, [*[2005] 3 S.C.R. 870*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B161-00000-00&context=) at [paragraph] 6, the Supreme Court of Canada recently reaffirmed the provinces' authority to set time limits within which the provinces' courts can entertain actions.

**31**  Almost 20 years ago, Mr. Justice McIntyre considered the integration of ***Charter*** litigation into the pre-existing scheme of Canadian legal procedure in order to obtain a suitable remedy. In ***R. v. Mills***, [*[1986] 1 S.C.R. 863*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23B7-00000-00&context=), McIntyre J. stated at [paragraph] 261-2:

... it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is not for the judges to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. In fact, the jurisdictional boundaries created by Parliament and the Legislatures are for the very purpose of restraining the courts by confining their actions to their allotted spheres. In s. 24(1) of the *Charter* the right has been given, upon the alleged infringement or denial of a *Charter* right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The *Charter* has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction. It will be seen as well that it prescribes no remedy but leaves it to the court to find what is appropriate and just in the circumstances.

The questions then arise as to which of the courts are courts of competent jurisdiction within the meaning of s. 24(1) of the *Charter* and what is the nature of the remedy or remedies which may be given. In attacking these problems, that of jurisdiction and that of remedy, the courts are embarking on a novel exercise. There is little, if any, assistance to be found in decided cases. The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s. 24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the *Charter* confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

**32**  More recently, in ***R. v. 974649 Ontario Inc.*** [*(2001), 206 D.L.R. (4th) 444*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49N-00000-00&context=), McLachlin C.J. emphasized at [paragraph] 24 the need to incorporate ***Charter*** litigation into the existing jurisdictional framework:

... the task of the court in interpreting s. 24 of the *Charter* is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just *Charter* remedies under s. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals. ...

**33**  The ***Limitation Act*** exemplifies the property and civil rights power of the legislature in British Columbia to enact legislation prescribing time limits applicable to claims for damages. Hence, s. 9(1) provides for the extinguishment of claims upon the expiry of the applicable limitation period. That section does not limit a person's ***Charter*** rights but, rather, the right to recover a monetary remedy after a certain time.

**34**  It is clear that the ***Limitation Act*** applies to claims for damages based on s. 24(1) of the ***Charter***.

**What is the Applicable Limitation Period?**

**35**  Citing ***Novak v. Bond***, [*[1999] 1 S.C.R. 808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M428-00000-00&context=) ("***Novak***"), Mr. Ward urges the court to find that an arithmetical approach is not in accordance with the law. He submits that the defendants have "slavishly adhered" to a two-year limitation period commencing at the time of Mr. Bush's arrest without properly considering the factual matrix or the applicable law. In my opinion, ***Novak*** deals with the issue of postponement and not the issue of when the cause of action arose or the length of the applicable limitation period.

**36**  In this case, s. 3(2)(a) of the ***Limitation Act*** clearly governs the issue of when the cause of action arose. Hence, the applicable limitation period is two years as Mr. Bush's claims are "for damages in respect of injury to person or property" whether based on tort or statutory duty.

**Was the Limitation Period Postponed?**

**37**  Section 6 of the ***Limitation Act*** governs when the running of time is postponed. The relevant portions of s. 6 provide:

1. The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
2. for personal injury;
3. for damage to property;

...

1. Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
2. an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
3. the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
4. For the purpose of subsection (4),
5. **"appropriate advice"**, in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
6. **"facts"** include
7. the existence of a duty owed to the plaintiff by the defendant, and
8. that a breach of a duty caused injury, damage or loss to the plaintiff,

....

1. The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

....

**38**  Section 6 ensures that a plaintiff who, despite reasonable diligence, cannot discover and bring a litigable claim against the appropriate defendant within the applicable limitation period is not barred from bringing his or her action.

**39**  Mr. Ward submits that even if Mr. Bush's claims constitute an action for personal injury and are subject to a two-year limitation period, the time was postponed and did not begin to run against him until, (a) at the earliest, October 21, 2003, when he retained counsel or, (b) at the latest, June 24, 2004, when Judge Smyth determined that Mr. Bush's ***Charter***rights had been breached.

**40**  It is beyond question that the postponement provisions in the ***Limitation Act*** "reflect the common law view that it is unfair to the plaintiff if the running of time commences before the existence of the cause of action is reasonably discoverable": ***Novak*** at [paragraph] 69. However, it is a question of fact in each case as to whether the plaintiff's circumstances justify the application of the postponement provisions.

**41**  In ***Novak***, the defendant allegedly misdiagnosed a lump on the plaintiff's breast as benign until October 1990 when a specialist diagnosed breast cancer, performed a partial radical mastectomy, and discovered that the cancer had spread. The plaintiff considered suing but decided not to, instead concentrating on maintaining her health and believing that she had been cured. In May 1995 the cancer recurred and she started her action in April 1996. The court considered the proper interpretation of s. 6(4)(b) of the ***Limitation Act*** and, at [paragraph] 72, the question of "the meaning to be ascribed to the opaque phrase, ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action'". While the word "ought" suggests an objective "reasonable person" standard, the reference to the plaintiff's "own interests" and "circumstances" contemplate subjective considerations.

**42**  McLachlin J. (as she then was) stated for the majority at [paragraph] 66:

Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances.

**43**  In each case, the plaintiff's particular circumstances are to be assessed through a subjective/objective lens in determining whether his or her claim should be statute-barred. The facts in ***Novak*** were unique. McLachlin J. considered (at [paragraph]96) the plaintiff's concerns "so serious, substantial and compelling that, taking into account all of her circumstances and interests, she could not reasonably have commenced a suit at the time the cause of action first arose."

**44**  Here, Mr. Ward contends that Mr. Bush could not commence his action until he learned that the strip-search was conducted as routine jail policy and without proper grounds. Mr. Bush heard two sergeants make that admission during their evidence at his criminal trial. Mr. Ward suggests that it would have been irresponsible for Mr. Bush to sue before that time as he and his counsel could only speculate as to the reasons for his strip-search. Further, Mr. Bush did not know how long he had been imprisoned until the jail records were disclosed to his counsel as part of the pre-trial discovery proceedings. Mr. Ward suggests that it would have been irresponsible for Mr. Bush to bring this action prematurely, before knowing those facts.

**45**  I disagree with Mr. Ward's contention that only when Judge Smyth determined that Mr. Bush's ***Charter*** rights were violated was he in a position to reasonably bring his claim. In October 2002, Mr. Bush knew the relevant facts; it was a simple matter of identifying the appropriate defendants as the City and the Attorney General. When Mr. Bush contacted Mr. Ward in October 2003, or earlier, he would have received appropriate advice that a civil suit based on ***negligence*** and a breach of his ss. 8 and 9 ***Charter*** rights had a reasonable prospect of success.

**46**  In fact, on December 15, 2003, Mr. Ward filed an amended notice of constitutional question in the criminal proceedings, seeking a judicial stay on several grounds including allegations that Mr. Bush was strip-searched on October 3, 2002, in breach of his ss. 7 and 8 ***Charter*** rights; denied the right to counsel and detained unlawfully on October 3 and 4 in breach of his ss. 7, 9, and 10 ***Charter*** rights; and detained in custody in the Vancouver Jail from approximately 5:00 p.m. on October 3, 2002, until approximately 6:00 p.m. on October 4 in breach of his ss. 7, 9, 10, and 11 ***Charter*** rights.

**Is 3(2)(a) of the *Limitation Act* Inconsistent with a Claim for Damages Brought Pursuant to s. 24(1) of the *Charter* and Hence, to the Extent of the Inconsistency, of No Force or Effect?**

**47**  Mr. Bush relies on s. 52 of the ***Constitution Act, 1982***, which provides:

1. The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

**48**  Mr. Bush submits that ***Prete v. Ontario (Attorney-General)*** [*(1993), 110 D.L.R. (4th) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1W5-00000-00&context=) (Ont. C.A.) ("***Prete***") stands for the proposition that any provincial legislation, such as the ***Limitation Act***, that purports to limit the time within which a ***Charter*** remedy may be sought is of no force or effect.

**49**  In ***Prete***, the plaintiff sought damages as a remedy under s. 24(1) of the ***Charter*** for an alleged infringement of his s. 7 rights. His claim was for malicious prosecution. At issue, was whether s. 5(6) of the ***Proceedings Against the Crown Act***, R.S.O. 1990, c. P-27, rendered the defendants immune from prosecution, and whether the plaintiff's claims were time-barred by s. 11 of the ***Public Authorities Protection Act***, R.S.O. 1980, c. 406.

**50**  With respect to the issue of Crown immunity, Carthy J.A. cited ***Nelles v. Ontario*** [*(1989), 60 D.L.R. (4th) 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-651D-00000-00&context=) (S.C.C.), in which Lamer J. (as he then was) held at pp. 641-42:

... the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's *Charter* rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*. ... Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the *Charter*, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

**51**  On that basis, Carthy J.A. concluded at p. 100:

The reasons of Lamer J. standing alone, are strongly persuasive that a statutory enactment cannot stand in the way of a constitutional entitlement. Section 32(1)(b) of the *Charter* provides that the *Charter* applies to the legislature and government of each province. The remedy section of the *Charter* would be emasculated if the provincial government, as one of the very powers the *Charter* seeks to control, could declare itself immune.

**52**  Section 11 of the ***Public Authorities Protection Act*** provided:

1. No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

**53**  Carthy J.A. concluded at p. 102:

Put in the *Charter* context, I see no valid comparison between procedural rules of court and statutory limitation periods. I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises. Having found that immunity is not available under the *Proceedings Against the Crown Act* from a claim for *Charter* remedy, it, therefore follows that, in my opinion, s. 11 of the *Public Authorities Protection Act* should be read as not applying to relief claimed under s. 24(1) of the *Charter*.

**54**  The facts in ***Prete*** are distinguishable. First, the ***Proceedings Against the Crown Act*** was not a statute of general limitation. Second, s. 11 of the ***Public Authorities Protection Act*** specifically applied to the Crown, upon which the Act purported to bestow absolute immunity. Clearly it was inappropriate to defend an action for malicious prosecution on the basis of a statute granting absolute immunity to the prosecutors. ***Prete*** focused on the issue of whether the Crown could avoid its ***Charter*** obligations simply by passing statutes granting immunity or imposing extremely short limitation periods.

**55**  These distinctions were highlighted by the Federal Court of Appeal in ***St-Onge***, in which Noel J.A. held at [paragraph] 2:

Section 45(1)(g) of the *Limitations Act*, [*R.S.O. 1990, c. L.15*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G31-JC0G-62Y9-00000-00&context=) is an enactment of general application that applies to any civil liability, irrespective of whether it is based on a violation of *Charter* rights. The six-year limitation period in the Act is immune to the controversy surrounding the constitutional validity of short limitation periods when they preclude the exercise of a *Charter* right. ...

**56**  ***Prete*** was also distinguished by Pritchard J. in ***Ravndahl*** at [paragraph] 13-14:

In my view, the type of statutory limitation under consideration in *Prete* is distinguishable from those in *St-Onge* and *Nagy*. It is also distinguishable from the limitation period being considered in this application.

In *Prete*, the limitation period was not of general application. Even more significantly, the window for commencement of proceedings was only six months and this short limitation period was for the sole benefit and protection of the Crown. This latter consideration appears to have been the focus of the court's concern and its willingness to circumscribe the applicability of the limitation period. ...

**57**  Thus, ***Prete*** is not authority for the proposition that a statute of general limitation such as the ***Limitation Act*** is inconsistent with the provision of remedies pursuant to s. 24(1) of the ***Charter***. Section 9 of the ***Limitation Act*** only purports to extinguish claims for damages pursuant to s. 24(1) of the ***Charter***; other remedies survive - as in ***Ravndahl***. In this case, Mr. Bush has only advanced a claim for damages. He has previously obtained a ***Charter*** remedy in the form of a stay of the criminal proceedings against him in Provincial Court.

**58**  Mr. Bush also relies on ***Mazzeo v. Ontario***, [*[1996] O.J. No. 1021*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCX1-JB7K-22JN-00000-00&context=) (Ct. J. (Gen. Div.)), appeal dismissed by endorsement that the appeal was without merit, [*[1997] O.J. No. 4172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD21-F873-B0TT-00000-00&context=) (C.A.). In that case, Lally J. stated at [paragraph] 17: "The plaintiff's claims under the *Charter* cannot be defeated by the limitations in the *Limitations Act* or the *Public Authorities Protection Act*." There, the Crown, one of many defendants, succeeded in having the court dismiss the plaintiff's action against if for disclosing no reasonable cause of action. The plaintiff had sued the Crown on the basis that its officials were negligent in failing to notice alleged deficiencies caused by the other defendants and that the province's dual land titles and registry system constituted discrimination contrary to s. 15 of the ***Charter.*** The court held that the action against the Crown was statute-barred and the fact that the ***Land Titles Act*** did not apply throughout Ontario did not constitute discrimination. The court's statement that ***Charter*** claims cannot be defeated by limitations was *obiter* and it was made without any analysis at all. The case is not at all persuasive with respect to Mr. Bush's arguments regarding the unconstitutionality of s. 3(2)(a) of the ***Limitation Act***.

**59**  Accordingly, I dismiss the plaintiff's challenge to the constitutionality of the ***Limitation Act***.

**CONCLUSION**

**60**  Mr. Bush's claims in ***negligence*** and for breach of his ***Charter*** rights are extinguished by operation of s. 9(1) of the ***Limitation Act***. It is unnecessary to determine whether his action against the City is statute-barred for failure to give notice within two months of suffering the damages complained of.

**61**  Accordingly, Mr. Bush's action is dismissed with costs to the defendants.

ALLAN J.

**End of Document**

[***Chow-Hidasi v. Hidasi, [2011] B.C.J. No. 848***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1SG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

G. Barrow J.

Heard: March 8, 9 and 11, 2011.

Judgment: May 4, 2011.

Docket: 81662

Registry: Kelowna

**[2011] B.C.J. No. 848** | 2011 BCSC 583 | 84 C.C.L.T. (3d) 125 | 2011 CarswellBC 1078 | 201 A.C.W.S. (3d) 304

Between Allena Fay Chow-Hidasi, Plaintiff, and Istvan Stephen Hidasi, Defendant

(47 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Causation — Foreseeability and remoteness — Motor vehicles — Liability of driver — Speed — Vehicle equipment — Action by passenger against driver of vehicle involved in collision dismissed — Defendant lost control of vehicle and hit two concrete barriers, injuring plaintiff — Defendant testified he heard clunk, suddenly lost steering and braking, so pulled emergency brake — Vehicle veered into barriers — Plaintiff felt vehicle veer sharply and heard defendant exclaim he could not brake — Vehicle was equipped with proper tires and regularly maintained — Collision caused by unexpected mechanical failure — Defendant was travelling speed limit and responded immediately to mechanical failure — While pulling emergency brake did not prevent accident, it was not unreasonable.**

|  |
| --- |
| Action by the passenger against the driver of a vehicle involved in an accident. The plaintiff, the wife of the defendant, was injured in the accident. The parties were travelling along a mountain road. The defendant was familiar with the road and knew it could be treacherous in the winter, so checked the weather before leaving. The temperature was above zero and the roads were mostly bare. The defendant testified that he was travelling 100 kph when he heard a clunking noise and the vehicle suddenly lost braking and steering capacity. The defendant pulled the emergency brake, but the vehicle veered sharply into the concrete barriers, injuring the plaintiff. The plaintiff did not hear the clunking noise, but felt the vehicle veer sharply and heard the defendant exclaim that he could not brake. The plaintiff argued that the defendant was overdriving the road and had inadequate tires.  HELD: Action dismissed.  The vehicle was equipped with brand new all-season tires. The road conditions were good and the vehicle never lost traction. The plaintiff did not express any concern with the defendant's speed, which was within the speed limit. The steering and braking was lost due to an unexpected mechanical failure. The defendant had the vehicle regularly serviced and maintained and, in fact, had a full safety inspection the day before the accident. The failure was unforeseeable. The defendant responded immediately to the mechanical failure and tried to brake and steer but was unable. While pulling the emergency brake did not have a good outcome, it was not an unreasonable thing to do in the circumstances. The defendant was not negligent. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 8-1(8), Rule 9-7, Rule 9-7(9)

**Counsel**

Counsel for the Plaintiff: R.D. Watts.

Counsel for the Defendant: M. Davie.

**Reasons for Judgment**

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| **G. BARROW J.** |

**1**   Liability for a single-motor-vehicle accident is the issue on this summary trial. On January 26, 2007 the parties were on route from their home in Peachland to Vancouver by way of Highway 97C . As they approached the summit the defendant, Mr. Hidasi, lost control of the car. The plaintiff, Mrs. Chow-Hidasi, was in the front passenger seat. The vehicle collided with two separate concrete no-post barriers before coming to a stop. Mr. Hidasi was not injured in the accident; Mrs. Chow-Hidasi was.

**2**  The parties agree that this matter is suitable for resolution under Rule 9-7. In fact, the plaintiff also brought an application for a summary determination of the issue of liability. During the hearing she abandoned her application on the understanding that all of the evidence tendered in support of or in response to it was admissible in the context of the defendant's summary trial application. I am satisfied, given the nature of the issues and the lack of any significant conflict in the evidence, that this case is suitable for determination by summary trial.

**3**  By way of overview, the plaintiff argues that the defendant was overdriving the road conditions. She also argues that the vehicle was equipped with inadequate tires. The defendant denies that he was overdriving the road conditions, and argues that the accident happened as a result of a sudden and unexpected loss of both the steering and braking capacity of the vehicle. He argues that he responded appropriately in the face of that emergency, but the accident occurred in any event. The plaintiff does not accept that there was a mechanical problem, but argues that even if there was it was the product of inadequate or negligent maintenance of the vehicle by the defendant. In the further alternative, she argues that the defendant's response to the emergency was itself negligent and liability should be found on that basis.

**4**  In addition to the substantive issues, there is an evidentiary issue relating to the admissibility of certain examination for discovery evidence of the defendant and another relating to spoliation.

**5**  I will deal first with the evidence and the admissibility issue and then turn to the legal analysis.

**The Facts**

**6**  The plaintiff objected to the admissibility of some of the examination for discovery evidence of Mr. Hidasi, evidence that Mr. Hidasi points to in support of his position. All of the impugned discovery evidence is exhibited to an affidavit of the plaintiff's counsel's legal assistant. As I understand the objection, it is that the questions in dispute were reproduced and exhibited to the legal assistant's affidavit because they appear on pages of the transcript that contain other questions and answers which the plaintiff wishes to rely on. I pause to note that while that may be so, the affidavit itself does not contain a statement to that effect. On the first day of the hearing the plaintiff's counsel provided the defendant with a list of specific discovery questions that he wished to rely on. The questions and answers to which objection is taken are not on that list.

**7**  I am satisfied that the questions and answers are admissible, and that no prejudice inures to the plaintiff as a result. They are admissible because the plaintiff put them in evidence. As to the notice of the specific questions and answers the plaintiff wished to rely on, it does not alter of the foregoing. If it was intended to be a notice as contemplated by Rule 9-7(9), it was not filed within the time limited under Rule 8-1(8). It is therefore of no moment. As to the question of prejudice, the only reasonable inference to be drawn from the plaintiff's notice of application is that the impugned evidence formed part of the plaintiff's case. The defendant could have addressed the matters about which he gave evidence on discovery in his affidavit evidence. He may not have, I infer, because he concluded it was unnecessary given that the plaintiff had already put those matters into evidence. In any event, if the discovery evidence is excluded, fairness would require an adjournment to allow the defendant to supplement the evidence given the changed face of the evidentiary record he had reasonably thought would form the basis for the hearing. All that would have been accomplished in the result is that the evidence that is contained in the discovery answers would be before the court in the form of an affidavit.

**8**  Turning to the circumstances of the accident, and by way of general background, the plaintiff and the defendant are married to one another. Mrs. Chow-Hidasi is 50 years old. Mr. Hidasi's age is not disclosed in the evidence, but he has been licensed to drive since at least 1960. On the day of the accident Mr. Hidasi was driving a 1992 four-wheel drive Jeep Cherokee Limited Edition, a vehicle he purchased second hand in 1995. It had 214,111 kilometres on it.

**9**  The parties planned to take Highway 97C (sometimes referred to as the Coquihalla connector) to Vancouver. It runs primarily between Peachland in the east and Merritt in the west. Between those two communities it climbs over a mountain pass. Mr. Hidasi was familiar with the highway. I infer he knew it could be treacherous in the winter. As a result, on the day before the accident, and in anticipation of their trip, he had a safety inspection carried out on the vehicle from which he concluded that his vehicle was safe and suitable to make the planned journey. In addition, Mr. Hidasi checked the weather forecast and road conditions for the highway before they left. He learned that at the summit they could expect winter driving conditions, but there was no mention of ice on the road surface. Further, the parties could see the eastern end of the highway from their kitchen window. They made a conscious decision to delay their departure until about 9:00 a.m., by which point they had seen a steady flow of westbound traffic and concluded that they would be able to make the trip in relative safety. It was a clear day, and when they departed there was some snow on the side of the road as well as intermittent patches on the road itself. According to the thermometer in the vehicle, the outside temperature when the accident happened was between 1 and 2 degrees Celsius.

**10**  There is no evidence that either Mr. Hidasi or Mrs. Chow-Hidasi were distracted in any fashion prior to or at the time of the accident. They were both sober, alert and well rested. There is some evidence that Mr. Hidasi had some medical problems in 1999. There is no evidence that any of those problems played a role in the events of January 26, 2007.

**11**  The accident happened about 5 or 6 kilometres east of, and below, the Brenda Mines turnoff. The Brenda Mines turnoff is itself east of and below the summit of Highway 97C. At the site of the accident, the road is a divided four-lane highway with a posted speed limit of 100 kilometres per hour. There is a concrete no-post barrier separating the east and westbound lanes and another concrete no-post barrier on the right edge of the paved portion of the westbound lanes. According to Mr. Hidasi, just before the accident he was travelling at approximately 100 kilometres per hour in the slow lane, climbing up a "gentle" grade and in the midst of a "very gentle" left hand curve. He had not experienced any slippage or loss of traction or control during the trip. None of this is denied by Mrs. Chow-Hidasi. In fact, on examination for discovery she said that until just before the accident, they were chatting and "enjoying the ride".

**12**  As with their other evidence, the parties' accounts of the moments just before the collision are almost entirely consistent with one another. Mr. Hidasi has deposed that the first indication he had of a problem was when he heard a "clunking noise", after which he experienced a loss of steering and braking ability. Mrs. Chow-Hidasi recalls the events immediately before the loss of control somewhat differently. Specifically, she did not hear any abnormal mechanical sound. The first indication she had that there was a problem was when the vehicle began "veering sharply from the right lane into the left". When that happened, she heard her husband exclaim "that he had no brakes".

**13**  On experiencing what he perceived to be a loss of steering and braking ability, Mr. Hidasi, afraid of losing complete control of the vehicle, applied the emergency brake. He said on discovery that he felt that because they were in the midst of a gentle left hand curve, the vehicle would continue in a straight path of travel and they would end up going off the right shoulder unless he was able to stop. It was as a result of this concern that he engaged the emergency brake. When he did that, the vehicle began to veer towards the centre of the highway and the concrete no-post barrier. As soon as that happened, he disengaged the brake but the vehicle struck the barrier anyway. It rotated 180 degrees, travelled back across the highway, and struck the no-post barrier that bounded the right hand edge of the westbound lanes. The vehicle rotated again, and eventually came to rest, still on the travelled portion of the highway.

**Analysis**

**14**  The plaintiff bears the onus of proving ***negligence***. She argues that the fact that the defendant lost control on a highway in daylight is a circumstance from which the court may infer a want of reasonable care and find ***negligence***.

**15**  The defendant casts this submission as an attempt by the plaintiff to engage the maximum *res ipsa loquitur*, a doctrine that might now be only of historical interest (see *Fontaine v. British Columbia (Official Administrator)*, [*[1998] 1 S.C.R. 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=) at para. 26). I do not agree. As Newbury J.A. pointed out in *Nason v. Nunes*, [*2008 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=), if, and to the extent, the doctrine mandates that as a matter of law an inference of ***negligence*** be drawn whenever a motor vehicle leaves the roadway in a single-car accident, it is no longer valid. What remains permissible is drawing a factual inference arising from a loss of control by a driver of the vehicle in a single-car accident. The court may, not must, infer a want of reasonable care in such circumstances. Whether it is appropriate to do so will depend on all the circumstances. If the inference is drawn, it may be rebutted. The strength of the inference, and hence the strength of the evidence necessary to rebut it, will also depend on the circumstances. Absent some non-tortious explanation for the loss of control by the defendant in this case, I would be inclined to infer ***negligence*** on his part in these circumstances.

**16**  The defendant argues that there is evidence from which the court should find that the accident may have happened as a result of events for which the defendant was not legally responsible, mainly a mechanical failure. The real issue is whether there was such a failure, and if so whether it was something that could have been avoided by the exercise of reasonable care. Finally, there is the issue of whether, assuming there is a non-tortious explanation for the accident, the defendant responded to that situation with appropriate care.

**17**  Before turning to those issues, I will address what the plaintiff argues is positive or affirmative evidence of ***negligence***. Those matters are the speed the defendant was travelling and the condition of the tires on the vehicle.

**18**  The defendant's vehicle was equipped with all-season Michelin tires which he described as "practically brand-new". He had the tires checked as part of the 16-point safety inspection he commissioned the day before the accident. Mr. Hidasi referred to the tires as "year-round" tires on his examination for discovery. The plaintiff argued that I should conclude that "year-round" tires are different than, and presumably less effective than, "all-season" tires. I am satisfied that the vehicle was equipped with Michelin all-season tires that were practically brand new. Mr. Hidasi deposed to as much, and this aspect of his affidavit evidence is not denied by Ms. Hidasi. Further, his reference to "year-round" tires is not particularly significant given that it is apparent that English is not Mr. Hidasi's first language.

**19**  The temperature on the day of the accident was at or just above freezing. The road was primarily bare, although it had some patches of snow. The defendant has deposed that prior to the accident he did not experience any loss of traction. In fact, he did not experience a loss of traction even after he lost steering and braking capacity. Mr. Hidasi deposed that when he recognized he could not steer or brake the vehicle, he engaged the parking brake and the vehicle began to "slowly ... drift from the slow ... lane towards the ... centre lane". On discovery he said much the same thing. As earlier noted, the plaintiff's recollection is somewhat different. Her first indication that there was a problem was when the vehicle started "veering sharply" from one lane to the other. Even on the plaintiff's account I am not persuaded that the condition of the tires played any legally significant causative role in the accident. I recognize that after the vehicle struck the centre no-post it rotated 180 degrees. The tires had by that point obviously stopped tracking properly. I am not prepared to infer that the loss of traction at that point was due to the condition of the tires. It seems to me that it is more likely than not, that it was caused by the collision with the no-post barrier.

**20**  I note in passing the opinion of Dr. Amrit Toor, an engineer with expertise in accident reconstruction, who prepared a report on behalf of the plaintiff. He was asked to assume that Mr. Hidasi had "year-round tires in average condition (30-79% tread)". In his opinion the "snow or icy conditions" (a description the defendant argues is not borne out on the evidence) likely resulted in "radically reduced friction". In spite of that Dr. Toor wrote that:

If prior to loss of control the Hidasi vehicle was travelling an uphill incline and was following a curved path, then it is likely that there was enough traction for the travel speed to negotiate the road curvature.

In short, Dr. Toor does not attribute either the initial collision or the post-initial collision movements of the vehicle to the condition of the tires. To the contrary, he concludes that the vehicle had sufficient traction to negotiate the roadway. In summary, I am not persuaded that the condition of the tires played any role in the events in question.

**21**  As to Mr. Hidasi's speed, the uncontradicted evidence is that he was travelling 100 kilometres per hour just before he experienced the loss of steering and braking ability. He said on discovery that at the point of the first impact with the concrete no-post barrier he glanced at his speedometer and was travelling at 97 kilometres per hour. The posted speed on that section of the Coquihalla connector is 100 kilometres per hour. I recognize that posted speed is a maximum speed and not necessarily a reasonable speed in winter conditions. I note also that Mrs. Chow-Hidasi did not, either before or after the accident, express any concern for her safety due to the speed that her husband was driving. Finally, as with the tire condition, I am not persuaded that Mr. Hidasi's speed played any legally significant causative role in the accident. The plaintiff argues that:

Had the defendant been travelling at a more appropriate rate of speed, he would most likely have had less difficulty in bringing the Vehicle under control, or would at least have subjected the Plaintiff to a reduced risk of injury and lessened the severity of any impact that might have still ensued.

**22**  It may be that if the plaintiff had been travelling at, say, 50 or even 60 kilometres per hour, he may have been able to stop the vehicle before colliding with the concrete no-post barrier. It does not follow, however, that driving at a rate of speed in excess of that was unreasonable. I am not persuaded that the speed that the defendant was travelling amounted to a lack of reasonable care or that it was a legally significant cause of the collision.

**23**  There remain two issues. They engage what are sometimes referred to as the notions of "inevitable accident" and the "agony of the moment". Although these concepts often arise together, they are distinct. The former posits a non-tortious explanation for an accident. In the matter at hand that explanation is, according to the defendant, the sudden loss of steering and braking ability. Such a mechanical failure is only non-tortious if it could not have been prevented by the exercise of reasonable care. If the exercise of reasonable care could or would have revealed the mechanical problem, then a driver is not absolved of responsibility when the problem becomes manifest. His or her ***negligence*** remains a cause of the accident, albeit the ***negligence*** rests, at least in part, on a different footing, namely a failure to exercise reasonable care in inspecting and maintaining the vehicle as opposed to ***negligence*** in the manner of driving.

**24**  Even if a defendant experiences a sudden mechanical failure which occurred in spite of the exercise of reasonable care in maintaining and servicing a vehicle, that is not necessarily an end of the matter. The issue that remains is whether the defendant exercised reasonable care in responding to the emergency. It is in this way that the concepts of inevitable accident and the agony of collision often arise in the same circumstances. The doctrine of agony of collision does not deal with the cause of or explanation for an accident; rather, it is a summary way of expressing the standard of reasonable care required of a driver faced with an emergency. In *Lloyd v. Fox* [*(1991), 57 B.C.L.R. (2d) 332*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60PD-00000-00&context=) (C.A.), the essence of the doctrine was succinctly captured by Hinds J.A. who wrote that:

... when considering circumstances which could give rise to the application of the doctrine of agony of the collision, attention should be focused on whether the actions taken by the driver who seeks to raise the doctrine were the actions of a reasonably competent driver. If so, he or she may be absolved of fault; if not, the driver's fault ... (at p. 336).

Relief from legal responsibility may result because as Paperny J. explained In *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1997), [*47 Alta. L.R. (3d) 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JN6B-S1BR-00000-00&context=) at para. 53:

... The doctrine relieves a driver from having to exercise extraordinary skill, presence of mind, poise or self control when an emergency situation is created by another driver and that means errors of judgment on the part of the plaintiff driver may be excused ...

There are limitations on availability of the doctrine. It is unlikely to prevail if the person seeking to invoke it caused or contributed to the emergency situation. In the context of this case, that may arise if the manner in which Mr. Hidasi maintained or serviced his vehicle was itself negligent or if his speed or the condition of his tires were contributory causes of the accident. I have concluded that neither speed nor the condition of his tires were contributory causes of the accident, but there remains the issue of the manner in which he maintained his vehicle, and his driving subsequent to the failure of his breaks and steering.

**25**  A defendant who advances what is sometimes referred to as a defence of explanation, of which the notion of inevitable accident is an instance, bears the onus of explaining how the motor vehicle accident may have happened without ***negligence***. The defendant does not have to explain how the accident in fact happened; rather, he or she will avoid liability if a non-tortious explanation is, on the evidence, an equally probable explanation for the accident. When that is so, the plaintiff cannot succeed because he or she will not have discharged the burden of proving that the accident occurred as a result of the defendant's ***negligence*** (see generally *Singleton v. Morris*, [*2010 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0S6-00000-00&context=) at para. 38 and *Hackman v. Vecchio* [*(1969), 4 D.L.R. (3d) 444*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G24F-00000-00&context=) at 446 (B.C.C.A.)).

**26**  On the facts of this case, there are three issues to be resolved. The first is whether Mr. Hidasi experienced a mechanical failure. I am satisfied that he did experience a sudden and unexplained loss of steering and braking ability. He deposed to as much, and Mrs. Chow-Hidasi deposed to hearing him utter a contemporaneous and seemingly excited exclamation to that affect.

**27**  In reaching this conclusion I have considered the two aspects of the evidence that the plaintiff argues militate against it. The first is what the plaintiff argues are prior inconsistent statements made by the defendant when speaking to employees of the Insurance Corporation of British Columbia, and the second relates to spoliation. I will deal with each of these issues separately.

**28**  The prior inconsistent statements are contained in two documents. The first is a claims report completed by an Insurance Corporation employee, presumably on the basis of information obtained from Mr. Hidasi. In the section dealing with the description of the accident, the employee wrote the following:

INS NW ON 97C WHEN LEFT FRONT WHEEL LOCKED UP, CROSSED FAST LANE, HIT CONCRETE MEDIAN, SPUN AROUND AND HIT L/R, STOPPED IN CTR RESTING AGAINST CTR MEDIAN.

The plaintiff points out that there is no reference in this description of the accident to either a loss of steering or brake failure; rather, the explanation given by the defendant was that his left front wheel "locked up". The second reference is found in the running records kept by employees of the Insurance Corporation. On January 26, 2007 the following note appears:

INS CALLED TO CORRECT MISUNDERSTANDING, SAYS HIS VEHICLE DID NOT ACTUALLY SPIN AROUND. HIS LEFT FRONT WHEEL LOCKED UP AND VEH SLID, HIT LEFT FRONT WHEEL AGAINST CENTRE DIVIDER, THEN IT TURNED AND SLID BACKWARDS TOWARD ORIGINAL TRAVEL DIRECTION AND LEFT REAR BUMPER AGAINST MERIDIAN. HE'S VERY CONCERNED THAT THIS BE RECORDED ACCURATELY. CAME TO REST IN CENTRE FAST LANE AGAINST CONCRETE DIVIDER.

The plaintiff points out that this is amounts to substantially the same explanation of the accident, namely that Mr. Hidasi's "left front wheel locked up". Mr. Watts notes that there is no mention of a loss of steering or braking ability.

**29**  I am unable to place any weight on these seeming inconsistencies for several reasons. First, the accounts on their face do not purport to be verbatim reproductions of the words spoken by the defendant; rather, they are summaries, and brief summaries at that. Second, as earlier noted, English is not the defendant's first language. Third, the summary in the claim file report is based on a conversation that occurred about two and one-half hours after the accident; the reference in the running records is to a conversation later that same day. As to the latter conversation, the defendant said on examination for discovery that he was "very upset" when he was dealing with the Insurance Corporation in part, no doubt, because of the accident itself, and in part because he had difficulty conveying the dynamics of the collision. Finally, and most significantly, I am satisfied that the defendant lost braking power because he said so at the moment he realized that was the case. The plaintiff acknowledges as much. It is clear, as a result, that the summary interpretation by an employee of the Insurance Corporation of what the defendant said about the accident is either incomplete or that defendant did not mention some all of the circumstances of the accident.

**30**  The second aspect of the evidence to which the plaintiff points is what Mr. Watts describes as the spoliation issue. This issue arises from, and rests on, Mr. Hidasi's examination for discovery evidence. He testified that after the accident he wanted his own mechanic and a mechanic from Chrysler, the manufacturer of the vehicle, to inspect the vehicle. He testified that the Insurance Corporation refused his request and the vehicle was later destroyed without having been inspected by anyone. The plaintiff argues that in these circumstances the doctrine of spoliation applies and the court should draw the inference that there was no mechanical defect in the vehicle. It should be noted that there is no suggestion that the defendant, in seeking a mechanical inspection, was doing so in support of the plaintiff's claim. In fact there is no evidence that the Insurance Corporation was even aware there would be a claim by the plaintiff.

**31**  As illustrated in *Dawes v. Jajcaj*, [*1999 BCCA 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1KW-00000-00&context=), the notion of spoliation has been used to support at least three distinct legal theories. The first is that of a separate and independent intentional tort. That was the assertion in *Endean v. Canadian Red Cross Society* [*(1998), 48 B.C.L.R. (3d) 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29T-00000-00&context=). The Court of Appeal rejected it. The second is to support the exclusion of evidence. That was the argument advanced in *Dawes*. The basis for seeking exclusion was the negligent destruction of evidence that the opposing party wished to have examined. The court rejected that proposition as well (see para. 68). The third and only recognized role of the notion of spoliation is that when established it may give rise to a rebuttable evidentiary presumption. The presumption is captured in the latin maxim from which the doctrine derives its name: *omnia praesumuntur contra spoliatorem* which means "all things are presumed against the wrongdoer" (see para. 61 of *Dawes*).

**32**  The plaintiff's argument is that because the Insurance Corporation permitted the motor vehicle to be destroyed in the face of a request by the defendant to have it examined by a mechanic, a presumption arises that the examination would have shown no mechanical defect. The problem with this argument, in my view, is that it runs contrary to the rationale on which the presumption ordinarily rests. As between the defendant and the plaintiff, the result would be an inference drawn on the basis of an assumption (namely, that the defendant wished to hide the condition of the car) when in fact he was not seeking to hide it, rather he was urging its investigation. Further he sought to have it investigated not because he thought it was mechanically sound, but because he was convinced it was not and wanted to establish that for his own reasons. As a result, I place no significance on the fact that the Insurance Corporation destroyed the vehicle. It may have been otherwise if the plaintiff, as opposed to the defendant, had sought to preserve the motor vehicle even if she did that through her husband, the defendant. That is not, however, what happened.

**33**  As earlier noted, I am satisfied that the defendant experienced a loss of steering and braking ability.

**34**  The next issue is whether the mechanical failure could have been prevented by the exercise of reasonable care. The onus is on the defendant to establish this proposition. That is so because unless the mechanical failure occurred without ***negligence*** on his part, it cannot operate to absolve him of responsibility. In short, the explanation is only significant if it is non-tortious.

**35**  The defendant argues that the court cannot conclude that he failed to exercise reasonable care, in part, because the plaintiff did not call expert evidence on the maintenance and servicing that might reasonably be required on this vehicle. In my view it is for the defendant to call evidence of that kind if it wishes to rest its case on that footing. It may be that expert evidence is necessary or at least helpful in some cases. Whether that is so, however, will depend to a significant degree on the facts. For example, a very old motor vehicle with very high kilometres may give rise to maintenance issues about which reasonable people may be unaware. On the other hand, expert evidence as to what may be reasonable maintenance will not usually be necessary in the case of an accident involving a nearly new vehicle.

**36**  In this case the motor vehicle was 15 years old and had 214,111 kilometres on it. It was far from new, but it cannot be said that it was at or near the end of its safe useful life. In my view expert evidence is not necessary to resolve the issue of whether Mr. Hadasi acted reasonably in the manner in which he maintained his vehicle.

**37**  The defendant was both proactive and reactive in having his vehicle serviced and maintained. He was reactive in the sense that whenever he experienced problems, he had the vehicle examined by a mechanic. On his examination for discovery he said:

... If there was anything unsatisfactory for my standards, yeah, I took it to the mechanic to do it, to check it out. Any time I noticed something unusual, yes, I took it and he look after it. It is my life and my wife's life.

As to preventative or proactive servicing, the best example is what he did the day before this trip. He took the vehicle to Lube World for the express purpose of having them complete a "full safety check". On his examination for discovery he said:

They checked all the fluids and they checked the steering belt, power steering belt and the fan belt. They said all belts are okay. They asked me to step on the brake and how much brake I had, and they checked the back lights, if the brake lights are working; the index lights, everything was checked, whatever concerns safety.

He deposed that the staff at Lube World told him they did not find any safety issues. The invoice for that service shows that they conducted a "16 point safety check" and included within those 16 points was a check of the brake fluid, power steering fluid, and tire condition.

**38**  In terms of other routine maintenance, Mr. Hidasi frequently used a Midas dealership in Westbank. Documents from that enterprise reveal that in November 2001 the brakes were serviced. The service included the installation of brake shoes and brake pads, machining the brake drums, the installation of rotors, and flushing and replacing the brake fluid. It was carried out when the vehicle had 169,000 kilometres on the odometer. In January 2003 the same Midas dealership did a further brake service which included brake shoes and brake fluid. The vehicle had 181,911 kilometres on it when that service was done.

**39**  Mrs. Chow-Hidasi deposed that basic lubrication and oil services were routinely carried out on the vehicle, but mechanical repairs were only performed when they became necessary. She also deposed that other than checking fluid levels and replacing fluids as necessary, no maintenance had been performed on the vehicle's power steering system or brakes. She is in error in this latter regard, given the service records from Midas. More significantly however, she said on discovery that she had ridden as a passenger in her husband's Jeep on a number of occasions prior to the accident and had no concerns about its mechanical condition. In fact, she testified that he was "very meticulous" in the manner that he maintained the vehicle; that he "often" took it in for routine maintenance, and had done so on the day before they left on this trip.

**40**  I am satisfied that the manner in which Mr. Hidasi maintained his vehicle was reasonable. I am satisfied that the brake and steering failure he experienced was unexpected and was not discoverable through the exercise of reasonable care.

**41**  It is appropriate to address the nature of the mechanical failure because it has some bearing on the issue of Mr. Hidasi's response to it. The expert mechanical evidence called by the plaintiff is that the power steering and power brakes in this vehicle operated using the engine. In the case of the brakes, the engine created a vacuum which was used to assist in braking; in the case of the steering, the engine powered a pump which created hydraulic pressure. To lose both systems at the same time is highly suggestive of a loss of power as opposed to independent failures of some other part of each system. According to the same expert, in the event of a loss of power a driver will still be able to both steer and brake, however both would be significantly more difficult in that they would be reliant entirely on the physical force generated by the driver. The evidence is also that the loss of power steering and power brakes would have no affect on the path of the vehicle's travel. As to the emergency brake, it operated mechanically and applied braking to the rear wheels only.

**42**  Mr. Hidasi's evidence is that from his perspective there was a complete loss of ability to steer and brake - that is, no matter how hard he tried he was unable to turn the steering wheel and unable to move the brake pedal. As he put it in his affidavit evidence:

... no matter how hard I tried, my steering wheel would not turn and I could not move my brake pedal.

On examination for discovery he denied that the brake pedal was merely stiff. He said that he could not depress it at all. Specifically he said "It did not have any movement whatsoever". So too with the steering wheel, he was specifically asked if it was stiff, and said:

It was not stiff, it just did not move. It was stationary.

**43**  The plaintiff argues that, given the expert mechanical evidence, it is likely that the brake pedal could have been depressed and the steering wheel could have been turned notwithstanding the loss of power. The plaintiff argues that had the defendant simply tried harder, the vehicle would have responded to both his steering and braking input.

**44**  Moreover, if the defendant had simply done nothing, it is likely the vehicle would have continued to track around the gentle curve it was in and come to rest without incident. She argues that applying the emergency brake, particularly with the force that the defendant applied it, was negligent and caused the accident. Finally, she argues that Mr. Hidasi should have geared down using the automatic transmission to slow the vehicle down.

**45**  I am not satisfied the defendant's reaction to the circumstances he unexpectedly faced was unreasonable. First, there is no suggestion that Mr. Hidasi was in some fashion shocked into inaction and delayed responding to what he reasonably perceived as an emergency. To the contrary, all of the evidence suggests that he responded immediately. Second, it may well have been that if Mr. Hidasi was a stronger individual or simply redoubled his efforts at attempting to manually steer and manually brake the vehicle he would have been successful. I do not accept that he knew that, or should have known that. Rather, I find that he tried his level best to steer and brake. He perceived that both of these options were ineffective and he needed to adopt an alternative course and do that quickly. From his perspective he had two options: either do nothing or engage the emergency brake. Choosing the latter was not an unreasonable course of action. When it gave rise to unexpected consequences and in effect created a further danger, Mr. Hidasi responded to that. He immediately disengaged the emergency brake. By that point, however, he was unable to alter the path of travel of the vehicle and the collision occurred. It may be that the vehicle would have tracked around the curve it was on without difficulty if Mr. Hidasi had done nothing. It may also be that had he geared down using the automatic transmission he would have been able to stop the vehicle without incident. It may be that adopting either or both of those courses of action would have been better than adopting the course that Mr. Hidasi did. This issue is not whether he took the best course of action, but whether he responded reasonably, bearing in mind the tolerance the law affords to what might be described as errors in judgment committed by a driver faced with an emergency situation.

**Conclusion**

**46**  In conclusion, I am not satisfied the plaintiff has proven the defendant was negligent and the action is accordingly dismissed.

**47**  Unless there is something relevant to the question of costs about which I am unaware, the defendant is entitled to costs at Scale B.

G. BARROW J.

**End of Document**

[***Cuppen v. Queen Charlotte Lodge Ltd., [2005] B.C.J. No. 1332***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0WF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Brown J.

Heard: October 4 - 8, 12 - 13, 15 and 21 - 22; and

November 1 - 5 and 29; and December 1 - 3, 2004.

Judgment: June 13, 2005.

Vancouver Registry No. S017014

**[2005] B.C.J. No. 1332** | 2005 BCSC 880 | 32 C.C.L.T. (3d) 103 | 140 A.C.W.S. (3d) 475 | 2005 CarswellBC 1414

Between Doug Cuppen, plaintiff, and Queen Charlotte Lodge Ltd. and Daigle Welding & Marine Ltd., defendants

(91 paras.)

**Case Summary**

**Damages — Physical injuries — Leg injuries — Foot — Fractures — General damages — For personal injuries — Non-pecuniary damages, including pain and suffering — Retroactive loss of income — For torts — Pure economic loss — Limits on compensatory damages — Tort law — *Negligence* — Duty of care — Standard of care — Causation — Causal connection — Contributory *negligence* — Defences — Contributory *negligence* — Voluntary assumption of risk (volenti non fit injuria).**

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| Action by Cuppen against the Queen Charlotte Lodge for damages for injuries sustained in a boating accident. Cuppen was a guest at the Lodge. On June 21, 2001 he went boating in a vessel provided by it. The water was calm. He powered the boat up to move to a new area when the boat veered suddenly to the left and went into a hard spin. Cuppen hit the railing on the right side of the boat and broke his right femur. He required two operations. Cuppen was bedridden for the first few weeks. He was then in a wheelchair for a month and a half and on crutches for the next few months. He attended physiotherapy and was able to get around with a cane. By June 2002 he still experienced pain over the implant to his femur. He required a third operation in December 2002 to remove the pins and plate. Cuppen recovered but was unable to attend the social functions he formerly attended as the principal sales person and marketer for his business. Cuppen was an equal partner with his brother in a business that sold drilling muds to oil drilling companies. He was responsible for sales, while the brother looked after the business's technical services. The partners shared profits equally. Cuppen claimed that despite the efforts of his sales employee, the business lost an important account. Cuppen paid the employee $48,842 for his efforts to maintain the account.  HELD: Action allowed.  Cuppen was awarded damages of $371,046. There was a defect in the boat which caused the veer to occur. Cuppen did not operate the vessel in a manner that caused the sudden veer. He did not satisfy the court that the defect was caused by the Lodge's ***negligence***. However, the Lodge breached its duty to warn Cuppen of dangers it knew or ought to have known of in the use of the boat. It had previously received complaints from guests about steering difficulties with their boats. The cause of the problems was unknown because the Lodge did not investigate them further. Cuppen's past experience in operating similar boats did not negate his entitlement to reasonable reliance on the Lodge to be informed of potential hazards. If Cuppen received the proper warning he would have increased his vigilance and the accident would not have happened. The Lodge failed to meet the standard of care of a fishing lodge in its particular area. Cuppen was not contributorily negligent. He did not voluntarily assume the risk of injury. Cuppen did not agree to waive any claims of ***negligence*** against the Lodge. He was awarded $100,000 for pain and suffering. Damages for loss of opportunity were assessed at $235,000. He lost $24,421 as his share of the employee payment, and would have earned this amount if he was not injured. |

**Statutes, Regulations and Rules Cited:**

Athens Convention Article 1(4)

Marine Liability Act, [*S.C. 2001, c. 6 s. 28*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9P1-JF75-M0PB-00000-00&context=)(1), Part 3, Part 4, Schedule 2, Part 1

**Counsel**

Counsel for the plaintiff: M.P. Katzalay D. Chisholm

Counsel for the defendant Queen Charlotte Lodge Ltd.: J. Spears

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| **BROWN J.** |

1. OVERVIEW

**1**  The plaintiff, Doug Cuppen, was injured in a boating accident on June 21, 2001. He seeks damages for personal injury, loss of income and loss of opportunity from the defendant Queen Charlotte Lodge Ltd..

**2**  The action was dismissed against the defendant Daigle Welding & Marine Ltd. before trial.

1. BACKGROUND FACTS

**3**  Guests of the Queen Charlotte Lodge have a choice of fishing with or without a guide. The lodge provides 17-foot aluminium hulled boats for use of their guests. Each year, the lodge fits the boats for the season. Until 2001 these boats had been fitted with a 70 horsepower Johnson engine and a cable steering system. In 2001, the lodge switched to 75 horsepower 4 stroke Mercury engines, using the same cable steering system as had been used in 2000.

**4**  In July 2001 the lodge began changing the steering systems on the boats from a cable steering system to an hydraulic steering system. Most of the guest-driven vessels were changed from cable steering to hydraulic steering in the months of July and August 2001.

**5**  On June 21, 2001 Mr. Cuppen and his companion, Ms. Walsh, were guests of the Queen Charlotte Lodge. Mr. Cuppen and Ms. Walsh left the lodge in the boat provided by the lodge, with Mr. Cuppen at the helm. June 21st was a pleasant day and the waters were calm. Mr. Cuppen and Ms. Walsh had been trolling. Mr. Cuppen was powering the boat up to plane to move to a new area when the accident occurred. The boat veered suddenly to the left and went into a hard spin. Mr. Cuppen and Ms. Walsh were thrown in the boat. Mr. Cuppen hit the railing on the right side of the boat and broke his right femur.

**6**  Mr. Cuppen was airlifted to Vancouver where his fracture was set. On June 26th he required further surgery. He was bed-ridden for the first few weeks after the two operations, was then in a wheelchair for a month and a half, and on crutches for the next few months. Through the fall of 2001 he attended physiotherapy. Eventually he was able to get around with a cane. By June 26, 2002 he was still experiencing pain over the implant to his femur. He required a third operation in December, 2002 to remove the pins and plate. After the third operation he again attended physiotherapy. He has recovered, although he is not able to attend all social functions that he would normally attend as the principal sales person and marketer for his business.

**7**  Mr. Cuppen and his brother, Jack Cuppen, are equal shareholders in Mudmaster Drilling Fluid Services Ltd. Mudmaster sells drilling muds to oil drilling companies. The plaintiff was primarily responsible for sales for that business. Mr. Jack Cuppen was responsible for the technical services provided by that business. They shared the profits of the company equally.

**8**  Mr. Cuppen's claims for past wage loss and loss of opportunity arise from the loss of sales to one of Mudmaster's clients, Devon Canada Drilling. After Mr. Cuppen's injury, a sales employee with Mudmaster, Mr. Niewensteeg tried to assume Doug Cuppen's sales responsibilities as well as his own, while Mr. Cuppen recovered from his injury. Mr. Niewensteeg was paid $48,842 in commission for the sales made to the Devon account from the period July 2001 to the end of the company's 2002 fiscal year. Mr. Niewensteeg said that despite his efforts, he was not able to maintain the account. Since March, 2003, Devon has not purchased drilling mud from Mudmaster.

III. CONTENTIOUS EVIDENCE

1. The Manner in Which the Accident Occurred

**9**  One of the issues between the parties is the manner in which the accident occurred.

**10**  Mr. Cuppen said that the weather that day was beautiful and calm with about a one foot chop and a light swell. The seas were very calm. He had been fishing in the Queen Charlottes for 16 years. On many occasions he had been to the Charlottes twice a year. He was familiar with boats like those provided by the lodge. He had been to this lodge once before. Immediately before the accident, he was standing at the centre control with one hand on the wheel and one hand on the throttle. He was keeping watch; he heard nothing unusual and he did not feel the boat hit anything. There was nothing unusual in the waves. The wheel was torn from his hand when the boat suddenly veered to the left.

**11**  Ms. Walsh said that it was a beautiful day, the water was calm and there were no large waves. Mr. Cuppen was standing at the wheel and she was standing beside him. He was powering up when suddenly the boat pulled in one direction very hard. She was thrown to the front of the boat. The boat had not hit anything. Mr. Cuppen had not fallen before the boat went into its spin.

**12**  The defendant argues that the plaintiff must have let go of the wheel, or released his grip on the wheel, or struck a log, wave, or some other obstruction in the water to cause the boat to veer.

**13**  The defendant called two other guests, Greg Masniuk and Scott Youngblood, who were nearby in another boat and observed the incident. Their boat was within a few hundred yards of the accident site. They each testified that they saw a wave strike the side of the Cuppen vessel immediately before it went into a spin. Each of them concluded that Mr. Cuppen lost control because of this wave.

**14**  Mr. Masniuk said that he and Mr. Youngblood were trolling, and their boat was going very slow. Mr. Masniuk was observing events by looking back over his right shoulder. They saw the Cuppen boat coming toward them at a high speed. He said that he and Mr. Youngblood were approximately 100 - 150 yards away at the time. He and Mr. Youngblood watched as a wave rocked the Cuppen boat. The wave was not a rogue wave, but regular ocean swell, nothing unusual.

**15**  Mr. Youngblood described the weather on June 21st as fairly nice. He and Mr. Masniuk had their lines in the water and were going slowly. There was a gentle ocean swell, 1 to 2 feet. Mr. Youngblood was standing at the centre console, driving the boat. He saw the Cuppen boat coming toward them, going quickly. The boat was 200 - 300 yards away at the time. A wave hit the boat and the boat went into a spin. The wave that struck the Cuppen vessel was not an unusual one: the wave rolled up to the boat, the boat rolled over the wave, it was no different from other waves. The person at the wheel fell over. Mr. Youngblood concluded that it was because of the wave.

**16**  I accept the evidence of Mr. Cuppen and Ms. Walsh. They were credible witnesses, who expressed themselves in a straightforward manner and did not exaggerate their evidence. I accept that Mr. Cuppen was standing at the wheel holding the wheel in his left hand and the throttle in his right, bringing the boat up to plane when suddenly and without warning the boat veered to the left and went into a spin. I accept their evidence that the boat did not collide with anything to cause the boat to veer suddenly and there was nothing in the manner in which Mr. Cuppen was handling the boat to cause it to go out of control.

**17**  I accept the evidence of Mr. Youngblood and Mr. Masniuk as to their observations. However, I do not agree with their conclusion as to the cause of the accident. It is not surprising that they concluded that the swell must have caused the boat to go into a spin. They had no other explanation for the boat's sudden spin. While the coincidence of the swell and the boat spinning suggested to them that one caused the other, they were not in a position to determine the cause of the accident, and their evidence does no more than describe the events which they witnessed. There is nothing in their description of the weather and the gentle swell to explain the sudden veering of the Cuppen vessel, or to undermine the evidence of Mr. Cuppen and Ms. Walsh on this point.

1. Was a Warning Given to the Guests About the Steering on the Vessels?

**18**  Ms. Walsh and Mr. Cuppen were travelling with friends, the Outhwaites. Ms. Walsh and Mr. Outhwaite each testified that on their first evening at the lodge, the lodge manager, Duane Foerter warned them that some of the guests were having difficulty steering the boats.

**19**  Ms. Walsh said that in the course of his welcoming speech, Mr. Foerter mentioned that they had increased the horsepower on the motors; that guests should be careful in handling the boats; that the boats pulled in one direction and that there had been some problems. Mr. Cuppen was not present at the time because he had stepped outside to have a cigarette. She did not advise Mr. Cuppen of the warning until some time after the accident.

**20**  Mr. Outhwaite said that on the first evening after dinner, while Mr. Cuppen was out having a cigarette, Mr. Foerter spoke to the group. Mr. Foerter said the lodge had increased the horsepower of the motors and that there were some steering difficulties. He advised the guests to pay particular attention and to keep a firm grip on the steering at all times. Mr. Outhwaite did not pass this warning on to Mr. Cuppen.

**21**  Mr. Foerter, too, gave evidence. He said that he was responsible for the hotel side of the operation. The operations manager, Brian Higgs, was responsible for the physical plant and the water side of the operation. Mr. Foerter said that it was his practice to orient the guests in phases. The first phase was at lunch on the first day, with a follow up in the evening. While his orientation changed to accommodate events, it was essentially the same from season to season: on the first night, guests had already been out fishing and had a late dinner around 9:00; at the dessert stage, he gave information with respect to the remaining days, times for breakfast, times to wake up, the barbecue, the history of the lodge, etc. He said that in June 2001 he would have given his standard collection of information in his orientation speech. It was his practice to alert guests to potential hazards such as crab traps, gill net openings, or high tides. He said that he would likely have mentioned the new 75 horsepower motors as something exciting and new.

**22**  In cross-examination he acknowledged that he may have advised the guests that the 75 horsepower engines had more torque in the way the boats operated. He was asked specifically whether he advised the guests that the boats would veer and not to let go of the steering. He did not recall specifically saying so, but did not deny making such a comment. He acknowledged that if there were safety warnings he would raise it after dinner.

**23**  I accept the evidence of Ms. Walsh and Mr. Outhwaite. I find that in the course of Mr. Foerter's comments after dinner on the first evening of their trip to the lodge, he advised guests of the increased horsepower of the motors, said that some guests had experienced problems and advised guests that they should keep a firm grip on the wheel at all times.

1. Guest Reports

**24**  Queen Charlotte Lodge provided questionnaire forms for its guests to complete at the conclusion of their trip. The questionnaires ask such things as whether the rooms were well appointed and comfortable, the quality of the food at breakfast, lunch and dinner acceptable, and, with respect to the boat, whether it was well equipped, trouble free, comfortable and clean each day. In 2001 several of the guests completed these questionnaires and returned them to the lodge. The import of and the conclusions to be drawn from these reports are a significant issue between the parties.

**25**  A number of the guests made comments regarding the boats. Frank Beckman, who was at the lodge on June 8th, 2001, reported: "Our boat (#2) was always pulling hard to the right. We mentioned it to several dock people, but it never got fixed. The boat would be dangerous for a rookie." Ken Peters, who was also among the guests on June 8, 2001, said: "Didn't like looseness of steering, shift lever was very stiff and difficult to use (in and out of neutral) suspect a characteristic of Mercury." Roger Cullum, who attended on June 11th, 2001, said "Boat pulled sharply to left when underway." Rick and Trudy Parker reported on June 11, 2001 "The motor I found pulled too much one way or the other." Mike and Ben Cogo reported on June 14, 2001 "Steering too hard." Louis Gaspari on June 15, 2001 said: "Steering on boat was horrible." Ted Hamilton on June 18 reported: "Steering at full power challenging." Jackie Gessner on June 18, 2001 said: "Cables on motors need to be replaced by hydraulics, could be very dangerous!" Ken Flurry was at the lodge between June 22 and 25, 2001 and said "Mercurys were hard to shift and steer." Carolyn Forrest was also at the lodge between June 22nd and June 25th reported "Please inform guests before they go on the water of the sensitivity of the steering with new motors." David Forrest said "Tell people about the sensitive steering before they hit the water." Rita Loewen, also at the lodge between June 22nd and June 25th, said "Boat steering is very sensitive - make visitors aware." Dean Loewen said "Boat steering was very loose and created a problem when you let go of the wheel as it veered direction immediately!! Should inform all operators." John Stephen who attended the lodge between June 22nd and June 25th said "75 hp too much - needs hydraulic steering - too jerky." Joe Bars (June 25 - 30) said "New motors are a pain to shift! Very difficult in bad weather fishing. Steering seems a bit loose." Hugh Porter, who attended the lodge at the end of June said "As you know, we had a problem with one or two of the boats and one of our crew was seriously hurt (Ted Feidler) - wrong motors and steering - needs to be some form of compensation." Rod Sopco who attended the lodge with the same group as Hugh Porter said "You need to do something with the steering on your boats." Mike Milburn who attended the lodge between July 23rd and 27th reported "My boat didn't have the hydraulic steering which did cause some handling problems. I suggest the changes be completed ASAP."

**26**  Some of the guests were called to describe their experience with the boats in 2001. Dean Loewen said that he had been attending the Queen Charlotte Lodge regularly since 1994. He was there on June 21st. On one occasion, when he and his wife were leaving the harbour in calm waters, at full speed, he released pressure slightly on the steering wheel and the wheel spun viciously. He was holding onto the console and was able to regain control of the boat.

**27**  Mr. Loewen said he had been to the lodge some 8 - 10 times before and had never had a problem such as this. He had always captained his own boat without a guide. He had never had an experience such as this. Before this, he would release the pressure and the boat would continue to go straight. It was not unusual for him to release pressure while he was at the wheel. He said that he had not received any warning with respect to this propensity of the boats. He returned again that August and did not experience that problem with the boats.

**28**  Hugh Porter testified that he had arranged for a group of his friends to attend the last weekend of June/beginning of July 2001. He raised a concern with respect to the steering of the boats because some in his group had experienced problems steering the boats. One of the incidents involved him personally: he was accelerating with one hand on the wheel and one on the throttle; he released his hand from the wheel and was thrown into his fishing partner. After the incident he complained to the dock staff and completed the guest survey. He discussed the problem at length with Duane Foerter.

**29**  Ted Fiedler attended with the Porter group. He testified that he had been around vessels most of his life. He was aware that the lodge had increased the horsepower of the engines. On the first afternoon he throttled up, and reached for his glasses, releasing the wheel for one second. The boat veered sharply and he was thrown overboard. He thought that the engine had not been trimmed correctly. In his experience, if you let go of the helm and the boat instantly veers, there must be a problem with the trim. He had not received any warning from the lodge with respect to steering of the vessels.

**30**  Two other guests were called by the defence to describe the incidents which they referred to in their guest summaries. Roger Cullum said of his reference "Boat pulled sharply to the left when underway" that he did not recall the specific event, but if he wrote it, it must have happened.

**31**  Ken Peters said that his reference in the guest summary (didn't like looseness of steering) described the steering while they were trolling at an idle. If you let go of the wheel the boat would slowly drift off course. He believed that an adjustment could be made that would tighten the boat up and cause it to keep a steady course while trolling. He said that his group had no problems operating the boat at speed.

**32**  Mr. Outhwaite testified about difficulty which he had with his boat. He said that he was an experienced boater who had been operating boats since he was 8 or 10 years old. He said that on one occasion, when he was powering the boat up to plane on calm waters within Naden Harbour, the boat suddenly veered when he momentarily removed his hand from the steering wheel. He said that in his many years of boating he had never experienced such a phenomenon.

1. The Evidence of Mr. Crawford and Mr. Higgs

**33**  Mr. Crawford is the full-time mechanic at the Queen Charlotte Lodge. He has been with Queen Charlotte Lodge for 10 years. He rigs the boats in the spring and maintains the boats throughout the season. At the end of the season he removes the engines and the steering systems and puts the boats away for the season. In the spring he is in charge of installing the steering systems and the engines on the boats and putting each vessel through sea trials before they go into service. He said that he experienced no difficulty with the steering systems on the boats before they were put into service in the spring of 2001.

**34**  He works seven days per week during the season. He has set up a system with a white board at the dock where the dock crew make notes of any mechanical problems. The dock hands are instructed to ask guests every day if there are any mechanical problems. Problem vessels are repaired overnight. If he is not able to remedy the situation overnight, there are spare boats available. He keeps a notebook of the work that he does on each vessel. He said that in the spring of 2001 there were no problems with the steering on the vessels, other than stiff steering.

**35**  After the accident, he took the Cuppen boat out of the water, checked for damage and found none; tried it on the water and found nothing wrong with it, so put it back into service.

**36**  At the weekly debriefing he and other staff members would go through the guest questionnaires and if guests complained about particular things, the lodge would change it.

**37**  With respect to the guest summaries in 2001, he said that he was not aware of any steering complaints before this incident. Several of the guest summaries were put to him during cross-examination. He said that guests were always complaining about the steering making them tired and sore. When he was referred to the guest summaries which noted the steering to be dangerous, he said that most people were spoiled and were not used to using two hands on the boat. He did not ask Mr. Cuppen or his friends about the accident. He said it was not his position to do so.

**38**  He said that in 2000 the lodge decided to convert the boats to hydraulic steering. The hydraulic steering systems were purchased in 2000, with the intention of gradually converting the boats from cable to hydraulic, as time permitted.

**39**  He said that the hydraulic systems were installed in July and August 2001 because that was the slow time of the year. He said that it was easier to change the steering systems at that time, rather than installing the hydraulic systems before the fishing season or later in the year. He insisted that there were no problems with the cable steering; it was just a question of guest convenience. He was adamant that the lodge did not change the steering because the guests were having serious difficulty operating the boats.

**40**  Mr. Higgs, the operations manager of the Queen Charlotte Lodge also gave evidence. He has worked with the Queen Charlotte Lodge in various positions from time to time since 1991. He returned to the Queen Charlotte Lodge in 2000 as operations manager. He has operated small vessels for most of his life and has experience in all aspects of the sport fishing business. He has used cable steering throughout his life. He experienced no problems with the steering on the guest boats in 2001. He was responsible for the decision to change the vessels from cable steering to hydraulic steering. He did not do it as a safety issue, but as an enhancement for the guests, to make it more convenient for them. He said that the upgrade to hydraulic steering was planned in 2001, before the season. He had discussed it with the mechanic, Mr. Crawford and with the supplier, Bridgeview Marine. There was no urgent need to change to hydraulic steering, and they would do it as the opportunity arose.

**41**  Any safety issues water-side were his responsibility. He said that there was nothing to alert him to a problem with the steering of the boats in the spring of 2001. In testing the boats, none of his staff had described a torquing problem with the steering. He was aware of the guest comments and addressed them at a weekly meeting of his management group. He did not recall any of the comments. In any season they would have 400 - 500 complaints, all of which could be related to safety and the lodge had no capacity to follow-up with guests after receiving their comment cards, "end of story". He maintained that any of the equipment is dangerous for a rookie. He speculated as to what various guests meant in their comments with respect to the steering. He said that cable steering was more susceptible to veering, but the comment cards did not cause him to believe that there was a steering problem.

**42**  With respect to the Cuppen incident, he did not ask Mr. Cuppen or Ms. Walsh what happened. He said that there was no mechanical fault in the boat and it was very apparent that the accident was "operator caused". Nor did he speak with Mr. Fiedler following his incident because "we knew what the problem was." The lodge staff did not follow up with any of the guests who completed guest commentaries which referred to the boats or steering as dangerous. He insisted that it would be impossible to telephone the guests and inquire as to the difficulty they were experiencing. He said that the lodge staff did not accelerate changing the vessels to hydraulic steering as a result of this incident, and that the changeover proceeded as planned.

**43**  I did not find Mr. Crawford or Mr. Higgs to be helpful witnesses. Each was evasive and argumentative. Each appeared determined to maintain their position that there was nothing wrong with the boats, that anyone who experienced a problem with the boats did so because of operator error.

**44**  On some points, Mr. Crawford's evidence was clearly wrong. Mr. Crawford maintained that all of the hydraulic systems had been purchased in the fall of 2000 for installation in 2001. This is not consistent with the evidence of Mr. Higgs who said that the purchase discussions took place in the spring of 2001, or with the evidence of Mr. MacNeice of Bridgeview Marine who said that the hydraulic steering systems were purchased in 2001. Similarly, I do not accept Mr. Crawford's evidence that the steering systems were replaced in July and August because that is the slow period at the lodge. I accept Mr. Foerter's evidence on this point that July and August are busy periods at the lodge.

**45**  Some aspects of Mr. Higgs' evidence was incredible. Mr. Higgs maintained that it was impossible to find the time to follow up with the guests who described safety concerns with the steering. The guests provided addresses, telephone numbers and, in some cases, email addresses. It would require very little time for Mr. Higgs, or a staff member, to determine the nature of the problem a guest experienced with the boat. It is incredible that the operations manager, who insisted that safety was his primary concern and that he would shut down the lodge were there any safety issues, could not find the time to telephone the guests who were expressing serious safety concerns.

**46**  Similarly, it is incredible that guests could be seriously injured as were Mr. Cuppen and Mr. Fiedler, yet no member of the lodge staff would interview the injured person or another member of the guest's party to determine the cause of the incident. Instead, the lodge staff would conclude that the accident must have been caused by operator error.

1. THE PLAINTIFF'S POSITION

**47**  The plaintiff alleges that his injuries were caused by the ***negligence*** of the Queen Charlotte Lodge. The ***negligence*** is particularized in the Amended Statement of Claim:

1. failure to properly maintain the boat;
2. equipping the boat with an inadequate, improper or defective steering system;
3. equipping the boat with a motor which exceeded the maximum horsepower capacity of the defective boat;
4. failure to warn or adequately warn the plaintiff of the defects and dangers inherent in the boat, specifically of the danger that the defective boat would, without warning, veer violently to one side;
5. failure to properly instruct the plaintiff in the use and operation of the boat, including precautions to be taken, so as to avoid injury from the boat.

**48**  The plaintiff pleads that the lodge knew or ought to have known that the boat contained a latent defect which, in the absence of reasonable care in the preparation and manufacture of the boat, would cause injury and damage. In the alternative, he pleads that the defendants knew or ought to have known that the boat contained an inherent risk of danger in that it would, without warning, veer violently to one side, which, in the absence of an adequate warning of the risk, would cause injury and damage.

**49**  In the course of the case, the plaintiff's position crystallized: in the spring of 2001, one or more of the lodge boats was defective in that it had a tendency to veer dangerously and without warning; that the lodge had notice of this problem from its guests and failed to take adequate steps to remedy the problem or to warn the other guests of the problem; Mr. Cuppen was injured as a result.

1. THE DEFENDANT'S POSITION

**50**  The defendant, Queen Charlotte Lodge denies that it provided an unseaworthy or defective vessel to the plaintiff and denies that it was negligent. The defendant denies responsibility for the plaintiff's accident and injury and, in the alternative, pleads contributory ***negligence***. The defendant pleads, in addition, that the plaintiff knew of and consented to the risk of possible injuries in operating a vessel.

1. ANALYSIS

**51**  These pleadings raise the following issues with respect to liability:

1. Was there a defect in the vessel?
2. Was the lodge negligent?
3. If so, did Mr. Cuppen's injury result from that ***negligence***?
4. Was Mr. Cuppen contributorily negligent?
5. Did Mr. Cuppen consent to and assume the risk of injury?
6. Was there a defect in the vessel?

**52**  I have concluded that there was a defect in the boat. I have accepted the evidence of Mr. Cuppen and Ms. Walsh as to how the accident happened. There was nothing in the manner in which Mr. Cuppen was operating the boat to explain the boat's sudden veer. Mr. Cuppen was holding onto the wheel. They were standing together in the centre of the boat so that the loading of the boat would not have explained the sudden veer. They did not strike a log or other debris. No unusual wave struck the boat.

**53**  I do not accept Mr. Crawford's conclusion that Mr. Cuppen was responsible for the accident because Mr. Crawford did not find anything wrong with the boat. Mr. Crawford made no effort to learn the circumstances of the accident before he checked the boat, even though Ms. Walsh remained at the lodge and could have explained events to him. Instead, Mr. Crawford assumed that operator error was the cause of the accident. (I do, however, accept Mr. Crawford's evidence that he pulled the boat out of the water and found no visible damage or obvious mechanical problem.)

**54**  It is reasonable to infer that the boat's sudden and violent veer to one side was caused by some defect in the boat. It is not possible to determine the particular defect because the boat is no longer configured as it was: the boat's cable steering was replaced in August 2001 with hydraulic steering.

1. Was the lodge negligent?

**55**  The plaintiff pleads that the defendant was negligent in equipping the boat with a defective steering system. While I am satisfied that there was a defect in the boat, it is not possible to determine the nature or cause of the defect. I am not able to infer that the defect itself arose from the lodge's actions. The defect may have been caused by the manufacturer of the steering system. The evidence does not allow me to exclude this as a possible cause of the defect in the boat. Therefore, the plaintiff has not satisfied me that the defect itself was due to ***negligence*** by the lodge.

**56**  However, I am satisfied that the lodge had a duty to warn Mr. Cuppen of dangers it knew or ought to have known of in using the boats.

**57**  A manufacturer or a supplier is required to warn all those who may be reasonably affected by potentially dangerous products: Lambert v. Lastoplex Chemicals Co., [*[1972] S.C.R. 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B021-00000-00&context=) and Hollis v. Dow Corning Corp., [*[1995] 4 S.C.R. 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3MF-00000-00&context=).

**58**  As the Supreme Court of Canada noted in Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. [*[1997] 3 S.C.R. 1210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WX-00000-00&context=) at para. 22:

Liability for failure to warn is based not merely on a knowledge imbalance ... It is based primarily on the manufacture or supply of products intended for the use of others and the reliance that consumers reasonably place on the manufacturer and supplier. Unless the consumer's knowledge negates reasonable reliance, the manufacturer or supplier remains liable.

**59**  In Hollis, the Supreme Court of Canada said that a manufacturer of a product has a duty to warn customers of dangers it knows or ought to know are inherent in the products used. The duty is a continuing one, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered. In Hollis, Dow had received reports of unexplained ruptures of breast implants. The Supreme Court of Canada found that Dow had a duty to convey this information to the medical community, that arguments based on the assumption that Dow only had the obligation to warn once it had reached its own definitive conclusions with respect to the cause and effect of the unexplained ruptures failed. Although the number of ruptures was statistically small over the relevant period and the cause of the ruptures was unknown, Dow had an obligation to take into account the seriousness of the risk posed by the potential rupture. It was precisely because the ruptures were "unexplained" that Dow should have been concerned. It would not have been onerous for Dow to have included an update in their product inserts to the effect that "unexplained" ruptures had been reported.

**60**  I am not able to distinguish the circumstances of this case from those in Hollis. Here, as in Hollis, the Queen Charlotte Lodge had received reports of "unexplained" problems guests were experiencing with the boats. Before the Cuppen accident, seven guests had reported steering difficulties in their guest summaries. Two of those specifically described the steering as dangerous. The difficulty that the guests were experiencing with the boats remained unexplained because Queen Charlotte Lodge did not contact the guests to inquire about the problems they were experiencing and, with the benefit of that information and knowing the number of the boat that the guest was using, conduct a proper investigation to determine the nature of the problem. Instead, Mr. Crawford and Mr. Higgs dismissed the guests' complaints as operator error.

**61**  Queen Charlotte Lodge's obligation to warn did not arise only when it had its own definitive conclusions with respect to the cause and effect of the "unexplained" difficulties the guests were experiencing. As in Hollis, the number of complaints was statistically small and the cause of the difficulty was unknown, but the Queen Charlotte Lodge had an obligation to take into account the seriousness of the risk posed by such a steering difficulty. At least two of the guests had notified the lodge that the steering could be dangerous.

**62**  There is no legitimate reason that an entity in the position of Queen Charlotte Lodge, supplying vessels to paying guests, would not have a duty to warn the guests of a potential danger in the use and operation of its vessels. Although Mr. Cuppen had operated similar boats before, his experience was not sufficient to negate reasonable reliance, particularly reliance on the supplier to advise him of warnings that it had received from other guests.

**63**  Here, as in Hollis, the reports of difficulties were admitted in evidence at trial for the purposes of establishing that the lodge had received the reports, not for the truth of their contents, except where the authors of the reports were called to give evidence and confirmed their reports.

**64**  As in Hollis, Queen Charlotte Lodge had a duty to convey its knowledge of the "unexplained" guest difficulties: given the danger inherent in the use of a boat on the open water and the likelihood of injuries should the guest experience difficulty with steering, such as that described in the reports, there was a high onus on Queen Charlotte Lodge to alert its guests to the possible problem. The lodge would have the same duty to warn, whether the steering difficulty which I have described is considered a defect (as I have concluded) or merely a feature of the boat.

**65**  As in Hollis, Queen Charlotte Lodge had a duty to keep its guests apprised of problems "even if they do not consider those developments to be conclusive." In Hollis the court noted:

Dow attempted to justify its recalcitrant warning practices by arguing that the numbers of "unexplained" ruptures were small over the relevant period ... and by arguing that "unexplained" ruptures, being unexplained, are not a distinct category of risk of which they could realistically have warned. In my view, these arguments failed because both are based upon the assumption that Dow only had the obligation to warn once it had reached its own definitive conclusions with respect to the cause and effect of the "unexplained" ruptures. This assumption has no support in the law of Canada. Although the number of ruptures was statistically small over the relevant period, and the cause of the ruptures was unknown, Dow had an obligation to take into account the seriousness of the risk posed by a potential rupture to each user of a Silastic implant. Indeed, it is precisely because the ruptures were "unexplained" that Dow should have been concerned.

1. Did Queen Charlotte Lodge's failure to warn cause Mr. Cuppen's injury?

**66**  Had Mr. Cuppen been alerted to the difficulties that others were reporting with steering, Mr. Cuppen would have increased his vigilance and it is likely that the accident would not have happened. Mr. Cuppen was an experienced boater. He was not a professional boater as were the staff at Queen Charlotte Lodge. However, he had operated similar boats for a number of years and was experienced in fishing in the Queen Charlottes. He was aware that boats could be dangerous. I am satisfied that had he been alerted that other guests, also experienced in fishing in the Queen Charlottes, found the boats to be difficult to control or were having difficulty with the steering, he would have increased his vigilance and likely would not have been injured.

**67**  Was the warning provided by Mr. Foerter sufficient? A warning must be reasonably communicated to the user and must clearly describe the specific danger (Hollis). Mr. Foerter's after-dinner speech was not attended by all of the guests. The lodge made no effort to ensure that the concerns about the boats were brought to the attention of each person operating the boats. The warning was not sufficient.

**68**  In summary, I am satisfied that the lodge was negligent in failing to take adequate steps when it knew or ought to have known that its guests were having difficulty operating the boats. The lodge received complaints in writing and in person from the guests complaining of problems operating the boats, in particular with the steering of the boats. Because the lodge keeps no record of the particular boat used by a particular guest, it is not possible to determine which of the boats were the subject of these complaints. More than one boat was involved, because some the guests complaining were operating the boats at the same time, as were Mr. Cuppen and Mr. Outhwaite. It is clear, from the evidence of Mr. Higgs and Mr. Crawford that, having received the reports from guests that the steering was difficult or dangerous, the lodge took no steps to determine the nature of the problem that the guests were experiencing, or which of the boats were involved.

**69**  Although Mr. Crawford said that he checked the vessels after one set of guests left and before the next set used the boats, checking the vessels without information from guests as to the problems they were experiencing with the vessel would be ineffective.

**70**  The lodge could readily have determined the nature of the problems that the guests reported and which vessels were involved by contacting the guests at the telephone numbers and email addresses provided by the guests. The lodge failed to do so.

**71**  Having notice of these reports, the lodge could readily have provided an adequate warning to each of the guests before the guests took the boats out.

**72**  Alternatively, the lodge could have replaced the cable steering systems with hydraulic steering systems, as it did later in the season.

**73**  The lodge failed to meet the standard of care to be expected of a fishing lodge in the Queen Charlottes in that having received notice from its guests that the guests were experiencing steering difficulties which could be dangerous, the lodge took no steps to address the situation.

1. Was Mr. Cuppen contributorily negligent?

**74**  The defendant argues that Mr. Cuppen was contributorily negligent because he was not using a kill switch when operating the boat. The defendant has not satisfied me that using the kill switch would have prevented or lessened Mr. Cuppen's injury. The kill switch is a coiled plastic cable which attaches at one end to the operator of the boat and at the other to the key. Its purpose is to switch the engine off by pulling the key if the operator moves beyond the reach of the cable. The cable in this case was approximately 3 to 4 feet long. I am not satisfied that using a kill switch would have avoided or lessened Mr. Cuppen's injury. Mr. Cuppen said that when the boat veered he was thrown violently into the metal rail on the side of the boat, striking his hip. The metal railing on the boat was bent by the force. The pictures of the railing show a very sturdy metal bar. Various witnesses confirmed that the railing was sturdy and would require a significant force to bend. I accept Mr. Cuppen's evidence that he was thrown into this railing when the boat first veered. The kill switch is not designed to and would not restrain Mr. Cuppen, preventing him from being thrown into the rail. At most, it may have caused the engine to turn off, bringing the boat to an eventual stop. There is no evidence to satisfy me that Mr. Cuppen's injury would have been any different, had the boat coasted to a stop.

1. Did Mr. Cuppen voluntarily assume the risk of injury?

**75**  Mr. Cuppen did not agree to waive any claim for ***negligence*** against the lodge. He was not warned of the difficulty other guests were experiencing with the boats, so was not aware of the specific risks. He did not consent to accept the risk of injury. This defence fails.

VII. DAMAGES

1. Damages for Pain and Suffering

**76**  The parties are agreed that the quantum for pain and suffering is $100,000.

1. Special Damages

**77**  The parties are agreed that Mr. Cuppen incurred special damages of $11,625.

1. Pecuniary Loss

**78**  The plaintiff claims for pecuniary loss, arising primarily from the loss of one of Mudmaster's most significant clients, Anderson. In the fall of 2001 Anderson was taken over by another oil and gas company, Devon. Mr. Cuppen had already experienced a takeover of this account when Anderson had taken over his client Ulster. The Ulster/Anderson/Devon account was one Mudmaster's largest accounts. It was a demanding account and required a lot of hands-on attention from Mr. Cuppen. After his accident in June 2001, Mr. Cuppen was not able to attend to the account personally. He assigned responsibility for the account to one of his employees, Mr. Niewensteeg. Mr. Niewensteeg was relatively junior in the business and, although he made his best efforts, was not able to maintain contact with the contacts at Devon as had Mr. Cuppen. The oil industry, perhaps in common with many industries, expects senior members of supply firms to deal with senior members of drilling teams. Mr. Niewensteeg found that Mr. Cuppen's contacts were not very willing to deal with him and would ask him repeatedly when Mr. Cuppen was returning. Mr. Niewensteeg said that the sales to the Devon account through 2002 were the result of Mr. Cuppen's efforts before his injuries. Sales diminished over time until March of 2003 when Devon stopped purchasing from Mudmaster. Mudmaster sales to Devon in 2002 totalled $789,303 and in 2003 $329,243. The plaintiff has introduced expert evidence which quantifies the loss of profits in 2003 at $141,680.

**79**  Mr. Cuppen is confident that had he not been injured, he would have been able to maintain his existing contacts at Devon and make new contacts, such that the business would have been maintained at its 2002 levels. Mr. Cuppen had successfully weathered an earlier takeover, when his client Ulster was taken over by Anderson. He is confident that he could have maintained sales, despite changing professional staff. The plaintiff claims pecuniary loss from the accident to date and for an additional 4 years into the future. The plaintiff quantifies this loss at $316,680 to trial and $560,000 after trial, based on an annual loss of profit of $141,680, the difference between the 2002 sales, generated by Mr. Cuppen's efforts in 2001 and the reduced level of sales in 2003.

**80**  Mudmaster is attempting to renew its contacts with Devon. A junior sales person is currently contacting junior engineers at Devon with a view to making contacts and eventually generating sales.

**81**  Mr. Cuppen's contacts at Anderson remained with Devon for a considerable time, some 1 - 2 years after his injuries. Devon continued to drill in the areas where Mudmaster had been making sales. Although Devon switched from water-based to oil-based drilling muds, Mudmaster had provided such drilling muds in the past and was able to provide such drilling muds. However, since 2003, Mudmaster has made no sales to Devon, even though Mr. Cuppen was back to work in early 2003. I am not satisfied that the loss of sales after March 2003 was due to Mr. Cuppen's injury.

**82**  The plaintiff advanced the claim for the company's loss, arguing the alter ego' line of cases. The issue, however, is not Mudmaster's loss of business, but the proper measure of Mr. Cuppen's loss of opportunity: Rowe v. Bobell Express Ltd., [*[2005] B.C.J. No. 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=), [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=).

**83**  I am satisfied that the injuries that Mr. Cuppen sustained in the accident prevented him from generating sales as he usually would until early 2003.

**84**  Mr. Cuppen had the ability to generate sales, resulting in an annual profit of $141,680. Because of this accident, he was not able to generate those sales for approximately 20 months. He continues to be somewhat less able to engage in promotional activities and may generate a somewhat lower level of sales than he would, had he not been injured. Considering the pros and cons, and the relative likelihood of these hypothetical events, I assess his loss of opportunity at $235,000.

1. Past Income Loss

**85**  Mudmaster paid Mr. Niewensteeg $48,842 in commissions for sales to the Devon account, to compensate Mr. Niewensteeg for his efforts to maintain the Devon account. Ultimately, his efforts were not successful. The payment was a reasonable effort on Mr. Cuppen's part to mitigate his damages. Because he and Jack Cuppen share the Mudmaster profits, Doug Cuppen has lost $24,421 that would otherwise have been paid to him and is entitled to recover this amount in damages. The plaintiff advanced an "in trust" claim for Jack Cuppen for his share of $48,842, but could not provide authority for such a claim.

1. LIMITATION ON LIABILITY

**86**  The defendant submits and the plaintiff acknowledges that the Marine Liability Act, [*S.C. 2001, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S222-00000-00&context=) applies to limit the amount of damages the plaintiff may recover in this action. The plaintiff submits that the applicable section is Part 3, s. 28(1) which provides the maximum liability of $1 million. The defendant argues that Part 4 of the Act applies and the limit of liability is $350,000.

**87**  I have concluded that it is Part 3, s. 28 that applies to this claim, and that the limitation of liability is $1 million.

**88**  Part 4 of the Act provides for liability for carriage of passengers by water. For Part 4 to apply, the plaintiff must be a passenger for the purposes of the Convention (the Athens Convention, Part 1 of Schedule 2 to the Act). Article 1(4) of the Convention defines a passenger as the person carried in a ship, under a contract of carriage, or one who accompanies a vehicle or live animal which are covered by a contract for carriage of goods. A contract of carriage is defined as a contract made for the carriage by sea of a passenger. The carrier is defined as a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier.

**89**  Part 4 clearly applies to the normal contract of carriage i.e. that of one who is carried from one point to another by a carrier. Mr. Cuppen did not have a contract of carriage with the lodge. The lodge provided him with a boat, so that he could fish while he was a guest at the lodge. Thus, the appropriate limitation is not $350,000 pursuant to Part 4, but is $1 million pursuant to Part 3. The damages that I have awarded in this case are less than $1 million and I need not consider the matter further.

1. CONCLUSION

**90**  In summary, the plaintiff is entitled to the following damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | General Damages | $100,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Commission | $ 24,421 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of opportunity | $235,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $ 11,625 |  |
|  |  | -------- |  |
|  | TOTAL | $371,046 |  |

**91**  The plaintiff is entitled to costs at Scale 3, unless there are matters of which I am not aware, in which case the parties may make further submissions before me with respect to costs.

BROWN J.

**End of Document**

[***Ekman v. Cook, [2013] B.C.J. No. 2443***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3Y3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G. Weatherill J.

Heard: October 15-17, 2013.

Judgment: November 7, 2013.

Docket: M115107

Registry: Vancouver

**[2013] B.C.J. No. 2443** | 2013 BCSC 2027

Between Roger Ekman, Plaintiff, and Lynn Marie Cook and William Joseph Cook, Defendants

(80 paras.)

**Case Summary**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — *Negligence* — Turns — Liability — Civil actions — Operator — Owner — *Negligence* — Action by motorcyclist for damages for injuries sustained in motor vehicle accident allowed in part — Motorcyclist sustained serious injuries when he collided with defendant's truck as he was attempting to pass and defendant made left turn — Defendant ought to have been alive to possibility of passing vehicle and she should done mirror and shoulder check — Plaintiff should have used caution in attempting to pass — Plaintiff was 75 per cent liable for accident and defendant truck driver was 25 per cent liable — Defendant truck owner was vicariously liable for defendant driver's *negligence*.**

|  |
| --- |
| Action by a motorcyclist for damages for injuries sustained in a motor vehicle accident. The female defendant (the "defendant") was driving a truck owned by her son, the male defendant, with his consent. The truck was towing a horse trailer containing one horse. The defendant was stopped on the roadway waiting to make a left-hand turn into her driveway. The plaintiff was travelling in the same direction, at least one vehicle behind the defendant. The accident occurred when the plaintiff attempted to pass and the defendant turned left into the driveway. The plaintiff collided with the truck and sustained serious injuries.  HELD: Action allowed in part.  Both the plaintiff and the defendant failed to exercise the appropriate standard of care expected of them in the circumstances and were negligent, and their ***negligence*** caused the accident. The defendant knew she was driving slowly on a straight roadway where passing was permitted and she ought to reasonably have been alive to the possibility of a passing vehicle. She should have looked in her side mirror and done a shoulder check in a manner timely to the commencement to her left turn. It was incumbent upon the plaintiff to proceed with caution while attempting to pass. The plaintiff was in the better position to assess the circumstances and avoid the accident. It should have been evident to him that the traffic ahead was stopped for a reason, including the possibility that a vehicle ahead of him was preparing to make a left hand turn. The appropriate apportionment of liability was 75 per cent to the plaintiff and 25 per cent to the defendant. The defendant's son was vicarious liable for her ***negligence*** by virtue of s. 86 of the Motor Vehicle Act. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 86*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-60KK-00000-00&context=), s. 159, s. 160, s. 166

**Counsel**

Counsel for the Plaintiff: K. Gourlay, D. Robertson, A/S.

Counsel for the Defendants: J. W. Joudrey, C. V. Morcom.

**Reasons for Judgment**

|  |
| --- |
| **G. WEATHERILL J.** |

**INTRODUCTION**

**1**  This is the trial on the issue of liability for an accident that occurred on June 11, 2011 on a rural street in Surrey British Columbia.

**2**  The accident occurred on 16 Avenue west of its intersection with 184 Street. Lighting and weather were not contributing factors. It was a flat and straight paved roadway. There was one lane in each direction, separated by a broken yellow line signifying that passing was permitted.

**3**  The defendant, Lynn Marie Cook ("Ms. Cook"), was driving westbound on 16 Avenue in a 2002 Ford F250 pick-up truck ("Truck") owned by her son, the defendant William Joseph Cook, with his consent. The Truck was towing a horse trailer ("Trailer") containing one horse. It was approximately eight feet tall.

**4**  Ms. Cook intended to turn left into the driveway ("Driveway") of her property, Thunder Valley Ranch, located at 18150 16 Avenue. She and the traffic behind her had slowed to nearly a complete stop.

**5**  The plaintiff was also driving westbound along 16 Avenue. He was driving a motorcycle behind the Truck and Trailer and at least one other vehicle.

**6**  The accident occurred when the plaintiff was attempting to pass those vehicles and the Truck turned left to enter the Driveway. The plaintiff's motorcycle collided with the Truck in the area immediately ahead of the rear wheel-well on the driver's side. The plaintiff sustained serious injuries.

**EVIDENCE AT TRIAL**

**A. The Plaintiff's Case**

***The Plaintiff***

**7**  The plaintiff was 40 years old at the time of the accident. He described himself as a "moderately" experienced and "cautious" motorcycle rider.

**8**  As a result of his injuries, including a head injury, the plaintiff remembers nothing of the accident itself. He does recall that prior to the accident he had been on a motorcycle trip from Surrey to Chilliwack with two others whom he had met that day through an internet motorcycle social network.

**9**  Subsequent to the accident, the plaintiff attended the scene and measured the width of the eastbound lane to be ten feet, seven inches. He confirmed that the posted speed limit at the stretch of 16 Avenue where the accident occurred was 60 km/h.

**10**  The plaintiff agreed on cross examination that, if the traffic ahead of him on 16 Avenue was stopped, it was likely stopped for a reason.

**11**  The plaintiff was charged with an offence, presumably under the *Motor Vehicle Act*. The police officer who laid the charge did not show up at trial. The charge was dismissed.

***Joel Bellefleur***

**12**  Mr. Bellefleur met the plaintiff for the first time on the day of the accident. He, the plaintiff and a woman were introduced through an on-line motorcycle site. They rode their respective motorcycles together from Surrey to Chilliwack and had lunch.

**13**  The plaintiff and Mr. Bellefleur returned to Surrey together without the woman they had been travelling with. The plaintiff took the lead as he was more familiar with the route than Mr. Bellefleur was.

**14**  Mr. Bellefleur recalls that they proceeded westbound on 16 Avenue through the traffic lights at 184 Street. He was approximately one to two motorcycle lengths behind the plaintiff.

**15**  The traffic ahead of them slowed down and had almost stopped when the plaintiff turned into the eastbound oncoming lane to pass the almost stopped vehicles ahead of them.

**16**  Mr. Bellefleur also turned into the eastbound lane to follow the plaintiff, but he saw a vehicle approaching in the eastbound lane. He concluded that, although there was sufficient time and distance for the plaintiff to pass safely, there was insufficient time and distance for him to do so. Just as he made his decision to abort an attempt to pass the westbound vehicles, the Truck turned left across the eastbound lane directly into the plaintiff's path and the collision occurred.

**17**  The existence of the Driveway was not readily apparent. Mr. Bellefleur did not see the left turn signals on the Truck and Trailer were in operation.

**18**  On cross examination, Mr. Bellefleur agreed that, although he had felt safe following the plaintiff's lead during their trip to and from Chilliwack, there were instances shortly before the accident when, in his judgment, he felt the plaintiff was taking risks passing other vehicles.

***Nino Bucceri***

**19**  Mr. Bucceri was the driver of the eastbound vehicle that Mr. Bellefleur had seen and that caused him to decide not to attempt to pass the westbound vehicles. Mr. Bucceri testified that there was no other eastbound traffic.

**20**  He saw one motorcycle and then a second pull out of the westbound lane into the eastbound lane. He was not concerned. He felt the motorcycles had sufficient time and room to pass the westbound vehicles. In his words, "they were quite a distance away", a couple of hundred meters.

**21**  Seconds later, the Truck turned slowly into the eastbound lane to enter the Driveway.

**22**  He was unable to say whether or not the Truck's turn signal was on prior to it commencing its turn.

**23**  The collision occurred a couple of seconds after the Truck began its left turn. It had not yet entered the Driveway at the time of the collision. He did not actually witness the impact because it occurred on the side of the Truck that was not visible to him.

**24**  He could not recall the discussion he had with the R.C.M.P. officer after the accident.

***Vanessa Bucceri***

**25**  Ms. Bucceri was a passenger in the eastbound vehicle being driven by her husband, Mr. Bucceri.

**26**  Ms. Bucceri testified that there was no other eastbound traffic. There was some oncoming westbound traffic.

**27**  She saw two motorcycles pull out from behind the westbound traffic into the eastbound lane, one ahead of the other. She estimated the distance between her vehicle and the motorcycles was approximately 200 to 300 meters. She too was not concerned because she felt that the motorcycles had sufficient time and distance to safely pass the westbound vehicles.

**28**  A few seconds later, the Truck began to slowly and gradually turn left into the eastbound lane. She did not see whether or not its turn signal was on. She did not see the collision because it occurred on the side of the Truck that was not visible to her.

**B. The Defendants' Case**

***Lynn Marie Cook***

**29**  Ms. Cook was driving the Truck at the time of the accident. She was driving her daughter and her daughter's friend, Ashley Henry, home from a horse riding event. She testified that, both when she hooked up the Trailer to the Truck earlier that day and when she left the event, she confirmed that the Trailer's brake and signal lights were operating properly.

**30**  Ms. Cook estimated the Trailer's length to be 10 to 12 feet. On cross examination, her examination for discovery transcript was put to her in which she had testified that the trailer's length was 16 feet.

**31**  Ms. Cook testified that the distance along 16 Avenue from the intersection of 184th Street and the Driveway is approximately 300 meters. The Driveway was marked with an orange traffic cone on one side and a mail box on the other.

**32**  Ms. Cook estimates that her speed after the 184 Street intersection increased to approximately 30 to 40 km/h before she began to slow down and put her left turn signal light on. She noticed that there were vehicles behind her.

**33**  She testified that she came to a complete stop because one or two eastbound vehicles had to go by before she could turn. Once that traffic cleared, she began her left turn. There was an oncoming vehicle in the eastbound lane approximately 500 meters away.

**34**  She testified that, before commencing the turn, she looked over her left shoulder and did not see the motorcycles.

**35**  On cross examination, the plaintiff said that she also checked the Truck's side mirrors prior to turning. However, in the statement she provided to ICBC three days after the accident, she did not mention having looked in the mirrors. She only mentioned doing a shoulder turn.

**36**  During her examination for discovery, she twice failed to mention checking the mirrors when asked whether she had turned directly from where she had stopped or whether she had accelerated in the westbound lane before commencing the turn. Again, she mentioned only a shoulder turn. However, later in her examination for discovery she did state that she also checked the mirrors.

**37**  Ms. Cook testified that it typically takes approximately 30 seconds to complete the turn from 16 Avenue to the Driveway with the Truck towing the Trailer. On cross examination, her examination for discovery transcript was put to her in which she stated that the turn takes approximately eight to 10 seconds.

**38**  She testified that she began to turn at approximately 5 km/h and that all four tires of the Truck had reached the gravel of the Driveway when the collision occurred. She did not see the motorcycle before the collision. She also testified that she believes Ms. Henry told her she had not seen the motorcycles prior to the accident either.

**39**  Ms. Cook testified that she did not move the Truck after the collision.

**40**  Ms. Cook retained counsel three days after the accident to advance a claim on her behalf.

***Ashley Henry***

**41**  Ms. Henry and Ms. Cook's daughter are friends. Both were passengers in the Truck at the time of the accident. Ms. Henry was seated in the rear seat on the driver's side.

**42**  Ms. Henry described the traffic along 16 Avenue as average. In the Truck's wide side mirror she noticed two motorcycles weaving in and out of the traffic behind the Truck.

**43**  The Truck proceeded westbound after the intersection at 184 Street. She heard the noise of the signal light come on. She testified that the Truck came to a complete stop to wait for oncoming traffic to clear.

**44**  Just as the Truck began to turn left across the eastbound lane, she looked behind because she was concerned the weaving motorcycles were going to try to pass the Truck. She saw a motorcycle collide into the Truck. She believes that the Truck was touching the gravel Driveway but was unable to say how far into the Driveway it was at the time of the collision.

**45**  Ms. Henry testified that, after the accident, the plaintiff was found behind the rear wheel of the Truck either under or near it. Ms. Cook moved the truck forward to make room for those who were attending to the plaintiff.

**46**  After the accident, Ms. Cook and Ms. Henry checked the brake and signal lights of the Truck and Trailer and found them to be in working order.

**47**  On cross examination, Ms. Henry stated that, since the accident, she had not spoken with Ms. Cook about it.

**48**  It was also put to her that she did not mention the weaving motor cycles to either the police or to Ms. Cook immediately after the accident. She had no explanation for not having done so.

***Deidre Reid***

**49**  Ms. Reid was the front seat passenger in a vehicle being driven by her husband. They had been driving westbound along 16 Avenue for some distance. She described the traffic as quite heavy.

**50**  She testified that two motorcycles passed her vehicle in what she described as a "reckless" manner, travelling at speeds that were substantially higher than the speed of the other traffic along 16 Avenue, pulling out and in between the vehicles.

**51**  Her vehicle stopped at a red traffic light at the intersection of 16 Avenue and 184 Street. The Truck and Trailer were first in line, then another car, then the two motorcycles (the same motorcycles she described earlier), then another vehicle and then Ms. Reid's vehicle. When the light turned green, these vehicles began to accelerate and then slowed down fairly quickly. She could not recall whether they came to a stop but testified that her speed was a maximum of 20 to 25 km/h.

**52**  She saw that the Truck's left turn signal light was on. It was obvious to her that the driver was intending to make a left turn. Ms. Reid agreed on cross examination that the fruit stand on the right side of 16 Avenue was very visible to traffic and that the Driveway on the left side was difficult to see.

**53**  She testified that, approximately one to two seconds after she saw the Truck's left turn signal and just after the Truck began to make a left turn, the lead motorcycle turned into the eastbound lane to pass the vehicles ahead of it, followed by the second motorcycle. Ms. Reid gasped. The collision occurred one to two seconds later. Shortly before the collision, she saw the first motorcycle brake hard enough for the rear wheel to lift off the ground. The total time between when she saw the Truck's turn signal and the collision was approximately 3 to 4 seconds.

**54**  Ms. Reid estimated that the plaintiff's motorcycle accelerated from almost stopped to approximately 40 to 50 km/h prior to the collision.

***Constable Bonnie Sauve***

**55**  Cst. Sauve has been an R.C.M.P. officer for approximately five and one half years. She was on duty on June 11, 2011 and attended the scene of the accident. She observed the plaintiff lying on the road. It appeared to her that his legs were pinned underneath the Truck.

**56**  Cst. Sauve examined the Truck and Trailer and determined that all signal lights were in working order.

**57**  Cst. Sauve testified on cross-examination that, during her interview of Ms. Henry, no mention was made by Ms. Henry that she had seen the motorcycles prior to the accident.

**ANALYSIS**

**58**  Liability in motor vehicle accident cases is determined on their individual facts: *Shallow v. Dyksterhuis*, [*2013 BCSC 1761*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23DS-00000-00&context=) at para. 16.

**59**  Although not in and of itself a basis for a finding of ***negligence***, the *Motor Vehicle Act* does set out the respective obligations of drivers who are passing on the left and of drivers who are making a left turn.

**60**  A driver passing another vehicle must not do so unless it can be done safely having regard for all the circumstances:

**Passing on left**

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

**Clear view on passing**

160 A driver of a vehicle must not drive to or on the left side of the roadway, other than on a one way highway, unless the driver has a clear view of the roadway for a safe distance, having regard for all the circumstances.

**61**  A driver turning left is obliged to look out for both oncoming traffic and traffic from behind:

**Turning left other than at intersection**

166 A driver of a vehicle must not turn the vehicle to the left from a highway at a place other than an intersection unless

1. the driver causes the vehicle to approach the place on the portion of the right hand side of the roadway that is nearest the marked centre line, or if there is no marked centre line, then as far as practicable in the portion of the right half of the roadway that is nearest the centre line,
2. the vehicle is in the position on the highway required by paragraph (a), and
3. the driver has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway.

**62**  The leading British Columbia authority on the relative duties of drivers when passing is *Samograd v. Collision*, [*[1995] B.C.J. No. 2597*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=), [*1995 CarswellBC 1106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=) (C.A.), aff'g [*[1993] B.C.J. No. 2950*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S36C-00000-00&context=), [*1993 CarswellBC 2649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S36C-00000-00&context=) (S.C.). In that case, the appellant on his motorcycle was passing the respondent on a highway. The appellant did not see that the respondent's left turn signal light was on. The respondent looked in his rear-view mirror but did not look in his side mirror before commencing to turn left. The trial judge apportioned liability 40:60 against the plaintiff. The Court of Appeal upheld that finding but, in the process, stated that the law does not impose a greater obligation on the passing vehicle or on the left-turning vehicle. Both drivers' obligations are to be assessed in relation to the circumstances they face. A relevant consideration is which of them had the better opportunity to see the potential for a collision before it occurred and therefore had a correspondingly greater opportunity to avoid it.

**63**  It is not unusual in actions involving motor vehicle accidents for witnesses, both those who are parties with something to gain or lose and those who are non-parties with nothing to gain or lose, to give evidence regarding estimates of speed, dimensions and distance with exactitude and to testify based upon habit rather than distinct recollection. That is not a criticism. It is human nature to attempt to assist the finder of fact. In such circumstances, the court must do its best to determine the course of events with a discerning eye for this phenomenon. That is the situation in this case.

**64**  Mr. and Ms. Bucceri testified that there was no other eastbound traffic. Ms. Cook and Ms. Henry testified that they had to wait for other eastbound traffic to clear before Ms. Cook could make the turn. Neither Ms. Reid nor Mr. Bellefleur mentioned that there was any other eastbound traffic.

**65**  Mr. and Mrs. Bucceri testified that they were 200 to 300 meters away from the Truck when the accident occurred. Ms. Cook testified that the Bucceri vehicle was 500 meters away.

**66**  Ms. Cook and Ms. Henry testified that the Truck had come to a complete stop. Ms. Reid and Mr. Bellefleur thought that the traffic had almost stopped.

**67**  When given four separate opportunities to do so, once in her statement to ICBC, twice during her examination for discovery and once during her evidence in chief, Ms. Cook made no mention of looking in the side mirrors before commencing her turn. Her later evidence during her examination for discovery and on cross-examination that she had looked in the mirrors was more suggestive of her habit of doing so rather than of a recollection that she did so at the time of the accident.

**68**  Ms. Cook testified during her evidence in chief that it takes 30 seconds for the Truck and Trailer to complete a turn into the Driveway. During her examination for discovery, she estimated that time to be eight to 10 seconds.

**69**  Ms. Reid testified that the Truck commenced its left turn immediately before the plaintiff pulled into the eastbound lane to pass. The Bucceris and Mr. Bellefleur testified that the plaintiff pulled out to pass seconds before the Truck began to turn.

**70**  Ms. Cook testified that all four wheels of the Truck were on the gravel Driveway at the time of the accident. Ms. Henry believes that the Truck had just entered the Driveway when the impact occurred. Lining up the skid marks shown in the police photographs with the point of impact on the Truck makes it the clear that only the front two wheels of the Truck could have been in the Driveway at the time of the collision. The photos also show that the impact occurred to the north of the solid white fog line on the south side of the eastbound land.

**71**  Ms. Henry testified that the Truck was moved forward immediately after the accident in order to extricate the plaintiff from under it. Ms. Cook said that the Truck was not moved.

**72**  Ms. Henry testified that she never spoke to Ms. Cook after the accident about it. Ms. Cook said they did discuss the accident.

**73**  Ms. Henry testified that she saw the motorcycles weaving in and out of traffic immediately prior to the accident, yet she made no mention of this to Cst. Sauve. Ms. Cook testified that she believes Ms. Henry made no mention of this to her either.

**74**  On the whole of the evidence, I find that Ms. Cook's recollections of time, distances, measurements and the steps she took to determine whether her left turn could be made safely is generally unreliable. I prefer the evidence of Mr. Bellefleur and of Mr. and Mrs. Bucceri, all of whom were disinterested parties. I also prefer the evidence of Ms. Reid except her evidence related to the timing of when the Truck began to turn in relation to when the plaintiff started to pass. It defies common sense that the plaintiff would begin to pass a vehicle as well as a large pickup truck towing a horse trailer when that Truck was already occupying the eastbound lane to turn left. Each of the Bucceris and Mr. Bellefleur testified that the plaintiff pulled out to pass before the Truck began to turn.

**75**  I am satisfied on the whole of the evidence that the following is probably what happened:

1. the Truck slowed down to make a left turn. Ms. Cook turned the Truck's and Trailer's left turn signal lights on. They were operating properly;
2. shortly after the signal lights were activated, the plaintiff accelerated to pass the westbound vehicles and did not see the signal lights;
3. there was no eastbound traffic approaching other than the Bucceri vehicle, which was approximately 300 meters away. If there had been other oncoming traffic, the plaintiff would have had to wait for it to clear before starting his passing manoeuvre;
4. Ms. Cook felt she had enough time to safely turn the Truck and Trailer into the Driveway before the Bucceri vehicle reached her. She slowed down to a near, but not complete, stop before commencing the left turn into the Driveway. Her focus was on the approaching Bucceri vehicle and was not on the vehicles behind her. She either did not perform a shoulder check or look in the Truck's side mirror before commencing the turn or, if she did, she did not do so immediately prior to commencing her left turn, otherwise she would have seen the plaintiff's motorcycle that had started to pass a matter of seconds before;
5. Ms. Cook began to make a left turn while the plaintiff was passing the vehicle that was immediately behind the Truck and Trailer. The plaintiff had accelerated to the point that he was probably exceeding the posted speed limit of 60 km/h. The skid marks shown in the police photographs confirm that the plaintiff braked hard and skidded for more than the length of the Trailer before impact. That is circumstantial evidence as to where the plaintiff was on the road when he became aware that Ms. Cook was turning left; and
6. the impact occurred when the Truck was straddling the white fog line along the south side of the eastbound lane.

**76**  Ms. Cook knew she was driving slowly towing a horse trailer along a straight roadway where passing was permitted. She ought reasonably to have been alive to the possibility of a passing vehicle. She should have looked in her side mirror and done a shoulder check in a manner timely to the commencement of her left turn. If it is true that Ms. Henry noticed weaving motorcycles and was concerned they were going to try to pass, so too should Ms. Cook have.

**77**  Each of the plaintiff and Ms. Cook were obliged to ensure that their respective manoeuvre could be performed safely. I find on the balance of probabilities that both the plaintiff and Ms. Cook failed to exercise the appropriate standard of care expected of them in the circumstances and was negligent and that their respective ***negligence*** caused the accident. Each is partly liable for the accident.

**78**  I also find that, of the two of them, the plaintiff had the better opportunity to assess the circumstances and avoid the collision. It should have been evident to him that the traffic ahead of him had slowed almost to a stop for a reason, including the possibility that a vehicle ahead of him was preparing to turn left. The Truck/Trailer's left turn signal should have been evident to him. It is incumbent upon drivers who are uncertain as to what is going on ahead of them on a highway to proceed with caution when attempting to pass. The plaintiff did not do so.

**79**  In my view, the appropriate apportionment of liability is 75% to the plaintiff and 25% to Ms. Cook. The defendant William Joseph Cook is vicariously liable for Ms. Cook's ***negligence*** by virtue of s. 86 of the *Motor Vehicle Act.*

**80**  The parties are at liberty to make submissions as to costs.

G. WEATHERILL J.

**End of Document**

[***Fairley (Guardian ad litem of) v. Waterman, [2002] B.C.J. No. 3***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-6198-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Wong J.

Heard: June 18 - 22, 25 - 29 and September 24, 2001.

Judgment: Janaury 3, 2002.

Vancouver Registry No. C983119

**[2002] B.C.J. No. 3** | 2002 BCSC 10 | 110 A.C.W.S. (3d) 561 | [2002] B.C.T.C. 10

Between Braeden Fairley, an infant, by his Guardian ad litem, Bree Erin Fairley and the said Bree Erin Fairley, plaintffs, and Dr. D.H. Waterman, the Fraser-Burrard Hospital Society as operators of the Royal Columbian Hospital, defendants

(88 paras.)

**Case Summary**

**Torts — *Negligence* — Standard of care, particular persons and relationships — Medical doctors and medical personnel.**

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| Trial of an action by the infant, Fairley, by his guardian ad litem, against the doctor, Waterman, and others, alleging that the doctor was negligent. Fairley was a twin. He was delivered by Waterman about one hour after his brother. He suffered a catastrophic brain injury due to lack of oxygen at or shortly before his birth. Waterman did not notice anything abnormal on the fetal heart monitoring strips until just before he delivered Fairley. His evidence was that when the strips began indicating that Fairley was having difficulties, he acted promptly to deliver him. Two of the doctors who gave evidence reviewed the explanations offered by Waterman at discovery for the decisions he made during the delivery. Both of these doctors were specialists and one was an internationally renowned expert. They concluded that the strips did not indicate a basis for intervention until 6:10, when Waterman began to intervene. A third doctor, who did not review Waterman's explanations at discovery, believed that the strips indicated intervention was required at 4:10. All of the experts agreed that interpretation of the strips was an art and not a science and that no two specialists would interpret the same strip in the same fashion.  HELD: Action dismissed.  Fairley did not establish on a balance of probabilities that Waterman failed to meet the standard of care. Since there were two schools of thought in respect of the interpretation of the strips, and both schools of thought were acceptable, the court could not retrospectively prefer one school of thought to the other. Adherence to either school of thought was an acceptable standard of care and, if Waterman made a simple clinical misjudgment, that misjudgment did not amount to ***negligence***. |

**Counsel**

N.H. Smith, Q.C., for the plaintiffs. C.E. Hinkson, Q.C., and R. Samtani, for the defendant.

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| **WONG J.** |

INTRODUCTION

**1**  This is a tragic case involving a catastophic brain injury suffered by the infant plaintiff Braeden Fairley prior to his birth. The infant plaintiff's injury was unfortunately unforeseen and unpredictable.

**2**  Whenever there is injury, there is a natural human inclination to find fault; ultimately reasoned consideration, though harsh, must prevail.

**3**  Braeden Fairley was born at Royal Columbian Hospital in New Westminster in October 25, 1997, one hour and 13 minutes after the birth of his twin brother Russell.

**4**  Braeden suffered a severe brain injury due to lack of oxygen at or shortly before the time of his birth. At four years of age, Braeden cannot walk or talk and there is no expectation that he will ever do either. He cannot eat normally and must be fed by a tube into his stomach. He has frequent seizures. He will be completely dependent on caregivers for the rest of what will probably be a greatly shortened life.

**5**  On causation, the evidence is clear that Braeden's brain injury is the result of a lack of oxygen at or shortly before birth. All of the established criteria for linking the adverse outcome with intra partum hypoxia were met in this case.

**6**  All of the experts who addressed the point agreed that there is a process of hypoxic injury beginning with the lack of oxygen, which eventually begins to show an abnormal heart rate pattern. This is eventually followed by acidosis, which is the actual mechanism of the brain injury. Abnormal heart rate patterns will persist for some time before the lack of oxygen produces acidosis. It was also agreed that if acidosis has begun the extent and severity of the resulting brain injury will depend on the period of time the lack of oxygen is allowed to continue.

**7**  Any delay in delivering when hypoxia is present will increase the risk of injury or aggravate any injury process that may have begun. Dr. Carson, the plaintiffs' expert, in his report stated that if Braeden had been delivered earlier, it is probable that the asphyxic incident would have been much less severe and he would have sustained no, or very much less, handicap.

**8**  The primary issue in this case is whether there were earlier signs of compromise, or at least sufficient uncertainty about the baby's condition that required the defendant Dr. Waterman to intervene earlier than he did. In other words, what did the fetal monitoring strips for the last two hours prior to Braeden's birth show and what the response to them should have been. It was apparent during this trial that no two specialists in obstetrics and gynaecology will interpret the same fetal heart strip in the same fashion.

**9**  The plaintiffs say Braeden's condition is the result of the ***negligence*** of the attending obstetrician Dr. Waterman.

**10**  It is Dr. Waterman's position that his interpretation of the fetal heart monitoring strip was within the standard of a reasonably competent obstetrician practising in New Westminster in 1997.

**11**  In circumstances where there are two competing and acceptable schools of thought the law is quite clear that adherence to either school (i.e. non-intervention versus intervention) is an acceptable standard of care, and a simple clinical misjudgment cannot amount to ***negligence***.

**12**  I have concluded that no ***negligence*** has been established. My reasons follow.

THE BACKGROUND

**13**  Mrs. Fairley was diagnosed by her family doctor, Dr. Sundvick, as having a twin pregnancy on or about April, 1997. A twin pregnancy by definition is a high risk pregnancy and accordingly she was referred to an obstetrician gynaecologist, Dr. Waterman, to provide both prenatal and intra-partum care.

**14**  Prior to his attendance on Mrs. Fairley, Dr. Waterman had provided prenatal care for women carrying twins and had delivered twins. In fact, by 1997, he had delivered 18 sets of twins. Of those 18 sets of twins, some were delivered vaginally and some by caesarean section. Dr. Waterman had no antipathy to delivery by way of caesarean section but he did note (as did all the obstetrical experts in this matter) that there are increased risks to both mother and fetus of delivery by way of caesarean section. Dr. Waterman further noted that the mortality rate for caesarean sections was four times that of the vaginal delivery.

**15**  Mrs. Fairly first attended on Dr. Waterman on August 22, 1997. She thereafter attended on him from time to time. The pregnancy was an uneventful twin pregnancy with exception of the development of hydronephrosis, a condition causing kidney pain resulting from pressure of the pregnant uterus, for which she received appropriate treatment and hospitalization.

**16**  Dr. Waterman provided thorough and complete prenatal care to Mrs. Fairley. This prenatal care included a detailed discussion of the risks involved in a twin pregnancy, hospitalization for hydronephrosis, frequent ultrasound referrals, referral for an amniocentesis, and steroid injections in an anticipation of a premature delivery. Dr. Waterman further gave consideration to carrying out an amniocentesis as he was considering carrying out a caesarean section, given the extreme pain Mrs. Fairley was suffering as a result of the hydronephrosis. The amniocentesis proved to be unnecessary as Mrs. Fairley's pain abated.

**17**  Mrs. Fairley agreed that she was happy with the prenatal care provided to her by Dr. Waterman. She further agreed that Dr. Waterman responded to concerns expeditiously. The plaintiff's obstetrical advisor, Dr. Carson, agreed on cross examination that Dr. Waterman was managing the pregnancy right up until the time of admission to the hospital with a high standard of care. Both Dr. Hudson and Dr. Williams concurred that Dr. Waterman provided appropriate prenatal care, with Dr. Hudson stating that Dr. Waterman was "diligent in identifying and pre-treating risk factors".

**18**  On October 24, 1997, at 2040 hours, while in hospital in respect of the hydronephrosis, Mrs. Fairley had a spontaneous rupture of her membranes (she was approximately 33 1/2 weeks' gestation at this time) and went into labour. Dr. Waterman attended her shortly thereafter at 2150 hours. At this stage she was in early labour contracting every three minutes. Both fetal hearts were monitored and found to be satisfactory. At 2300 hours she was in active labour and four centimetres dilated. Electronic fetal monitoring of the fetal hearts was reassuring.

**19**  On October 25, 1997, at 0210 hours, a vaginal examination was done indicating that the cervix was eight centimetres dilated (which is an indication of good progress). The cervix had become fully effaced at 0235 hours, and an epidural was placed. At 0245 hours, Dr. Waterman attended and carried out a vaginal examination, at which time the cervix was fully dilated. Dr. Sundvick was contacted and Dr. Cislak, a paediatric specialist, and the special care nursery were notified as to Mrs. Fairley's status.

**20**  Mrs. Fairley's labour continued to progress and at 0523, she delivered Twin A ("Russell"). Dr. Carson had stated that beginning from approximately 0410 onward, the fetal heart tracing in respect of Braeden was either non-reassuring or uncertain, and continued to be so until he was delivered. This is in significant contrast to the evidence of Drs. Williams, Hudson and Waterman. Drs. Williams and Hudson are of the view that the strip in respect of Braeden was not problematic and in fact, no intervention was indicated before 0610. Dr. Waterman's evidence is that the strip in conjunction with the ultrasound monitoring he was carrying out did not indicate there were any difficulties until approximately 0610, at which point he contacted the O.R.

**21**  Mrs. Fairley's evidence is that her recollection of events from the time of Russell's delivery at 05223 hours onward is "fuzzy". The lack of detailed recollection is reflected in her evidence that Dr. Waterman did not employ the use of ultrasound monitoring at any point during her labour and delivery after 0523 hours. As an aside, Constable Fairley, her husband, also failed to recall any ultrasound monitoring. The evidence of Dr. Waterman is clear that in fact from 0530 hours to 0600 hours, he did use ultrasound monitoring. The evidence is borne out by the evidence of Mrs. Fairley's current general practitioner, Dr. Sundvick, who was in attendance at the delivery. Dr. Sundvick stated that she recalls Dr. Waterman employing the use of ultrasound monitoring and further recalls Dr. Waterman instructing the attending nurse between the hours of 0530 hours and 0630 hours that it was the nurse's "goal in life to keep her hand on the fetal heart". Mrs. Fairley's recollection in this regard is therefore incorrect. The nursing notes which indicate the fetal heart reading in the period between 0530 and 0600 hours further corroborate Dr. Waterman, as these readings could have only been obtained via ultrasound monitoring.

**22**  The use of the ultrasound monitoring at this point is of some importance in that it is evidence of the type of care provided by Dr. Waterman. Dr. Hudson noted that an obstetrician faced with poor quality tracings had a limited number of options available to assess the well-being of the fetus. One option would have been to apply a fetal scalp electrode which could not be done in this case as Braeden's membranes had not been ruptured and the presenting part was too high to safely rupture those membranes for fear of a "prolapse" which is described as a "true obstetrical emergency." The same problem arises with the use of scalp Ph. Accordingly, the only other option, according to Dr. Hudson, would be to monitor the fetal heart with a portable ultrasound machine. Dr. Williams' evidence in this regard is that an option utilized in these circumstances in most tertiary care centres is the use of a small portable ultrasound machine. Even Dr. Carson was prepared to concede that in the circumstances where a fetal scalp electrode or a fetal scalp Ph could not be employed, the only other thing that could be done would be to rely on ultrasound.

**23**  Dr. Waterman was in attendance on Mrs. Fairley prior to the delivery of Russell. He viewed the fetal heart monitoring from time to time and was reassured by that monitoring. In this regard, he noted in his evidence in chief that the strips were reassuring as there was good variability and accelerations with contractions. From 0530 to 0600, the fetal heart tracing was of poor quality and accordingly, Dr. Waterman carried out monitoring via ultrasound. Dr. Waterman was of the opinion that the fetal heart was demonstrating accelerations with contractions.

**24**  By approximately 0600 hours, the fetal heart rate for Braeden was between 120 and 180 beats per minute. The fetal heart tracings showed periodic changes and were somewhat difficult to interpret. Dr. Waterman wondered whether the tracing was indicative of accelerations with contractions and a return to a lower baseline, or whether in fact, the strip was indicative of late decelerations. The variability was reasonably well-preserved and accordingly, although concerned, Dr. Waterman did not consider that Braeden was in significant distress. Having said this, he still wished to expedite the delivery process.

**25**  Braeden's presenting part remained high and Dr. Waterman could not confidently perform an amniotomy (artificial rupture of Braeden's membranes), and therefore the operating room was consulted at 0610. Another case was underway but the anaesthetist and charge nurse from the operating room attended on Mrs. Fairley by approximately 0620. The operating room personnel were prepared to carry out a STAT caesarean section if required, however, this was unnecessary as Dr. Waterman performed a controlled amniotomy and the head of Braeden settled into the pelvis and he was delivered at 0636.

**26**  Braeden Fairley is a severely compromised child. His presentation on delivery was reflective of that compromise in that he was unresponsive at birth with no spontaneous activity. He was immediately intubated and ventilated, receiving cardiac compression and epinephrine via an endotracheal tube.

**27**  Ultrasounds and CT examination done on October 27, 1997 indicated significant brain injury. Braeden's condition is such that he cannot walk, talk, crawl or take care of himself in any fashion. He has frequent seizures almost daily. It is unlikely that these conditions will improve. Braeden is tube fed and has developed scoliosis of the spine. As a result of Braeden's condition he will require ongoing care for the rest of his life. He has significant cognitive impairment, so much that he does not realize the extent of his injuries, nor is he able to interact with his environment on the most rudimentary basis.

**28**  The doctors have opined the life expectancy for Braeden of an additional 10 to 18 years from trial or to age 14 to 22.

THE LAW ON STANDARD OF CARE

**29**  The leading case on standard of care for medical practitioners is the judgment of the Supreme Court of Canada in Wilson v. Swanson, [*[1956] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) (S.C.C.). At pages 811-812, Rand J. set out the duty owed by a physician towards his patient:

What the surgeon by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them. In a given situation some may differ from others in that exercise, depending on the significance they attribute to the different factors in the light of their own experience. The dynamics of the human body of each individual are themselves individual and there are lines of doubt and uncertainty at which a clear course of action may be precluded.

There is here only the question of judgment; what of that? The test can be no more than this: Was the decision the result of the exercise of the surgical intelligence professed? Or was what was done such that, disregarding it may be the exception case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there is no breach or failure.

**30**  Gow J. in Scrimgeour v. Singer, [*[1988] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FCCX-60XY-00000-00&context=) (January 8, 1988, Vancouver Registry No. 860304) (B.C.S.C.) has cautioned at p. 17 that:

...one is not to label a professional medical practitioner as negligent on the basis of the ideal or the perfect, desirable though it is to encourage and strive for each of these.

**31**  A more recent decision from this court is the judgment of MacDonald J. in Dudas v. Munro, [*[1997] B.C.J. No. 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0S9-00000-00&context=) (April 12, 1997 Vancouver Registry No. C908043) (B.C.S.C.). In that case, the infant plaintiff suffered a severe blood loss prior to birth. It was alleged that the attending obstetrician, Dr. Munro, should have delivered the plaintiff more quickly than he did. In outlining the law, and dismissing the claim, His Lordship stated at page 3:

[4] In Bellknap v. Greater Victoria Hospital Society [*(1989), 1 C.C.L.T. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=) (B.C.C.A.) at pp. 220/1, the following passages from a unanimous judgment of the House of Lords in Maynard v. West Midlands Regional Health Authority, [1985] 1 All E.R. 635 were adopted:

Differences of opinion and practice exist ... in the medical as in other professions. There is seldom any one answer exclusive of all other to problems of professional judgment. A court may prefer one body of opinion to the other: but that is no basis for a conclusion of ***negligence***.

...one man clearly is not negligent merely because his conclusion differs from that of other professional men ... The true test for establishing ***negligence*** in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as **no doctor of ordinary skill** would be guilty of if acting with ordinary care ... a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. (emphasis added)

[5] In Bolam v. Friern Hospital Management Committee, [1957] 2 All E.R. 118 (Q.B.) at p. 122, the issue was put to a jury in a manner approved by the Court of Appeal in Belknap v. Greater Victoria Hospital Society (above, at p. 221):

A doctor is not guilty of ***negligence*** if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art ... a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

[6] There are several statements (which I adopt) referred to during a review of the law relating to the medical standard of care found in Challand v. Bell (1959), 27 W.W.R. 182 (Alta. S.C.) at pp. 184/6:

...it is not required that [a doctor] use the highest degree of skill, for there may be persons who have a higher education and greater advantages ... nor will he be held to have guaranteed a cure ...

The law requires a fair and reasonable standard of care and competence. ...At the same time ... a surgeon doe not become an actual insurer; he does not undertake that he will perform a cure ...

In medical cases, the fact that something has gone wrong is very often not in itself any evidence of ***negligence***.

A proper sense of proportions requires us to have regard to the conditions in which ... doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as ***negligence*** that which is only a misadventure.

**32**  Both the B.C. Court of Appeal and Supreme Court of Canada discussed in detail the law with respect to medical ***negligence*** in ter Neuzen v. Korn, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=). In that case, the plaintiff sued the defendant in ***negligence***, and on the basis of other causes of action, after she contracted the AIDS virus as a result of an attempted artificial insemination procedure performed by the defendant. The jury concluded that the defendant had been negligent notwithstanding the fact that the expert evidence indicated that the defendant had conducted himself in the same manner as other experts in the field. However, in reversing this decision, the Court of Appeal stated at paragraphs 96 and 97:

The law is well established that physicians are required to conduct themselves at least in accordance with the standard of their professional peers, but they are not expected to guarantee the success of their procedures or the perfect safety of their patients.

There are many cases where this principle is discussed, of which Belknap v. Greater Victoria Hospital Society [*(1989), 64 D.L.R. (4th) 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=) (B.C.C.A.) is an example....

**33**  Sopinka J. speaking for the Supreme Court of Canada on this point stated at pp. 590-1:

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent. As L'Heureux-Dubé J. stated in Lapointe, in the context of the Quebec Civil Code (at p. 15):

Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, **a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories**. As expressed more eloquently by André Nadeau in a "La responsibilité médicale" (1946), 6 R. du B. 153, at p. 155:

[TRANSLATION] *The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference*. [Emphasis added].

**34**  It is within the framework of these judgments that the conduct of Dr. Waterman and the allegations which have been raised against him must be addressed.

**35**  If further authority is needed for these propositions, one need look no further than the decision of the B.C. Court of Appeal in Brimacombe v. Matthews [*[2001] B.C.J. No. 538*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2N3-00000-00&context=), where the court stated at paragraph 2:

The law is very clear, as stated succinctly by Mr. justice Sopinka in ter Neuzen v.Korn [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=), that great care must be taken in assessing the actions and decisions of medical doctors in the course of discharging their professional responsibilities. This applies particularly to what happens in the operating theatre or the delivery room where various choices arise and difficult decisions must be made as operations or deliveries progress. The following passage from ter Neuzen describes the approach that must be taken in these matters:

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because the courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field.

**36**  The court in Brimacombe, supra, went on to allow the appeal, stating at paragraph 77:

The trial judge does not seem to have applied the correct test to determine liability as explained in the authorities such as Korn and the cases cited in that decision. There is no doubt that this was a troubled delivery from the three minute mark. On one side, there were signs of distress, and on the other side, there were indications, such as the heart monitor, that the problem could be solved by having the mother continue to push. The test is not whether something better or different should or could have been done, or whether a satisfactory result was finally achieved, but whether the defendant failed to measure up to the standards of his profession....

ANALYSIS ON THE EVIDENCE OF STANDARD OF CARE

1. Evidence of Dr. Carson

**37**  The essence of the allegations of ***negligence*** against Dr. Waterman were with respect to his response to the fetal heart strips during the final two hours proceeding Braeden's birth. The plaintiff had evidence from Dr. George Carson, a specialist who practices in Regina, Saskatchewan. His evidence is refuted by that of Dr. Stephen Hudson, an obstetrician gynaecologist who has practiced in Vancouver, presently practices in Victoria, British Columbia and Dr. Keith Williams, specialist in obstetrics and gynaecology who previously practiced in Vancouver, and now practices at Yale University in New Haven. Drs. Hudson and Williams had the benefit of viewing explanations offered by Dr. Waterman for decisions he made when examined for discovery in these proceedings. Dr. Carson did not have the benefit of this information. What Dr. Carson has done is to review the matter in hindsight without the benefit of the defendant physicians' examination for discovery transcript. Accordingly, he did not know all the factors Dr. Waterman considered before proceeding as he did with the delivery.

**38**  Dr. Carson opined that:

Braeden developed non-reassuring monitoring after 0430 hours on October 25, 1997 and that there was sufficient evidence of non-reassuring monitoring labour 0430 hours and certainly all of the time after the delivery of Twin A at 0523 hours until delivery of Twin B at 0636, to require intervention.

**39**  The basis of Dr. Carson's opinion was, in large part, his interpretation of the fetal heart monitoring strips. Dr. Carson agreed that there are differences of opinion in the interpretation of monitor strips and further agreed that research conducted confirms that a lack of both inter and intra-observer consistency in interpretations in fetal heart monitoring strips.

**40**  Having said this, Dr. Carson did note that with respect to interpretation of fetal heart monitoring strips, there are amongst those with expertise in the area a significant tendency to come to similar decisions about similar strips. In this case, three qualified experts; that is, Dr. Hudson, Dr. Williams and Dr. Waterman, have concluded that the strips do not indicate a basis for intervention until approximately 0610 hours. Dr. Carson is the only one that did not so conclude.

**41**  In his evidence in chief Dr. Carson discussed SOGC guidelines in respect of standards of interpretation of fetal heart monitoring strips. In cross examination, Dr. Carson agreed that if there is a very significant minority that took a different point of view, SOGC would likely conclude that there were two satisfactory or acceptable ways to manage a problem and reflect that significant dissent in their guidelines.

**42**  In this case, the opinions of the three obstetricians are that the strips were not problematic until approximately 0610. Dr. Carson is a minority in his interpretation of the strips and at a minimum, there are two schools of thought in respect of interpreting the strips. These two schools of thought are reflective of the need to bring clinical judgment to the assessments of strips. The law is clear that an error in clinical judgment cannot be seen as ***negligence*** and when there are two separate schools of thought in respect of a medical issue adherence to one of those schools is not ***negligence***, even if, in retrospect, adherence to that school of thought is erroneous. The case law is clear; one cannot prefer one school of thought over another on a retrospective analysis.

**43**  Mr. Hinkson submitted that Dr. Waterman's interpretation of the fetal heart monitoring strips was correct and appropriate in all the circumstances. Even if it was not, his judgment was within the parameters of a reasonable school of thought (a school of thought endorsed by 75% of the obstetricians involved in this matter) and accordingly, no liability can attach to Dr. Waterman in respect of those interpretations and his subsequent actions based on those interpretations.

1. Evidence of Dr. Hudson

**44**  Dr. Hudson is a specialist in the field of obstetrics and gynaecology. This obstetrical practice is limited only to high risk obstetrics. Dr. Hudson is an assistant professor at the University of British Columbia, Department of Obstetrics and Gynaecology, and has been so since 1995.

**45**  With respect of the interpretation of fetal heart monitoring strips, Dr. Hudson noted:

...if the strips are not completely reassuring, one will not necessarily find each specialist dealing in the same way as people have varying opinions in this regard.

**46**  With respect of the interpretation of the strips themselves, Dr. Hudson noted that at 0400 hours, there was a change in the fetal heart rate of Twin B which appeared to him to be an acceleration, which would have been reassuring. Dr. Hudson went on to state that there was variability of the fetal heart for Twin B which was "very reassuring and an important aspect to fetal heart monitoring interpretation."

**47**  Dr. Hudson also noted that at that time the fetal heart rate was going up with contractions and he would undoubtedly have interpreted that as being reassuring accelerations with contractions of good variability.

**48**  In response to Dr. Carson's evidence that from 0410 to 0425 hours there were decelerations after contractions with delayed recovery and the strip was for that time non-reassuring, Dr. Hudson stated that he could not agree with that proposition, noting the fact that he could not understand how Dr. Carson arrived at that interpretation. Dr. Hudson stated that in looking at the fetal heart monitoring strip in context, a more appropriate interpretation was that there were accelerations with contractions with a base line remaining exactly as it had been in between the contractions.

**49**  At 0440, Dr. Hudson noted that the fetal heart tracing in respect to Braeden resumed a more stable pattern and that for both the twins, the fetal heart rate patterns were satisfactory.

**50**  In response to Dr. Carson's view that at that stage, the baseline was 150 the tracing of poor quality and what was probably being seen were decelerations with delayed recovery and a non-reassuring strip, Dr. Hudson noted that:

...while there are some occasional losses of contact which is very common using an external monitor variability is very good and overall there are no significant decelerations of concern coupled to that is the fact that the mother is pushing very frequently.... In fact, I would say this is the reassuring part of the fetal heart strip.

**51**  Dr. Hudson went on to note there was "absolutely" nothing on the strip up to the time of Russell's delivery [that is 0523] that should have persuaded Dr. Waterman to take steps other than he did.

**52**  Dr. Carson opined that from 0455 to 0510, the strip in respect of Twin B was non-reassuring as there were decelerations with delayed recovery. In specific reply to this, Dr. Hudson stated he did not agree that the strip looks unsatisfactory and in particular, that there is good variability. He further noted that the fetal heart rate appears to be going up when Mrs. Fairley is pushing and that is a reassuring pattern.

**53**  From 0510 to 0522, Dr. Carson opined that the strip was uncertain with poor quality tracing and some decelerations. Dr. Hudson disagreed, noting that there was "tremendous" variability and nothing which was really "of any concern as a clinician."

**54**  From 0523 to 0530, the quality of the fetal heart rate tracing was poor and there appeared to be variable decelerations and accelerations. Having said that, he noted that although it is difficult to interpret this part of the tracing, there was nothing which was "really alarming".

**55**  It was in the period from 0530 to 0600 that Dr. Waterman employed the use of monitoring via ultrasound. This is the appropriate and correct procedure as noted by Dr. Hudson. He stated that:

The circumstances of this case, (where the presenting part was high and the membranes could not be ruptured) are a limited number of options with respect of monitoring and that ultrasound monitoring is appropriate.

**56**  With respect to the pattern on the fetal heart strip that could be seen from 0530 to 0600, Dr. Hudson noted that changes seen in the heart rate were more assuring than non-assuring.

**57**  Dr. Carson working with hindsight took a contrary view, opining that between 0540 and 0555, there were decelerations with delayed recovery and accordingly, the strip is non-reassuring. In specific response to this, Dr. Hudson stated that this portion of the tracing was not good and accordingly, it was difficult to interpret. However, if you were going to interpret it, he said that the baseline was somewhere around 120 with quite significant fluctuations in the fetal heart rate, which is not uncommon in the second twin. He went on to note that he could not categorize the strip as non-reassuring or reassuring, but that he would certainly not think it worrisome.

**58**  Dr. Carson opined that from 0555 to 0610, the fetal heart rate had a reduced variability with decelerations with each contraction and delayed recovery. In response, Dr. Hudson noted that there was a poor quality tracing and it was very difficult to know exactly what was happening with the fetal heart rate and accordingly, he would have expected that the baby was being monitored with a Doppler or by ultrasound. Dr. Hudson quite reasonably concluded that it would be "very difficult for a third party to objectively comment on what was happening here". (emphasis added).

**59**  Dr. Carson noted that from 0610 to 0620, there continued to be reduced variability and decelerations with each contraction and the strip is non-reassuring. Dr. Hudson noted that during that time, at first glance, it appeared that the heart was probably accelerating with pushing and then coming to a baseline again, then accelerating and coming down to a baseline. However, after more of the strip unfolded, the strip became more worrisome and accordingly he stated that:

At first glance, I would have interpreted these as accelerations, largely because we knew this baby accelerations (sic) largely because we knew this baby was appropriately grown, we knew - well I presume from the previous interpretations the fetal heart rate patterns that this baby hadn't been compromised. It was not bleeding and there was no reason to suspect this baby was in jeopardy. So at first I would have thought these were reassuring accelerations and I would have waited a bit longer to see what evolves.

**60**  It should be noted that this is in essence the same assessment Dr. Waterman made at the time of labour and delivery, stating:

By 0600 hours, we started to be able to pick up a good heart tracing on Twin B. The heart rate was somewhere between 120 and 180. The tracing did show periodic changes. The tracing was somewhat difficult to interpret. I wondered whether these were accelerations with contractions and a return to a lower baseline or in fact she was having late decelerations. However, the variability was reasonably well-preserved and therefore, although I was concerned, I did not see that the baby was in significant distress, however, I did want to expedite the delivery process.

**61**  Dr. Hudson noted that at about 0620 and 0625, looking back at the strip, even though there appeared to have been accelerations with contractions, the actual nature of the strip would make him start to wonder whether these, in fact, were reassuring or non-reassuring and he would have started to become concerned even though it was possible they were reassuring accelerations. In this regard, Dr. Hudson noted that the fetal heart rate pattern was so variable during the second stage of labour [once the cervix is fully dilated and for delivery] that is the norm to have these fluctuations and often it can be very difficult to interpret exactly what is happening.

**62**  There is an allegation that a caesarean section should have been carried out in order to expedite delivery, however, Dr. Hudson noted that a caesarean section is not always the easiest way out of a difficult situation and, more importantly, it is not always the most desirable route to take. This statement was echoed and expanded upon by Dr. Carson who agreed on cross examination that the consensus is that one should strive to achieve a vaginal birth where safe and possible. Dr. Hudson noted in respect of timing of caesarean sections that they can actually take longer than doing a amniotomy and forceps delivery. Dr. Carson noted that a caesarean section can take up to 30 minutes to carry out and further recalled literature from the "British Journal of Medicine" indicating that the majority of the women in the 5,500 case studied by that particular piece of literature were not delivered until 30 to 40 minutes after the decision was taken.

**63**  Dr. Hudson concluded that there was no justification for Dr. Waterman to have acted differently. At all times his management was appropriate for the clinical circumstances.

1. Evidence of Dr. Williams

**64**  Dr. Williams is a high risk obstetrician with the rank of Associate Professor, currently practicing at Yale University School of Medicine. Dr. Williams completed a four-year residency in obstetrics and gynaecology from 1980 to 1984 and a further sub-specialization in the field of fetal maternal medicine (high risk obstetrics) between 1984 and 1986. In 1991, Dr. Williams was appointed the Head of Fetal Assessment, Division for the Centre of Prenatal Diagnosis and Treatment. In October, 1997, he was practicing in the field of obstetrics and gynaecology at BC Women's and Children's Hospital in Vancouver, British Columbia.

**65**  Dr. Williams has extensive experience with respect to reading fetal heart monitoring strips and in fact, he is unaware of anyone in British Columbia who has more experience in this regard as he has. Dr. Williams has spent an extensive amount of time developing fetal assessment protocols and fetal assessment training. He has been involved in close to twenty and perhaps up to thirty courses at each and every peripheral hospital throughout British Columbia in respect of addressing intrapartum fetal heart rate assessments. These courses were given to both nurses, family doctors and obstetricians at these centres, and Dr. Williams was responsible for the structure and teaching of these courses. During the course of his clinical practice while in British Columbia, Dr. Williams was consulted by other obstetricians in respect of the interpretation of fetal heart monitoring strips. Dr. Carson has agreed that Dr. Williams is well-known to a variety of areas, including the interpretation of fetal heart monitoring strips.

**66**  In respect of the fetal heart tracing, Dr. Williams noted that:

The baseline heart rate prior to 4:00 a.m. was approximately 125 beats per minute with a shift in baseline after 4:00 a.m. to 145 with accelerations with normal variability being maintained at approximately 4:20 a.m. At approximately 5:00 a.m., the baseline heart rate on Twin B appeared to rise between 160 and 170 beats per minute with normal variability being maintained with what appeared to be unclassifiable decelerations. This deceleration pattern consisted until approximately 5:10 a.m. Between 5:10 and 5:20, no decelerations of the fetal heart were apparent with the baseline heart rate of 150 beats per minute. The fetal heart rate appeared to have normal variability between 5:20 and 5:30 although there were a few episodes that were missing. Between 5:30 a.m. and 6:00 a.m., only intermittent tracing was present.... The aspects of the tracing that were shown evidenced normal variability.... At 6:00 o'clock, continuous external fetal heart monitoring was established. Shortly after this time, the baseline was 170 beats per minute with a late deceleration pattern.... The fetal heart tracing appeared worrisome from 6:10 a.m.

**67**  Dr. Williams considered that Dr. Waterman had provided appropriate intrapartum care, noting Mrs. Fairley was assessed by Dr. Waterman. He was aware of her status. Further, she was continuously monitored and Dr. Waterman was aware of the fetal heart rate changes in Twin B. In this regard, Dr. Williams noted that the tracings did not mandate any other intervention prior to 6:10 a.m.

**68**  With respect to rupturing of the membranes, Dr. Williams noted that Dr. Waterman quite appropriately did not rupture the membranes because of the high presenting head on Twin B, with the concordant risk of cord prolapse.

**69**  Dr. Williams noted that a caesarean section was not indicated as Twin B was to be delivered vaginally after rupturing the membranes. He noted it was appropriate to carefully weigh the risk of rupturing the forewaters with a high presenting part, which included prolapse of the cord and the need for a STAT C-section. Dr. Williams closed his report by noting that Dr. Waterman met the standard of care of an obstetrician practicing in 1997 in his management of this twin gestation. His review of the information and documentation lead him to conclude that it "did not indicate a need for a different course of action."

**70**  In reply to Dr. Carson's view that from 0410 up to and including 0500, the fetal heart strip for Twin B is either non-reassuring or both uncertain and non-reassuring, Dr. Williams noted that his interpretation was somewhat different in that he saw several positive features which would have reassured him about normal oxygenation, and those included normal variation, accelerations and no significant decelerations. Accordingly, Dr. Williams concluded that there were no problems with oxygenation with the fetus at that point in time.

**71**  In response to Dr. Carson's view that between 0510 and 0522, the strip was of poor quality with some decelerations and the interpretation is uncertain, Dr. Williams stated that he could see no significant evidence of any problems and the variability was normal. Normal variability and the baseline present at approximately 150 per minutes, Dr. Williams concluded "that there was normal oxygenation to the fetus at this point in time."

**72**  Dr. Williams noted that from 0530 to 0600, there was only an intermittent tracing present. In these circumstances, Dr. Williams believed the option which was utilized "all the time" in most tertiary care institutions was the use of a small portable ultrasound machine to ascertain the status of the fetal heart.

**73**  In response to Dr. Carson's view that from 0530 until 0555, the baseline for Twin B was 150 with decelerations down to 90 and delayed recovery, Dr. Williams noted that the tracing was an intermittent one and there was not enough information in order to make the interpretation by Dr. Carson. It is reflective to note that this is in essence the same opinion that Dr. Hudson came to. Dr. Carson was argumentative and dogmatic throughout his evidence and appeared to be taking the role of an advocate as opposed to an independent expert. The clearest example of this can be found in his extrapolations from the absence of readings from 0530 to 0600. Also instructive are his comments to cross examining counsel: he said he assumed "you would not have advanced reports that, in fact, don't support your case so I don't know how many others you may have got that didn't support the position you want."

**74**  In respect of the fetal heart rate between 0530 and 0600, Dr. Williams stated that if the rate was between 120 and 180 beats per minute, he would then have concluded that this was normal and there was no problem with oxygenation at that point.

**75**  Dr. Williams was of the view that a caesarean section was not the appropriate alternative in a situation like the matter at hand. In this regard, Dr. Williams noted that a caesarean section was not without risks and the risks included an increased risk of blood loss, infection and anaesthetic risk related to death.

**76**  Dr. Williams concluded that there was no need to intervene in respect of this matter before 0610 as normal oxygenation was being maintained to the fetus up to that point in time.

**77**  In coming to his conclusion and assessing the strips, Dr. Williams noted that he attempted to review the tracings in the same time sequence as the patient in labour using the same information that would be available to an obstetrician at the time of labour. Dr. Carson on the other hand looked at the strips before and after certain segments to see how the fetal heart was responding and agreed that the obstetrician on the scene did not have that benefit as he does not know what is coming next. In this regard, Dr. Williams noted that:

...a reasonable obstetrician would interpret tracing as he or she is reviewing it. The tracing, one should never review tracings going backwards from a poor outcome. One should always review tracings going forward. All that a reasonable obstetrician has, when they are reviewing an outcome in labour, is what is there in front of them and what has gone on before?

1. Evidence of Dr. Waterman

**78**  Dr. Waterman's evidence was clear and consistent. He answered questions both on examination in chief and on cross-examination directly and completely.

**79**  Dr. Waterman noted that by 0400, there was a normal fetal heart tracing for both twins, with a baseline around 120, no decelerations and good accelerations. The strip continued to display good baseline with good accelerations. From 0430 to 0523, there was some loss of pickup in respect of Braeden's fetal heart rate, and when the pickup was regained, there were good accelerations present with a baseline of 130 and good variability. To the time of delivery of Russell, the strip indicated no problems or concerns in respect of Braeden.

**80**  Dr. Waterman noted that the delivery of a first twin often affects the second twin in that one commonly sees a fall off of uterine activity once the uterus decompresses, which in turn changes circulation and profusion to the placenta, and this manifests itself in alterations noted on the fetal heart monitoring strips. Dr. Waterman went on to note that following the delivery of Russell, there was from approximately 0530 to 0600 a lapse in the fetal heart monitoring, and accordingly, Dr. Waterman employed the use of intermittent auscultation and ultrasound monitoring. During this time, the fetal heart rate was consistently above 110, mostly between 120 and 180. Mrs. Fairley was pushing well with her contractions. Forewaters of Braeden were descending into the vagina nicely with each contraction, however, the presenting part remained slightly high. Accordingly, Dr. Waterman could not perform an amniotomy.

**81**  To perform an amniotomy with the presenting part high is to risk a cord prolapse. This is something that is "important to avoid".

**82**  By 0600, Dr. Waterman was able to pick up good fetal heart tracings in respect of Braeden. The heart rate was between 120 and 180. The tracing did show periodic changes, which were somewhat difficult to interpret. Dr. Waterman wondered whether these were accelerations with contractions and a return to a lower baseline or whether in fact they were indicative of late decelerations. In this regard, variability was reasonably well preserved and accordingly, Dr. Waterman, although concerned, did not consider that Braeden was in significant distress, however, he did wish to expedite the delivery process.

**83**  Braeden's presenting part remained too high to perform an amniotomy and accordingly, the operating room was consulted at 0610. Another case was underway but the anaesthetist and charge nurse from the operating room attended in the delivery suite by approximately 0620 and Dr. Waterman explained the situation. The operating room personnel were prepared to carry out a STAT caesarean section if required. Dr. Waterman performed a controlled amniotomy and Braeden was delivered at 0636.

**84**  Dr. Waterman, like Dr. Williams and Dr. Hudson, did not agree with Dr. Carson's interpretations of the fetal heart strips, noting that until 0600, there was good variability and good baseline. From 0600 to 0610, there was some question as to what the tracing was indicating, however, with the well-preserved variability, Dr. Waterman was reassured, but out of an abundance of caution, wished to expedite delivery. That these steps were reasonable and appropriate in the circumstances is supported by the opinions of Drs. Hudson and Williams.

CONCLUSION

**85**  This matter involves the interpretation of fetal heart monitoring strips and actions that should or should not have been taken given the information from those strips, and the totality of the presenting situation. All experts agreed that the interpretation of fetal heart monitoring strips is an art, not a science, and that there will be divergence between physicians and even by a single physician over time. In this case, three experts (one of which is an internationally renowned expert) are of the view that the fetal heart strips did not require any intervention or alteration in the course of treatment provided by Dr. Waterman. The minority view expressed by Dr. Carson is that in fact the strips required intervention earlier.

**86**  Accordingly, the plaintiffs have at best established that there are two schools or thought in respect of the interpretation of these particular strips, the majority view being that the strips required no intervention. In circumstances where there are two competing and acceptable schools of thought, the Appellate courts have been quite clear in indicating that adherence to either school (in this case, non-intervention versus intervention) is an acceptable standard of care, and a simple clinical misjudgment cannot amount to ***negligence***.

**87**  Since the plaintiffs have not established a failure to meet the standard of care on a balance of probabilities, the action against Dr. Waterman must be dismissed. The management of a twin gestation carries with it significantly increased risks over a single pregnancy, and as noted by Dr. Hudson, while this outcome was tragic, "not everything in obstetrics can be explained."

**88**  Accordingly, the action against Dr. Waterman is dismissed with costs following the result of the cause.

WONG J.

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[***Ford v. Henderson, [2005] B.C.J. No. 931***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0P7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Wedge J.

Heard: March 7 - 11, 2005.

Judgment: April 26, 2005.

Vancouver Registry No. M012218

**[2005] B.C.J. No. 931** | 2005 BCSC 609 | 138 A.C.W.S. (3d) 1075

Between Martin Robert Ford, plaintiff, and Paul Stewart Henderson, defendant, and Insurance Corporation of British Columbia, third party

(78 paras.)

**Case Summary**

**Damages — General damages — For personal injuries — Considerations — Loss of earning capacity — Special damages — Loss of income — Physical injuries — Body injuries — Neck — Whiplash — Torts — *Negligence* — Contributory *negligence* — Proof of.**

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| Action by the 26-year-old plaintiff Ford against the defendant Henderson for damages arising from injuries suffered in a motor vehicle accident in 1999. Ford was a passenger in Henderson's vehicle when Henderson hit a hydro pole. The parties agreed Henderson caused the accident. Ford was not wearing his seatbelt at the time of the accident. He suffered lacerations to his forehead, injuries to his neck, shoulders and upper back, and a possible concussion. He claimed he continued to suffer from headaches and pain in his neck and shoulders and was left with memory impairment and cognitive and behavioural difficulties. At the time of the accident, Ford worked as a drywall swamper. He returned to work 10 months after the accident. He underwent two surgeries to reduce the scarring on his forehead. He attended a rehabilitation program. Between 2002 and 2004, Ford sustained injuries from four work-related accidents. He did not complain of memory problems until 2002. Since 2004, he had held the position of shipper/receiver. Ford admitted he had regularly used marijuana until 10 months before trial. He suffered from migraine headaches before the accident.  HELD: Action allowed in part.  Ford suffered significant soft tissue injuries that impaired his ability to work and enjoy life for approximately 12 months and which had lingering effects for the first few months after he returned to work. Thereafter, his injuries resolved. Ford did not suffer a mild traumatic brain injury in the accident. There was no evidence of cognitive impairment or any behavioural or emotional problems. General damages were assessed at $65,000. Ford was entitled to full wage loss recovery for the 10 months he was off work, calculated at $30,415. Ford did not move from swamping to shipping/receiving as a result of his injuries. He was not entitled to damages for future wage loss or loss of earning capacity. The insurer failed to prove the available seatbelt was properly functioning. No contributory ***negligence*** was assessed. |

**Statutes, Regulations and Rules Cited:**

Insurance (Motor Vehicle) Act, [*R.S.B.C. 1996, c. 231 s. 52*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B04K-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: R.F. Giusti, Q.C.

No Appearance on behalf of the Defendant

Counsel for the Third Party: A. Burnett

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| **WEDGE J.** |

1. INTRODUCTION

**1**  Martin Ford claims damages arising from injuries he suffered when the car in which he was a passenger hit a hydro pole.

**2**  It is common ground that the defendant Paul Henderson caused the accident. He did not enter an appearance. The third party, ICBC, conducted the defence at trial. ICBC accepted that Mr. Henderson was at fault for the accident. Liability is in issue only insofar as Mr. Ford was not wearing a seat belt at the time of the accident.

**3**  Mr. Ford suffered lacerations to his forehead, injuries to his neck, shoulders and upper back, and possible concussion. He says he has suffered, and continues to suffer, from headaches and pain in his neck and shoulders, and is left with memory impairment and cognitive and behavioral difficulties.

1. ISSUES

**4**  There were two issues in the trial:

1. Quantum of damages: Mr. Ford claims non-pecuniary damages, past wage loss, loss of earning capacity and future care costs. No claim was made for special damages;
2. Contributory ***negligence***: ICBC seeks a finding that Mr. Ford contributed to his injuries by failing to wear his seat belt.
3. FACTS

Mr. Ford's Background and Work History

**5**  Mr. Ford was twenty years of age at the time of the accident. He is now twenty-six. He is not married, but is living in a committed relationship with a woman who has two young children.

**6**  Mr. Ford was quite a good student in elementary school. He began encountering difficulties with his school work in about Grade 8. At that time, the teaching staff at his school raised the possibility that he may have Attention Deficit Disorder. However, no health care professional ever diagnosed Mr. Ford with that disorder. His school marks were very poor in most subjects after Grade 8. He completed his Grade 11, but passed only one or two courses toward Grade 12. He left school in 1997 without attaining Grade 12, and has not since attempted to obtain his senior matriculation.

**7**  Mr. Ford was a very good athlete, and participated in many sports. By Grade 10 or 11, however, he had stopped playing most sports. He continued to play his favourite sport, lacrosse, at which he excelled. He played for two of the best senior teams in the league. He stopped playing lacrosse in September 1997, which was the end of the lacrosse season for that year. He did not play lacrosse in the 1998 or 1999 season.

**8**  Mr. Ford worked in part-time jobs while attending high school. After leaving school in 1997, he worked at a restaurant, assisting with food preparation and deliveries. In 1998, and for part of 1999, he worked for two successive employers at labouring jobs.

**9**  On July 27, 1999, nine weeks before the accident, Mr. Ford obtained work as a drywall swamper at Dryco Building Supplies (Langley) Ltd. He was 20 years of age at the time. He was working for Dryco at the time of the accident in September 1999.

**10**  A drywall swamper delivers sheets of drywall to construction sites. It is an extremely physically taxing job. Mr. Ford carried various sizes of drywall sheets from the delivery truck to the sites, some of which weighed up to 240 pounds and required two people to carry.

**11**  At Dryco, Mr. Ford received an hourly wage of $9 per hour. However, by September 1999, he was also being paid for "piecework", a more lucrative means of earning an income as a drywaller. A worker who is paid for piecework receives a fixed rate for every thousand feet of drywall delivered to a site. As a result of the piecework, Mr. Ford's income increased over the nine weeks he worked for Dryco. During the last two-week pay period before the accident, September 4 to 18, 1999, Mr. Ford earned $1,340.18. In November 1999, when he attempted to return to work for a few weeks, his base wage rate was raised to $10 per hour.

**12**  Before the accident, Mr. Ford was healthy and fit, although he was no longer playing organized sports. He was capable of working efficiently as a drywaller despite its physical demands. He acknowledged that from about Grade 10 until ten months ago, he smoked approximately 15 to 20 marijuana cigarettes on average in each two week period. He now consumes very little of the drug, largely due to the influence of the woman with whom he now lives.

The accident

**13**  On the evening of September 30, 1999, Mr. Ford and the defendant, Paul Henderson, went to the Langley Soccer Club on Crush Crescent in Langley, B.C. for a beer. They drove to the club in Mr. Henderson's car, a 1990 Ford Mustang. They stayed for about two hours, and consumed two cans of beer each. They left the club at about 11:00 p.m., intending to drive to Mr. Henderson's home.

**14**  Mr. Henderson was driving his car, which was parked about 30 feet from the parking lot exit. Mr. Henderson started the car and headed toward the exit, intending to turn onto the roadway. As he approached the exit, but while still in the gravel parking lot, Mr. Henderson suddenly "floored" the accelerator and lost control of the car. Mr. Ford said he intended to fasten his seat belt, but had not yet managed to do so when Mr. Henderson hit the accelerator without any warning. The car, travelling at an estimated speed of between 30 to 50 kilometres per hour, went across the road and into a ditch on the far side, and struck a hydro pole.

**15**  Mr. Ford was thrown forward into the front windshield. The impact of Mr. Ford's forehead sheared off the overhead rear view mirror and shattered the windshield. The Mustang was damaged beyond repair.

**16**  Mr. Ford thought he may have suffered a momentary loss of consciousness. He could recall the events immediately before and after the car hit the hydro pole. Any loss of consciousness must have been very brief, because Mr. Ford recalled seeing blue sparks as a hydro line from the pole made contact with the Mustang. He quickly pushed Mr. Henderson, whom he thought may have briefly lost consciousness as well, out of the car.

**17**  Firefighters and ambulance paramedics attended the accident. After receiving treatment for his forehead lacerations and having his neck immobilized with a neck brace, Mr. Ford was taken to Langley Memorial Hospital. The ambulance crew report indicates Mr. Ford told the paramedics he did not lose consciousness. The emergency department records similarly indicate no loss of consciousness. Both ambulance and hospital records indicate that Mr. Ford was alert and had a Glasgow Coma Score of 15. Mr. Ford was examined by hospital staff, and received several stitches to his forehead. No CT scan or MRI was ordered. Mr. Ford was released from hospital at about 2:20 a.m..

**18**  The following day, October 1, 1999, Mr. Ford was taken by his father to a medical clinic to have the bandages on his forehead changed. On October 2, he went to see his family doctor, Dr. William Coulter, and was seen by an associate of Dr. Coulter. On October 3, Mr. Ford returned to the emergency department of Langley Memorial Hospital, complaining of headache and increased neck pain. He also told hospital staff that he did not feel "all there". At that time, he was diagnosed with neck sprain and concussion.

**19**  Mr. Ford remained off work from October 1 to October 22, 1999. He then attempted to return to work at Dryco, resuming his duties as a drywaller swamper. He worked for about three weeks, but again went off work November 16, 1999, as a result of severe shoulder and neck pain. He did not return to work until August 1, 2000.

**20**  Mr. Ford underwent two revisionary surgeries by Dr. David O'Brien, a plastic surgeon, to reduce the scarring on his forehead. Residual scarring is still visible across Mr. Ford's forehead.

**21**  After he went off work again in November 1999, Mr. Ford continued to see Dr. Coulter. He was also referred by ICBC to an orthopaedic surgeon, Dr. Robert Froh, in March 2000, for an independent medical examination. In a report dated March 17, 2000, Dr. Froh concluded that Mr. Ford's injuries were the result of the accident, and that he was still partially disabled. Dr. Froh stated that "given the type of work that he does, it is not unreasonable, given the location of injury, that he has still not gotten back to work." According to Dr. Froh, Mr. Ford was "70% recovered" from his injuries at that point in time.

**22**  Dr. Coulter, in a note dated April 14, 2000, concluded that Mr. Ford continued to be disabled from his occupation as a drywall swamper. He was of the opinion that Mr. Ford would benefit from a work hardening program, and referred him to a rehabilitation service known as Health West. Mr. Ford attended Health West from May 18 to June 29, 2000 for four hours per day, five days per week. In a discharge summary dated July 4, 2000, a Health West physiotherapist cleared Mr. Ford to return to work.

**23**  Mr. Ford contacted Dryco after he was cleared to return to work, but was told there was no work for him. Instead, Mr. Ford obtained work with another company, Winroc Corporation, who offered him a position as a drywall swamper paid on an hourly basis. He began working for Winroc on August 1, 2000.

**24**  Mr. Ford worked as a drywall swamper for Winroc from August 2000 until June 2004. In August 2002, he obtained piecework as well as work paid on an hourly basis, which resulted in a substantial increase in his earnings. Mr. Ford's only absences from work at Winroc were the result of work-related injuries, none of which are alleged to have been related in any way to the injuries he suffered in the accident.

**25**  In May 2001, during a visit to Dr. Coulter's office, Mr. Ford complained of ongoing pain in his right shoulder. Dr. Coulter ultimately concluded the pain was the result of overuse from carrying heavy gyproc sheets on a repetitive basis.

**26**  In February 2002, Mr. Ford sustained a lower back and neck injury when he tripped and fell while carrying a piece of drywall. As a result, he was placed on light duties for a week, and was absent from work on a WCB claim for three weeks.

**27**  Mr. Ford saw Dr. Coulter on February 28, 2002, accompanied by his father, who raised the issue of some residual memory impairment that he said his son had suffered since the accident in 1999. This was the first occasion on which Dr. Coulter received a complaint from the family about Mr. Ford experiencing memory or cognition problems. In a report dated July 30, 2003, Dr. Coulter said:

He was unable [sic] to provide little detail about the type of memory impairment, but it appears to be related primarily to short term memory and inability to recall appointments and recall details of recent events .... After a prolong [sic] discussion, he was referred to Dr. Ansel Chu, medical rehabilitation specialist, with regards to his soft tissue injuries and evaluation of any residual neurological symptoms including memory loss sustained in the motor vehicle accident.

**28**  Dr. Chu saw Mr. Ford on May 1, 2002. In a report dated May 8, 2002, Dr. Chu concluded there was

... no significant musculoskeletal pathology in his cervical and thoracic, spine, or in the shoulders. There were no impingement positions in the rotator cuff and no specific glenohumeral joint pathology.

I suspect that his intermittent pain episodes are due to soft tissue myofascial pain. It is typical that it comes and goes in such a fashion, and today I found no significant abnormalities to account for his pain.

.... I do not think that there is any significant problem with the cervical spine itself .... There are no investigations warranted at this time.

**29**  Dr. Chu conducted a mini-mental status examination, and concluded that any problems with memory were "more of concentration difficulties than actual cognitive impairment".

**30**  Dr. Coulter did not order any further testing of Mr. Ford at the time. He did not refer him to a neurologist, psychiatrist or psychologist.

**31**  In July 2003, Mr. Ford suffered a work-related back strain and was off work for 2 days. In August 2003, Mr. Ford suffered an injury to his pelvis, left knee and left arm while loading drywall onto a truck, and was off work for a week on a WCB claim.

**32**  On June 22, 2004, Mr. Ford suffered a back injury while delivering drywall to a site. He was placed on light duties from June 24 to July 2. His duties involved assisting the shipper/receiver in the Winroc office. He returned to his swamping position on July 3, but applied for the position of assistant shipper/receiver when the position became available about six weeks later. He was the successful applicant, and since September 2004 he has held the position of assistant shipper/receiver with Winroc.

**33**  In May 2004, Dr. Coulter referred Mr. Ford to Dr. Ursula Wild, a neuropsychologist, for testing. The referral came from Dr. Coulter at the request of Mr. Ford's counsel. Following an assessment, Dr. Wild concluded that Mr. Ford had likely sustained a closed head injury as a result of the accident on September 30, 1999, which was "of sufficient severity to lead to a concussion or mild traumatic brain injury". That conclusion rests in part on her understanding that Mr. Ford lost consciousness in the accident, and on reports from Mr. Ford and his father that he suffered significant memory impairment and changes in personality after the accident. Dr. Wild had not reviewed Mr. Ford's school records at the time she rendered her opinion. She understood that Mr. Ford, while somewhat indifferent to school work, was an average student prior to the accident. She was not aware of Mr. Ford's marijuana use when she drafted her report, but denied it would have played a role in Mr. Ford's memory or cognitive problems.

**34**  Dr. Coulter testified at trial. He acknowledged that he did not feel it necessary to refer Mr. Ford for a neurological assessment. Nor did he feel it necessary to order an MRI or CT scan. He agreed that the first time Mr. Ford complained of memory loss and cognitive problems was in February 2002, more than two years after the accident.

**35**  Mr. Ford has performed well in the position of assistant shipper/receiver since he obtained the job in September 2004, with the exception of one or two errors. He uses post-it notes and a large chalk board to assist him in his work, as does the shipper/receiver he assists. Both the shipper/receiver, who is his immediate superior, and a manager with the company testified they were pleased with Mr. Ford's work.

**36**  With the current boom in construction, Winroc and other drywall suppliers are doing very well. Winroc has expanded with the construction boom, and anticipates that business will continue to grow as a result of the 2010 Olympics to be held in the Vancouver area. The company intends to keep Mr. Ford in its employ so long as he continues to perform as he is currently.

1. DISCUSSION
2. Quantum of Damages

**37**  Mr. Ford seeks damages for non-pecuniary loss, loss of income to the date of trial, loss of earning capacity, and cost of future care. No claim was made for special damages.

1. Non pecuniary damages

**38**  Mr. Ford says he continues to suffer some shoulder and back pain as a result of the accident in 1999, and frequently suffers from headaches, some of which are migraine headaches. He has residual scarring to his forehead, of which he says he is self-conscious. He also says he has been left with permanent memory impairment, and cognitive and emotional difficulties. He seeks $100,000 for pain and suffering, and the loss of enjoyment of life.

**39**  ICBC acknowledges that Mr. Ford suffered significant lacerations to his forehead that have resulted in permanent residual scarring, and considerable soft tissue injuries causing pain and restricting his activities for about a year after the accident. However, says ICBC, Mr. Ford returned to employment as a drywall swamper, a physically taxing job, within twelve months of the accident. Thereafter, for the next four years, he performed his swamping job without difficulty. The only work he missed in those four years was acknowledged by Mr. Ford to be solely the result of work-related injuries. ICBC argued that there is no evidence of ongoing physical impairment, and no evidence of a mild traumatic brain injury. Accordingly, it says non-pecuniary damages ought to be in the range of $40,000 to $50,000.

**40**  I am satisfied that Mr. Ford suffered significant soft tissue injuries which impaired his ability to work and enjoy life for approximately twelve months, and which had lingering effects for the first few months after he returned to work as a drywall swamper. Thereafter, in my view, his injuries resolved. He worked from August 2000 until September 2004 in a job that is physically demanding, suffering only the occasional on-the-job injury. The first of those work-related injuries occurred in 2002, approximately two years after he returned to work following the accident.

**41**  Mr. Ford did not resume playing sports, but he had ceased participating in most sports by 1995. He stopped playing lacrosse, his sport of choice, two years before the accident.

**42**  Mr. Ford suffered lacerations to his forehead, requiring two revisionary surgeries, and is left with significant residual scarring on his forehead.

**43**  I do not accept that Mr. Ford suffered a mild traumatic brain injury in the accident. From statements he made soon after the accident, I conclude that he did not lose consciousness. In his statement to ICBC in October 1999, he said he recalled seeing sparks fly from the hydro wires which fell on the car following its impact against the hydro pole. He denied loss of consciousness to the ambulance paramedics and hospital staff. His Glasgow Coma Score was 15 out of 15.

**44**  At no time in the weeks or months following the accident were there any abnormal neurological findings made with respect to Mr. Ford. No such findings have been made to date. His family physician, who saw Mr. Ford regularly, saw no reason to refer him for an MRI or CT scan, or for an assessment by a neurologist. Mr. Ford made no complaints about memory or cognitive problems for more than two years post-accident. The complaints he did make involved minor memory lapses.

**45**  Mr. Ford functions very well in a demanding office job, one that requires organizational abilities, good cognition and a well-functioning memory. His employer is pleased with his work performance. There is no suggestion of behavioral or emotional problems at work, despite the fact that as a swamper he worked as part of a team, and now works closely with the shipper/receiver in a job that has certain pressures. Mr. Ford is in a committed relationship with a woman who testified to the occasional lapse of memory by Mr. Ford. She also testified that he was easy to get along with and was a wonderful father-figure for her young children. There was no evidence of day-to-day cognitive impairment, nor any behavioral or emotional problems.

**46**  I cannot accept Dr. Wild's conclusion that Mr. Ford suffered a mild traumatic brain injury. First, her report is based on information that does not coincide with the evidence I heard at trial. Dr. Wild did not have an entirely accurate picture of Mr. Ford's baseline functioning before the accident, or of his functioning after the accident. I do not suggest that Mr. Ford or his father intended to mislead Dr. Wild. It appears they simply tended to magnify certain characteristics and minimize others.

**47**  At the time she drafted her report, Dr. Wild had not reviewed Mr. Ford's school records or his medical records pre-dating the accident. She appears to have understood, incorrectly, that Mr. Ford's complaints with respect to memory and cognitive impairment began soon after the accident, and that he lost consciousness in the accident.

**48**  Second, Dr. Wild's prognosis for Mr. Ford is not borne out by the evidence. As already noted, after the accident Mr. Ford continued to work successfully as a drywall swamper for four years. He is now working successfully in the assistant shipper/receiver job. By all reports, he has not encountered cognitive or behavioral problems in either his work life or his personal life.

**49**  I accept that Mr. Ford suffered headaches as a result of the soft tissue injuries to his neck and shoulders, and that the headaches persisted until the soft tissue injuries resolved. However, it is clear from Mr. Ford's medical records that he was seeking medical and chiropractic assistance for migraine headaches in the two to three years prior to the accident, and had a propensity to suffer migraine attacks. Mr. Ford still occasionally suffers from headaches, and the occasional migraine attack, but in my view they cannot be attributed to injuries suffered of the accident.

**50**  Each award for non-pecuniary damages must be tailored to the particular individual who suffered the loss. I have reviewed the authorities provided by counsel with respect to the range of damages awarded in this jurisdiction to plaintiffs who have suffered injuries similar to those of Mr. Ford. I have concluded that Mr. Ford did not suffer a mild traumatic brain injury. However, taking into account the soft tissue injuries Mr. Ford did suffer, as well as the permanent scarring to his forehead despite two revisionary surgeries, I assess non-pecuniary damages at $65,000.

1. Loss of Income

**51**  There is a significant dispute as to Mr. Ford's wage loss to the time of trial. Mr. Ford was twenty years of age at the time of the accident, and had been working as a drywall swamper only nine weeks when he was injured in the accident. Counsel for Mr. Ford argued that the first few weeks of employment were not fairly representative of Mr. Ford's earnings, as he was just learning a new job. He also argued that Mr. Ford lost his job at Dryco as a result of the accident, and did not earn at Winroc what he would have earned at Dryco until almost three years after the accident. Finally, he argued that Mr. Ford was unable to work for the entire ten months after the accident until he began working for Winroc on August 1, 2000.

**52**  Counsel for ICBC argued that the best means of determining Mr. Ford's wage loss was to average the nine weeks' wages. He argued that taking into account Mr. Ford's average weekly wage at Dryco, Mr. Ford's earnings were greater, from the outset of his employment at Winroc, than his earnings at Dryco before the accident. Finally, ICBC argued that Mr. Ford was capable of returning to some kind of employment well before July 4, 2000, but failed to mitigate his loss by finding other work in the interim.

**53**  I turn first to the ten-month period after the accident. Mr. Ford tried to return to work October 22, 1999, and worked for approximately three weeks before going off work again. There was no evidence to suggest that Mr. Ford suffered a new injury while working those three weeks. Dr. Froh, the orthopaedic specialist retained by ICBC to conduct an independent medical examination, accepted that Mr. Ford's disability stemmed entirely from the accident. He also accepted, at least as of March 2000, that Mr. Ford could not return to work at that time. Dr. Froh's opinion was that, as at mid-March 2000, Mr. Ford had experienced a 70% recovery from his injuries.

**54**  In May 2000, Mr. Ford began an intensive work fitness program with a view to returning to work once the program was completed. He was given clearance to return to work by the program's physiotherapist on July 4, 2000. In my view, Mr. Ford was disabled from work as a drywall swamper until he was cleared to return to that job.

**55**  ICBC argued that Mr. Ford failed to mitigate his loss by seeking less physically taxing work before July 4, 2000. The onus was on ICBC to prove that such work was available at a reasonably commensurate rate of pay. It did not lead any evidence establishing the existence or availability of such work for a person with a Grade 11 education.

**56**  Mr. Ford is accordingly entitled to full wage loss recovery from October 1 to 22, 1999, and from November 16, 1999 to July 4, 2000.

**57**  The next issue is the amount of wage loss incurred from October 1, 1999 to July 4, 2000. During the last full pay period before the accident (September 4 to 18, 1999), Mr. Ford earned $1,340 (or $670 per week). I accept Mr. Ford's argument that his wage loss ought to be based on the last full pay period before the accident. The first few weeks on the job were not indicative of his wage-earning potential. He was just learning his job skills, and had not yet begun doing piecework, which was clearly more lucrative than working only at an hourly wage.

**58**  Between the date of the accident and July 4, 2000, Mr. Ford lost a notional 37 weeks of work. Taking into account vacation leave and other unpaid time off, I calculate his loss at $22,780 in gross pay (34 weeks x $670). The parties agree there must be a 15% reduction pursuant to s. 52 of the Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231*. Taking that into account, Mr. Ford's wage loss in the 10 months following the accident is $19,363.

**59**  But for the accident, Mr. Ford would have continued to work for Dryco, earning an hourly wage and wages for piecework. At Winroc, he did not have the opportunity to do piecework until August 2002, two years after he began working for the company. His hourly wage was $11. His income tax returns indicate that in 2000, he earned $6,446; in 2001, $21,694; and to August 6, 2002, $19,606, for a total of $47,746. But for the accident, and assuming he would have worked 48 weeks per year, between August 1, 2000 and August 1, 2002, he would have earned a total of $64,320 (96 weeks x $670) at Dryco. The difference is $16574. Deducting $3,572 for a paid WCB claim in February 2002, and a further 15% pursuant to s.52 of the Act, the loss is $11,052.

**60**  In total, I calculate Mr. Ford's wage loss between October 1, 1999 and August 6, 2002 at $30,415. He is entitled to that amount for wage loss to the date of trial.

1. Loss of Earning Capacity/Future Wage Loss

**61**  It was common ground that by August 2002, when Mr. Ford began doing piecework, his earnings improved substantially. In 2003, he earned $45,952. In 2004, he earned a total of $51,000, which included his work as a swamper until September and as an assistant shipper/receiver thereafter.

**62**  When Mr. Ford obtained the position of assistant shipper/receiver, he was placed on salary. He now earns $48,000 per year, not including company bonuses. Had he remained working in the field as a swamper, he could have earned up to $60,000 per year so long as he was willing to work overtime. Had he obtained his Class 1 Licence, he could have earned up to $70,000 driving and swamping.

**63**  The first issue is whether Mr. Ford moved from swamping to assistant shipper/receiver as a result of injuries he sustained in the accident. I have concluded the answer is "no". Mr. Ford resumed his work as a swamper in August 2000 without any residual difficulties arising from the injuries he suffered in the accident. He worked for two years before suffering a work-related injury in 2002. He suffered two more work-related injuries in 2003. In June 2004, he suffered another work-related injury and went on light duties in the office for six weeks. Shortly after returning to swamping, the office position became available. Several employees bid on the job, and Mr. Ford was the successful applicant.

**64**  Mr. Ford testified that he enjoys his new job. It does not involve the physical demands of the swamping job, or the risk of injury. There is some potential to move laterally in the company. Colleagues of Mr. Ford testified to the rigours of swamping. The move was a logical career move for Mr. Ford, and one precipitated by a significant injury he sustained while swamping.

**65**  Mr. Ford argued that but for the accident, he may have moved to a career in firefighting or accounting. As I have concluded that the injuries Mr. Ford suffered in the accident have completely resolved, and that he did not suffer a mild traumatic brain injury, those arguments cannot succeed.

**66**  It follows that Mr. Ford is not entitled to damages for future wage loss and loss of earning capacity, or cost of future care.

1. Contributory ***Negligence***

Did Mr. Ford contribute to his injuries and, if so, to what extent?

**67**  ICBC sought a 25% to 35% reduction against all damages awarded to Mr. Ford because he failed to engage his seat belt. It pointed to the comment in the report of Dr. Froh, the orthopaedic specialist, that Mr. Ford's injuries "would undoubtedly have been less severe had he been wearing a seat belt."

**68**  As a matter of common sense, I conclude that Mr. Ford's injuries would have been less severe. His head struck the rear view mirror and the windshield with considerable force. A seat belt would have lessened the impact.

**69**  Mr. Ford argued that the onus is on ICBC to establish contributory ***negligence***. First, it must prove that Mr. Henderson's vehicle was equipped with a passenger seatbelt in good working order. Second, it must prove that the use of a properly functioning seatbelt would have avoided or minimized the injuries suffered by Mr. Ford (Harrison v. Brown, [*[1987] 1 W.W.R. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21KW-00000-00&context=).). In the alternative, Mr. Ford argued that there should be a finding of minimal contributory ***negligence*** in the circumstances of this case.

**70**  I have concluded that ICBC has failed to prove facts on which a finding of contributory ***negligence*** could be based. There was no evidence of a properly functioning seatbelt in Mr. Henderson's 1990 Ford Mustang. As a newer model car, it was undoubtedly equipped with a shoulder/lap seatbelt. In fact, Mr. Ford testified that he was about to engage it when the accident occurred. But there was no evidence that it was properly functioning, such that it could have avoided or minimized Mr. Ford's injuries.

**71**  Had the facts established a properly functioning seat belt, I would have found that Mr. Ford contributed to his injuries, but only minimally. At most, I would have assessed his contributory ***negligence*** at 10%.

**72**  While Mr. Ford's injuries would have been less severe had he engaged his seat belt, I must assess his degree of contributory ***negligence*** on the basis of fault, not on a strictly causative basis. In Cempel v. Harrison Hot Springs Hotel Ltd. [*(1998), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) at para. 19, [*100 B.C.A.C. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=), the Court said the following:

... The ***Negligence*** Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances. [Emphasis in original]

**73**  The Court of Appeal reiterated this concept in Alberta Wheat Pool v. Northwest Pile Driving Ltd. [*(2000), 80 B.C.L.R. (3d) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=) at para. 46:

Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care. Fault may vary from extremely careless conduct, by which a party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.

**74**  The question, then, is whether the failure to wear a seatbelt is "a minor lapse of care" or a "reckless indifference or disregard" for one's safety. The inquiry is fact-driven, and will always depend on the circumstances of the particular case.

**75**  In this case, I accept the evidence of Mr. Ford that he intended to engage his seat belt, and was in the process of doing so, as Mr. Henderson drove the car from the parking lot. The car was parked only 30 feet from the parking lot exit. Within seconds of starting the car, Mr. Henderson floored the accelerator and lost control. The accident occurred only a matter of seconds later. In my view, Mr. Ford's failure to engage his seat belt in the circumstances is closer to a minor lapse of care.

**76**  However, I have concluded that ICBC did not prove contributory ***negligence*** and accordingly there will be no deduction from the damage award.

1. SUMMARY OF CONCLUSIONS

**77**  I have concluded that Mr. Ford is entitled to the following award of damages:

1. $65,000 for non-pecuniary damages;
2. $30,415 for loss of wages to the date of trial;
3. No damages for future wage loss or cost of future care.

In total, Mr. Ford is entitled to an award of damages in the amount of $95,415.

**78**  The parties may now speak to the issue of costs if necessary.

WEDGE J.

**End of Document**

[***Gemex Developments Corp. v. CH2M Gore & Storrie Ltd., [2005] B.C.J. No. 917***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0NR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Slade J.

Heard: September 16 and 17, 2004.

Judgment: April 21, 2005.

New Westminster Registry No. S034541

**[2005] B.C.J. No. 917** | 2005 BCSC 604 | 9 M.P.L.R. (4th) 151 | 139 A.C.W.S. (3d) 377 | 2005 CarswellBC 956

Between Gemex Developments Corp., plaintiff, and CH2M Gore & Storrie limited, Neil Nyberg, Frank Quinn, Tom Field and Shinji Goto, defendants

(55 paras.)

**Case Summary**

**Construction law — Architects and engineers — *Negligence* or misrepresentation — Municipal law — Municipal officers — Tort law — *Negligence* — Duty of care — Fiduciary duty — Abuse of legal procedure — Abuse of process — Abuse of public office.**

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| Action by the plaintiff, Gemex Developments, against the defendants, Nyberg, Quinn, CH2M Gore & Storrie and others, for ***negligence***, breach of fiduciary duty and abuse of process in relation to a show cause hearing under the Municipal Act. Gemex built a concrete wall around its residential property next to the Coquitlam river. Following a public outcry, the city council called upon Gemex to show cause why the fence should not be removed. Quinn and Nyberg, the city engineers, retained CH2M to investigate the hydrological impact and structural stability of the wall. Quinn and Nyberg accepted CH2M's request for indemnification by the city. In its report, CH2M raised concerns about the stability of the wall in high wind conditions. A previous report by CH2M raised concerns about the walls. At the show cause hearing, Gemex presented its own expert engineering report. CH2M recalculated using the method of Gemex's experts but found the wall did not meet stability requirements unless counterweights were installed. Based on Gemex's assurances that it would provide additional measures if necessary, the city council found the wall did not pose a public nuisance or safety hazard. Gemex subsequently added counterweights to the walls. In the action, Gemex claimed the cost of the counterweights, its expert report and costs related to preparing and attending for the show cause hearing.  HELD: Action dismissed.  There was no direct evidence to support a finding that Nyberg and Quinn requested a report from CH2M with the intention that a report adverse to Gemex's interests would be produced. The intention could not be inferred from the previous report. There was no evidence Nyberg and Quinn did anything to affect CH2M's independent professional judgment. Even if CH2M had failed to use the appropriate standards, Nyberg and Quinn were not negligent in providing the report to council. It was not within their duties to analyze or comment upon the CH2M's independent report. Their role was only to facilitate commission of the reports and their delivery to council. There was no evidence that CH2M knowingly prepared a false report on the stability of the wall. CH2M was not negligent. Gemex did not provide evidence of a generally accepted standard among engineers for the analysis of the stability of the wall. In any case, Gemex alleged pure economic loss and there was no relational proximity between it and CH2M. |

**Statutes, Regulations and Rules Cited:**

British Columbia Building Code

British Columbia Supreme Court Rules Rule 18A

Municipal Act, R.S.B.C. 1979, c. 290 s. 755.1, s. 755.1(1), s. 755.1(2), s. 755.1(3), s. 936

**Counsel**

Counsel for the Plaintiff: T.L. Spraggs and D.L. Elgee

Counsel for the Defendants: J.R. Singleton, Q.C. and S.R. Robertson

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| **SLADE J.** |

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| I | INTRODUCTION |  |

**1**  Gemex owns a residential property in the City of Coquitlam. The property is bisected by the Coquitlam River. In the summer of 1996, Gemex built a concrete wall along three sides of its property. The fence on the south side property line fronts on the access road to lots in the area known as Caliente Place. Neighbours, angered by the prospect of facing an eight foot concrete wall in close proximity to their residences, raised a public outcry. City council, apparently concerned over the safety of the concrete fence, resolved, pursuant to its powers under the Municipal Act, to call upon Gemex to show cause why the fence should not be removed.

**2**  This action against the City's engineers, Neil Nyberg and Frank Quinn, and against CH2M Gore & Storrie limited, Tom Field and Shinji Goto, consulting engineers (CH2M, Field and Goto, will be referred to as CH2M), relates to their respective roles in the assessment of the safety of the fence.

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| II | FACTS |  |

**3**  In March 1996, the City retained CH2M to investigate the hydrological impact and structural stability of a concrete wall then under construction on the East boundary of Gemex property. The report, dated March 29, 1996, was forwarded to Mr. Quinn, the Assistant City Engineer.

**4**  The March 29, 1996 report raised concerns over the hydrological impact of the wall on flows of the Coquitlam river in the event of flood conditions. Concerns were also raised over the structural stability of the wall, including stability under seismic or high wind loading.

**5**  The City agreed to indemnify CH2M from any third party claims which may arise in relation to their work.

**6**  The City did not inform Gemex of the existence of the report at the time of receipt.

**7**  In September 1996, the City retained CH2M to provide another report. The subject of this report was a concrete wall on the western boundary of the Gemex property. Walls were also under construction on the south and north boundaries. Once again, the City indemnified CH2M.

**8**  The CH2M report on the west wall was delivered on September 20, 1996, to the attention of Mr. Quinn. This report also raised concerns over the stability of the wall in high wind conditions.

**9**  Mr. Nyberg was the City Engineer when the reports were commissioned and received. Mr. Quinn was the Assistant City Engineer. His responsibilities included the hiring of consultants by the City Engineering Department.

**10**  The Engineering Department had been directed by resolutions of City council to obtain independent engineering reports. Messrs. Quinn and Nyberg worked together to obtain the reports from the selected consulting engineer, CH2M. Neither were assigned any responsibility for the drafting of the reports, performance of design checks, or verification of the calculations made by CH2M. They performed no such role. In their affidavits, both Mr. Quinn and Mr. Nyberg depose that they gave no instructions to CH2M of any conclusions sought by the City in these reports.

**11**  Messrs. Nyberg and Quinn attended the City council meeting on September 23, 1996, at which the CH2M report dated September 20 was presented. Council resolved to issue a notice of hearing to Gemex, pursuant to s. 936 of the Municipal Act, 1979. This was notice of a hearing by council to consider whether it should order that Gemex cause the wall, as depicted in sketch plans within the March 29, 1996, and September 20, 1996, reports, to be modified in compliance with "accepted engineering practices", or removed. The notice invited Gemex to make representations at this public meeting.

**12**  The notice of hearing, together with a draft order under s. 936 of the Municipal Act, was delivered to Gemex under cover of a letter from the City solicitor. The notice specified that the public hearing would take place on October 8, 1996, at the council chambers. The solicitor's letter advised Gemex that council would consider all evidence available to it concerning the safety of the wall. CM2H's reports of March and September 1996, were delivered to Gemex by the City solicitor at the time of delivery of notice of the October 8th hearing.

**13**  By letter dated September 27, 1996, Gemex's solicitor, Thomas L. Spraggs, responded to the September 24th letter from the City solicitor. Mr. Spraggs inquired as to the wind velocity, and frequency of occurrence, of a wind of sufficient force to blow the wall over. He advised that he had been informed that the engineering criteria and information used in the report were faulty, and threatened immediate court proceedings if Messrs. Nyberg and Quinn did not "withdraw" the report by 4:00 p.m. on October 4, 1996. Mr. Spraggs also requested a one month adjournment of the show cause hearing to allow Gemex' experts time to review the CH2M reports.

**14**  The City solicitor responded to Mr. Spragg's letter on October 1st. She advised that only council had authority to adjourn the hearing. She invited Mr. Spraggs to contact CH2M with any questions on the March and September 1996 reports. The defendant Tom Field was identified as the contact person. Mr. Spraggs was advised that only council had the authority to "withdraw" the reports.

**15**  The Writ of Summons and Statement of Claim in this proceeding were filed in the New Westminster Registry on October 3, 1996, and were served on that day. By letter dated October 7, the City solicitor advised Mr. Spraggs of the City's position that it would proceed with the hearing. The City solicitor's letter repeats a previous invitation to Gemex to provide expert reports describing any alleged errors or omissions in the reports. She advised also that council had directed a two week adjournment of the hearing to October 22, 1996. This was to give Mr. Spraggs's client an opportunity to obtain expert reports and advice.

**16**  Neither CH2M nor the City received a response to its solicitor's invitation to Mr. Spraggs to contact CH2M.

**17**  The hearing proceeded on October 22nd. Mr. Spraggs, representing Gemex, tendered a report from O & S Engineering International Inc. This report contains an analysis of the wall structures resistance to wind and seismic forces. The author of the O & S report concluded that the "fence" is stable in both wind and earthquake.

**18**  After extensive submissions from Mr. Spraggs, and discussion, the hearing ended. Council adjourned the matter over to the following Monday.

**19**  The O & S report was referred to CH2M for review. CH2M's report to Mr. Quinn advised that it recalculated the stability of the wall using the method utilized by O & S, and found that the structure, as it was in September 1996, did not meet stability requirements. This report notes that the O & S report discusses the addition of counterweights to the wall structure. The October 25, 1996, CH2M report states that these counterweights, if installed, would result in the wall meeting stability requirements.

**20**  On October 28, 1996, at a special meeting, the City of Coquitlam council resolved to accept the O & S and CH2M reports, and find that the wall does not currently pose a public nuisance or safety hazard. This ended the proceedings initiated under s. 936 of the Municipal Act.

**21**  The October 28 resolution of council was made upon consideration of Gemex assurances that the wall was safe, and that it was prepared to provide additional measures if necessary.

**22**  Gemex added counterweights to the wall structure. It is Gemex's position that these were not required to stabilize the wall.

III Damages Claimed

**23**  Gemex claims the following:

1. $8,357.04 for the cost of six counterweights.
2. $7,276.00 for the report from O& S International Inc.
3. Unspecified costs incurred for other professionals, including legal fees to prepare and attend the show cause hearing.

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| IV | Bases for Claims, As Pled |  |

**24**  The Statement of Claim asserts causes of action in ***negligence***, breach of fiduciary duty, and abuse of process.

**25**  For the most part, the facts alleged in the Statement of Claim do not distinguish among Messrs. Nyberg and Quinn, and CH2M. The claims of breach of fiduciary duty and abuse of process appear to be grounded in the assertion that Messrs. Nyberg and Quinn sought a report from CH2M that would deem the wall unsafe, in order to establish a basis for the exercise of council's power under the Municipal Act to have the wall removed. As for the claim against CH2M, it is asserted that it deliberately produced a report "affecting the plaintiff without due care and attention, with a view that it would cause damage to the plaintiff's property, as well as, financial loss ...".

**26**  The claim based on ***negligence***, in relation to all the defendants, is grounded in particulars which allege that they applied incorrect building codes and standards, and failed to take into account certain relevant considerations in the production of the report (CH2M), and the delivery of the report to council by Messrs. Nyberg and Quinn.

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| V | DISCUSSION AND ANALYSIS |  |

1. Procedural Matters

**27**  The defendants Nyberg and Quinn applied under Rule 18A for an order dismissing the action as against them. This application was heard, and judgment was reserved.

**28**  Some time later, the plaintiffs brought an application under Rule 18A, seeking judgment against CH2M. Judgment was reserved.

**29**  This judgment addresses both applications.

1. The Defendants Nyberg and Quinn

**30**  The claim against Messrs. Nyberg and Quinn must be considered in the light of s. 755.1 of the Municipal Act, R.S.B.C. 1979, c. 290, which was in effect at the time. Subsections 1-3 of that section state:

1. No action for damages lies or shall be instituted against a municipal public officer or former municipal public officer for anything said or done or omitted to be said or done by him in the performance or intended performance of his duty or the exercise of his power or for any alleged neglect or default in the performance or intended performance of his duty or exercise of his power.
2. In this section "municipal public officer" means ...
3. an officer or employee of a municipality, ....
4. Subsection 1 does not provide a defence where
5. the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross ***negligence*** or malicious or wilful misconduct ....

**31**  Mr. Spraggs, counsel for Gemex, argued that the conduct of these defendants amounted to both wilful misconduct and gross ***negligence***.

**32**  The claim of wilful misconduct is based, primarily, on allegations that Messrs. Nyberg and Quinn commissioned the September 1996 report from CH2M knowing or believing that CH2M would deliver a negative report, as:

1. It had concluded in its March 29, 1996, report that a similar wall located on the Gemex property was unsafe.
2. Messrs. Nyberg and Quinn accepted CH2M's request for an indemnity.

**33**  There is no direct evidence to support a finding that Messrs. Nyberg and Quinn, or either of them, requested the September report from CH2M with the intention that a report adverse to Gemex interests be produced. Such a motive could not be inferred from the fact that a previous report, the March 1996 report, raised a concern over the stability of the portion of the wall which was the subject of the earlier report. There is nothing in the evidence to suggest that Messrs. Nyberg and Quinn, or either of them, did anything in their communications with CH2M that would impede or otherwise affect the exercise by CH2M of its independent professional judgment in relation to either report.

**34**  The acceptance by Messrs. Nyberg and Quinn of CH2M's request for an indemnity cannot support, to a level of probability (if at all), an inference that Messrs. Nyberg and Quinn communicated to CH2M a desire that it provide a report adverse to the interests of Gemex. While it may not have been the practice for consulting engineers providing services to the City to request an indemnity, or a practice of the City to give an indemnity if requested, an alternate rational inference from the provision of an indemnity in the present circumstances is the foreseeability that the service rendered had the potential to embroil CH2M in litigation. There was, after all, much publicized public controversy over the construction of the wall and its impact on the neighbouring properties.

**35**  As for ***negligence***, Mr. Spraggs argues that Messrs. Nyberg and Quinn were negligent in providing to council a report which failed to utilize the appropriate construction standards in the analysis of the structural stability of the cement wall.

**36**  I will, in my analysis of this basis for a claim in ***negligence*** against Messrs. Nyberg and Quinn, assume that there was such a failure on the part of CH2M.

**37**  The argument fails for this reason: it was not within the scope of Messrs. Nyberg and Quinn's duties to their employer, the City of Coquitlam, to analyze or comment on the CH2M reports. The City council requested, in each case, that the engineering department obtain independent engineering reports. Their role was to facilitate the commission of the reports, and their delivery to council, nothing more. If they were not required by their employer to analyze and comment on the impugned reports, there would be no basis for finding that they owed a duty of care to do so to their employer, much less to Gemex.

**38**  Mr. Spraggs argued that the failure of Messrs. Nyberg and Quinn to withdraw the report in compliance with his demand of September 27, 1996, constituted ***negligence***. The theory, as I understand it, is that the failure to withdraw the report upon demand resulted in Gemex spending money to counter the opinions expressed in CH2M's reports and to add unnecessary counterweights to the wall.

**39**  Tempting though it is to comment expansively on this theory of tort law, it will suffice to say that Messrs. Nyberg and Quinn had no authority to "withdraw" the report. They had been directed to obtain the reports by council. The reports were received and passed on to council. Council acted on the reports by resolving to require Gemex to show cause why the wall should not be ordered modified or removed. Decisions as to whether to "withdraw" the reports were outside the authority and duties of these defendants.

1. CH2M Gore and Storrie Limited, Tom Field and Shinji Goto

**40**  Mr. Elgee appeared as counsel on the hearing of this application.

**41**  He advanced two theories for the liability of CH2M:

1. That CH2M knowingly prepared a false report on the stability of the wall.
2. That CH2M was professionally negligent in applying incorrect standards to its assessment of the stability of the wall.

**42**  There is no evidence probative of an intention on the part of CH2M to produce a false report.

**43**  Gemex relies for proof of professional ***negligence*** on several reports, as tendered in evidence through the affidavit of Diane Lynne Spraggs, president of Gemex. This affidavit, sworn February 13, 2004, exhibits the following reports:

1. Letter to Thomas L. Spraggs from Dr. Nathan, P. Eng., dated October 28, 1996, and a more detailed report, undated, delivered to Thomas L. Spraggs on November 25, 1996.
2. Report of Hooley and Schubak Ltd., consulting engineers, dated June 9, 1998.
3. Report of CAN consulting engineers, dated June 6, 2002.

**44**  The last mentioned report responds to a report obtained by counsel for the defendants from G.S. Sayers Engineering Ltd., dated August 16, 1999.

**45**  The onus is on Gemex, as plaintiff, to prove ***negligence*** on a balance of probabilities. Gemex claims that CH2M, by using the British Columbia Building Code as the basis for its analysis of wind and seismic effects on the wall, failed to carry out its professional duties in accordance with the applicable standard of care. In short, Gemex claims that British Columbia Building Code has no application to an analysis of the structural stability of a free standing concrete wall.

**46**  None of the plaintiff's reports refer to a generally accepted standard among engineers for the analysis of the stability of a structure of this kind.

**47**  It is notable that Dr. Nathan, who disagreed with CH2M's conclusions on the stability of the wall, stated In his report that "there is no code of practice for a garden wall".

**48**  The CAN engineering report offers no opinion on the appropriate standard by which to analyze the resistance of the wall to wind and seismic forces. The author of this report states that the average competent engineer should ask for expert advice if it is realized that the building code doesn't apply to "fences". The author goes on to state that if CH2M had found the fence satisfactory (using the building code as a guide) "that would have been the end of the investigation as the case would have gone no further". The report goes on to say that upon CH2M finding the fence unsatisfactory on the application of the building code it should have, knowing that this was going to be a contentious issue, investigated further. It is, in my respectful opinion, self evident that the standard of care could not be determined by reference to the question whether or not the application of the standard relates to a matter that may become contentious.

**49**  The Hooley, Schubak Ltd. report, like the others obtained by Gemex, is critical of CH2M's use of the building code. The Hooley and Schubak report embarks on a detailed and highly theoretical analysis. This leads to a conclusion that the structure is stable. In doing so, the authors take into account information on the structure of a significant portion of the wall which was not available to CH2M. Gemex was invited to provide just this sort of information to CH2M before the scheduled date for the show cause hearing, and refused or neglected to provide the information.

**50**  The evidence relied upon by Gemex falls far short of proof of ***negligence*** on the part of CH2M to the level of probability. Neither the standard of care nor ***negligence*** is proven.

**51**  If ***negligence*** were proven, one question remaining would be whether, in the present circumstances, there is a basis in law for the recovery of damages. Gemex has suffered neither physical injury nor property damage. It claims economic loss only.

**52**  The current state of the law for pure economic loss was summarized by Finch C.J. in M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co., [*[2002] B.C.J. No. 1125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2FC-00000-00&context=), [*2002 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2FC-00000-00&context=), where he summarized the law as follows:

The Supreme Court of Canada has held that there is no absolute bar to the recovery of pure economic loss where the plaintiff has suffered neither physical injury nor property damage. The Court has held that in certain limited circumstances, pure economic loss may be recoverable Include:

1. The independent liability of statutory public authorities.
2. Negligent misrepresentation.
3. Negligent performance of a service.
4. Negligent supply of shoddy goods or structures.
5. Relational economic loss.

See: Winnipeg Condominium, [*[1995] 1 S.C.R. 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GT-00000-00&context=), at para. 12 and Martel Building Ltd. v. Canada, [*[2000] 2 S.C.R. 860*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M469-00000-00&context=); [*193 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M469-00000-00&context=)

**53**  If it could be considered that the potential for recovery could, in the present circumstances, come within the heading "negligent performance of a service", it would remain for Gemex, as plaintiff, to establish some relational proximity between it and CH2M.

**54**  The interests of the City of Coquitlam and Gemex were plainly divergent in this matter. The City's interest was to assure the safety of its residents. Gemex interest was to protect its investment in the wall. There is no proximity between CH2M and Gemex.

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| VI | CONCLUSION |  |

**55**  The action is dismissed. Costs to the defendants at scale 3.

SLADE J.

**End of Document**

[***Hanes v. Loblaws Inc., [2017] B.C.J. No. 101***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MS1-JVC1-F7VM-S3T5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

L.D. Russell J.

Heard: October 18-21, 2016.

Judgment: January 23, 2017.

Docket: S94216

Registry: Kelowna

**[2017] B.C.J. No. 101** | [*2017 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NT0-WM81-F7G6-64JH-00000-00&context=)

Between Darlene Hanes, Plaintiff, and Loblaws Inc., Defendant

(149 paras.)

**Case Summary**

**Tort law — *Negligence* — Dangerous things and situations — Action by customer for damages for injuries sustained in slip and fall accident in defendant's store dismissed — Plaintiff, who was wearing leather-soled shoes with two-inch heel, slipped on store floor — Store parking lot was wet and slushy and defendant had placed mats to absorb moisture, placed warning cones on floor and employee who was mopping warned plaintiff to be careful — Defendant had system in place to guard against dangerous substance remaining floor and had employees working on mopping floor — No evidence floor was wet when accident occurred.**

**Tort law — Occupier's liability — Dangerous premises — Particular situations — Floors — Action by customer for damages for injuries sustained in slip and fall accident in defendant's store dismissed — Plaintiff, who was wearing leather-soled shoes with two-inch heel, slipped on store floor — Store parking lot was wet and slushy and defendant had placed mats to absorb moisture, placed warning cones on floor and employee who was mopping warned plaintiff to be careful — Defendant had system in place to guard against dangerous substance remaining floor and had employees working on mopping floor — No evidence floor was wet when accident occurred.**

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| Action by a customer for damages for injuries sustained in a slip and fall accident in the defendant's store. The plaintiff attended the store after church. She was wearing two inch high heels with leather soles. The ground was slushy and wet and it was likely the plaintiff's shoes were wet from her walk through the parking lot. There were mats on the floor to absorb moisture from customers' feet. There were also warning cones placed on the floor. As the plaintiff entered the store, an employee, who was mopping, warned her to be careful. The plaintiff slipped as she moved across the floor. Her right foot turned under, her right leg extended, and she fell to the floor. As a result of the fall, she experienced injuries to her right knee and pain to her right knee and leg, and back. The plaintiff claimed non-pecuniary damages for injuries to her right knee and lower back. In addition, she claimed for past loss of income in relation to her planned Zumba business, as well as for the future loss of income and loss of earning capacity. The defendant admitted that it was an occupier of the store and, as such, owed a duty of care to the plaintiff to ensure that she would be reasonably safe while she was using the premises. It claimed that it had a reasonable inspection program to ensure floors were safe. It also claimed that the plaintiff's failure to call expert evidence to explain her medical condition meant that she had not established damages. It also argued that the plaintiff had failed to prove causation.  HELD: Action dismissed.  The plaintiff's fall was truly an accident and liability could not be found against the defendant. It was clear that the defendant had in place a system to guard against any dangerous substance remaining on the floor's surface. In addition, the defendant had employees working at the entrance whose major responsibility was to keep the outside conditions from intruding into the store. While this did not mean that there was no moisture on the floor that day, there was no evidence that the surface of the floor was sufficiently moist to cause the plaintiff to fall. |

**Statutes, Regulations and Rules Cited:**

Occupiers Liability Act, [*R.S.B.C. 1996, c. 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)(1)

**Counsel**

Counsel for Plaintiff: C.R. Penty.

Counsel for Defendant: P.E. Norell.

**Reasons for Judgment**

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| **L.D. RUSSELL J.** |

**1**   This is a tort action in ***negligence*** and under the *Occupiers Liability Act*, *R.S.B.C. 1996 c. 337* (the *"OLA")* brought by Ms. Darlene Hanes against Loblaws Inc. ("Loblaws"). Ms. Hanes claims that she suffered damages from a fall in the Kelowna Superstore on December 19, 2010 at noon.

**2**  In terms of damages, the plaintiff claims non-pecuniary damages for injury to her right knee and lower back. In addition, she claims for past loss of income in relation to a planned Zumba business, as well as for future loss of income and loss of capacity.

**3**  Loblaws admits that it is an occupier of the store and, as such, under s. 3(1) of the *OLA*, owed the plaintiff a duty of care to ensure that she would be reasonably safe when using the premises.

**4**  That duty of care applies, in this case, to the condition of the premises.

**5**  Loblaws operates Superstore and says that it has a reasonable inspection program in place to ensure that the floors are safe.

**6**  Loblaws also claims that the plaintiff's failure to call expert evidence to explain her medical condition means that she cannot make out her case, as damages have not been established. In any event, Loblaws maintains that the plaintiff has failed to prove causation, either in relation to a breach of the *OLA*, or in regard to ***negligence***.

**7**  One medical witness that Ms. Hanes did call was her general practitioner, Dr. Bobbyn. He testified by deposition to his observations of Ms. Hanes over a period of approximately two years following her fall. His clinical records were also presented to support her attendance at his office.

**8**  Dr. Boyce, a surgeon who performed knee surgery on the plaintiff's right knee, was also called to provide his observations and his clinical records. However, his surgical report contained some opinion evidence that I could not give weight to in the absence of a properly prepared and served report.

**Issues**

**9**  I agree with the characterization of the issues by counsel for Loblaws. In addition, I agree with their submission that the plaintiff must, both in regard to liability, and causation, meet the burden of proof.

**10**  The questions she must answer in the affirmative are as follows:

1. Liability:
2. Was the floor unreasonably slippery due to the presence of water?
3. Did the presence of that water cause the plaintiff to fall?
4. Was the defendant acting unreasonably either because its inspection program did not fulfill its requisite standard of care, or because that inspection program, which was otherwise satisfactory, was not being followed at the time of the fall?

**11**  If liability is found against the defendant, then the focus becomes damages. In this context, the plaintiff must answer the following questions:

1. Damages:
2. Has the plaintiff proved that any injuries were caused by the fall?
3. If so, has she proved what injuries were caused by the fall?
4. If so, what were the duration, severity, and frequency of the symptoms caused by the fall?
5. What are her damages for non-pecuniary loss, past wage loss, and future wage loss?

**12**  The plaintiff does not claim for future cost of care or special damages.

**Facts**

**13**  On December 19, 2010, Ms. Hanes and her then partner, Mr. Taylor, went to church and then to the Superstore. Ms. Hanes wanted to return a box of mandarin oranges.

**14**  The witnesses' evidence was that it had snowed the night before but had warmed up somewhat, leaving some slush and generally wet conditions. On leaving church, Ms. Hanes had to walk through an exposed parking lot to her car.

**15**  It is likely her shoes were wet from her walk through the parking lot.

**16**  Subsequently, Mr. Taylor drove Ms. Hanes to the front of the Superstore, where she could get out of his car under the overhang, protecting her somewhat from the wet conditions.

**17**  Ms. Hanes had dressed for church and was wearing approximately 2 inch high heels with leather soles.

**18**  After dropping the plaintiff off, Mr. Taylor drove to the other side of the parking lot and parked in a location that allowed him to see the store's exit. He did this so he could drive to the exit door and pick the plaintiff up when he saw her exit, allowing her to avoid the snowy parking lot.

**19**  Meanwhile, Ms. Hanes entered the store. She passed through the vestibule where there was a mat to absorb moisture from customers' feet. She entered the store proper through a second set of doors. As she entered, an employee, who was mopping the mat, warned her to be careful.

**20**  Through the second set of doors, there was another mat on the floor and a warning cone off to the left of that mat.

**21**  The plaintiff turned left to go to the customer service desk to return her oranges. Subsequently, she was instructed to go and get another box of oranges. Consequently, she turned to her left towards the oranges and, as she moved across the floor, her right foot turned under, her right leg extended, and she fell to the floor.

**22**  There is a video clip of the fall and the immediate aftermath.

**23**  A customer rushed to her aid and picked her up. Ms. Hanes was in pain and could not stand. Ms. Shore, an employee of the Superstore, asked her customer service colleague to call "Code 66," which is a signal to send first aid to the front end of the store.

**24**  Ms. Shore got a chair for Ms. Hanes, who then sat down in it. Roger Brown, the store's assistant manager, arrived almost immediately, and James Schwebius, the store's manager, arrived right after. Both inquired regarding her condition. Both also inspected the floor to ascertain whether there was any hazard that needed to be cleared.

**25**  They found nothing. Mr. Brown took a picture of the floor where Ms. Hanes had fallen. However, it is unhelpful. He also took a picture of her feet while she was still wearing her shoes.

**26**  Del Dhaliwal, the store's front end manager also arrived quickly and spoke to Ms. Hanes. She offered Ms. Hanes a glass of water and helped her take off her coat.

**27**  Ms. Hanes was in discomfort so Mr. Brown wheeled her to the store's medical clinic. The medical clinic is a tenant of Superstore.

**28**  In the medical clinic, Mr. Schwebius asked Ms. Hanes whether she had been shopping with a companion. He learned that Mr. Taylor was waiting for her in the parking lot. Mr. Schwebius left the store and searched for Mr. Taylor. Once he located Mr. Taylor, he accompanied him into the medical clinic where he found Ms. Hanes.

**29**  Mr. Brown is confident that Mr. Taylor's first words to Ms. Hanes were: "I told you those shoes were slippery!"

**30**  Mr. Brown says he recalls this because, when he looked at Ms. Hanes' footwear, he could not help but think that it was not suitable for the weather, and Mr. Taylor's comments echoed his thoughts. He was also somewhat surprised that Mr. Taylor did not immediately ask how she was feeling.

**31**  Mr. Taylor denies this and says he may have commented that his own cowboy boots were slippery in the snow.

**32**  Ms. Hanes could not get up on the exam table in the clinic. She was given a shot and was sent by ambulance to Kelowna General Hospital ("KGH").

**33**  No records were produced from Ms. Hanes' visit to the clinic or to KGH. She advises that she had an x-ray, some pain medication administered intravenously, and was released the next day with Tylenol.

**34**  That she suffered bruising and swelling to the back of her right upper leg, as well as her buttock, is not disputed.

**35**  Ms. Hanes did not see water on the floor where she fell. However, when she took off her jacket, the back of it was wet. She surmises that water on the floor caused her to fall.

**36**  The moisture on the back of her jacket, which did not extend to cover her buttocks, is the only evidence on which she relies to prove that there was water on the floor when she fell.

**37**  She also did not see anyone cleaning the floor after she fell.

**38**  On December 22, 2010, three days after her fall, she went to see her doctor, Dr. Bobbyn. He did not find any injuries to her ligaments.

**39**  Thereafter, she saw her doctor on January 10, 2011 (due to right hamstring and buttock pain), February 4, 2011 (a clinic visit), August 4, 2011 (tender right quadricep, right leg strain resolving), October 6, 2011, December 21, 2011 (a visit in which she complained of knee pain for the first time), January 24, 2012, May 23, 2012, and June 20, 2012. On August 7, 2012, she saw her doctor because she had pain in her back. At that time, she had a number of imaging procedures done on her knee and lower spine.

**40**  She has also undergone physiotherapy and massage therapy but has only obtained temporary relief.

**41**  She advises that she has taken painkillers due to pain in her right leg, knee, and now her back.

**42**  Ms. Hanes moved to Alberta in June 2013, and has undergone treatment there for her right knee and back.

**43**  On February 5, 2015, she had surgery at KGH for a tear to her right meniscus. Once again, there was no expert report produced. Consequently, Dr. Boyce could only testify to having performed this surgery, and to observing wear and tear changes to the plaintiff's right knee, as well as a tear to her meniscus.

**44**  Ms. Hanes testified that, at this time, she is on a waiting list for lower back surgery.

**Evidence**

The witnesses for the defence were as follows: Roger Brown, James Schwebius, Therese Shore, Del Dhaliwal, and Sean Mulligan.

**Roger Brown**

**45**  Roger Brown was with Loblaws for 15 years and was assistant store manager at the time of Ms. Hanes' fall.

**46**  He is currently the Occupational Health and Safety Advisor for Yukon College in Whitehorse, Yukon.

**47**  He testified that all employees (known as "colleagues"), are trained in customer safety. The sales floor is the biggest concern with respect to safety because spills of cooking oils or soap can be very dangerous.

**48**  All employees in the course of their duties are required to inspect the floor. "Don't pass it up, pick it up" is a mantra repeated to, and by, employees.

**49**  With a 170,000 square foot store, even with this kind of training, not every corner can be covered. Consequently, each department must keep a "Sweep Log" for their area. This requires an inspection of each department (of which there are 20) at least once an hour. A book is kept in which the responsible employee must sign off and note the time the inspection was completed. If no hazard is spotted, an "I" is noted to indicate an inspection has taken place. If something was swept up, an "S" is noted to show that the hazard was cleaned up. If something required mopping, an "M" is noted. If an obstacle was removed from the floor, an "O" for other is noted.

**50**  The department manager has to sign the Sweep Log, as does the store manager.

**51**  The General Services employees are the store's janitors. They help with general clean-up, as well as cleaning the washrooms and parking lots, as well as collecting carts. These employees take care of the front entrance, with one or two assigned to monitor and mop that area on a permanent basis.

**52**  In poor weather, the store takes extra steps to try to ensure the safety of employees and customers. The aim is to try to keep external conditions from penetrating the store. Mats and safety cones are used.

**53**  Heavy mats, which are five feet wide and twenty feet long, cover the front door entrance, where there is a vestibule leading to a second set of doors. The mats are about one inch thick and trap moisture from patrons entering the store.

**54**  A second set of mats is placed inside the doors that form the entrance to the store proper. The area where customers come into the store is known as "the Front End." The Front End comprises the foyer, the area where customers enter the store, the customer service area, the U-scan area, the washrooms, and the exit doors.

**55**  Because the mats get wet from the moisture tracked in by patrons, the employee assigned to monitor and mop the Front End makes use of a "Rug Doctor," a carpet cleaning machine that vacuums up water. He or she will use this as often as necessary, but in wet weather, it will be used many times a day.

**56**  A separate Sweep Log is kept for the Front End when the weather is bad.

**57**  The Sweep Log is kept year round, maintained daily, checked weekly by management, and retained. Exhibit 2, tab 1 is the Front End Sweep Log for December 19, 2010. It covers the entire Front End.

**58**  Most of the mopping takes place at the site of the second set of glass doors where customers enter the store. This is likely the place of highest risk and so it attracts the most care.

**59**  Exhibit 2, tab 1 shows that regular mopping was taking place throughout the morning and up to the time of the fall. Between 7:15 a.m. and 12:25 p.m., 20 incidents of looking after the Front End floors are indicated, with 17 moppings, 2 shovellings, and 1 case of both mopping and shovelling.

**60**  This does not prove that there was mopping in front of the customer service desk. However, since mopping is performed in response to perceived need, had there been water on the floor in front of the customer service desk, it is likely there would have been a report from one of the employees noting it.

**61**  As well, with the high level of traffic through the area by store employees and customers, it is unlikely that the floor would have been wet without someone taking notice.

**62**  It is clear from Mr. Brown's evidence that the store is constantly on the lookout for hazards on the floor, no doubt because of potential liability issues.

**63**  In fact, the heading on the Sweep Log is "Safety Comes First!" and in smaller print beneath that heading is a note that says: "This is our evidence to support any possible litigation."

**64**  Mr. Brown was working the day of Ms. Hanes' fall. It was one of the busiest shopping days of the year for the store, as shoppers were getting ready for Christmas.

**65**  When Mr. Brown arrived on the scene in response to the Code 66 page, Mr. Schwebius, the store manager, was already there talking to Ms. Hanes.

**66**  Mr. Brown immediately inspected the area of the fall to determine if a hazard existed that could cause another fall. After finding nothing, he went to get a camera and took pictures of the floor and of Ms. Hanes' feet. He got a wheelchair and took her to the medical clinic where he ensured that she was in the queue. He also saw her talking to the receptionist.

**67**  After Mr. Taylor came in and made his comment about Ms. Hanes' shoes, Mr. Brown took her contact information and left the clinic.

**68**  Exhibit 2, tab 3 is a schematic of the store signed by Mr. Brown. It indicates in yellow highlighter where Ms. Hanes fell approximately.

**69**  Mr. Brown obtained the security video from the camera located by the customer service desk. The video is not designed for general observation, but rather for facial identification purposes, presumably to help prosecute shoplifters. Nonetheless, it shows an employee mopping by the entrance doors.

**70**  There are two disks of the incident, found at Exhibit 2, tab 5(1) and (2).

**71**  The video on disk 1 is approximately one hour and 46 minutes (1:46) in length.

**72**  Sean Mulligan is the General Services employee seen on the video mopping at the entrance doors. He is seen mopping again 18 minutes later at 18:37. Again at 59:09 he is seen mopping. At 1:16:25, he uses the Rug Doctor on the mat to suck up excess water. At 1:21:35, he mops again. At 1:37:39, Ms. Hanes falls just to the left of the customer service desk.

**73**  The video also indicates that there was a large volume of traffic through the area where Ms. Hanes fell. Several thousand customers come through the store every day.

**74**  The store grosses approximately $2 million per week. There are about 300 employees in the store at any one time.

**75**  At 1:31:29, the store's meat manager, accompanied by another employee, walks through the area. Seven seconds later, at 1:31:36, a cashier walks through. At 1:33:06, there is a group of employees caught on video, as the entrance to the offices and the lunchroom is nearby. At 1:33:28, Mr. Schwebius walks through the area looking at the entrance doors. He is then followed by a General Services employee with a mobile clean-up cart at 1:34:23, who is accompanied by a cashier carrying baskets. Mr. Schwebius appears again at 1:34:27. The cashier appears again with baskets at 1:35. At 1:35:44, Ms. Shore comes through. Two employees pass at 1:36:22 and 1:36:42. Another employee walks past at 1:37:05, and then the accident happens at 1:37:39.

**76**  This video does not show the fall clearly. Ms. Hanes is at the bottom of the picture.

**77**  Ms. Shore is seen getting a chair for Ms. Hanes as Mr. Schwebius arrives. Mr. Brown arrives at 1:39:22. He is captured looking at the floor.

**78**  Mr. Brown explained that there were four employees on site immediately after the fall, including three managers. They are trained to deal with hazards because they do not want anyone else to fall. However, it is clear from the video that they are not wiping up a pool of water or mopping the floor in the area of the fall. Moreover, none of them slipped in the area where Ms. Hanes fell.

**79**  Mr. Brown says unequivocally that there was no water on the floor.

**80**  The second video clip, Exhibit 2, disk 2, is the view from the right hand side of the customer service desk, and gives a better view of Ms. Hanes falling. The video does not show any glare on the floor, which could arise from water reflecting the overhead lights.

**81**  The video does however show Mr. Brown taking pictures of the floor at 1:42:03. He got the wheelchair at 1:44:55, and carried the plaintiff's coat as he took her to the clinic.

**82**  He was not asked if her coat was wet.

**83**  Mr. Brown made reference to Exhibit 2, tab 4, pp. 1 and 2, each page showing two photographs he took. They are not contemporaneous with the fall, but provide the following: a view of the area of the fall (page 1 A and B), of the entrance with a cone in the approximate area of the fall, (page 2 - A) and a view from the customer service desk toward the area of the fall (page 2 - B). The Rug Doctor appears in photos 1-A and 2-A.

**84**  I found Mr. Brown to be a credible witness and, as a former employee, one whose independence could not be questioned.

**James Schwebius**

**85**  Mr. Schwebius gave his evidence by video deposition.

**86**  He has spent 29 years with Loblaws, with 19 of those years in the Kelowna Superstore. He is now the district manager and has overall responsibility for seven Loblaws stores.

**87**  As store manager, he spent about 70% of his time on the sales floor, and 30% doing administrative work.

**88**  Mr. Schwebius emphasized the importance he places on training employees on the safety of the sales floor. In employee meetings, called "huddles," employees are regularly reminded of the need to "pick it up, don't pass it up" and to maintain Sweep Logs showing hourly inspections of their individual departments.

**89**  Safety plays an important role in the orientation of new employees. If an employee spots a problem on the floor, such as a grape squashed on the floor, either that employee cleans it up, or calls a General Services employee to do it. However, the first employee to see the problem is not permitted to leave the area until the cleaner arrives.

**90**  The use of Sweep Logs is to enforce, at a minimum, the inspection of each department on an hourly basis. One employee in each department has the responsibility to ensure that there are no hazards within the department, and must sign off on each hourly check. This is a formal program, and so the person charged with performing the departmental inspection must note the actual time he or she finished the job. As described by Mr. Brown, one letter, or a combination of code letters (i.e. 'S,' 'M,' 'I,' and 'O'), must be noted in order to indicate what steps were taken.

**91**  In snowy or rainy weather, extra care is taken with the safety of the floors, and mats as well as cones are put out.

**92**  He did not recall Ms. Hanes' fall, though did remember that he searched for Mr. Taylor in the parking lot.

**93**  Mr. Schwebius and counsel for the plaintiff appeared to be a little at cross purposes when discussing the operations at the entrance to the store.

**94**  Counsel appeared to suggest that the sweep times were not an accurate reflection of when the floors were actually swept or mopped, but instead that initials were added whenever it was convenient for the employee to go over to the Sweep Log.

**95**  Mr. Schwebius was unclear in his answer, but ultimately indicated that an employee would sign the Sweep Log when the task was done.

**96**  I take from his answer that the routine sweeps were recorded as they were done, and that the times indicated may be somewhat approximate.

**97**  Mr. Schwebius said that his practice in bad weather was to request that a separate Sweep Log be kept for the Front End. In contrast, ordinarily, the Sweep Log for that area would include the customer check out, and the area of the tills right up to the entrance/exit doors.

**98**  He was clear that the employees in the store would have modified their cleaning habits to reflect weather and traffic patterns in the store.

**99**  When Mr. Schwebius arrived to speak to Ms. Hanes, he automatically looked around the area to be certain there was no existing hazard on the floor that could cause injury to someone else passing through the area. He found nothing.

**100**  He also pointed out that the video disks in evidence show him passing by the area in front of the customer service desk many times during the time preceding the fall.

**101**  This is a high volume area of the store and it is his view that either he or another employee would have noticed a pool of water there.

**Therese Shore**

**102**  Ms. Shore is now a retired employee. She was the Front End hostess the day of the incident. She did not witness the fall, but saw a customer helping Ms. Hanes to her feet.

**103**  She found a chair for Ms. Hanes and inquired about the plaintiff's condition.

**104**  She called to a fellow employee to sound Code 66 and, after Mr. Schwebius and Del Dhaliwal arrived, she left the scene.

**105**  She did not find any water on the floor in the area of Ms. Hanes' fall.

**106**  Her job that day was to help maintain the floor in the Front End. Consequently, in order to spot any pools of water or spills, she regularly scanned the floor by walking across it with her head down.

**107**  She had traversed the area in front of the customer service desk many times that morning before Ms. Hanes' fall. There was no other such incident that morning.

**108**  On the day of the incident, her initials on the Sweep Log show that she mopped the floor by the front entrance twice, while her fellow employee, Sean Mulligan, mopped it many more times.

**109**  Ms. Shore would have mopped up after Mr. Mulligan finished using the Rug Doctor. As Ms. Shore indicated, this is because the Rug Doctor, while effectively taking up water from the mats, can leave some water around the margins, which then need to be mopped up.

**Sean Mulligan**

**110**  Mr. Mulligan has been a Superstore employee for 11 years. His job is in maintenance, which mostly entails cleaning the floors.

**111**  He does not recall the specific incident. However, he did prepare a brief statement the day of Ms. Hanes' fall. In that statement, he indicated that he was mopping at the Front End between 10:15 a.m. and 12:10 pm on Sunday, December 19, 2010.

**112**  He ceased mopping when the host (presumably Ms. Shore) relieved him.

**113**  By my count, he recorded mopping five times between 10:15 a.m. and 12:10 p.m. that day.

**114**  On the day of the incident, his focus was on maintaining all of the Front End.

**115**  He did not participate in Ms. Hanes' care following her fall.

**116**  Mr. Mulligan struck me as a serious, conscientious employee whose attention to his job is paramount.

**Del Dhaliwal**

**117**  Ms. Dhaliwal's evidence did not add much. She was the Front End supervisor at the time of the fall.

**118**  She noticed and recalled Ms. Hanes' shoes.

**119**  She also recalls that, after Ms. Hanes had been taken care of, she inspected the floor in the area of the fall. She found nothing there.

**120**  She had no problem walking to the scene of the fall and felt no loss of traction due to moisture on the floor.

**The Authorities**

**121**  There are many cases dealing with 'slip and fall' allegations. I will review only the most relevant.

**122**  As I have indicated, the pleadings of the plaintiff indicate that she has sued under the *OLA* and in ***negligence***.

**123**  There are connections between the duty set out in the *OLA* and the common law of ***negligence***. As stated in the plaintiff's submission, in a quote from *Agar v. Weber*, [*2014 BCCA 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B196-00000-00&context=) at paras. 29-31, Smith J.A. states as follows:

[29] In ***negligence***, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness ... [citations omitted].
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission ... [citations omitted].

[30] The standard of care under the *OLA* and at common law for ***negligence*** is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.

[31] Under the statutory test for occupiers' liability, the Court in *Waldick v. Malcolm*, *[1991] 2 S.C.R. 456* described the standard of care at 472:

... the statutory duty on occupiers is framed quite generally ... That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all the circumstances of the case is reasonable".

[Emphasis in original.]

**124**  That this standard of care is not one of perfection is clear. Instead, the standard of care must be one that would be expected of an ordinary, reasonable, and prudent person in the same circumstances: *Foley v. Imperial Oil Limited*, [*2011 BCCA 262*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S22N-00000-00&context=) [*Foley*]; and *Ryan v. Victoria (City)*, [*[1999] 1 S.C.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41J-00000-00&context=) at para. 28.

**125**  The Court of Appeal has found that the common law of ***negligence*** has been somewhat modified by the *OLA*. Specifically, the statute has eliminated the distinctions between different classes of visitors to premises, distinctions which existed earlier in the common law approach to liability for occupiers of land. As stated by Lowry J.A. in *Simmons v. Yeager Properties Inc.*, [*2014 BCCA 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2SH-00000-00&context=) [*Simmons*] at para. 6:

... All visitors will be owed a duty of care, as described in s. 3(1) [of the *OLA*], unless they are excluded by the *Act*, as with those who have or are deemed to have willingly assumed the risk of injury, as outlined in ss. 3(3), 3(3.1) and 3(3.2).

**126**  He goes on to say that the general framework for proving liability must still apply. Consequently, merely showing that an injury occurred on an occupier's property will not be sufficient to establish liability. There is no such presumption: *Simmons* at paras. 7-8.

**127**  The usual test of causation must prevail even when a plaintiff is seeking to hold a defendant liable under the *OLA*. As a result, there must be a breach of the legislated standard of care by the defendant, and that breach must have caused the injury that was suffered. The usual "but for" analysis will apply in these circumstances.

**128**  If the plaintiff cannot establish on a balance of probabilities that the defendant's ***negligence*** caused the injury, her action against the defendant must fail.

**129**  Causation is the plaintiff's burden, is a question of fact, and the plaintiff must prove that the breach of the defendant's duty caused, or contributed to, the damages she asserts.

**130**  However, despite the fact that this burden of causation is on the plaintiff, there is also an evidentiary burden on the defendant. Specifically, the defendant is required to rebut any reasonable inferences that might be drawn from the evidence regarding whether reasonable care was taken by them to safeguard the plaintiff who entered their property: *Foley* at para. 47.

**131**  In the circumstances of this case, it is clear that the defendant Loblaws had in place a system to guard against any dangerous substance remaining on the floor's surface. In this context, see: *Charlie v. Canada Safeway Limited*, [*2010 BCSC 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6305-00000-00&context=) [*Charlie*].

**132**  As well, partly because of the inclement weather that day, Loblaws had employees working at the Front End whose major responsibility was to keep the outside conditions from intruding into the store.

**133**  Their efforts to keep the floors clean and dry are diarized in a reliable way in the Sweep Log.

**134**  Mr. Mulligan and Ms. Shore were occupied with mopping and cleaning the floor around the front doors in the area where Ms. Hanes fell.

**135**  This does not mean that there was no moisture on the floor that day, but there is simply no evidence that the surface of the floor was sufficiently moist to cause Ms. Hanes to fall.

**136**  As well, the law is clear that there is no presumption of ***negligence*** from the provisions of the *OLA*, and the fact that Ms. Hanes slipped and fell does not shift the onus of proof.

**137**  I note that in *Charlie*, where the plaintiff made an argument similar to the now out-moded *res ipsa loquitur* maxim, the Court found that there was no accumulated water observed on the surface. In addition, there was no other evidence about accumulated water, nor any evidence that a hazard of any kind was present at the time she slipped and fell.

**138**  The plaintiff in *Charlie*, as with Ms. Hanes in this case, argued that her fall must have been caused by water on the floor, as she felt there was nothing else that could have caused her to fall. However, her argument was unsupported by evidence. She was unable to prove the existence of a condition or hazard that caused her to slip and fall, or that any such condition existed as a result of a breach of duty by the defendant.

**Analysis**

**139**  There is simply no evidence that Ms. Hanes' fall was caused by moisture on the floor, whether that was a pool of water, or just general moisture causing the surface to become unreasonably slippery.

**140**  The only indication of the presence of moisture at all comes from an assumption on Ms. Hanes' part that the moisture she says she felt on the back of her jacket, a jacket that did not cover her buttocks, following her fall was caused by water on the floor.

**141**  This evidence is completely uncorroborated. The video disk shows many customers, employees, and managers walking back and forth across the area where she fell before and after the incident. None of them seems to have noticed anything wrong with the surface, and none appears to have lost traction as they traversed the area around the customer service desk.

**142**  Numerous employees inspected the floor and found neither pools of water nor a moist surface.

**143**  It is my view that Ms. Hanes' shoes were already wet when she entered the store due both to her crossing the snowy church parking lot, and residual moisture on the concrete outside the store.

**144**  With the wet leather soles and high heels she was wearing, it would have been very easy for her to skid a little on her right high heel and to turn her ankle, causing her to fall. However, assigning any cause to her fall is itself speculative.

**145**  In my view, her fall was truly an accident and liability cannot be found against Superstore.

**146**  I also cannot find fault with the quality of the surface of the floor in the Superstore, and I find that the program in place to keep the floor as clean and dry as possible in the circumstances met a reasonable standard of safety.

**147**  It is clear from the witnesses' evidence and from the video disks that the cleaning program was underway the morning of the fall right up to the time Ms. Hanes fell.

**148**  Ms. Hanes has not established that Loblaws is liable for her fall and injuries. Therefore, it is unnecessary for me to address the damages she alleges she has suffered.

**149**  The plaintiff's action is dismissed with costs to the defendant.

L.D. RUSSELL J.

**End of Document**

[***Harder v. Poettcker, [2017] B.C.J. No. 1580***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P8D-XTB1-FGJR-217F-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.S. Sigurdson J.

Heard: April 21, 2017.

Judgment: August 11, 2017.

Docket: M103503

Registry: Vancouver

**[2017] B.C.J. No. 1580** | 2017 BCSC 1407

Between James Harder, Plaintiff, and Lee Poettcker, Defendant

(56 paras.)

**Case Summary**

**Civil Litigation — Civil procedure — Costs — Assessment or fixing of costs — Considerations — Particular circumstances — Where success divided — Offers to settle — Amount of offer v. award — Time of offer — Plaintiff awarded 15 per cent of costs of action — Appeal upheld jury finding that plaintiff was 85 per cent responsible for motor vehicle accident — Plaintiff sought costs of action — Defendant made offer to settle in October 2012 that was better that result at trial — Offer was not one that ought reasonably to have been accepted — Under s. 3(1) of *Negligence* Act, plaintiff was awarded costs in same proportion as liability — *Negligence* Act, ss. 3, 3(1) — Supreme Court Civil Rules, Rules 9-1, 9-1(1)(c), 14-1(9).**

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| Hearing to determine the costs of the plaintiff's action. The Court of Appeal upheld the decision of a civil jury finding the plaintiff 85 per cent responsible for a 2009 motor vehicle accident in which he was injured. Plaintiff's damages were assessed at $87,000, of which he was entitled to 15 per cent or $13,050. Because liability was divided between the parties, s. 3 of the ***Negligence*** Act provided that costs should be in the same proportion as their respective liability, unless the court otherwise directed. The plaintiff submitted that, notwithstanding the liability finding of the jury and the net recovery of the plaintiff as compared to the defendant's formal offer to settle, he was entitled to his full costs and disbursements throughout trial. The defendant argued that the plaintiff should be paid 15 per cent of his costs to the date of the formal offer to settle and no costs thereafter, and that the plaintiff should pay 100 per cent of the defendant's costs after the formal offer to settle delivered on October 19, 2012. The offer was for $33,723, plus costs to the date of the offer.  HELD: Plaintiff awarded 15 per cent of costs.  The offer to settle was made over two years after the action started and nearly three years before trial commenced. The offer was open for the plaintiff to accept until the commencement of trial. It was reasonable for the plaintiff not to have accepted the offer at the time it was made. The only medical evidence at that time was that the accident caused his fibromyalgia. By April 2013 the plaintiff was aware that the reports of the defendant's experts weakened his case and he ought to have reconsidered the offer to settle. However, as costs were only payable to the plaintiff to the date of the offer, the total amount the plaintiff would have received effectively decreased from the time the offer was first made. The plaintiff obtained additional medical evidence to support his case. The offer was not one that ought reasonably to have been accepted. The overall balance of the relevant factors weighed in favor of the plaintiff. The defendant was not awarded costs after his offer to settle. In accordance with s. 3(1) of the Act, the plaintiff was awarded 15 per cent of his costs throughout from the defendant. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, s. 168

***Negligence*** Act, s. 3, s. 3(1)

Supreme Court Civil Rules, Rule 9-1, Rule 9-1(1)(c), Rule 9-1(4), Rule 9-1(5), Rule 9-1(6), Rule 14-1(9)

**Counsel**

Counsel for the Plaintiff: Jesse R. Kendall.

Counsel for the Defendant: Gillian M. Dougans.

**Reasons for Judgment re Costs**

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| **J.S. SIGURDSON J.** |

**Introduction**

**1**  In this case the Court of Appeal upheld the decision of a civil jury finding the plaintiff 85% responsible for a motor vehicle accident that took place on February 3, 2009 in which he was injured. Pursuant to the direction of the Court of Appeal I assessed the plaintiff's damages at $87,000 of which he was entitled to 15% or $13,050.

**2**  Because liability was divided between the parties, s. 3 of the ***Negligence*** *Act* provides that costs should be in the same proportion as their respective liability, unless the court otherwise directs. Moreover, after considering the effect of s. 3 of the ***Negligence*** *Act*, I must consider the application of Rule 9-1 to a formal offer to settle made by the defendant on October 19, 2012 for $33,723, plus costs to the date of the offer.

**3**  The plaintiff's position is that, notwithstanding the liability finding of the jury and the net recovery of the plaintiff as compared to the defendant's formal offer to settle, he is entitled to his full costs and disbursements throughout trial.

**4**  The defendant's position is that the defendant should pay the plaintiff 15% of his costs to the date of the formal offer to settle and no costs thereafter and that the plaintiff should pay 100% of the defendant's costs after the formal offer to settle delivered on October 19, 2012.

**5**  The parties agree that the proper approach is for me to first consider the application of s. 3(1) of the ***Negligence*** *Act* and then consider the effect of the formal offer to settle on the issue of costs.

**6**  With that introduction I will provide some background.

**Background**

**7**  A complete description of the circumstances giving rise to the liability decision of the jury appears in the Court of Appeal judgment: *Harder v. Poettcker*, [*2016 BCCA 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MBG-F9Y1-JS0R-20YF-00000-00&context=). The nature and extent of the injuries suffered by Mr. Harder is described in my judgment on damages: *Harder v. Poettcker*, [*2017 BCSC 312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5N1F-TXX1-DXPM-S4B3-00000-00&context=).

**8**  Although the plaintiff was initially represented by counsel when this action was commenced in July 2010, shortly after the defendant filed a response denying liability and injuries on January 20, 2011, the plaintiff filed a notice of intention to act in person on March 21, 2011. The defendant served a notice dated December 20, 2011 requiring a jury trial. Mr. Harder had obtained new counsel in October 2011 but his counsel withdrew on April 3, 2012. Mr. Harder, acting on his own, wished to proceed with scheduled discoveries on April 5, 2012, adjourned his discovery of the defendant and the parties then proceeded on the rescheduled date of May 22, 2012 with his examination.

**9**  In October 2012 the plaintiff was still representing himself but had retained Mr. Kingston to act as his settlement counsel.

**10**  On October 19, 2012 the defendant sent to the plaintiff a formal offer to settle under Rule 9-1. The offer was for $33,723, plus costs to the date of the offer. The offer was stated to be on top of any advances or payments under Part 7. The offer remained open for the plaintiff to accept until "4:00 p.m. PST, on the last business day prior to the commencement of trial".

**11**  The offer was also sent to Mr. Kingston along with an email in which the defendant summarized the risks for the plaintiff. Ms. Dougans, counsel for the defendant, wrote:

Liability remains a significant issue as Mr. Harder was backing out and failed to see traffic behind him. On the quantum issue his loss of income following a lengthy period of total disability is too speculative to consider; and, his back condition was deteriorating before this accident. The cost consequences to Mr. Harder if he does not exceed our offer at trial will be significant as we have two IMEs scheduled, a continuation of his discovery, discovery of the defendant if Mr. Harder choses to have a jury trial. The formal offer to settle is more than I think Mr. Harder's claim is worth in light of his discovery evidence on the issue of liability. I hope you will give it serious consideration.

**12**  The plaintiff's current counsel went on the record on June 4, 2013 and served a notice requiring a trial by jury on April 14, 2014.

**13**  The trial commenced on September 8, 2015 and took place over nine days. At trial the jury decided that the plaintiff was 85% responsible for the accident and the jury assessed non-pecuniary damages at zero for the plaintiff, and only $5,100 for special damages. Although the entire jury verdict was set aside on the plaintiff's application, the Court of Appeal reinstated the jury verdict on liability and pursuant to its direction I assessed the plaintiff's damages. Damages were assessed at $50,000 for pain and suffering, $10,000 for loss of housekeeping, $15,000 for recovery of money paid to third parties, and $12,000 for special damages, totaling $87,000, of which the plaintiff's 15% recovery was $13,050.

**14**  Following the guidance of *Wong-Lai v. Ong*, [*2012 BCSC 1569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2DX-00000-00&context=) (at para. 21) and *Bedwell v. McGill*, [*2008 BCCA 526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B35X-00000-00&context=) (at para. 29) the appropriate approach to take in determining this application is to first decide whether I should make a costs order in line with the liability apportionment as provided for in s. 3(1) of the ***Negligence*** *Act* before considering the appropriate order pursuant to Rule 9-1 as a result of the offer to settle.

**Section 3(1) of the *Negligence* Act**

**15**  Section 3 of the ***Negligence*** *Act* states:

3(1) Unless the court otherwise directs, the liability for costs of the parties to every action is in the same proportion as their respective liability to make good the damage or loss.

...

**16**  The principles to be considered are summarized in *Moses v. Kim*, [*2007 BCSC 1820*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-221F-00000-00&context=) as varied on appeal ( [*2009 BCCA 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3PH-00000-00&context=)). The relevant factors the court considers in exercising its discretion to make an exception to the apportionment rule include the following:

1. The seriousness of the plaintiff's injury;
2. The difficulties facing the plaintiff in establishing liability;
3. The fact that in settlement negotiations the amount offered was substantially below the ultimate amount;
4. Whether the plaintiff was forced to go to trial to obtain recovery;
5. The difficulty and length of trial;
6. The positions taken by the parties at trial, in particular whether the positions taken were appropriate and reasonable in the circumstances;
7. Whether the defendant made any settlement offers;
8. The ultimate result of the trial;
9. Where the plaintiff achieves substantial success whether it would be effectively defeated if costs were awarded pursuant to s. 3(1) of the ***Negligence*** *Act*;
10. The defendant's degree of success.

(*Moses v. Kim*, [*2007 BCSC 1820*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-221F-00000-00&context=) at para. 13)

**17**  The plaintiff asserts that the principal consideration for the Court is whether an injustice will result by following s. 3(1). Mr. Kendall points out that where the defendant has suffered no injury or damages there is a potential for injustice if the usual rule is applied. This case, he argues, is therefore one in which the Court ought to exercise its discretion under s. 3(1) of the ***Negligence*** *Act*.

**18**  The plaintiff's injuries were not catastrophic but were found to be a moderate low back injury. Liability, although controversial, was not complicated or time-consuming and took less than a day's trial time to be heard. The defendant offered an amount that turned out to be substantially more than what the plaintiff was ultimately awarded given the jury's division of liability. The plaintiff was not forced to go to trial to get an award nor could the formal offer to settle be considered a nuisance offer. The choice of trial with the jury was that of the plaintiff and the costs of getting to trial are not a relevant factor.

**19**  Neither party suggested the other party took unreasonable positions at trial or in the time leading up to trial and the result yielding a before apportionment award of $87,000 was based on the conclusion that the accident was not the cause of the plaintiff's back surgery or his fibromyalgia. As the plaintiff did not achieve substantial success an award of costs pursuant to s. 3(1) of the ***Negligence*** *Act* would not defeat that substantial success and would not cause the plaintiff injustice under the circumstances.

**20**  Moreover, I think to award the plaintiff more than 15% of his costs would ignore the defendant's success at trial. I conclude, before I consider the effect of the defendant's formal offer to settle, that I would not depart from the costs award directed by s. 3(1) of the ***Negligence*** *Act*.

**21**  I turn now to consider the applicability of Rules 9-1 and 14-1(9) to the defendant's offer to settle.

**Effect of Defendant's Offer to Settle**

**22**  Rule 14-1(9) stipulates that costs are awarded to the successful party unless the court orders otherwise:

Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

**23**  In considering whether to exercise its discretion, the court may consider, among other things, whether an offer to settle has been made. Rule 9-1(c) provides that:

Definition

1. In this rule, "offer to settle" means

...

1. an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
2. is made in writing by a party to a proceeding,
3. has been served on all parties of record, and
4. contains the following sentence: "The ...*[party(ies)]..*..., ...*[name(s) of party(ies)]..*..., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

**24**  Sub-Rules 9-1(4)-(6) provide that:

Offer may be considered in relation to costs

1. The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

1. In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
2. deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
3. award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
4. award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
5. if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

Considerations of court

1. In making an order under subrule (5), the court may consider the following:
2. whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
3. the relationship between the terms of settlement offered and the final judgment of the court;
4. the relative financial circumstances of the parties;
5. any other factor the court considers appropriate.

**25**  The principles applicable to the court's discretion with respect to the defendant's application for costs after an offer to settle was made are described in the leading decision in *Hartshorne v. Hartshorne*, [*2011 BCCA 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2V7-00000-00&context=):

[25] ...Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, [*2009 BCSC 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M223-00000-00&context=), [*91 B.C.L.R. (4th) 372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M223-00000-00&context=) at para. 61, citing *MacKenzie v. Brooks*, [*1999 BCCA 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1VH-00000-00&context=), *Skidmore v. Blackmore* [*(1995), 2 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M229-00000-00&context=) (C.A.), *Radke v. Parry*, [*2008 BCSC 1397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RP-00000-00&context=)). In this regard, Mr. Justice Frankel's comments in *Giles* [*[2010] B.C.J. No. 1061*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-223T-00000-00&context=) are apposite:

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

"[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp*. [*(1988), 37 B.C.L.R. (2d) 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22SH-00000-00&context=) at 25 (C.A.), leave ref'd, [*[1988] S.C.C.A. No. 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-FBFS-S42M-00000-00&context=), [1988] 1 S.C.R. ix;

"[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* [*(1995), 2 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M229-00000-00&context=) at para. 28 (C.A.);

"[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, [*2008 BCCA 526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B35X-00000-00&context=), [*86 B.C.L.R. (4th) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B35X-00000-00&context=) at para. 33;

"[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegaçao Norsul*, [*2009 BCCA 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0XG-00000-00&context=), [*88 B.C.L.R. (4th) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0XG-00000-00&context=) at para. 16.

[26] Rule 37B(6) of the *Rules of Court* (which is now R. 9-1(6) of the *Supreme Court Civil Rules* and remains the same as its predecessor) lists the following factors to be considered in making an award for double costs under R. 37B(5)(b):

1. whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
2. the relationship between the terms of settlement offered and the final judgment of the court;
3. the relative financial circumstances of the parties;
4. any other factor the court considers appropriate.

**26**  With respect to the first factor whether the offer to settle was one that ought reasonably to have been accepted, the Court of Appeal in *Hartshorne* said that:

[27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Bailey v. Jang*, [*2008 BCSC 1372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PW-00000-00&context=), [*90 B.C.L.R. (4th) 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PW-00000-00&context=) at para. 24; *A.E. v. D.W.J*. at para. 55. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

**27**  Although with the advantage of hindsight, of course the offer ought to have been accepted, that is not the perspective which I should take in assessing the offer. The plaintiff says that when it was made in October 2012 he had not yet retained trial counsel although he had litigation assistance counsel and the defendant had not procured an expert to counter the plaintiff's expert evidence of Dr. Shuckett. Dr. Shuckett is a rheumatologist whose opinion was supportive of the plaintiff's claim that his fibromyalgia was caused by the accident.

**28**  The plaintiff adds that there was no breakdown of heads of damages in the offer and therefore no rationale was provided for the offer. The plaintiff relies on *Hartshorne* and *Saopaseuth v. Phavongkham*, [*2015 BCSC 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GBN-M0T1-JC5P-G4BB-00000-00&context=) in arguing that this factor is of special significance where certain heads of damage are contested, as was the case here. I do not however find that to be a significant factor in this case.

**29**  The defendant says that the plaintiff would reasonably have understood from the email and the state of the medical evidence that causation for his back surgery and fibromyalgia would be strongly contested by the defendant and based on the evidence ought to have accepted the offer when it was made on October 19, 2012.

**30**  As the expert evidence was developed subsequent to the offer the plaintiff's position that the surgery or fibromyalgia was the possible result of the accident grew weaker. The defendant points out that even though the plaintiff says that the defendant's experts supported the plaintiff's claim that there was injury they did not support the plaintiff's position that the fibromyalgia and back surgery were caused by the accident.

**31**  As to liability the defendant says that the circumstances were such that the plaintiff could reasonably have expected a division of liability and a significant risk of losing on liability altogether given the additional duty under the *Motor Vehicle Act* not to drive a car in the opposite direction unless it can be done safely (s. 168). Ms. Dougans argued that any division was highly likely to be more than 50% and that the plaintiff knew his own evidence was that he only looked once behind his vehicle before he backed up and never looked again until the impact.

**32**  The plaintiff, on the other hand, argued that the liability evidence before trial supported the plaintiff's position that he would not be more than 50% responsible including admissions that the defendant was not looking in the direction he was travelling before the collision, that it was too late to swerve and avoid striking the plaintiff's vehicle because of speed and traffic conditions, and he did not know the speed of his vehicle in the parking lot prior to the collision but that it could have been as high as 40 km/h.

**Analysis**

**33**  The party making the offer, the defendant here, bears the onus of proving that the offer ought to reasonably have been accepted (*BCSPCA v. Baker*, [*2008 BCSC 947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M393-00000-00&context=) at para. 36).

**34**  In *Fan (Guardian ad litem of) v. Chana*, [*2009 BCSC 1497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B282-00000-00&context=) at para. 19 the court stated that:

The reintroduction of judicial discretion in costs certainly serves the ends of justice. Costs should be a penalty for unreasonable conduct in the litigation, not a penalty for failing to guess the outcome. In this regard, Courts must, I think, extend some leeway to litigants holding honest but, ultimately, mistaken views of their claims. It is generally better that such expectations be disposed of at law, rather than discouraged. The public should not be given the impression that there is no reasonable access to a legal resolution. It must be recognized that some people will only be comfortable if they "hear it from the judge." This should be a valid option for those who seek it, not a form of deemed unreasonableness. As such, inducements to settle, and to avail oneself of alternate dispute resolution, ought to complement rather than obstruct judicial determinations.

**35**  This approach was expressly approved by the Court of Appeal in *Fan v. Chana*, [*2011 BCCA 516*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22SN-00000-00&context=) at paras. 52-54.

**36**  In the present case the offer to settle was made on October 19, 2012, over two years after the action started and nearly three years before trial commenced. The offer was open for the plaintiff to accept until the commencement of trial. Therefore, I must assess whether it was unreasonable for the plaintiff not to accept the offer not only in October 2012 but thereafter and until September 2015 when trial started, bearing in mind what was known to the plaintiff at the relevant times (*Meghji v. Lee*, [*2014 BCCA 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61V8-00000-00&context=) at para. 112).

**37**  I will first review the circumstances at the time when the offer to settle was made.

**38**  It is my view that it was reasonable for the plaintiff not to have accepted the offer at the time it was made. On October 19, 2012 when the offer was initially made the only medical evidence before the plaintiff was Dr. Shuckett's first report dated May 5, 2011. This report supported the plaintiff's claim that the accident caused his fibromyalgia. Given what the plaintiff knew at this point in time it was therefore not unreasonable for him to rely on the available evidence and reject the defendant's offer (see *Wafler v. Trinh*, [*2014 BCCA 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61P9-00000-00&context=) at para. 65).

**39**  However, the offer remained open for the plaintiff to accept for the lengthy period of time before trial. It became more attractive when the medical evidence, as it developed, favoured the defendant's position that the accident had not caused the fibromyalgia or the problem that necessitated back surgery. On December 12, 2012 or shortly thereafter, nearly two months after the offer was made, the defendant produced Dr. Splawinski's report in which the doctor opined that the accident did not cause worsening of the lumbar spinal stenosis per se. Dr. Wade's report, commissioned by the defendant as well, was provided on April 9, 2013. While it is true that the defendant's medical experts opined that the plaintiff suffered a mild to moderate back injury they both determined that the fibromyalgia was not caused by the accident.

**40**  With this new medical evidence in hand and its implications in terms of establishing what the plaintiff claimed as the quantum of damages he was entitled to, I find that the amount of the October 2012 offer became more attractive. At the latest by April 2013 the plaintiff, who had counsel by then, was aware that the reports of the defendant's experts weakened his case and he ought to have reconsidered the offer to settle.

**41**  However, the plaintiff obtained a further report from Dr. Shuckett dated May 7, 2015 in which she provided some support for the plaintiff's contention that there was some causal link between the accident and his back problems. The plaintiff did not tender a report from the back surgeon. Nevertheless, I find that given the two expert reports prepared by the defendant's experts and the way the evidence developed, the plaintiff ought to have realized by no later than mid-April 2013 that the medical evidence in support of his case had substantially weakened.

**42**  The question is whether, even if the offer ought not to be reasonably accepted initially, the offer became one that ought reasonably to have been accepted by the plaintiff before trial.

**43**  Another factor to consider, though, is the costs consequences of accepting the offer after the defendant had served its medical reports. The offer stipulated that the plaintiff would be entitled to its costs and necessary and reasonable disbursements up "to the date of delivery of the offer". The offer also stipulated that the defendant would be entitled to its costs and necessary and reasonable disbursements "from the date of the delivery of this offer".

**44**  Given the defendant's added costs in the interim the net value of the offer, objectively, was less attractive than it had been. In other words, the value of the offer had diminished due to the additional costs incurred by the defendant which the plaintiff would be liable to pay under the terms of the offer.

**45**  Thus, while the amount of the offer, $33,723, had not changed the value of the offer had diminished by a not insignificant amount. For example, according to the defendant's draft bill of costs the disbursements related to the medical experts' reports of two doctors amounted to around $6,000. There were other costs incurred by the defendant that the plaintiff would have been liable to pay if he had accepted the offer in or around April 2013 or after.

**46**  This means that effectively the total amount the plaintiff would have received decreased from the time the offer was first made. That of course was the point of the offer. The question then becomes whether given the change of circumstances the offer to settle became one that that the plaintiff ought to have reasonably accepted.

**47**  The inquiry as to whether it was unreasonable for the plaintiff not to accept the offer once the entirety of the medical evidence was before him has both a subjective and objective component. The Court must consider the matter from the perspective of the party receiving the offer, the plaintiff in this case, taking into account the reasons why they rejected the offer. Then the Court considers whether those reasons are objectively reasonable (see *Park v. Targonski*, [*2016 BCSC 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HX7-VJ11-FCSB-S3YK-00000-00&context=) at paras. 16-17 and *Ward v. Klaus*, [*2012 BCSC 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1MY-00000-00&context=) at para. 36).

**48**  Looking at the result of the trial in retrospect clearly the offer ought to have been accepted, but that is not the test.

**49**  Objectively, I think it was reasonable for the plaintiff to conclude that even if the evidence of Dr. Wade and Dr. Splawinski was accepted at trial (as it in fact was by me when I did the assessment of damages) that total damages before any apportionment would exceed $80,000, as they did. I also think that it was reasonable for the plaintiff to conclude before trial, based on the available evidence of the driving by both drivers, that it was unlikely that if there was a split on liability it would be worse than 50% from the plaintiff's perspective.

**50**  I recognize that the result of jury trials are difficult to predict, and the outcome on liability and damages was very different than what the plaintiff had anticipated, and very poor from his perspective. Nevertheless, I have concluded that, although I find this a close call, notwithstanding the fact that the medical expert evidence over time weakened the plaintiff's case, the plaintiff did not act unreasonably in not accepting the offer to settle.

**51**  In the circumstances, I am unable to conclude that the offer was one that ought reasonably to have been accepted either on the date the offer was delivered or at any later date before trial.

**52**  The next factor to be considered is the relationship between the terms of the settlement offered and the final judgment at the end of trial. In this case, as the offer was for $33,723 and the award after apportionment was $13,050, this factor favours the defendant.

**53**  The relative financial circumstance of the parties is a factor that is relevant in the circumstances and should be considered. The plaintiff points out that, as noted in tax documents filed, his income is meagre, consisting mostly of CPP benefits and old age pension benefits. Under these circumstances the plaintiff argues that given that it is the defendant's insurer who is at risk in this litigation, the relative financial consequences are much greater to the plaintiff than to the defendant. The plaintiff also points out that he will have to bear about $17,000 in costs as a result of the decision in the Court of Appeal where the plaintiff was unsuccessful.

**54**  As to other relevant factors, the plaintiff says that the purpose of the cost rules relating to offers to settle is to encourage reasonable settlements but parties should not be unduly deterred from bringing meritorious but uncertain claims because of the fear of a punishing costs order. The defendant disagrees and says that a plaintiff with a meagre income should not be protected from the cost consequences of refusing a reasonable offer and exposing the defendant to great expense. Both views have some merit.

**55**  However, I find that in the circumstances of this case the overall balance of the relevant factors weighs in favor of the plaintiff. Given the circumstances that I have outlined, I exercise my discretion to refuse to award the defendant costs after his offer to settle.

**56**  Accordingly, I have concluded that in accordance with Rule 3(1) of the ***Negligence*** *Act* the appropriate order in the circumstances of this case is that the plaintiff is entitled to recover 15% of his costs throughout from the defendant.

J.S. SIGURDSON J.

**End of Document**

[***Hartup v. BCAA Insurance Corporation, [2002] I.L.R. para. I-4122***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S14B-00000-00&context=)

Canadian Insurance Law Reporter Cases

British Columbia Supreme Court

Before: Oppal J.

Decision: June 28, 2002.

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2000s* > *2002***

**[2002] I.L.R. para. I-4122** | [*[2002] B.C.J. No. 1520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G31T-00000-00&context=)

Hartup v. BCAA Insurance Corporation

**Case Summary**

**Duty to defend — Exclusionary clause — Intentional or criminal act — Claim against insureds based on their son's negligent shooting of a pellet gun — Son convicted of careless storage of firearm — Exclusionary clause not applying — Insurer having duty to defend.**

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| **Facts:** This was an application for a declaration that the insurer had a duty to defend the plaintiffs. The plaintiffs had been sued by N who suffered an eye injury when the plaintiffs' son negligently discharged a pellet gun. The son had been convicted of improper storage of a firearm under the *Criminal Code*. The insurer denied coverage to the plaintiffs based on an exclusionary clause in the policy for injury caused by any intentional or criminal act by any insured person.  HELD: The insurer was obliged to defend the action.  The claim against the plaintiffs was based on ***negligence*** and also on the intentional tort of assault. The criminal act of the son did not cause the injury. The real nature of the claim against the plaintiffs was ***negligence***; the intentional acts were framed as particulars of the ***negligence***. Since the pleadings fell within the policy coverage, the insurer was required to provide a defence. |

**Counsel**

Garth E. Edwards for the plaintiffs, Dale E. Walker for the defendant.

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| **OPPAL J.** |

Introduction

**1**  Raymond New has alleged that he suffered an eye injury when Nathan Hartup, the 21 year old son of the plaintiffs, Keith Charles Hartup and Bonita Joan Hartup, negligently discharged a pellet firearm. He has commenced an action for damages against the plaintiffs who are insured by the defendant, BCAA Insurance Corporation. Mr. New's claim is based on ***negligence*** under the Occupiers Liability Act, *R.S.B.C. 1996, c. 337*. The insurer has refused to defend the plaintiffs on the grounds that the claim falls within an exclusion clause in the policy. The insurer has argued that the exclusion clause is applicable for two reasons:

1. That Nathan Hartup as an insured under his parents' policy was convicted of a criminal offence.
2. In the alternative, that the act committed by Nathan Hartup was an intentional tort.

**2**  In this action, the plaintiffs seek a declaration that the insurer has a duty to defend them in the damage action. As well, the plaintiffs seek an order for indemnification for costs and disbursements.

**3**  This matter was heard under Rule 18A of the Rules of Court.

Facts

**4**  In October 1998, Mr. New was injured as a result of the alleged negligent use of a pellet firearm by Nathan Hartup. The incident took place in the plaintiffs' residence where Nathan resided. While it is not specifically admitted, it is not in dispute that at the relevant time Nathan Hartup was an insured within the meaning of the policy. As a result of the incident, Nathan was charged with three firearms-related offences under the Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=). There appears to be some confusion between counsel relating to the charges. He entered a guilty plea under s. 86(2) of the Code to a charge of contravening the storage regulations for firearms under para. 117(h) of the Firearms Act. It should be noted that he did not plead guilty to the offence of the careless use of a firearm which is set out under s. 86(1) of the Code.

**5**  It is not in dispute that the plaintiffs and the insurer had entered into a valid insurance contract that included provisions for third party liability. The policy contained the following provisions:

Coverage E - Legal Liability: We will pay all sums, which you become legally liable to pay as compensatory damages because of unintentional bodily injury or property damage.

Defence, Settlement, Supplementary Payments: Under Coverage E, we will defend any suit against you alleging bodily injury or property damage and seeking damages, even if it is groundless, false or fraudulent.

**6**  The relevant provision as far as this hearing is concerned is the exclusion clause which reads as follows:

You are not insured for claims arising from ...

1. bodily injury or property damage caused by any intentional or criminal act or failure to act by:
2. any person insured by this policy,...

**7**  The insurer's position is that because Nathan was an insured and because he was convicted of a criminal offence the insurer is not obliged to provide a defence or an indemnity to the plaintiffs in the damage action. In the alternative, it is argued that the injury to Mr. New was caused by an intentional act which would have the effect of invoking the exclusion clause and denying coverage.

Analysis

**8**  It would be useful to refer to some general principles relating to an insurer's duty to defend. In Nichols v. American Home Assurance Co., [*[1990] 1 S.C.R. 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6545-00000-00&context=), the Court restated the general principle that the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. McLachlin J. (as she then was) at paras. 16 and 17 stated as follows:

Thus far, I have proceeded only by reference to the actual wording of the policy. However, general principles relating to the construction of insurance contracts support the conclusion that the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. Courts have frequently stated that "[t]he pleadings govern the duty to defend": Bacon v. McBride [*(1984), 6 D.L.R. (4th) 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2MW-00000-00&context=) (B.C.S.C.), at p. 99. Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: Opron Maritimes Construction Ltd. v. Canadian Indemnity Co. [*(1986), 19 C.C.L.I. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-F7VM-S020-00000-00&context=) (N.B.C.A.), leave to appeal refused by this Court, [*[1987] S.C.C.A. No. 65*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1S91-JGBH-B44R-00000-00&context=).

At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices.

[Emphasis added]

**9**  In Bacon, supra, Wallace J. dealt with the issue of multiple claims. In so doing, he adopted with approval the following passage from Couch on Insurance, 2nd ed. (revised), 1982: Vol. 14, p. 706:

Where a complaint or petition in an action against one to whom a policy of automobile liability insurance has been issued states different causes of action or theories of recovery against the insured, one of which is within the coverage of the policy and others of which may not lie, the insurer is bound to defend with respect to those causes of action which, if proved would be within the coverage.

**10**  This passage is relevant because Mr. New's claim for damages is based not only upon ***negligence*** but also upon an intentional tort of assault.

**11**  In Joachin v. Abel [*(2001), 27 C.C.L.I. (3d) 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-F65M-63MG-00000-00&context=) the Ontario Superior Court of Justice summarized the general principles relating to an insurer's duty to defend at paras. 9 and 10:

A review of the recent and relevant case law reveals the following general principles, among others, with respect to an insurer's duty to defend:

1. The duty to defend and the obligation to provide indemnification are separate issues.
2. The duty to defend is broader than the duty to indemnify and is dependent on the claim made against the insured. The duty to defend, unlike the duty to indemnify, is triggered not by actual acts or omissions, but by allegations.
3. The duty to defend is engaged where the claim against the insured alleges acts or omissions for which damages are claimed that might be payable under the policy. Subject to what follows later, the widest latitude should be given to the allegations.
4. It is not necessary to prove that the obligation to indemnify will, in fact, arise in order to trigger the duty to defend - the mere possibility that a claim within the policy may succeed, suffices.
5. If the damages that are claimed are not payable under the policy there is no duty to defend. In other words, the duty to defend, even though broader than the duty to indemnify, is not so broad that it arises with respect to allegations which are clearly beyond the scope of the policy.

The foregoing principles are found in the following cases, among others: Longarini v. Zuliani [*(1994), 17 O.R. (3d) 527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X21D-00000-00&context=) (C.A.); Nichols v. American Home Assurance Co., [*[1990] 1 S.C.R. 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6545-00000-00&context=); Non-Marine Underwriters Lloyd's of London v. Scalera,[2000] 1 S.C.R. 551; Godonoaga (Litigation Guardian of) v. Khatambakhsh [*(2000), 49 O.R. (3d) 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4W2-00000-00&context=) (C.A.); and, Sansalone v. Wawanesa Mutual Insurance Co., [*[2000] 1 S.C.R. 627*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M450-00000-00&context=).

**12**  It is trite law that in interpreting insurance contracts a court must first consider the intention of the parties and where there is an ambiguity in the terminology employed in the contract, the terminology shall be construed against the insurance carrier as being the author or at least a party in control of the contents of the contract. See Consolidated Bathhurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [*[1980] 1 S.C.R. 888*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1TY-00000-00&context=).

**13**  In Riordan v. Lombard Insurance Co., [*[2001] B.C.J. No. 2676*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4D3-00000-00&context=), this court dealt with the issue of whether an exclusion clause applied where a fire was intentionally set by the plaintiffs' 13 year old foster son. Shaw J. conveniently and succinctly categorized the interpretation of insurance contracts under the so-called "old approach" and the "modern approach". The former states that coverage will not be accorded to an insured where a loss results from the wrongful act of a co-insured who has a joint interest in the subject matter of the insurance, whereas the latter involves a situation where an insured who is innocent of wrongdoing should not lose his or her coverage due to the wrongdoing of another insured unless the policy clearly provides for such loss of coverage (see paras. 13 and 14). As well, he stated the following at paras. 15 and 16:

In my view, the modern approach must prevail. This approach was adopted in Scott v. Wawanesa Mutual Insurance Co., [*[1989] 1 S.C.R. 1445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6509-00000-00&context=), by LaForest, J., for the minority (three of the seven judges). The majority (per L'Heureux-Dubé, J.) did not decide this point because, in their view, the wording of the contract was clear. The minority decision of LaForest, J. has since been applied in Inland Kenworth Ltd. v. Insurance Corp. of British Columbia [*(1990), 43 B.C.L.R. (2d) 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61GX-00000-00&context=) (S.C.) per Donald, J. at pp. 3 and 4, and Wigmore v. Canadian Surety Co., [1996] 9 w.W.R. 406 (Sask. C.A.) per Jackson J.A. for the Court, at paras. 30-33. Also, the Ontario Court of Appeal in Higgins v. Orion Insurance Ltd. [*(1985), 50 O.R. (2d) 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M2K2-00000-00&context=), a case that preceded Scott v. Wawanesa, thoroughly explored the issue of the old approach versus the modern approach and, for reasons with which I agree, chose the modern approach. The Higgins case was cited with approval by LaForest J. in Scott v. Wawanesa.

In Scott v. Wawanesa, LaForest, J. said, at p. 1454:

I am firmly of the view that the modern approach's primary focus on the meaning of the insurance contract is to be preferred to the old approach which is principally undergirded by public policy considerations extraneous to the contract. The modern approach seems to me to be entirely consonant with this Court's approach to the interpretation of insurance contracts.

And at pp. 1457-58:

Clearly, an insurer might choose to contract on the basis that it considered its indemnification obligation joint with regard to both the named insured and the other insured. But in offering to contract on such terms, it would be incumbent on an insured to manifest this intention in the very clearest of language. This is because a person entering such a contract would be agreeing to assume vicarious liability for the criminal conduct of another. This, it is fair to say, is fundamentally at odds with the expectation of the reasonable person when buying fire insurance. He or she insures on the assumption that his or her undivided interest is protected. This is the whole point of taking out insurance.

**14**  Shaw J. went on to find that the exclusion clause did not exclude coverage for the plaintiffs' claim for loss or damage resulting from the intentional acts of their foster son.

**15**  In Snaak v. The Dominion of Canada General Insurance Company, [*[2001] I.L.R. I-4000*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S0YY-00000-00&context=) the Ontario Superior Court of Justice dealt with circumstances similar to this case. The parents of Jeffrey Snaak, an infant, were sued for the intentional tortious acts of their infant son. It was specifically alleged that they negligently failed to supervise, discipline and control their son. The insurer refused to defend the claim. The insurance policy contained several exclusion clauses. In the section of the policy dealing with personal liability, one of the exclusion clauses provided:

EXCLUSIONS...

This policy does not apply to

...

1. INTENTIONAL OR CRIMINAL ACTS, meaning bodily injury or property damage resulting from:
2. an intentional or criminal act by any person or any named insured who is insured by this policy ...

**16**  MacKinnon J. held at para. 7 that in terms of the whole policy the exclusion clause was ambiguous. He stated that the wording is at odds with the exclusion clause which seeks on the defendant's view of it to lump all of the insureds together in excluding coverage:

1. the use of the words "any person" in the exclusion must be considered in the context that it is possible that the insurance coverage applies to more than one person. Objectively construed, one possible interpretation of the exclusion wording is that only the person who commits the intentional act is excluded from coverage;
2. Under the heading "AMOUNT OF INSURANCE" in the policy it is stated that:

"Coverage applies separately to each person who is insured, but this does not increase the amount of insurance provided by this policy."

This wording is at odds with the exclusion clause which seeks, on the defendant's view of it, to lump all of the insureds together in excluding coverage.

[Emphasis added]

And further, at para. 8 he stated:

I am loath to support the construction advanced by the insurer. I hold that it was within the reasonable expectation of Mr .and Mrs. Snaak that coverage would be extended to them for claims against them sounding in ***negligence*** as a result of deliberate acts of their son. The duty of an insurer to provide a defence is broader than its obligation to indemnify. The insurer has not satisfied me that the allegations against Mr. and Mrs. Snaak cast the Fleming claim solely within the policy exclusions.

**17**  The decision in Snaak was upheld by the Ontario Court of Appeal. The Court agreed the exclusion clause was ambiguous (see [*[2002], O.J. No. 1438*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-JKB3-X13N-00000-00&context=)).

**18**  In this case, the insurer relies on Gecho v. BCAA Insurance Corp. [*(1997), 35 B.C.L.R. (3d) 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-6122-00000-00&context=) (C.A.). The facts are worth noting. The plaintiff wife sought a declaration that she was entitled to be covered by the insurer after her estranged husband deliberately set her house on fire. The insurer denied coverage and relied on the following exclusion clause which is similar to the clause in this case:

We do not insure:

1. loss or damage resulting from any intentional or criminal act or failure to act by:
2. any person insured by this policy; or ...

**19**  The chambers judge ruled that the policy covered the loss. However, the Court of Appeal allowed the insurer's appeal and held that since Mr. Gecho was an insured person for the purposes of the policy and he "maliciously and criminally set the fire", the plaintiff wife was not covered by the policy. After noting that there were two separate exclusion clauses in the policy, one specific and the other general, the Court made the following comments at paras. 27 and 28:

Following the list of perils, each with or without its own specific limitations, there is a list of general exclusions. As noted above, amongst other things, the policy coverage excludes damage resulting from an intentional or criminal act by "any person insured by this policy".

The cause of the loss suffered by the respondent appears to fit within the description either of peril 1 ("fire"), or of peril 13 ("malicious act"). A claim under peril 1 can be countered only by reference to the general exclusions, whereas a claim under peril 13 is further limited by the specific exclusion of damage "caused by you".

**20**  On first glance, the facts in Gecho appear to be similar to the facts in this case. However, I think that upon closer examination there is a distinction. In Gecho, the operative words of the clause were "resulting from any intentional or criminal act" whereas in this case the words are "caused by any intentional or criminal act." The former is wider in scope than the latter. However, the real distinction in this case, as opposed to Gecho, is that the criminal offence did not cause the injury. The offence of which he was convicted was the careless storage of a firearm, not the careless or intentional use of a firearm.

**21**  The real claim against the defendants is based upon ***negligence***. It has been argued that since para. 7 of the statement of claim alleges intentional torts of pointing a firearm and assault with a weapon that the exclusion clause is triggered and the insurer is no longer obliged to defend. However, a closer examination of para. 7 reveals that the paragraph in question alleges ***negligence*** and that the two aforementioned intentional torts are mere particulars of the ***negligence***. However, even if I am incorrect in that conclusion, then surely the reasoning in Bacon, supra, is applicable in that where different causes of action are alleged, one of which is within the coverage and the other is not, the insurer must defend the action. Furthermore, if there is any ambiguity, it must be resolved in favour of the insureds. This case is indistiguishable from Snaak.

**22**  There are obviously good policy reasons for denying coverage to insureds who have committed criminal offences. In most cases that involve criminal conduct, the evidence relating to the exclusion clause is clear. However, such is not the case here. Moreover, the pleadings fall within the coverage of the policy.

Conclusion

**23**  There will be a declaration that the defendant insurer, BCAA Insurance Corporation, has a duty to defend the plaintiffs in the damage action.

OPPAL J.

**End of Document**

[***Integrated Contractors Ltd. v. Leduc Development Ltd., [2016] B.C.J. No. 2251***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M43-BH51-DXHD-G24C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N. Sharma J.

Heard: January 25-29, February 1-5, 9-12,

15-17, 22, 23, 25, 26 and 29, 2016.

Judgment: October 28, 2016.

Docket: S128886

Registry: Vancouver

**[2016] B.C.J. No. 2251** | 2016 BCSC 1984 | 2016 CarswellBC 3023 | 272 A.C.W.S. (3d) 750 | 69 C.L.R. (4th) 72

Between Integrated Contractors Ltd., Plaintiff, and Leduc Development Ltd., Defendant, and L & M Engineering Limited, Defendant by Counterclaim, and L & M Engineering Limited, Third Party by Counterclaim

(136 paras.)

**Case Summary**

**Construction law — Breach — Counterclaim by Leduc Development, the project owner, for breach of contract and *negligence* against L&M Engineering dismissed — Leduc claimed it hired L&M to provide engineering services and as project manager for subdivision project, but L&M claimed it was only hired to provide engineering inspection services — Project did not succeed for various reasons — Leduc failed to prove that L&M was project or construction manager, or that L&M was in any way responsible for delay of construction — Much of Leduc's evidence was not relevant, and even if it was relevant it did not support Leduc's theory of case.**

**Construction law — Liability — Grounds — Breach of contract — Delay — *Negligence* — Counterclaim by Leduc Development, the project owner, for breach of contract and *negligence* against L&M Engineering dismissed — Leduc claimed it hired L&M to provide engineering services and as project manager for subdivision project, but L&M claimed it was only hired to provide engineering inspection services — Project did not succeed for various reasons — Leduc failed to prove that L&M was project or construction manager, or that L&M was in any way responsible for delay of construction — Much of Leduc's evidence was not relevant, and even if it was relevant it did not support Leduc's theory of case.**

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| Counterclaim by the project owner, Leduc Development, for breach of contract and ***negligence*** against its project manager, Leduc Development. Leduc Development wished to construct a subdivision, in three phases, on a property it had purchased from the Crown. It hired ICL as the general contractor. It hired L&M Engineering to assist with the first phase to provide engineering design services. Leduc claimed that L&M also became the subdivision's project manager. The project did not succeed for a variety of reasons. ICL was not fully paid and it filed a claim for builder's lien and breach of contract against Leduc. Leduc responded to the claim and counterclaimed against L&M for breach of contract and ***negligence***. Leduc settled the claim with ICL and only the counterclaim proceeded to trial. Leduc claimed that as project manager, L&M was obliged by its common law and contractual duties to ensure the timely construction and cost effectiveness of the subdivision. Leduc claim L&M breached those duties, which resulted in delay of contraction and financial collapse of the subdivision. It sought damages for its lost investment, and damages resulting from loss of opportunity to earn profit on all three phases of land development. L&M claimed that it only provided engineering inspection services and it did so in compliance with both its common law and contractual duties.  HELD: Counterclaim dismissed.  Leduc failed to prove on a balance of probabilities that L&M was project or construction manager, or that L&M was in any way responsible for the delay of construction. Leduc focussed on legal claims that were not in the pleadings and therefore much of its evidence was irrelevant. Even if the evidence had been relevant, it did not support Leduc's theory of the case. The evidence adduced did not support a finding that L&M was the project manager, or that it took any duties akin to those of a project manager. L&M provided engineering services, including construction inspection services, but it did not manage the construction or purport to direct how and when the work was done. Accordingly, Leduc's claim failed because it had not proven a material fact that was the fulcrum of all of its claims against L&M. Furthermore, Leduc led no expert evidence about the duty or standard of care for engineers, project managers or construction managers. |

**Counsel**

Counsel for Leduc Development Ltd.: A.J. Winstanley.

Counsel for L & M Engineering Limited: T. Goepel, M. Stainsby.

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| **N. SHARMA J.** |

**A. OVERVIEW**

**1**  This trial was about the failed construction of a subdivision in Fort Nelson, British Columbia. The defendant, Leduc Development Ltd., purchased from the Crown a parcel of undeveloped land of just over 23 acres in April 2004 for $600,000 (the "Property"). The Property was zoned for residential, single-family dwelling and duplex construction. Leduc decided it would subdivide the Property and build residential homes on it in three phases.

**2**  L & M Engineering Services Limited was hired to assist with the first phase (the "Subdivision"). In the fall of 2005, Leduc hired the plaintiff, Integrated Contractor Ltd. ("ICL"), as a general contractor.

**3**  The Subdivision did not succeed due to a number of factors. ICL was not fully paid so it filed a claim for a builder's lien and breach of contract against Leduc. Leduc responded to that claim and also filed a counterclaim alleging breach of contract and ***negligence*** against L & M. Leduc settled its law suit with ICL. The case before me was the trial of Leduc's counterclaim against L & M.

**4**  The parties did not agree what this trial was about. Leduc accepts L & M was hired to provide engineering design services, but it alleges L & M also became the Subdivision's project or construction manager. Leduc alleges as project manager, L & M was obliged by its common law and contractual duties to ensure the timely construction and cost effectiveness of the Subdivision. Leduc claims L & M breached those duties, which resulted in delay of construction and financial collapse of the Subdivision. It seeks damages for its lost investment, and damages resulting from loss of opportunity to earn profit on all three phases of land development.

**5**  L & M submits Leduc has mischaracterized L & M's role on the Subdivision. L & M's position is that it only provided engineering inspection services and it did so in compliance with both its common law and contractual duties. Its position is that most of the evidence Leduc adduced at trial was irrelevant to the legal issues before me.

**6**  Having considered the pleadings in detail and the evidence, I conclude that Leduc's case was entirely dependent upon its assertion that L & M was the project manager. Leduc submitted L & M failed to perform a number of duties Leduc argued are inherently part of project managers' duties, and the evidence it called focussed on those alleged deficiencies.

**7**  However, I have concluded that Leduc has failed to prove on a balance of probabilities that L & M was project or construction manager, or that L & M was in any other way responsible for the delay of construction. I have also concluded that Leduc focussed on legal claims that are not in the pleadings, and thus, a lot of the evidence it adduced at trial was irrelevant. But even if that evidence had been relevant, it does not support Leduc's theory of its case.

**8**  All claims against L & M are dismissed.

**B. WHAT IS AT ISSUE IN THIS CASE?**

**9**  Leduc applied to amend its pleadings prior to trial but that application was denied (the amendments that were disallowed are contained in Appendix A): *Integrated Contractors Ltd. v. Leduc Development Ltd*. (September 26, 2014), Vancouver Registry No. S128886 (BCSC). L & M successfully argued that Leduc's proposed amendments would fundamentally alter the scope of the trial to L & M's prejudice, and would jeopardize the trial date. Leduc's position was that no new claims were being advanced; it said the amendments were simply a particularization of existing claims.

**10**  The Master did not agree with Leduc's position. She characterized the amendments as a "sea change" in the claims. She reasoned that if the amendments were allowed, L & M would have to conduct further investigations including document discovery, witness interviews and examinations for discovery. She also noted the causes of action sought to be added to the claim by Leduc were clearly out of time (para. 12). L & M had pointed out that the counterclaim contained "no actionable allegation against L & M for anything that occurred before August 2005" (paras. 7 and 10) but the proposed amendments implicated events prior to that time. She found the prejudice to L & M out-weighed the prejudice to Leduc. The application was denied.

**11**  The Master did recognize the prejudice to Leduc in not allowing the amendments. She said while triable issues were effectively "taken away" by her ruling, "Leduc can still make its claim and argument for delay on the pleadings that will stand at trial" (para. 17). Leduc submits that sentence renders relevant evidence that falls squarely within the language of the disallowed claims in two ways. First, it says the evidence is background in support of its claim for delay. Secondly, Leduc says the evidence is relevant to the duties L & M took on as "project manager".

**12**  Leduc's position is a reiteration of its position before the Master that the proposed amendments did not create new claims, but merely particularized the existing claims against L & M. The Master rejected that submission, as do I. The case Leduc presented in court was not, for the most part, grounded in the pleadings. Instead, Leduc lead a large amount of evidence only relevant to the rejected amendments.

**13**  Two examples are illustrative. First, Leduc adduced a large amount of evidence about differences between L & M's preliminary and detailed design engineer's estimates and the estimate prepared by ICL. Leduc submitted L & M knew or should have known that ICL's estimates were too high; or, Leduc alleges that difference proved L & M's estimates were too low and L & M should have updated its estimate. Leduc submits that knowledge ought to have spurred L & M to find another contractor or "force" a lower price on ICL. Leduc argues these failures by L & M were a breach of its contractual and common law duties and that they led directly to delay in construction, causing the project to collapse.

**14**  But one of the disallowed amendments specifically alleged that L & M was liable for underestimating the cost of the Subdivision:

. . . L & M Engineering breached its Retainer Agreement and/or its duty of care to Leduc, in that it negligently; (a) Underestimated to a significant degree the costs of developing the Subdivision Project; . . .

**15**  Secondly, Leduc argued that L & M's decision to suspend full time inspection on the site at the end of October 2004 constituted ***negligence*** and breach of contract. It is during that time that deficient work was done on the installation of the shallow utilities which resulted in remedial work and construction delays the following spring. Again, this allegation is specifically encompassed in a rejected amendment that stated L & M "failed to inspect the work of subcontractors to ensure that the underground electrical utilities were properly installed" (para. 13(j), Appendix A).

**16**  Those claims were explicitly prevented by the Master from proceeding to trial. These are two examples of Leduc focussing on the disallowed claims; many examples exist. The trial was significantly lengthened because of Leduc's failure to confine its evidence to the claims that were before me.

**17**  Leduc did not appeal the Master's decision. L & M's position is that most of Leduc's evidence at trial was irrelevant. On that basis, L & M's counsel objected to a large amount of evidence presented by Leduc, but he did so on a categorical basis to avoid constantly interrupting Leduc's evidence and slowing down the trial. This was an appropriate approach in the circumstances.

***1. The Pleadings***

**18**  Because the parties did not agree on what this trial was about, I rely on the pleadings. I have paraphrased from "Part 3: Legal Basis" of Leduc's Further Amended Counterclaim filed August 11, 2015 (starting at p. 27). The claims made against L & M as follows (followed by the paragraph reference from the counterclaim):

1. There was an implied term of the contract between Leduc and L & M that the latter would use reasonable care and skill, diligence and competence in "carrying out the various engineering services" and "the various professional roles" it assumed between April 2004 and March 2007 [para. 1].
2. L & M owed a duty of care to review construction progress, ensure work of subcontractors was carried out expeditiously, interpret contracts and ensure ICL carried out its contractual duties [para. 2].
3. "To the knowledge of ... L & M Engineering, the ordinary consequences that should follow in the usual course of things from their breach or breaches of contract or L & M Engineering's breach of duty of care would be" the following "losses" suffered by Leduc:
4. opportunity to earn profit from the failed contracts for purchase and sale of houses [para. 3(a)];
5. ability to participate in and earn profit from the build-out of further phases of the Subdivision, or the Property in general [para. 3(b) and (c)];
6. Leduc would suffer economic loss including carrying costs and accrual of interest, downturn in market price of houses [para. 3(d) and (e)]; and
7. extra engineering costs and legal expenses [para. 3(f) and (g)].
8. In the alternative, the losses listed above "were the types of losses that would ordinarily have been in the reasonable contemplation of ICL and L & M Engineering at the time" when their agreements and contracts (presumably with Leduc) were made.
9. Leduc suffered and continues to suffer loss and damage.

**19**  In support of these claims, Leduc asserts facts at p. 20 of the counterclaim: "Part 1: Statement of Facts". My summary of those assertions (followed by references to the paragraph from the counterclaim) is contained in Appendix "B".

**20**  Viewed together with the legal basis asserted in the counterclaim, I find that Leduc's entire case rests on its contention that L & M ceased simply to be the engineer for the Subdivision and became its project manager (I find the phrases "project manager" and "construction manager" are interchangeable).

**21**  Distilling the claim to its essential elements, to succeed Leduc must prove on a balance of probabilities that:

1. L & M agreed to, or in the alternative did, expand its role on the Subdivision beyond providing initial design and engineering inspection services, and became the Subdivision's "project manager".
2. Project managers have a duty of care to ensure, among other things, that construction is proceeding expeditiously, to monitor costs to prevent cost overruns and compel subcontractors to carry out their contractual duties.
3. Together with (a), or in the alternative, once L & M became project manager, its contract with Leduc was broadened to impose on L & M additional duties to monitor construction work to ensure it was proceeding expeditiously, and to monitor costs to prevent cost overruns and compel subcontractors to carry out their contractual duties.
4. L & M failed to ensure construction work was completed expeditiously, failed to prevent cost overruns and failed to compel subcontractors to carry out their contractual duties, thus breaching its duty of care and contractual duties to Leduc.
5. These failures delayed construction.
6. The delay caused the project to collapse, resulting in financial losses for which L & M is responsible.

**22**  As I explain in this decision, I find the evidence does not support a finding that L & M was the project manager, or that it took on any duties akin to those of a project manager. I find L & M provided engineering services, including construction inspection services, but it did not manage the construction or purport to direct how and when work was done. Accordingly, Leduc's claims fail because it has not proven a material fact that is the fulcrum to all of its claims against L & M.

**23**  In addition to failing to prove a material fact, Leduc's case has another major evidentiary deficiency. It led no expert evidence about the duty or standard of care for engineers, project managers or construction managers. These are matters beyond the ordinary knowledge possessed by a trial judge. Thus, even if I had made a finding that L & M became the project manager (which I have not), Leduc did not adduce expert evidence to establish what the standard of care was and how it was breached in this case; its claim in ***negligence*** would have failed on that ground alone: *International Culinary Institute of Canada Inc. v. Grant Thornton LLP*, [*2010 BCSC 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62WG-00000-00&context=) and *Bergen v. Gerald Guliker*, [*2015 BCCA 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB3-MY31-JX3N-B2D7-00000-00&context=) at para. 106.

***2. The Legal Principles***

**24**  Apart from the insufficiency of evidence to support Leduc's factual assertions, I also find Leduc's legal claims are not supported by the evidence.

**25**  Leduc's case is that L & M breached its contractual and common law duties as project manager which caused a delay in construction which caused the Subdivision to fail. Leduc focussed on three duties it argued L & M failed to fulfill: ensuring timely completion, preventing cost overruns and compelling subcontractors to complete contracts. Leduc adduced a lot of evidence at trial attempting to prove these three sub-issues, but the evidence did not establish the factual precondition that L & M was project manager. Leduc failed to prove on both an evidentiary and legal basis that those duties were the responsibility of L & M.

**26**  In terms of delay, Leduc relies on *Hick v. Raymond & Reid*, [1893] AC 22 (HL) as the authoritative case. Leduc also referred me to two text books that refer to *Hick* in support of its claim. Leduc was not entirely clear about the basis upon which it asserts L & M could be held responsible in damages for construction delay. At times, Leduc advanced delay as an independent tort, and at other times it was presented as an element of L & M's ***negligence***. In any event, Leduc emphasized its reliance on *Hick* as the leading authority in support of its claim.

**27**  I do not find *Hick* helpful. The issue in *Hick* was whether timeliness could be implied into the terms of a contract regarding the unloading of a ship's cargo. The co-signee of the ship had a contract requiring that it unload the ship's cargo but, because of a strike by local dock workers, the goods were not unloaded for over a month after docking. The ship owner then sued the co-signee for damages arising from "the unlawful detention of the ship for an unreasonable time" (at 23).

**28**  The House of Lords held that, as the contract stipulated no deadline for unloading the ship, the co-signee was required to unload the ship's cargo within a reasonable time. This approach was in conformity with a principle "as old as the law of contract" which states that if the language of a contract does not expressly or by necessary implication fix the time for the performance of a contractual duty, then the law will imply that it should be done within a reasonable time.

**29**  The House of Lords found that the co-signee was not liable for any damages, because a "reasonable time" must be calculated not in the abstract, but by taking the specific circumstances of the situation into account. In *Hick*, that meant considering the disruption caused by the dock workers' strike, which lead to a finding that the delay in unloading was not unreasonable.

**30**  *Hick* was referred to in the dissenting reasons of Justices Locke and Cartwright in *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [*[1959] S.C.R. 271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X2S8-00000-00&context=)[**1**](#Forward_fnref_fnr-1). That case also considered timely delivery of goods, but the specific legal issue related to the interpretation and application of a statutory provision, and the case is therefore of no application to the facts before me.

**31**  *Hick* is not a case about tort law, so the only possible relevance of *Hick* is to Leduc's contractual claims. The parties agree they did not have a written contract. Therefore, Leduc must persuade me on a balance of probabilities both that L & M contracted with Leduc to become project manager and that it is reasonable to assume that the unwritten contract Leduc had with L & M explicitly or implicitly included a term regarding timeliness that was broad enough to make L & M liable for construction delays.

**32**  The law is clear that courts will not readily imply terms into contracts. Implied terms are not found unless it is so obvious that the parties agreed to those terms without expressing them in the contract, and that they are necessary in a business sense: *Bentsen Consulting Ltd. v. Nicola Native Lodge Society*, [*2005 BCSC 1791*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S30G-00000-00&context=) at paras. 24 to 26.

**33**  It may be that it is necessary from a business sense that a project manager have a contractual duty to perform its duties on a timely basis (but I make no finding on that point), but I was not directed to any case that specifically confirms such a term should be implied if it is not explicitly contained in a project manager's contract. In any event, as I discuss later in these reasons, I do not find the evidence supports a finding that L & M caused any delay in the construction; in my view, its actions were timely.

**34**  Also, Leduc cannot succeed in establishing L & M breached implied contractual terms when Leduc cannot stipulate the terms. Leduc did not describe in its pleadings or during final submissions what the implied terms of the contract it submits L & M violated were.

**35**  Leduc also submits that explicit and/or implicit terms in its contract with ICL imposed on L & M "project manager" duties. L & M was not a party to that contract. Leduc points to *Homes by Jayman Ltd. v. Kellam Berg Engineering & Surveys Ltd.*, [*1995 CanLII 9065*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-DY33-B4HX-00000-00&context=) (ABQB); aff'd (on liability issues) [*1997 ABCA 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JNY7-X36S-00000-00&context=) for support for its position. I note in passing that the Alberta Court of Appeal commented that the liability issues in the case were "made difficult by the very complicated expert evidence" (para. 4); I have already pointed to Leduc's lack of expert evidence to be a major flaw with its case.

**36**  In any event, in *Homes*, an engineering company was found to have an implied duty to inspect and perform "some level" of supervision over the actions of a contractor, despite the fact that the engineering company was not a party to the contractor's contract. The trial judge found that considering the contract as a whole, it did "give rise to a reasonable assumption on the part of the Plaintiff that the Engineer would, at the very least, carry out some inspection duties" ... and the contractual terms "help[ed] determine the nature of the relationship between the Plaintiff and [the engineering company" (para. 52). But the trial judge also found "[i]t is a little more difficult to conclude that the contract required the Engineer to supervise the work" (para. 54), although ultimately she concluded that the "duty to inspect ... implies some level of supervision". She concluded that the engineer had an implied duty to "carry out some inspection of the work ... as well as some supervision" but it failed to do so. Interestingly, the only contract clause reproduced in the trial decision that refers to "supervision" places that duty on the contractor (para. 48) whereas all the clauses mentioning the engineer use inspect or inspection.

**37**  L & M admits it had a duty to inspect. As discussed below, if supervision means "directing" work, L & M denies it had that duty. Unfortunately, it is not clear exactly what the trial judge in *Homes* meant by "supervise" as differentiated from "inspect", but that was immaterial because she concluded on the facts had the Engineer complied with its duty to inspect, the defects would have been found (para. 52).

**38**  In my view, *Homes* does not go as far as Leduc suggested it did with regard to the imposition of duties on a non-party to a contract. At best, there are obiter comments in the decision that an engineer's inspection duties inherently includes some level of supervision, but neither term is defined, so the facts of what the engineers in that case physical did were determinative. What *Homes* does not do is support Leduc's allegation that its ICL contract imposed project management duties on L & M.

**39**  Moreover, Dave McWalter prepared the contractual documents for Leduc and he testified that L & M never performed project manager duties, and as he understood it, no terms in ICL's contract with Leduc altered that. Leduc did not call any witnesses from ICL that supported its claim on this point. I draw an adverse inference from the failure to call an ICL witness. Accordingly, I find no reliable evidence support's Leduc's position on this point.

**40**  L & M admitted that generally speaking there would be an implied term in its contract that it would carry out its engineering, design and inspection services with reasonable skill, care and diligence. The evidence does support L & M's position and I find that L & M fulfilled its engineering, design and inspection duties responsibly, diligently and in a timely fashion.

**41**  Leduc's claim of ***negligence*** against L & M as project manager is based on the same factual assertions as its breach of contract claim but, as noted above, there was no expert evidence about the standard of care of a project manager (or engineer) and whether the standard was breached in this case. So, even if a factual foundation existed for the ***negligence*** claim (and I find it does not), Leduc failed to adduce the evidence necessary for me to assess the claim.

**42**  Leduc has failed to prove a material fact essential to all aspects of its claim. L & M was not project manager and did not purport to undertake project manager duties. Leduc's entire claim fails on that basis alone. I move on to discuss the evidence in the case that leads me to that conclusion.

**C. BACKGROUND AND WITNESSES**

**43**  Leduc is a company owned by Lawrence Fix who lives in Richmond, British Columbia. The company was created for the purpose of developing the Subdivision. Mr. Fix paid about $400,000 of the purchase price for the Property and Ken Wevers, an investor, paid about $200,000.

**44**  Mr. Fix is retired and has a background in housebuilding but no experience with building residential subdivisions in northern British Columbia. Mr. Fix is the sole shareholder of Leduc. Mr. Fix's long-time friend and associate, Ed Renyk, is a director and the financial officer of Leduc. Mr. Renyk has been a chartered accountant for 40 years and also considers himself retired.

**45**  L & M is an engineering firm located in Prince George. It was retained by Leduc to assist in designing the development on the Property, and to act as the Subdivision's engineer. David McWalter is the president and a director of L & M. Konrad Dunbar worked for L & M during the relevant times. Mr. McWalter and Mr. Dunbar were the two witnesses called by L & M.

**46**  Leduc called 10 witnesses and relied on read-ins from the examination for discovery of David McWalter. In addition to Mr. Fix and Mr. Renyk, Leduc relied upon the testimony of:

1. Bill Myers -- Mr. Myers is Mr. Fix's nephew. He worked on the Subdivision until he had a falling out with his uncle. Mr. Myers believes he is owed about $23,000 for work he did on the Subdivision for which he was not paid. He left the site in October 2005 and did not return. He has not spoken to Mr. Fix since 2006.
2. Myrna Blake -- she has been a real estate broker since 1991. She co-authored an expert report that Leduc introduced into evidence. She was also hired by Leduc to try to market the Subdivision.
3. Sandra Shofner-McKee -- she was the managing broker and realtor of Re/Max in Fort Nelson. She was qualified to give opinion evidence as a professional realtor with a specialization in the residential market in Fort Nelson. She was the other author of the expert report.
4. Ken Wevers -- he is a retired contractor with experience in concrete and house construction and he was an investor in the Subdivision.
5. Samuel Moffett -- he is a builder who constructed one of the houses on the Subdivision and testified about what he believed the plan was for building the remainder of the houses.
6. Lawrence Sheldon -- he is with a small, private lending firm called Medallion which invested in the Subdivision by granting a mortgage to Leduc. Leduc defaulted on that mortgage.
7. Peter Toustousras -- he was a technologist with L & M who was the resident inspector on site daily in September and October, 2004.
8. Barclay Pitkethly -- he was a senior planner with the City of Fort Nelson from 2001 to 2006.

***1 Credibility and Reliability of Witnesses***

**47**  Mr. Fix is retired as is Mr. Renyk, and both men are in their 70s. They each testified about health issues that have negatively impacted their memory and, to a lesser extent, their concentration. I acknowledge and appreciate their candour about that.

**48**  Despite those challenges, both men generally had a fair to good recollection of the major events and the sequence of events pertinent to the case, many of which happened over 10 years before trial. However, at times it was clear to me that Mr. Fix's memory was impaired. Other factors also cause me to question Mr. Fix's reliability and credibility as a witness. Mr. Fix was reluctant to admit to obvious facts that were inconsistent with Leduc's theory of the case, sometimes even when confronted with a document that was consistent with L & M's position. A large amount of his testimony was based on his beliefs, assumptions or thoughts that were contradicted often by other testimony and/or documents. I also find at times he was less than forthright, especially about financial matters. I therefore place reduced weight on his testimony.

**49**  The impact health issues had on memory was more evident with Mr. Renyk. He was asked to explain financial documents he prepared at different points in time, and was specifically asked to identify what particular line items on those documents represented. He found this challenging, which is not unreasonable given the volume of documents and time that has passed; but I find the degree and nature of his lack of recollection was not completely accounted for by the passage of time. His explanation about how a particular expense or item was treated in his accounting was often confused or unclear, even when reviewing documents. Thus, reliance on his standard practice did not always clarify his testimony or assist his memory. It was also obvious that Mr. Fix was the controlling mind of the Subdivision and Mr. Renyk's role was secondary. I find those factors do diminish the reliable of Mr. Renyk's evidence. However, I find Mr. Renyk to be genuine and honest in his testimony and he clearly attempted to do his very best to answer any question. I have no concerns about Mr. Renyk's credibility.

**50**  Samuel Moffett testified on behalf of Leduc. He had a serious accident in March 2008 and sustained a brain injury impacting his memory and language. Because of that, his evidence is less reliable and I approach it with caution.

***2. Leduc's Expert Evidence***

**51**  Leduc relied on an expert report co-authored by Ms. Blake and Ms. Shofner-McKee. Both were cross-examined on that report. I find the report unreliable and place no weight on it for a number of reasons.

**52**  As a starting point Ms. Blake, and to some lesser degree Ms. Shofner-McKee, was retained to market some portion of the Subdivision at different times. It is problematic to rely on experts who were themselves participants in the history of sales, and who gave advice to one of the litigants: *Emil Anderson Construction Co. v. British Columbia Railway*, [*1987 CarswellBC 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X15S-00000-00&context=).

**53**  But more importantly, it became clear during their cross-examinations that the report was not truly a joint report, as represented. Counsel's letter of instruction to both women specifically stated that if "a particular section of your joint report is the work or the opinion of just one of you, please indicate where that is the case and the extent to which that is the case". Ms. Shofner-McKee described in her cross-examination that the report had "her portions" and "Ms. Blake's portions". The report does not reflect that, and that dissonance alone diminishes the weight I place on the opinions expressed in the report.

**54**  Ms. Shofner-McKee also agreed in cross-examination that she disagreed with the values in the report placed on executive homes but that she "conceded" the point to Ms. Blake. Ms. Shofner-McKee's view as expressed in correspondence to Leduc and Ms. Blake was that it was very difficult to sell undeveloped lots in Fort Nelson and pre-sales were not common. She agreed in cross-examination that her view on this point has not waivered. That view is contained in the original report, but it was removed from the final copy. Ms. Shofner-McKee seemed surprised by that and could not explain the deletion.

**55**  I find Leduc did not prove the assumptions upon which the report was based, and lacked evidence about other critical aspects of the report. Leduc provided no expert evidence as to what it would cost to build a home in Fort Nelson, yet it bases its claim for damages on what it says was its expected return on investment which is dependent upon both sale prices and house construction costs. While Leduc's witnesses testified about their "plan" for building houses in relation to cost or timing, no reliable evidence buttressed their beliefs. Moreover, I found that testimony vague and unsubstantiated.

**56**  The report itself has deficiencies. It notes that the type of home built would dictate the price, but the report did not identify what types of houses the authors assumed would have been built or sold. Also, the report is based on having a builder certified by the Home Protection Office ("HPO"), but Leduc led evidence that wanted to hire Mr. Moffett, who was not an HPO builder. Also, the report is based on one of the homes (5618 Birch Dr.) being the reference point for value of proposed lost lots sales, but that sale was not an arm's length transaction. Both experts agreed an arm's length transaction is the best indicator of a property's value.

**57**  I also find that the report was prepared to advocate for Leduc's opinion rather than assist the court. While the factors below may not individually reveal a predisposition in the opinion, considered together, especially in light of the experts' testimony, I find Ms. Blake and Ms. Shofner-McKee did not maintain the neutrality expected of an expert witness. A number of factors lead me to that conclusion:

1. Ms. Shofner-McKee wrote to Ms. Blake in a July 2, 2014 email that she assumed that they were "to answer yes to all of the questions asked". Ms. Shofner-McKee did not adequately explain in her testimony why that should not be interpreted as her approaching the opinion with a pre-determined answer.
2. In an email to counsel for ICL on September 10, 2010, Ms. Shofner-McKee comments on the possibility she would be a witness for ICL and stated: "My general thoughts on the Angus subdivision were and continue to be that Leduc was convinced that there was a higher market than there was for executive homes and for land". This appears to contradict the opinion she signed where it states that "at least 16 homes would have sold" in the 12 months starting October 2006, "sales prices of the built-out lots would have been in excess of $400,000", and "demand for 24 build out lots in Phase 2 would have continued at the same rate".
3. Ms. Blake emailed Leduc's counsel on July 7, 2014 and stated: "This is the draft of the opinion ... we need to know if this is on the right track insofar as answering what needs to be answered". The next day, counsel confirmed by email that he would provide "his input" later that day.
4. In an email dated July 8, 2014 to Ms. Shofner-McKee, Ms. Blake stated: "It will be really important for our opinion for the reasons that the lots in [other subdivisions] selling today ... both developers, I believe, initially insisted that they do the building of the homes (that was a deterrent as people like to have choice) and the personal facts plus choice regarding not doing so much. Otherwise ... we will be hit with ... well you say they would have sold but look the [other subdivisions] are sitting here and not selling ... we need to explain why not". I find this reflects a pre-disposition about the opinion before it has been prepared.
5. Ms. Shofner-McKee responds to that email by expressing her view that it was "very difficult" to sell bare lots in Fort Nelson. This view was eventually removed from the joint opinion.
6. On September 15, 2015, Ms. Blake emails Ms. Shofner-McKee and states: "Apparently [Leduc's counsel] made an error in the question re; the opinion ... we need to revise as per the attached." She asks Mr. Shofner-McKee to initial the removal of the following sentence from the opinion: "At this rate the full 24 homes of Phase 1 would have been sold out by June 1, 2008". Neither witness could clearly explain what error was in the question Mr. Winstanley posed, or why that error required the removal of a sentence in the report. In fact, their testimony on these points was inconsistent; neither had a good recollection. What is clear is that the opinion was changed based on information provided by counsel which neither expert could clearly explain or describe.
7. The report refers to one of the homes being purchased for $435,000 and Ms. Blake opined prices probably would have steadily increased by about 10% each year. Ms. Shofner-McKee's response to an email from Ms. Blake was: "[G]ood ... we actually have the data to support" [my emphasis]. However, that home was listed for sale at trial for less than what it was purchased for ($423,000).

**58**  For all these reasons, I place no weight on the expert opinion.

**D. ISSUES**

**59**  The following issues arise:

1. Was L & M the project manager for the Subdivision?
2. What caused the delay?
3. Did Leduc suffer a loss because of L & M's actions?

***1. Was L & M Project Manager?***

**60**  The nature of L & M's role is central to Leduc's case. Leduc alleges that L & M was carrying on business as professional engineers who were providing engineering services, and at some later point, "project management services" for the Subdivision.

**61**  L & M's position is that at no point did it agree to perform, nor did it perform, any type of "management services". In its response to the counterclaim L & M says in April 2004 it was retained to provide only the following professional engineering services:

1. L & M would revise Leduc's conceptual layout of the proposed Subdivision in order to increase density.
2. Once the layout was revised, L & M would submit an early application for subdivision approval on behalf of Leduc to the town of Fort Nelson.
3. L & M would seek the approval of the responsible Ministry to commence clearing of the Property on behalf of Leduc, and L & M would assist in securing a survey and geotechnical report, which were required for construction.
4. L & M would provide a preliminary construction cost estimate to Leduc and the latter would use that to market the Subdivision and secure financing.

**62**  These conditions are explicitly set out in an April 8, 2004 letter Mr. McWalter wrote to Leduc in which Mr. McWalter said he was confirming the agreement that arose from their recent meeting. No mention is made of other professional services, or anything akin to management services.

**63**  Leduc agrees L & M was retained for those services listed above, but submits L & M took on a greater role as construction proceeded. Many documents and L & M's witnesses' testimony contradict Leduc's position.

**64**  Leduc did not lead evidence that there had been an explicit discussion or communication between the principals of the parties (Mr. Fix and Mr. McWalter) about L & M becoming project manager or significantly expanding its role. I acknowledge that Leduc's two main witnesses (Mr. Fix and Mr. Renyk) believed that L & M had taken on this role, but I find those beliefs have not been proven on a balance of probabilities.

**65**  The best evidence from Mr. Fix is that he "assumed" L & M was responsible for a number of things he associated with project management, or he thought L & M should have been responsible for those same things. I find his beliefs were either based on unproven assumptions or contradicted by other more reliable evidence. In my view, the evidence adduced at trial overwhelming supports L & M's position. In particular, I find Mr. McWalter's and Mr. Dunbar's testimony was persuasive. They were credible and reliable; their evidence was consistent between each other and consistent with the documents. Both were clear and firm that L & M's role on this project was as engineers performing inspection functions.

***a. Examination for Discovery Read-ins***

**66**  Leduc led evidence that directly contradicts its claim and supports L & M's case. The following exchanges from the examination for discovery of Mr. McWalter were read into the record by Leduc:

94 Q And you say that position [held by Mr. Greer] was one of site supervisor?

A I would say a better definition of Mr. Greer's responsibilities were construction manager.

. . .

99 Q And who supervised the work of those subcontractors?

A Mr. Greer supervised the work of those subcontractors.

100 Q And who inspected the work of those subcontractors?

A L & M Engineering inspected the work to ensure that the requirements of the subdivision bylaw of the Town of Fort Nelson were adhered to.

101 Q Okay. So am I correct in saying that at all times L & M Engineering performed an inspection function?

A That is correct.

. . .

334 Q In the amended response to counterclaim, in paragraph 8, you describe the role of the site supervisor and the role of the project monitor. I accept that you don't like the term "project monitor," but the definition of "site supervisor" includes the hiring and managing of all trades that participated in the subdivision's construction. You see that?

A Again, that's a horrible definition.

335 Q Site supervisor is a horrible definition?

A M'mm-hmm, yeah.

336 Q Well, what would you call it?

A That would be the construction manager, or the contractor in a normal circumstance.

. . .

837 Q Tab 5. Again, these are invoices from Allan Greer and Triple 8 Services that you were forwarding -- that you've received and you're forwarding on to Leduc?

A Correct. We're forwarding them this minimal comment.

838 Q With a comment at the bottom of the first page:

"The contractual arrangement for the provision of Construction Management services by Triple 8 Services Ltd. was made directly with Leduc Developments Ltd. Accordingly, we cannot comment upon the all-inclusive hourly rate of $90/hour, nor can we comment upon the total hours charged by Mr. Allan Greer."

A That is correct. We had no information with respect to the contractual arrangements between Greer and Leduc.

839 Q But you do see the total of current invoices is $40,397.85?

A Yes, I do.

840 Q And that's in excess of the budget, is it not?

A I wouldn't know that. I never did see a budget between Leduc and Greer.

. . .

1627 Q How do you understand the difference between an engineer providing monitoring services and an engineer providing supervision services?

A Monitoring services are to ensure that the intent of the subdivision servicing bylaw from the municipality [is] respected so that at the end of the project we can assure the municipality that all works were constructed in accordance with their standards.

...

1642 Q So was Konrad Dunbar in the case of this roadway subgrade preparation, was he acting -- was he providing supervision services or was he providing monitoring services?

A He was ensuring that the work was done as per the geotechnical recommendations. Whichever label you wish to attach to that activity please do so.

1643 Q Well, I would like to attach to that activity inspection and supervision services.

A He was certainly inspecting. Was he supervising? No. Supervising implies directing the works. Konrad Dunbar was not directing the works. In other words, telling the contractor where to fix, when to fix, what equipment to use. That was not his role or responsibility.

1644 Q Well, I'm suggesting to you, sir, that inspection and supervision services were exactly his responsibility.

A No, they were not.

1645 Q All Right

A The role of an onsite engineer is to monitor the works by the contractor, to inspect the works by the contractor, but we certainly do not direct the works that are done by the contractor.

**67**  Mr. McWalter's testimony at trial was consistent with this evidence and both directly contradict Leduc's position.

***b. Allan Greer's Role***

**68**  Allan Greer was a surveyor from Australia, but he was not certified as such in British Columbia. He was associated first with Liard Project Services Ltd. ("LPS") and then with Triple 8 Project and Construction Management Services ("Triple 8"). He worked on the Subdivision for just over a year, finally leaving in late spring or early summer of 2005. Mr. Greer did not testify because apparently he could not be located.

**69**  Mr. Fix agreed that he viewed Mr. Greer as the construction manager when Mr. Fix first hired him in 2004. Mr. Fix also agreed that in the beginning, L & M's primary role was to be on site to inspect work to ensure that it met the City of Fort Nelson's standards but Leduc's position is that L & M "took over" Mr. Greer's role at some point. Mr. Fix emphasized that Mr. Greer was hired based on L & M's strong recommendation. He goes so far as to say L & M and Leduc "mutually agreed" to hire Mr. Greer and LPS.

**70**  L & M does not dispute it recommended Mr. Greer to Leduc to clear the Property, but it denies any participation in hiring him, and any knowledge of the contractual terms between Mr. Greer and Leduc. Mr. McWalter testified that he offered to prepare contract documents for the arrangement between Mr. Greer and Leduc, but Leduc declined. This was consistent with Mr. Fix's evidence; he testified that he preferred to do business without written contracts.

**71**  It is not clear to me why Leduc's contention that Mr. Greer was jointly hired by it and L & M would support the theory that L & M was the project manager, but I do not need to consider that issue. The evidence clearly shows that Mr. Greer was hired by Leduc exclusive of any participation of L & M.

**72**  Mr. McWalter testified L & M being unaware of the contractual terms between Leduc and Mr. Greer made it difficult, if not impossible, for L & M to verify the cost of work incurred on the Subdivision. It also meant that L & M did not always know when or what work Mr. Greer was doing. Mr. McWalter said he could not even determine if Mr. Greer was invoicing Leduc directly and how that was being tracked. The documentary evidence consistent with L & M's position, includes:

1. July 13, 2004 - an email from Mr. McWalter to Mr. Fix and Mr. Greer which stated: "I would like confirmation from Leduc that the project will be constructed by Allan Greer with Liard Project Services acting as a construction manager";
2. August 11, 2004 - an email from David McWalter to LPS (copied to Mr. Dunbar, Mr. Fix and Mr. Toustousras) in which he wrote: "As previously discussed L & M will provide construction layout services in addition to construction inspections, provide daily site reports, and take responsibility for the preparation of 'as built' drawings and the finalization of the subdivision completion and registration process with the Town of Fort Nelson Staff. In addition to Liard Project Services (LPS) providing construction services for Leduc, LPS will also provide materials testing services...The construction services being provided by . . . LPS have been negotiated directly between Leduc and LPS. Without knowledge of your contractual relationship, we are unclear whether or not we are to quantify or measure the work performed by LPS".
3. August 20, 2004 - an email from Mr. Greer to Mr. McWalter in which Mr. Greer described his finalization of the construction schedule and coordination of work regarding the gas service main.
4. August 21, 2004 - an email from Mr. Greer to Mr. Fix which contained a lengthy progress report. It described the work Mr. Greer had done and in my view, makes it clear he was "managing" the construction.
5. September 21, 2004 - an email from Mr. McWalter to Mr. Renyk in which Mr. McWalter warned Leduc that the project was being constructed on a cost plus basis, and therefore it would not have the normal price controls of a construction contract. He also noted that preliminary pricing from Mr. Greer was much higher than the engineer's estimate that L & M had provided.
6. September 22, 2004 -- letter from Dave McWalter to Larry Fix providing an update and rationalization of projects costs up to August 31, 2004. He wrote that "[t]he subdivision construction works are being managed on a 'construction management' basis by Allan Greer of Triple 8 Services Ltd" and that the cost estimate included with the letter was made using the preliminary pricing "provided by Allan Greer, your construction manager...".
7. October 27, 2004 - a letter from Mr. McWalter to Mr. Fix and Mr. Renyk to which was attached Triple 8 invoices. Mr. McWalter noted he was in no position to comment on Mr. Greer's rate of $90 an hour or the total hours because Leduc's contractual arrangements with Mr. Greer were unknown to L & M.
8. May 4, 2005 - an email from David McWalter to Mr. Greer responding to Mr. Greer's request for payment. Mr. McWalter wrote it was difficult to process those invoices because L & M "does not have any presence in the Fort Nelson area" and had received no progress reports, inspection reports or contractor's invoices for work done in late 2004 and early 2005. He also wrote that "we do not know what kind of work (if any) is happening at the construction site".
9. May 5, 2005 -- an email from Allan Greer to Larry Fix complaining about Mr. McWalter's email because in Mr. Greer's view "our instructions were issued directly from Leduc".
10. May 20, 2005 - an email from Mr. Dunbar to David McWalter in which Mr. Dunbar reported about a meeting held at BC Hydro to discuss the underground utilities. He stated that Mr. Fix had decided to let Mr. Greer "continue working as before".
11. Various dates - a large number of letters from L & M to Leduc enclosing invoices from LPS in which Mr. Greer's services were described as "construction management and survey services". The same description is used in the large number of letters sent to Leduc to which L & M attached Triple 8 invoices.
12. Various dates, approximately monthly - L & M issued invoices to Leduc accompanied by a letter describing the services it provided. In most of those letters, it described the provision of engineering services, professional engineering services and/or construction inspection services. In two invoices different wording was used and I discuss those invoices below.

**73**  In a letter dated July 6, 2005, L & M was described as providing "construction inspection and construction management services". Mr. McWalter testified that "management" is a typographical error and it should have read "supervision". He was firm that L & M did not provide Leduc with construction management services at any time. He explained L & M was providing construction management services on an industrial subdivision being built in Fort Nelson during the same time period, which might explain the error. I accept his testimony on this point and find the reference to construction management was an error.

**74**  The phrase "construction supervision ... services" was used in L & M's December 1, 2005 letter to Leduc accompanying its invoice which stated services were provided for the months of August, September and October, 2005. Mr. Dunbar and Mr. McWalter both testified that the "supervision" provided was not the same as project management; Mr. Dunbar did not direct where, when and how work would be done. Mr. Dunbar explained he may have done some extra work by dealing directly with contractors, but that was in furtherance of his role as engineer and was in relation to the remediation work. He also testified that L & M were basically "stepping up" to assist Leduc, failing which the project may have immediately failed.

**75**  Once Mr. Fix told Bill Myers to stop working, there was no project supervisor on site. This is consistent with the evidence Leduc read in from Mr. McWalter's examination for discovery. During this time (and others) the testimony, supported by many documents, proves L & M was continuing to try and persuade Leduc to hire a general contractor, as it had been doing for quite some time.

**76**  Taking into account all the testimony about what L & M did during this time period, I find on a balance of probabilities that Mr. Dunbar did not perform construction management or project management duties. Any "supervision" he provided was consistent with his role as an engineer to ensure the work done met the necessary engineering specifications and bylaw requirements.

**77**  Mr. Fix agreed in his testimony that Allan Greer was responsible for coordinating workers for construction and that Mr. Greer was directly emailing Mr. Renyk and Mr. Fix about the project. Mr. Fix's response during cross-examination to the wording L & M used in some of the documents to describe its and Mr. Greer's roles was that he "assumed L & M would do the construction management" as a team with Mr. Greer, or that L & M "should have" known the contractual arrangements between Leduc and Mr. Greer. I do not accept Mr. Fix's testimony on these points because there is insufficient reliable evidence consistent with his belief, and a large amount of reliable evidence contradicting his belief.

**78**  Finally, Leduc's conduct was inconsistent with its position. At some point Mr. Greer stopped working for LPS, but then conducted his work under Triple 8. Its letterhead is consistent with L & M's position about Mr. Greer's role: "Tripe 8 Project and Construction Management Services". Most significantly is the fact that Triple 8 was a company owned solely by Mr. Fix that he gave to Mr. Greer. In other words, Mr. Fix arranged to have a company he owned to be paid by Leduc for work done on the Subdivision. Neither Mr. Dunbar nor Mr. McWalter was aware of this association at the time. Mr. Fix's explanation for giving the company to Mr. Greer was so he could keep his "eye on finances".

**79**  I have no doubt that Allan Greer was, to Leduc's knowledge and with its consent, the Subdivision's project manager. I am not persuaded that Mr. Fix was unaware or did not understand that to be the case at the time.

***c. Bill Myers' Role***

**80**  Mr. Fix's testimony was that his nephew was Mr. Fix's representative on the site. Mr. Myers had no experience or training in engineering, road construction, installation of underground utilities or house construction. Mr. Fix's and Mr. Myers' idea was that Mr. Myer's would learn those things from Mr. Fix while working on the Subdivision.

**81**  Mr. Myers said he was the "Regional Manager" for Leduc. He testified that once Mr. Greer left, L & M was "continuing" Mr. Greer's role as project manager. He testified he was to assist Mr. Dunbar in that role. Yet, he contradicted himself in cross-examination because he agreed throughout 2005 Mr. Dunbar was on site as the "engineer". Mr. Myers also agreed that on a day-to-day basis, he directed workers as to what should be done, and when it should be done. He agreed Mr. Dunbar's role was to check the work to make sure it had been done right.

**82**  I find that Mr. Myers was Leduc's project manager after Allan Greer left the site. Regardless of the labels he used, he confirmed that in terms of directing crews on a daily basis and deciding when things were done, that was his responsibility, while Mr. Dunbar's role was to ensure things were being done correctly. I also find that Mr. Fix was aware that Mr. Myers was managing the construction on site.

***d. Letter of Agency***

**83**  Leduc asserts that L & M was its agent for all purposes, which it says is consistent with its position that L & M took on the role of project manager. It is not clear to me that is a logical progression but in any event, I find the evidence does not support this submission.

**84**  Leduc relies on a letter it wrote to the town of Fort Nelson dated April 21, 2004. In it Leduc advised the town that "[i]n all matters pertaining to the planning and subdivision of the proposed Angus Subdivision ... L & M ... is empowered to act as the agent for Leduc Development Ltd". Leduc also relies on Mr. Fix's interpretation of that letter, which was unsupported by any other evidence. As noted above, I approach Mr. Fix's testimony with caution.

**85**  L & M's position (supported by Mr. McWalter's testimony) is that the letter is a standard form required by the City of Fort Nelson whenever a developer who lives out of town is submitting a subdivision application. In that light, the phrase "pertaining to the planning and subdivision" specifically refers to the process of obtaining from Fort Nelson the necessary approvals to build a subdivision.

**86**  Leduc interprets the phrase "all matters pertaining to the planning and construction ..." to be a reference not only to the municipal process, but to all elements of its land development project. That interpretation is not reasonable on its face nor is it supported by any other evidence. Even if the meaning of the letter was ambiguous (which I find it is not), Leduc did not provide any reason as to how or why L & M could be bound by a representation Leduc made to the city.

**87**  I reject Leduc's argument on this point.

***e. Royal Bank Financing***

**88**  Leduc sought financing from the Royal Bank of Canada (RBC) in July 2004. RBC granted Leduc a letter of credit on terms. L & M was not a party to the letter of credit.

**89**  Leduc submits that the letter of credit itself broadened L & M's role, and thus its liability.[**2**](#Forward_fnref_fnr-2) While it may be possible for a contract to impose legal duties on a non-party, I find that is not the case with regard to the letter of credit. In my view, the letter of credit identifies L & M as a "monitor", but that imposes no additional duties on L & M than it had as project engineer. Moreover, even if the letter of credit created "new" duties, those duties would possibly be owed by L & M to RBC and not to Leduc.

**90**  In any event, I find the evidence does not support Leduc's contention. Leduc used L & M's cost estimate dated July 19, 2004 to obtain RBC financing, despite the fact that Mr. Greer had sent Leduc information subsequent to that estimate showing that actual construction costs would be much higher. This is confirmed by, among other things, Mr. McWalter's email to Mr. Renyk on September 21, 2004 in which he stated: "[e]ssentially, the project is being constructed on a 'cost-plus' basis without the normal controls of a construction contract".

**91**  On October 13, 2004, Ed Renyk sent an email to David McWalter stating that RBC wanted to know the progress of the development to compare to the total project costs given to the bank by Leduc during the loan approval process. He attached a worksheet "based on the information and figures attached to your 19 July 2004 letter...which [RBC] are using as the baseline of progress".

**92**  David McWalter's reply email on October 25, 2004 pointed out that Mr. Greer had provided much higher construction costs estimates. Again on October 27, 2004 David McWalter wrote to Ed Renyk stating "actual construction costs will be much closer to the Greer cost estimate because of inefficiencies resulting from fall weather and from the lack of a fixed price construction contract". This was consistent with many other documents and Mr. McWalter's testimony.

**93**  In response to Ed Renyk's follow up email asking for a report, David McWalter wrote the following in an email dated November 3, 2004:

With all due respect I was not aware that you (or the Bank) was requiring additional information from me at this time. Without the benefit of a fixed or unit priced contract, it is impossible for me to complete the spreadsheet that has been previously submitted to the bank. It is impossible to break down the total project costs into the categories for watermain, sanitary sewermain, storm sewermain, roadworks etc. I have no way of knowing if I have received copies of every single invoice for my review and approval. Likewise, I have no way of knowing what invoices have been paid to date at this time. The bank probably require[s] more than I can provide at this time, but without any kind of construction contract, I cannot provide the detailed breakdown as per your spreadsheet.

**94**  All Mr. Fix could say when confronted with this document was that he was aware L & M had "concerns". I find that Mr. Fix and Mr. Renyk had been adequately, and repeatedly, advised by L & M that costs on the Subdivision were increasing because of the arrangements Leduc had with Mr. Greer (not having a fixed construction contract in place).

**95**  In addition to its contractual claim, Leduc submits that L & M's July 19, 2004 cost estimate was a "fixed" quote or guarantee by L & M of what it would cost to construct the Subdivision. From that proposition, Leduc tried to argue that the certification and approvals L & M gave, which resulted in ICL being paid progress draws from the letter of credit, were inaccurate and/or negligently provided.

**96**  As noted above, Leduc failed in its attempt to amend its pleading to add these specific claims; they are also beyond the applicable time limitation. I find nothing in Leduc's argument that takes it outside of those disallowed claims.

**97**  But even if there was a legal basis in this case for Leduc to advance that argument, the evidence defeats its position. The evidence was clear that L & M's estimate was just that. There is nothing in the documents that suggests L & M was guaranteeing, or warranting the estimate amounted to a "quote". Leduc chose to hire Mr. Greer on its own terms and it did not involve L & M in that process; I have found Leduc knew Mr. Greer was its project manager. More importantly, as confirmed in the documents supported by Mr. McWalter's testimony, L & M repeatedly warned Leduc that its arrangement with Allan Greer appeared to make the construction proceed on a "unit price" basis that would be more expensive, and less efficient.

**98**  Leduc tries to point to Mr. Renyk's forwarding of the proposed real estate terms and conditions to David McWalter on July 16, 2004 as support for its position that the letter of credit created additional duties for L & M upon which Leduc can sue. Mr. Renyk referred to "covenant 1" of the terms and conditions which opens with the following: "Without affecting or limiting the right of the Bank at any time to demand payment or cancel any undrawn portion of any demand loan in this Agreement, the Borrower covenants and agrees with the Bank as follows ...".

Mr. McWalter testified that he understood those terms to be consistent with L & M's role to "monitor" the project for the bank, a role no different than being construction inspector. I agree his characterization is correct.

**99**  I find Leduc submitted to RBC L & M's preliminary design estimate despite knowing at that time that its actual construction costs would be much higher. It, and it alone, bears responsibility for the discrepancy between the engineer's cost estimate and the actual cost of construction, and whether that cost eventually exceeded the letter of credit (I make no finding on the latter point).

**100**  Mr. Fix and many witnesses that testified on behalf of Leduc had a somewhat casual approach to business and contracts. They preferred to rely on trust and people's word. Mr. Fix, Mr. Moffett and Mr. Sheldon all testified that they preferred not to put things on paper. Mr. Fix was adamant that he preferred not to put anything in writing; he would not sign contracts unless absolutely necessary.

**101**  I make no comment on the wisdom, from a business point of view, of such an approach as it appears Mr. Fix had been successful in business. But he had no experience in the construction of residential subdivisions in the far north. I find that inexperience, combined with Leduc's preferred approach to business, were major contributors to its legal difficulties with ICL and the many subcontractors who placed liens on the Property. All of these factors were instrumental in construction delay and they are not attributable to L & M's actions or inactions.

***f. Hiring ICL***

**102**  L & M's position, supported by numerous documents, is that it had been urging Leduc for some time to hire a general contractor. Leduc finally accepted that recommendation. This recommendation is relied upon by Leduc as proving L & M were project managers. Alternately, Leduc seems to argue that L & M is responsible for deficiencies in ICL's performance of its contractual duties because of that recommendation. Neither proposition is supported by the evidence. Moreover, a general contractor is the rough equivalent to a project manager so Leduc's argument fails at a common sense and logical level.

**103**  L & M recommended Leduc hire ICL because it was a company that was already working in Fort Nelson, meaning there would be cost savings because any expenses for travel time potentially could be split. L & M also knew ICL to have a good reputation. Leduc relied on the following evidence from Mr. McWalter's examination for discovery which explained why L & M recommended ICL:

891 Q Why was the request to quote limited to ICL?

A They were doing work in the area on several other projects that we were aware of, some of, some of which were being administered by L & M. In my opinion, they were a good contractor, they are a good contractor, and it seemed like a reasonable fit to get the works completed

. . .

894 Q How experienced was ICL by May 31, 2005?

A I am not sure if I am fully aware of their corporate history, but they had a very, very good track record with experience principles. They are still as I mentioned before, they are still in business now as IDL.

895 Q But I am just asking about their experience as of May 31, 2005.

A In my opinion, it was good.

896 Q What is good experience?

A They were a good, reliable contractor.

**104**  This evidence does not support Leduc's claim because it illustrates L & M's recommendation was reasonable and sound. This is supported by other evidence.

**105**  Mr. Dunbar testified about the difficulty of obtaining crews and equipment to work in Fort Nelson. Because of its location and weather, the construction season in Fort Nelson is generally from May or early June until it freezes again in October or November. Because of its remote location, it is expensive to bring in crews and equipment and this is made more difficult when a development is on a small scale, as was this Subdivision. The next nearest community of any size is a three and a half hour drive away. Also, Fort Nelson has a population of only about 5,000 people and none were equipped to perform the work needed on the Subdivision because, among other things, specialized heavy equipment was necessary and there were no local businesses that could supply that. Mr. McWalter testified that finding contractors even in Prince George can be a challenge for many of the same reasons. Mr. Myer's testimony supported Mr. Dunbar's with regard to the impact these factors had on construction. I did not understand Leduc to contest these statements; certainly it presented no evidence to undermine them.

**106**  I conclude L & M cannot be faulted for recommending ICL to work on the Subdivision.

**Conclusion**

**107**  I find the evidence does not support Leduc's position that L & M agreed to or did take on any professional duties beyond being the engineer for the Subdivision. L & M provided engineering design and inspection services and did not undertake any management responsibilities.

***2. What Caused the Delay?***

**108**  As noted above, it was not entirely clear to me whether Leduc argued delay as an independent tort or simply one element of its assertion that L & M was negligent in its project manager duties. Leduc's delay argument rested heavily on *Hick* which I have found to be of little assistance. Because I have also found that L & M was not the project manager for the Subdivision, it is not necessary for me to address the submissions about delay; Leduc has failed to persuade me on the evidence and the law that it has a valid claim for delay against L & M. However, in the event I am wrong about any of those conclusions, I address the causes of construction delay.

***a. Bad Weather***

**109**  There was abundant evidence that Fort Nelson experienced unusually large amounts of rain in both July and August 2005. Mr. Myers testified about heavy rain that shut down construction for about 13 days. During his testimony he described photographs that depicted the impact the rain had on the ongoing road construction. Notes made by Mr. Myers are consistent with this evidence as he recorded that torrential rain stopped construction from July 17 to July 29, 2005, and required water to be pumped until August 3, 2005. Mr. Dunbar testified that 2005 was the worst summer he experienced in Fort Nelson in terms of the rain. There is no doubt that the amount of rain was a major cause of the delay in construction.

***b. Leduc's Reliance on Allan Greer and Bill Myer***

**110**  BC Hydro convened a meeting in early May 2005 because it was concerned about deficiencies in the installation of shallow utilities. Both Mr. Dunbar and Mr. McWalter testified that they were aware BC Hydro is very particular with respect to installation of its services and that it provides its own inspectors for that scope of work.

**111**  Mr. Greer completed that work after L & M had left the site for the winter in 2004. That timing meant no one was on site to verify whether the work was done in compliance with BC Hydro's specifications. In addition, Mr. Greer had used frozen soils to backfill the trenches. Both circumstances required remediation work that delayed construction. Leduc alleges L & M "should have" been on site to review Mr. Greer's work in late 2004. This is a claim that cannot be brought because it concerns events before August 2005. In any event, I find the evidence does not support Leduc's position.

**112**  As discussed earlier in this decision, I have found that Mr. Greer was project manager and that his contractual arrangements were, to Leduc's knowledge, unknown to L & M. In a May 4, 2005 email to Mr. Greer, Mr. McWalter wrote that L & M had received no progress reports or inspection reports and was unaware of what was happening on the site. Combined with the rest of the reliable testimony and documents, I find that Mr. Greer's installation of shallow utilities and backfilling of the trench in late 2004 was work that was done without engineer oversight, but that Leduc and Mr. Greer bear the sole responsibility for that.

**113**  It was not long after this discovery that Mr. Greer stopped working for Leduc and Leduc finally agreed with L & M's repeated recommendation that Leduc hire a general contractor. L & M sent out a request for quotation to ICL at the end of May 2005. The evidence also shows that Mr. Knapp from ICL visited the site around June 9 and June 12, 2005 to review the work at L & M's request, so L & M responded promptly to Leduc's request.

**114**  Before ICL provided its quote, additional problems caused by the faulty work in late 2004 were discovered that required repair and remediation (in addition to the BC Hydro-related repairs). Although Leduc disagrees with the characterization of L & M's role, I have found Mr. Myers was project manager.

**115**  I find that L & M performed its engineering and inspection roles promptly during this time period by ensuring inspectors were on site to confirm the compaction of the shallow utilities trench met required standards, including Harder and Associates (a geotechnical firm) which did an investigation and completed a report. Mr. Dunbar's daily inspection reports are consistent with that timing. Mr. Myers also agreed that Harder and Associates asked for changes to his work in order to comply with the standards and this also contributed to delay in construction. Mr. Myers admitted that his inexperience was a significant factor in how long it took for the road to be readied for gravel.

**116**  As construction was delayed and ICL was not showing up on the site, Mr. Meyers testified that he, Mr. Fix and Mr. Dunbar agreed that Mr. Myers would do a portion of the work ICL was bidding on (finishing the subgrade of the roadworks). ICL facilitated this by delivering material (soils) to the site free of charge and lending equipment to Mr. Myers for this purpose. But Mr. Myers was working alone (or with only one other person), so that work took longer than it should have.

**117**  Mr. Dunbar testified the decision to let Mr. Myers do some of the roadwork was Leduc's alone but Mr. Fix claimed he had no knowledge of this arrangement. I prefer Mr. Dunbar's evidence on this point because it is more consistent with the documents and the rest of both his and Mr. Myer's testimony, and I have concerns about the reliability of Mr. Fix's testimony as discussed earlier in this decision.

**118**  However, it is unclear to me if Mr. Myers' work on the subgrade was an independent contributor to construction delay. The evidence suggested the possibility that ICL was not showing up at the Subdivision because it was delayed at another site. Whatever was the cause, I do find that none of that delay can be attributed to L & M. Leduc tried to argue that L & M should be held liable for not "forcing" ICL to show up earlier, but the contract between Leduc and ICL was not finalized until October 4, 2005. Withholding payment under the contract would have been the only mechanism L & M had for persuading ICL to work on time, but that was obviously unavailable before the contract was in place.

***c. Builders' Liens***

**119**  Builders' Liens were registered against the Property and were not removed until June 28, 2005. Common sense dictates that in a community the size of Fort Nelson, word would easily spread that Leduc was not paying its bills. This is confirmed by other evidence. Mr. Myers agreed in cross-examination that one of the reasons that ICL was reluctant to come on site without an assurance of payment was because by that time Leduc had a bad reputation in the community. He also agreed it became difficult to get people to work on site because Leduc had not paid many contractors and those contractors had been forced to file builders' liens. Mr. Dunbar also confirmed that was his impression and it made it more difficult to get people to work on the site; this contributed to delay. There are numerous documents consistent with this evidence.

**120**  Overall, I conclude that L & M did not contribute to construction delay, which I find on a balance of probabilities was caused by bad weather, Leduc's decision to rely on Allan Greer and Bill Myers as project managers and Leduc's diminished reputation in the community.

***d. Miscellaneous Submissions***

**121**  I have concluded that delay in construction was not caused by any action or inaction by L & M and that is sufficient to dismiss all claims by Leduc related to delay. However, for the sake of completeness, I address briefly other submissions raised by Leduc that fall outside of the factors I have found above that caused the delay. As with the main claims, I find the evidence does not prove that L & M is responsible for any of these circumstances.

***i. Delay in ICL Signing Contract***

**122**  Leduc blames L & M for not "forcing" ICL to agree to a contract earlier than it did. L & M sent ICL a request for quotation on May 31, 2005 but ICL's response was not received until August 2005. I agree with L & M's position that until the full extent of the repair work needed was known, it would have been imprudent for Leduc to bind itself to a contract with ICL in case Leduc could not deliver the site on time. No one knew how long remediation would take until all investigations were done and I am satisfied L & M acted expeditiously to have investigations done as quickly as possible. Also, Leduc did not explain how L & M could have forced ICL to provide its estimate or sign the contract earlier.

***ii. Failure to Pursue other Contractors***

**123**  Leduc submitted that L & M should have found someone else to do the work once it was clear ICL was not showing up on site when Leduc wanted it to. L & M's evidence and position was that given the remote location, short time remaining in the 2005 construction season and Leduc's diminished reputation in the community, no other company was available or willing to complete the work.

**124**  Leduc asserts that Peak Concrete Ltd. ("Peak"), a company owned by Ken Wevers, an associate of Mr. Fix's, could have done the work, and done it for a lesser amount than Leduc paid to ICL, but that L & M prevented this. No document to substantiate this claim was produced at trial. Mr. Fix could not remember what price Peak had offered to complete the job, which makes his assertion that Peak could do it for a lesser amount. In fact, there was no document because there was no estimate or quote provided by Peak. Mr. Wevers confirmed this during his testimony. He never provided Leduc or L & M an estimate or quote to do the work. Nothing went beyond general conversations Mr. Wevers had with Mr. Fix.

**125**  That evidence is further confirmed by evidence Leduc led by reading in portions of Mr. McWalter's examination for discovery [Q: 1721]. Mr. McWalter deposed that he had never heard of Peak and he was completely unaware of it being considered to do any work on the Subdivision. Mr. Fix confirmed he did not pass along information about Peak to L & M. L & M cannot be responsible for failing to investigate or engage a company which it did not know existed.

**126**  Moreover, Mr. Wevers said he considered doing only the curb, gutter work and sidewalks to assist Leduc to get the project done on time. This is consistent with the fact that Peak is a company specializing in concrete and not roadworks, or construction generally. Mr. Fix's claim that Peak could have done all the work ICL was bidding on has no credibility.

**127**  I find there is no validity to the assertion that any other contractor would have been available to do the work that ICL did.

***iii. Enforcing ICL's Contract***

**128**  Leduc submits that L & M should be liable for duties Leduc says L & M failed to perform which arose from the contract Leduc had with ICL. L & M is not a party to that contract. I have already discussed earlier in this decision that the legal support put forward by Leduc for this claim does not go as far as Leduc submitted. In addition, Leduc led evidence from Mr. McWalter that to the extent "supervision" meant directing work on site, that was never part of L & M's responsibility. That is consistent with clause GC-3 of the contract between Leduc and ICL, which states, in part, that "[t]he Contractor shall have complete control over its own organization, and the carrying out of the Work, and the method of Carrying out the Work."

**129**  Apart from the clarity of that contractual term, Mr. Dunbar explained that it would be unethical for the engineer to direct how work is done since the engineer's duties are to inspect the work to ensure it meets required municipal standards. To expect the engineer to do that would amount to it "inspecting" its own work.

**130**  Leduc argues the ethical concern is invalid because Mr. McWalter admitted L & M were performing construction management services for a different development. However, that was not a residential development and most importantly, I do not know if L & M was simultaneously providing engineering services at that site, which is where the ethical issue might arise.

**131**  Leduc tried to argue that L & M "delayed" issuing the certificate of substantial completion in violation of its contractual duties, but the evidence clearly showed that that certificate was issued promptly when it was requested. Leduc tried to link the refusal to issue the certificate promptly with its damages claim; Leduc took the position that it needed that certificate in order to get building permits and failure to do so meant lots could not be sold.

**132**  That position was contradicted by Mr. Pitkethley, Leduc's own witness. Consistent with documentary evidence, he testified that all that was needed by the town to issue building permits was the following: all legal surveys were completed and properties staked; all roads named or numbered with Town Council's approval, and preliminary subdivision approval was issued by the approving officer. All conditions were in place at the latest by July 19, 2006.

**Conclusion**

**133**  In summary, I find the evidence proves that L & M performed all of its common law and contractual duties in an expeditious manner and did not cause and cannot be held responsible for any delay in construction. I conclude the evidence proves on a balance of probabilities the delay was caused by bad weather, Leduc's decision to rely on Allan Greer and then Bill Myers as its project managers and Leduc not paying its subcontractors on time.

**3. Did Leduc suffer a loss?**

**134**  Given my conclusion that Leduc has failed to prove that L & M breached its contractual or common law duties, it is unnecessary for me to address this issue.

**E. CONCLUSIONS AND COSTS**

**135**  I dismiss all claims against L & M.

**136**  If the parties cannot agree on costs, they can apply through Trial Scheduling for a brief hearing before me so long as they do so no later than 30 days after the date of this decision.

N. SHARMA J.

\* \* \* \* \*

**Appendix "A"**

**DISALLOWED AMENDMENTS**

1. Prior to the Agreements or Contracts with the plaintiff, L & M Engineering breached its Retainer Agreement and/or its duty of care to Leduc, in that it negligently:
2. underestimated to a significant degree the costs of developing the Subdivision Project;
3. failed, subsequent to the clearing & grubbing subcontract, to properly organize and tender the subdivision construction works;
4. failed, subsequent to the clearing & grubbing subcontract, to negotiate fixed price contracts with the subsequent suppliers or subcontractors;
5. failed to put its own professional services on a fixed price contract;
6. failed to audit the costs of suppliers of materials, services, and the work of subcontractors to ensure that those costs remained within budget allowance;
7. generally failed to audit the use of the money loaned to Leduc by the Royal Bank;
8. failed to certify, in a timely and/or an adequate fashion, the construction costs of the Project Subdivision before each draw was advanced to Leduc;
9. failed to audit the invoices and expenses related to the construction of the Subdivision Project to ensure that the work met industry standards, and a reasonable price was charged for the work;
10. failed to inspect the work of subcontractors to ensure that the watermain was properly installed, pressure tested, and/or maintained;
11. failed to inspect the work of subcontractors to ensure that the underground electrical utilities were properly installed;
12. failed to determine and remediate, in a timely fashion or at all, the cause or causes of the subgrade and subbase failures;
13. generally failed to review the construction of the subdivision to ensure that it was being constructed to industry standards and complied with all building, municipal, geotechnical, and environmental standards; and
14. generally failed to review construction progress, and to ensure that the works required to complete the Subdivision Project were carried out expeditiously.
15. As a consequence of these breaches of contractual duty or breaches of duty of care by L & M Engineering, or any of them,
16. the Subdivision Project experienced delay that prevented its completion during 2004, by August 2005, and now threatened to also delay its completion during 2005;
17. the Subdivision Project began to experience cost overruns to budget that forced Leduc to seek out other private sources of funding when requested progress draws on the line of credit were delayed by L & M, or the amount requested by L & M was out of line with the percentage completion of the Contract Works; and
18. when Leduc experienced difficulties finding these additional funds, suppliers and subcontractors began to file liens against title to the Property, thereby causing Leduc to acquire the reputation as a developer who did not pay its suppliers and subcontractors.

. . .

1. L & M Engineering breached its Retainer Agreement with the defendant, and/or the aforesaid knowledge gave rise to a duty of care to Leduc that L & M Engineering breached when it negligently:

. . .

1. seriously underestimated the costs of completing the Subdivision Project;
2. certified to the Royal Bank of Canada and the City of Fort Nelson that the line of credit for $315,981 was sufficient to construct the works necessary to complete the Subdivision Project to full municipal standards;
3. failed to audit the costs of suppliers of materials, services and the work of the plaintiff to ensure that those costs remained within budget allowances;
4. failed to determine and remediate, in a timely fashion or at all, the cause or causes of the subgrade and subbase failures;
5. failed to obtain a subcontract for the supply and installation of streetlighting for the Project;
6. failed to make any or any sufficient allowance for the approaching onset of winter conditions so as to leave ICL's curb & gutter and paving subcontractors sufficient time to complete the Concrete Works and Asphalt paving called for by the Contract; and
7. failed to hold ICL to its August 16, 2005 Agreement to commence the Work forthwith and to fully complete it within the construction schedule mentioned in the Tender Form of August 24, 2005.

**Appendix "B"**

**SUMMARY OF FACTS ASSERTED IN COUNTERCLAIM**

1. L& M was at all times "carrying on business as professional engineers, providing engineering and project management services" [paras. 3 and 5].
2. L & M agreed to act as Leduc's agent in all matters pertaining to the planning and subdivision of the Property, and Leduc agreed to pay for those services on an hourly rate [para. 4].
3. In May 2004, L & M recommended to Leduc that Allan Greer and his company Liard Project Services be hired to do "supervision/inspection" of the clearing and grubbing work [para. 6].
4. By June 2004, "L & M and Leduc mutually agreed" to hire Allan Greer to search for a subcontractor to provide installation services for deep utilities and road grade, but the "responsibility for onsite supervision/inspection" always "remained with" L & M [para. 7].
5. Allan Greer and L & M jointly reviewed and recommended subcontractors. [para. 8].
6. In June 2005, Allan Greer withdrew, "leaving L & M Engineering to continue" and "[t]hereafter, up and until the month of August 2006, L & M Engineering provided project supervision and coordination, layout and inspection services" which included among other things, a requirement to have an engineer onsite in order "to ensure that all construction work was performed using good engineering practices" [para. 9].
7. In July 2004, Leduc sought financing from the Royal Bank of Canada ("RBC"). It obtained a letter of credit. The conditions to advance funds on that letter of credit included L & M having to perform certain specified things with regard to the construction [para. 10]. Because L & M knew the principals of Leduc lived in Richmond BC, L & M assumed a duty of care with regard to the RBC conditions, and it knew Leduc relied upon L & M for a number of specific conditions [para. 11].
8. The letter of credit broadened the engineering services and project management roles L & M had to perform to include an "acceptance and certification role", and "various roles" [para. 14 and 15].
9. ICL breached its contract and duty of care to Leduc by failing to complete construction on time, abandoning the contract, submitting invoices when no payment was due, charging for extra work, filing a lien, and proceeding to enforce the lien [para. 16].
10. ICL and L & M had express or implied knowledge of the circumstances Leduc lists as follows [para. 17]:
11. "Leduc... being based in Richmond, [was] relying upon L & M to be accurate in their estimates of costs", and take care to ensure that the project's remaining budget was sufficient to complete construction [17(a)].
12. Leduc was party to contracts for purchase and sale of individuals lots, and was required to "provide the purchaser a registered subdivision plan" by October 28, 2005 (for the first contract for purchase), and March 1, 2006 (for the second contract for purchase) [17(b)].
13. "The Agreements of August 16/05, September 12/ 05 and June 2006", were completed. The nature of their contents was also completed [17(c)].
14. "ICL's breach of the September 12/05 Agreement had left... [Leduc] in a position where... it faced the significant risk that... [Leduc] would not be able to meet the October 28th completion date" under the first contract for purchase or the March 1, 2006 completion date under the second contract for purchase [17(d)].
15. ICL failed to meet three completion dates: October 15, 2005; October 28, 2005; and March 1, 2006 [17(e)].
16. "The subsequent onset of winter weather conditions had caused the suspension of the Contract Works in whole or in part until June 2006" [17(f)].
17. Due to this delay, by October 15, 2005, Leduc "was fully extended on the financing for this subdivision development, with no or insufficient ability to earn income by selling or building on the lots" [17(g)].
18. "In the negotiations of May-June 2006, ICL was unlawfully taking the positions that the so-called Contract of October 4, 2005 was still in place", saying this prevented Leduc from bringing in another contractor. ICL claimed a right to payment of "its December 31, 2005 invoice, failing which it could refuse to complete the Contract Works" [17(h)].
19. During the May-June 2006 negotiations, Leduc had to accept ICL's position because the "funding for the project's completion was still controlled by L & M Engineering, the Royal Bank of Canada and the Town of Fort Nelson" due to the RBC line of credit. ICL's refusal to relinquish the October 4, 2005 Contract would cause serious delays as Leduc attempted to hire another contractor "that was acceptable to these three interests, thereby resulting in serious financial consequences" for Leduc [17(h)].
20. Leduc was party to the August 21, 2006 contract for purchase, which required it to provide a "registered subdivision plan and 23 lots in a stage of completion whereby construction of houses could be commenced immediately" by October 20, 2006 or sooner [17(i)].
21. "ICL had filed a lien on August 11, 2006, based on L & M Engineer's acceptance and certification that the "ICL Contract" had been completed and $275,544.19 was rightfully then due and owing" [17(j)].
22. L & M breached its agreement and was negligent. At paragraph 18 of its counterclaim, Leduc lists 35 subparagraphs outlining the alleged breaches which I have grouped and summarized as follows (including identifying the subparagraphs to which I refer). Leduc claims that L & M:
23. Recommended ICL to work for Leduc, and then failed to ensure ICL lived up to its contractual duties [18(a), (b), (c), (e), (h), (p), (r), (s) and (aa)];
24. Failed to ensure ICL provided all labour, materials, fuel machinery, and tools to do the work [18(c)];
25. Failed to prepare a "lump sum" contract for Leduc and ICL, allowing that contract to "remain unexecuted by ICL" until September 29, 2005 and not ensuring the work was done for that lump sum [18(d) and (s)];
26. Failed to advise Leduc of a right to terminate the contract, supporting ICL's actions which Leduc alleges breached ICL's duties [18(g), (I), (j), (k), (l),(m) and (jj)];
27. Failed to adequately supervise ICL in the performance of its contract to ensure it was done in an expeditious, competent or professional manner [paras. 18(x), (m), (aa), (m) and ( ff)], including keeping daily records, and maintaining adequate protection of work from damage (18(x), (bb), (cc)];
28. Failed to visit the site prior to construction [18(y)];
29. "[A]allowed ICL to erect full payment" on a progress draw before completing work, and approving work and invoices inappropriately [paras.18(n), (t), (u), (v), (w)];
30. Approved work that did not meet contractual requirements [18(ee)];
31. Failed to ensure that the subdivision project was complete to full municipal standard in timely fashion or at all [18(hh)]; and,

x Failed to ensure that ICL obtained adequate insurance [18(ii)].

1. These failures resulted in delay that prevented completion of project, cost overruns, and Leduc being sued with builder's liens.

[**1**](#Backward_fnref_fnr-1) It is also referred to in *Henry Hope & Songs v. Canada Foundry Co*, (1917), 39 D.L.R. 308 (Ont. CA) but the court's reference in that case simply affirms that if a party has no control over the cause of delay it cannot be held liable in contract for that delay.

[**2**](#Backward_fnref_fnr-2) Leduc also claims L & M should be liable for what it says is the difference between that estimate and the amount of money it spent on the Subdivision but, as noted above, that claim was one of the amendments disallowed by Master Bouck and ought not to have been pursued at trial.

**End of Document**

[***Jackson v. Kelowna General Hospital, [2006] B.C.J. No. 387***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23KY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Beames J.

Heard: June 14 - 17, June 20 - 24 and June 27 - 29,

2005 (Kelowna).

Judgment: February 16, 2006.

New Westminster Registry No. S73673

**[2006] B.C.J. No. 387** | [*2006 BCSC 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MB-00000-00&context=) | [*148 A.C.W.S. (3d) 807*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X1MB-00000-00&context=)

Between Nigel Jeremy Jackson, plaintiff, and Kelowna General Hospital, Carol Czech, Connie Gabert, Jill Headington a.k.a. Jill Hunt and Jane Doe 1 to 5, defendants

(63 paras.)

**Case Summary**

**Health law — Health care professionals — Particular professions — Nurses — Liability (malpractice) — *Negligence* — Failure to follow-up — Causation — Medical *negligence* action by plaintiff dismissed — Plaintiff failed to establish that defendants' breaches caused losses.**

**Tort law — *Negligence* — Causation — Causal connection — Medical *negligence* action by plaintiff dismissed — Plaintiff failed to establish that defendants' breaches caused losses.**

|  |
| --- |
| Action by the plaintiff, Jackson, for damages caused by the ***negligence*** of the defendant nurses, Czech, Gabert, and Hunt, and their employer, Kelowna General Hospital -- Plaintiff was admitted to KGH with head injuries sustained in a bar fight -- Four hours after completion of surgery, a nurse doing rounds found the plaintiff unresponsive and in respiratory distress -- Plaintiff was resuscitated and transferred to intensive care for four days -- He returned home one day later -- Plaintiff suffered permanent injuries from the incident -- Plaintiff submitted that the nurses failed to follow prescribed monitoring procedures, failed to provide required medication, failed to instruct the plaintiff regarding post-operation procedures, and failed to provide the plaintiff with a call bell -- Nurses submitted that they met the requisite standard of care, or alternatively, did not cause or materially contribute to any injuries suffered by the plaintiff -- HELD: Action dismissed -- Nurses failed to adequately assess, chart and monitor the plaintiff's vital signs prior to his respiratory failure -- However, there was no causal connection between such breach and the respiratory distress and aspiration suffered by the plaintiff -- It was not established that such monitoring would have demonstrated a deterioration in the plaintiff's condition that the nurses could have acted upon to avoid the ensuing incident -- The presence of contrary evidence militated against drawing an inference of causation from the nurses' breach -- Therefore, although the nurses breached their standard of care, the plaintiff failed to establish that his injuries resulted from such breaches. |

**Counsel**

Counsel for the Plaintiff: K.S. Garcha, H. Doig and J. Dhillion, Articled Student

Counsel for the Defendants: C.L. Woods and D. Bell

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| **BEAMES J.** |

INTRODUCTION

**1**  In the early morning hours of April 18, 2001, outside a bar in Vernon, British Columbia, the plaintiff was injured when he was sucker punched in the head. After spending the night in the Vernon Jubilee Hospital, he was admitted to the Kelowna General Hospital for surgery on his fractured jaw. That surgery finally took place shortly after 7 p.m. on April 19, 2001. Approximately four hours after the surgery was completed, the plaintiff was found by nursing staff unresponsive and in respiratory distress. A code blue was called; he was resuscitated and transferred to the intensive care unit, from which he was discharged on April 23, 2001. He was discharged from the hospital on April 24, 2001.

**2**  The plaintiff has brought this action against three nurses, Carol Czech, Connie Gabert, and Jill Hunt (formerly Jill Headington), who provided nursing care for him after his surgery and until the code blue was called, and against the Kelowna General Hospital as the employer of those nurses.

POSITION OF THE PARTIES

**3**  The plaintiff submits that the defendant nurses were negligent in seven respects, as follows:

1. they failed to follow the Patient Controlled Analgesia ("PCA") monitoring orders;
2. they failed to monitor or assess the plaintiff's nausea, pain and sedation levels;
3. they failed to provide antiemetic (nausea control) medication;
4. they failed to evaluate or monitor the plaintiff's use of the PCA pump provided to him;
5. they failed to reinforce any patient teachings with respect to the PCA pump and with respect to oral suctioning;
6. they failed to chart or document the plaintiff's vital signs; and
7. they failed to provide the plaintiff with a call bell.

**4**  The defendants submit that they met the standard of care expected of them in the circumstances, and that even if there was a failure to meet the standard of care, any such failure did not cause or materially contribute to the injuries and loss suffered by the plaintiff.

FACTS

**5**  Many of the background facts are not in dispute. The plaintiff and three other people went out for dinner and then to a bar, in Vernon, on April 17, 2001. It was an early celebration of the plaintiff's 21st birthday, which was on April 18, 2001. At the bar, the plaintiff and a former boyfriend of the plaintiff's girlfriend became involved in a verbal altercation which started inside the bar and then carried on outside the bar. As the plaintiff turned around to walk back into the bar, he was punched in the head. He was driven to the hospital by his girlfriend and admitted to the Vernon Jubilee Hospital at 1:33 a.m. On admission he was diagnosed as having a fractured lower jaw and he was noted to have superficial wounds above and below his left eye. As surgery was not available in Vernon, arrangements were made for him to be transferred to the Kelowna General Hospital for surgery. The plaintiff remained over night in the Vernon Jubilee Hospital, and throughout the night he was administered morphine for pain control.

**6**  The plaintiff's mother drove the plaintiff to Kelowna in the morning, and the plaintiff was admitted to the Kelowna General Hospital at approximately noon. On admission, he was noted to be alert and oriented, and his behaviour pattern was noted as being appropriate and reliable. It was originally planned that he would have surgery on April 18, but his surgery was cancelled, apparently as a result of other more urgent cases. He was administered morphine for pain control, together with gravol for nausea control, periodically throughout the day. He vomited at approximately 6 p.m..

**7**  On April 19, 2001, the plaintiff continued to wait for surgery. He was apparently prepared for surgery which was subsequently postponed at least once during the day. He continued to receive periodic doses of morphine and gravol throughout the day with no further episodes of vomiting. At approximately 7 p.m. he was finally taken in for surgery, which commenced at 7:20 and finished at 8:20 p.m. From surgery he was discharged into the postanesthesia recovery room (the "PAR"), where he was attended to by PAR nurse Leslie Poulen.

**8**  The anesthesiologist for the surgery was Dr. Wickett. Dr. Wickett wrote two medication orders for the plaintiff. The first was the PAR order recorded on the anesthesia record contained in the Kelowna General Hospital records. The PAR order directed that the plaintiff have morphine, 1 to 3 milligrams administered by i.v. as required; zofran, an antiemetic, as required; and droperidol, another antiemetic, as required.

**9**  The second order is referred to as the PCA standing order. The PCA pump was set up in the PAR. As its name suggests, the PCA pump system is a system which permits the patient to administer morphine to himself, as required, within the limits programmed into the machine. The PCA standing order written by Dr. Wickett provided for a dose of 1.5 milligrams of morphine not more than every 6 minutes, for an hourly limit of morphine of 15 milligrams. The PCA standing order provided that the patient's pulse, respiratory rate and blood pressure were to be monitored "q1h for 2 hours, then q4h unless ordered otherwise", which means once per hour for two hours and then once every four hours. The PCA standing order provided other directions for the nurses, including steps to be taken in the event of inadequate pain control; reduced respiratory rates or excessive sedation; nausea and/or vomiting; and other possible problems including itch and urinary retention. With respect to nausea or vomiting, the standing order provided that the patient could be administered one of three antiemetics, namely droperidol, gravol or zofran, as required.

**10**  Ms. Poulen provided the nursing care for the plaintiff while he was in the PAR. She testified that she followed the PAR order, and that the PCA order did not apply while the plaintiff was in the PAR. Ms. Poulen assessed the plaintiff six times in just under one hour. On each occasion, save the first, the plaintiff was scored as 10 out of 10 on the PAR score criteria, which assesses respiration, circulation, consciousness, movement and sensation, and colour. She administered 3 milligrams of morphine at 8:47 and again at 8:49. At 8:55, she set up the PCA machine. After the PCA machine was set up, the administration of morphine doses remained in the control of Ms. Poulen, rather than the plaintiff, through the PCA. Ms. Poulen administered 3 milligrams of morphine at each of 9:17, 9:20, 9:21 and 9:23. While the plaintiff was in the PAR, he was instructed about the use of the PCA and he was taught by Ms. Poulen to suction secretions from his mouth. He was discharged from the PAR after his final assessment at 9:30 p.m..

**11**  After discharge from the PAR the plaintiff was returned to the surgical ward he had been on since admission to the hospital, 4 West. There were 15 patients on 4 West on the night of April 19, 2001. The ward was staffed by Ms. Czech, a registered nurse who was the assessment nurse that night; Ms. Gabert, who was the medications nurse that shift; Ms. Hunt, a student nurse completing her last preceptorship before graduating from the nursing program at Okanagan University College, who was under the supervision of Ms. Gabert; Veronica McParland, a licensed practical nurse; and a floating nurse, not identified by name during the trial, who performed duties on both 4 West and 4 East during that shift.

**12**  The plaintiff arrived on 4 West at 9:45 p.m. On arrival, he was assessed by Ms. Czech and Ms. McParland. Ms. Czech completed a column in the nurse's assessment record, which forms part of the hospital records, showing the results of that assessment. Ms. Czech testified that in the course of her assessment, after admitting the plaintiff back onto the ward, she set up suctioning for the plaintiff, asked him to demonstrate what he had learned about suctioning while he was in the PAR, explained the PCA pump, and set up the call bell, explaining to the plaintiff that if he had nausea or pain he was to ring.

**13**  That instructions were provided to the plaintiff with respect to suctioning and the PCA pump is confirmed by the evidence of the plaintiff's former girlfriend, Cathy Wood, who testified that while she was in the room with the plaintiff, after his return from the operating room, a nurse explained to the plaintiff both suctioning and the process of pushing the button on the PCA pump to administer morphine to himself. However, with respect to the call bell, Ms. Wood testified that there was no call bell visible on the night of April 19, and that before she left the hospital late that evening she specifically looked for a nurse to inquire as to the whereabouts of the call bell. On the evidence, I consider it more likely than not that there was a call bell in the plaintiff's room, but it is less clear that the call bell was placed within easy reach of the plaintiff while he was being assessed on his readmission to 4 West.

**14**  While Ms. Czech and Ms. McParland were completing the assessment of the plaintiff, Ms. Gabert and Ms. Hunt attended in the plaintiff's room to check the PCA machine and its settings. That check involved ensuring that the settings on the machine conformed with the doctor's standing order in terms of dose and delay. Ms. Gabert testified that before she checked the machine, she printed off the PCA sheet, entered the doctor's orders on the sheet in handwriting, and took the sheet to the machine. She testified that she checked the settings and then taped the sheet to the machine. It was her evidence and the evidence of Ms. Hunt that this check took place at 10:00 p.m. and the timing of the check is corroborated by other evidence, including that Ms. Czech and Ms. Hunt were still in the room, performing the formal assessment of the plaintiff when the PCA machine check occurred. However, the evidence of Ms. Gabert is clearly inaccurate with respect, at least, to the printing of the sheet and the taping of the sheet to the machine, as the sheet in the hospital records was not printed until 11:33 p.m. that night.

**15**  There is some conflict in the evidence with respect to the nursing care the plaintiff received after the 9:45 formal assessment.

**16**  Ms. Gabert testified that she was not in the plaintiff's room between 10 p.m., when she checked the settings on the PCA machine, and the time the code blue was called, after midnight.

**17**  Ms. Hunt was inconsistent in her evidence. She said on one hand that she was not in the plaintiff's room between 10 p.m. and shortly before midnight, when she performed rounds. On the other, she testified that she was in and out of the plaintiff's room between 10 p.m. and midnight. Similarly, she said on the one hand that she did not see the plaintiff's girlfriend after 10 or 10:30 at night, and on the other hand said every time she was in the room, which she was in and out of all evening, she observed the plaintiff and his girlfriend talking.

**18**  Ms. Czech testified that after her formal assessment, which started at 9:45 p.m., she was not in the plaintiff's room again until 11:15, at which time she changed the plaintiff's i.v. bag; and that she was not in the plaintiff's room again after that until she found the plaintiff unresponsive and in respiratory distress, after midnight.

**19**  I did not hear evidence from Ms. McParland or from the floating nurse. Although the evidence of the nurses who did testify was that there was a practice on 4 West of performing hourly rounds, I heard no evidence about whom, if anyone, performed rounds at 11 p.m., unless it was during rounds that Ms. Czech changed the plaintiff's i.v. bag. There is nothing in the plaintiff's hospital records which would indicate anyone attended in his room between 10 and 11:15 p.m., or between 11:15 and approximately 12:15, when the plaintiff was discovered in obvious respiratory distress.

**20**  Ms. Wood says that no nurses attended in the plaintiff's room after the formal assessment and before she left the hospital shortly before midnight. I conclude that she must be mistaken, at least with respect to Ms. Czech's attendance in the room at 11:15, but I accept that her general observation with respect to the minimal number of nurse attendances into the room is in accord with what happened on the night shift of April 19, 2001.

**21**  Ms. Wood was with the plaintiff from shortly after he returned to his ward room from surgery until shortly before midnight. She testified that the plaintiff was drifting off to sleep and waking up throughout the time she was with him after his return to the ward and that they chatted when he was awake. The evidence in this case makes it clear that it is normal for a patient to sleep on and off following surgery, and particularly for a patient taking morphine via a PCA pump. Indeed that is one of the ways in which a patient using a PCA pump is protected against overdosing on morphine. Morphine has a sedative affect, and it is rare that a patient will be able to stay awake and alert enough to be able to administer the maximum hourly dosage permitted by the machine.

**22**  Ms. Wood confirmed that the plaintiff was asleep when she left the hospital. She also confirmed that if the plaintiff had not seemed fine to her she would have alerted the nurses as, indeed, she had done on at least one earlier occasion before the plaintiff had surgery. Ms. Wood testified that before she left, she looked for a nurse so she could advise she was leaving the hospital, and specifically to ask the nurse to locate the call bell as she had been unable to find one. She testified that she ran into a nurse coming out of one of the other patient's rooms, and that she was told by the nurse that the nurse would have to retrieve a flashlight. She waited approximately 10 minutes for the nurse to return, but when the nurse did not return she left.

**23**  All three defendant nurses testified that Ms. Hunt did hourly rounds at approximately midnight. Ms. Hunt testified that she volunteered to do rounds on the patients at approximately midnight because Ms. Czech was on her break. She testified that rounds consisted of checking every patient to see if the patient was breathing. If the patient was awake, she would ask if the patient had pain. In addition, she would check urinals, check i.v.'s, and take other steps depending on each individual patient. She remembers that everyone she checked on the ward that night was fine. As the overhead lights were off, she had a flashlight so that she could shine the flashlight on the patient to confirm the patient was breathing, and so that she could check i.v. sites. It is her evidence that she shone a flashlight on the plaintiff, that he was sleeping, that he appeared to be comfortable, and that he had easy respirations. She had no concerns about his condition at that time.

**24**  In cross-examination, she confirmed that he could have been sedated, rather than sleeping, and that she made no effort to arouse him to see how sedated he was. She did not check the PCA machine to see how much morphine the plaintiff had administered to himself, nor how many attempts he had made to access morphine. It was her evidence that she stood at the plaintiff's bedside for "probably" one minute, and that she could say that his breathing was easy, not laboured, and regular. She did not perform a formal assessment. She performed only hourly rounds, which she testified the nurses did every hour, every night on every patient. She did not know whether anyone else had checked the plaintiff's sedation level, and she was not instructed by anyone to check the plaintiff's PCA machine.

**25**  Ms. Gabert testified that Ms. Hunt performed the hourly rounds at midnight and that she had reported back that all of the patients were fine. Ms. Czech testified that she went on her break from 11:30 p.m. until midnight. On her return she was advised that Ms. Hunt had just done the rounds and that everyone was fine. Approximately 15 minutes later she decided to check her patients' i.v. lines. When she entered the plaintiff's room, sometime between 12:10 and 12:15 a.m., she found the plaintiff slumped over in the bed, with noisy grunting respirations. He was unresponsive to her attempts to arouse him. Consequently, she summoned the other nurses on the ward and a code blue was called.

**26**  I heard evidence from one doctor and several nurses who attended the code blue. I am satisfied that the plaintiff did not suffer a respiratory arrest, or a complete cessation of breathing, at any time when there were medical personnel in his room. However, it is clear that he suffered from a significant reduction of oxygen in his system, referred to as hypoxia, as a result of his inability to breathe normally.

**27**  None of the expert evidence before me was focused on the cause of the plaintiff's respiratory distress, but rather was focused on either the issue of the defendants' ***negligence*** or on the issue of damages.

**28**  The plaintiff's main theory appears to be that the plaintiff vomited, and then aspirated the vomit, causing respiratory arrest or, as I have found, respiratory distress. Alternatively, the plaintiff appears to suggest that the respiratory distress was caused by oversedation due to morphine. The defendant's neurologist, Dr. Keyes, opined that the plaintiff developed aspiration pneumonia after inhaling blood and oral secretions into his lungs. The defendant's anesthesiologist, Dr. Parsons, opined that the plaintiff likely had a relative overdosage of opiate (morphine), became sedated, and perhaps vomited or regurgitated leading to aspiration and eventual oxygen desaturation. The plaintiff's neurologist, Dr. Cameron, while not directly addressing the cause of the plaintiff's respiratory problems, implies that they were due to excessive morphine intake. Dr. Blair, the plaintiff's anesthesiologist, said that "patient's code blue was a result of narcotic depression of his respiration leading to a respiratory arrest, narcotic suppression of his level of consciousness and coincident loss of protective pharyngeal and laryngeal reflexes, leading to an episode of his aspirating secretions, or a combination of the two".

**29**  The attending physician at the code blue ordered that the plaintiff receive narcan, a narcotic antagonist, which reverses the affects of morphine; his jaw wires were cut; and he was provided oxygen, originally through bagging and subsequently through intubation. Once he was stable, he was transferred to the intensive care unit, where he was provided with intensive medical support. He was kept intubated and heavily sedated for over a day. Tests confirmed that he had aspirated and that there was infiltrate in his right lung, and he was treated for aspiration pneumonia. He was transferred back to a regular ward on April 23, 2001 and discharged from hospital on April 24, 2001.

**30**  I am satisfied that the plaintiff has never fully recovered from the events of April 18 to 24, 2001. The significant changes in the plaintiff are perhaps best illustrated by the evidence of Ms. Wood and the evidence of David Ryll, an employer of the plaintiff both before and after April of 2001. Mr. Ryll's testimony was compelling, and was confirmed in all respects by the other work-related witnesses called by the plaintiff. I reject any suggestion that the plaintiff is malingering or consciously exaggerating his symptoms.

APPLICABLE LEGAL PRINCIPLES

**31**  As McLachlin J., as she then was, said in Arndt v. Smith, [*[1997] 2 S.C.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3W7-00000-00&context=) at para. 33:

It is a fundamental rule of tort law that the plaintiff must prove two things. First, the plaintiff must prove that the defendant breached a duty owed to the plaintiff. Second, the plaintiff must prove that the breach caused the loss for which the plaintiff claims damages ...

**32**  If the plaintiff proves on a balance of probabilities that the defendants' ***negligence*** caused or contributed to an unfavourable medical outcome, the plaintiff has established causation. On the other hand, if the plaintiff fails to prove that an unfavourable medical outcome would have been avoided with proper treatment, the plaintiff's claim fails as causation has not been established (Laferrière v. Lawson, [*[1991] 1 S.C.R. 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-602C-00000-00&context=); Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=); Cottrelle v. Gerrard, [*[2003] O.J. No. 4194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-JKB3-X1JV-00000-00&context=) (Ont. C.A.)).

**33**  The plaintiff cannot meet the onus upon him to prove causation by merely proving the loss of a chance (Cottrelle, supra, at para. 36). Similarly, it is not enough for a plaintiff to prove that the defendants "created a risk scenario within which the plaintiff's pain, suffering and losses [have] occurred" (Oliver (Public Trustee of) v. Ellison, [*[1998] B.C.J. No. 589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S24H-00000-00&context=) (S.C.), at paras. 31-33; St-Jean v. Mercier, [*[2002] 1 S.C.R. 491*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BR-00000-00&context=) at para. 116).

***NEGLIGENCE***

**34**  There is no issue in this case that the defendant nurses owed a duty of care to the plaintiff, and that the standard of care they were obliged to provide was that of reasonable and prudent nurses in the circumstances. The issue is whether the defendant nurses breached the duty of care. The plaintiff submits that they did, in a number of specified ways. I will deal with each in turn.

1. Failure to Follow PCA Monitoring Orders

**35**  I have described above the two orders written by the anesthesiologist for the plaintiff's care after surgery, the PAR order and the PCA standing order. The defendant nurses had different interpretations of their obligations pursuant to the PCA standing order. Ms. Czech testified that she understood that the PCA standing order started as soon as the PCA was set up and the plaintiff's vitals had been taken in the PAR at 9 p.m., that she took the plaintiff's vitals at 9:45 p.m, or approximately 10 p.m., and that plaintiff's vitals should have been taken again at 11 p.m. and every four hours thereafter. Ms. Gabert suggested that the first hour of vitals monitoring is when the PCA was set up, the second assessment would be one hour later (or approximately 10 p.m.), and then assessments would be done every four hours.

**36**  The plaintiff's nursing experts, Ms. Lane and Mr. Senner, both expressed the opinion that the PCA standing order required monitoring when the plaintiff arrived on the ward, one hour later, a further hour later, and then every four hours thereafter. I accept their evidence. It is clear from Ms. Poulen, the PAR nurse, that all of the care that she provided to the plaintiff was pursuant to the PAR order. Although she set up the PCA machine, there was no patient administration of analgesics by the plaintiff while he was in the PAR room. There is, in my view, no overlap of the two orders, rather they must be consecutive.

**37**  The evidence before me is clear that the plaintiff was properly assessed, pursuant to the PCA standing order, at 9:45. However, there is no evidence whatsoever that would satisfy me that there was any formal assessment of the plaintiff after that time, as was required by the PCA standing order. As I have said, Ms. Gabert, as the medications nurse, did not perform any formal assessments of the plaintiff. Similarly, Ms. Hunt performed no formal assessments of the plaintiff. Ms. Czech has admitted that she performed no formal assessment of the plaintiff, and indeed did not see the plaintiff, between 9:45 and 11:15 p.m. Ms. Czech suggested in her evidence that although she did not know whether a formal assessment had been done after her assessment of 9:45, Ms. McParland or the floating nurse might have done vitals. She said they used a system of team nursing, and suggested a formal vitals assessment might have been performed by someone else. There is no indication in the hospital records of such an assessment having been performed, and the defendant hospital did not call any of its other employees to confirm such an assessment had been performed. I am satisfied that there was, in fact, no assessment of the plaintiff, as required by the PCA standing order, at 10:45 or 11:45 p.m. on April 19, 2001, or indeed at any time after 9:45 and before the code blue was called.

**38**  The anesthesiologist was entitled to rely on the nursing staff of 4 West to carry out his PCA standing order. I am satisfied that the nurses on 4 West failed to carry out the order, and by doing so, failed to meet the standard of care required of them.

1. Failure to Monitor or Assess the Plaintiff's Nausea, Pain and Sedation Levels

**39**  Unlike the specific obligation pursuant to the PAR standing order to monitor pulse, respiratory rate and blood pressure, there is no specific requirement in the PAR standing order to monitor nausea, pain levels, or sedation levels. It was conceded by the defendant nurses that it was important that a post-operative patient, on a PCA pump, with a wired jaw, be monitored with respect to nausea and sedation levels. I am satisfied that the plaintiff was made aware that he should alert the nurses if he had concerns about nausea or pain control. I am also satisfied that the nurses made observations, and likely inquiries, with respect to his sedation level at 9:45 (Ms. Czech), 10:00 (Ms. Gabert and Ms. Hunt), and at 11:15 (Ms. Czech).

**40**  In the absence of any specifically mandated monitoring frequency for nausea, sedation and pain level, I am not prepared to find that the monitoring that was done fell below the level expected of a reasonable and prudent nurse.

1. Failure to Provide Antiemetic Medication

**41**  The plaintiff urges me to conclude that the plaintiff should have been administered an antiemetic, specifically gravol, after he returned to the ward. However, there is no evidence before me that the plaintiff, at any time following surgery and before the code blue, was suffering from any nausea, or made any complaints of nausea. Ms. Wood was with him throughout the evening. There is no question that if he had made any complaints, Ms. Wood would have heard them and reported them.

**42**  The nurses on 4 West were aware that the plaintiff had received a powerful and long-lasting antiemetic while he was in the operating room. Given the potential sedative affect of any antiemetic that could have been administered to the plaintiff, it was reasonable, in my view, for the defendant nurses to determine that an antiemetic should not be provided to the plaintiff unless he complained of nausea. The standing order specifically called for an antiemetic for nausea and/or vomiting, as required. Given the absence of any complaints of nausea, and given that none of the witnesses who attended the code blue saw or smelled vomit, I am not prepared to conclude that the plaintiff ever needed an antiemetic.

**43**  Under all of the circumstances, I am not prepared to find the defendants in breach of their duty for not having provided the plaintiff with an antiemetic after surgery.

1. Failure to Evaluate or Monitor the Plaintiff's use of the PCA Pump

**44**  The features of the PCA machine the plaintiff was using on the night of April 19, 2001 included an ability to determine how many doses of morphine the plaintiff had administered to himself, as well as the number of attempts he had made to access morphine at times he was locked out, or before each six minute delay had expired. The defendant nurses testified that their normal practice was to check the readings from PCA machines once per shift, or once every four hours. There is no evidence before me that such frequency was inappropriate.

**45**  The plaintiff's expert nurse, Ms. Lane, is critical of the defendants' failure to obtain information from the PCA machine after its use was discontinued when the code team responded to the code blue, but given the chaotic events which followed upon the code blue being called, I am not prepared to find any fault with respect to a failure to obtain information from the machine after its use had been discontinued.

**46**  I have already found that the defendants were not in breach with respect to the monitoring of the plaintiff's levels of nausea, pain or sedation. I am satisfied that nothing arose from that monitoring which would or should have lead the defendants to believe they should check the PCA machine readings more frequently, or in advance of the normal monitoring schedule. Consequently, I am not prepared to find any breach of duty in this regard.

1. Failure to Reinforce any Patient Teachings with Respect to the PCA Pump and with Respect to Oral Suctioning

**47**  It is generally conceded by the defendants that it is important that post-operative patients who have had jaw wiring, such as the plaintiff, receive instructions with respect to the use of the PCA pump, suctioning equipment, and the call bell.

**48**  The evidence of Ms. Poulen is that she provided instructions to the plaintiff, in the PAR, with respect to the PCA pump and with respect to suctioning. The evidence is clear that those patient teachings were reinforced with the plaintiff when he was readmitted to 4 West, during the formal assessment performed by Ms. Czech at 9:45. I have her evidence in that regard, and confirmation of her evidence from Ms. Wood, who recalls hearing the plaintiff being given instructions with respect to both the PCA pump and the suctioning equipment.

**49**  With respect to the call bell, I consider it more likely than not that the plaintiff was provided with a call bell. He had spent almost two full days in the hospital before his return to 4 West on the evening of April 19, 2001, and I am not satisfied that any teachings with respect to the use of the call bell needed to be reinforced after his return to 4 West.

1. Failure to Chart or Document the Plaintiff's Vital Signs

**50**  It is safe to say that the charting performed by the nurses working on 4 West during the night shift of April 19, 2001, does not inspire confidence. It is clear from the evidence before me that it is critical that patient's hospital charts be fully maintained and that they accurately document the care provided to the patient. This is particularly the case, in my view, on a ward which employs team nursing. Each patient's hospital chart is an important method of communication between nurses and other health care professionals with respect to the patient.

**51**  In this case, it is clear that there was insufficient charting. Just one example relates to the allegation of the failure to assess and monitor the plaintiff's vital signs any time between 9:45 and the time the code blue was called. As I said earlier, Ms. Czech suggested that vital sign monitoring may have been conducted by Ms. McParland or the floating nurse and was simply not documented. It is incomprehensible that something as important as doctor ordered vital sign monitoring would not be charted. Similarly, as a result of the lack of charting, the evidence of the defendants is unconvincing with respect to when, and indeed whether, hourly rounds were done on that shift, prior to the rounds done by Ms. Hunt at midnight. No notes were made with respect to the periodic assessments, formal or informal, of the plaintiff's pain level, sedation level or nausea level. While I heard much evidence about "charting by exception", which involves the practice of making no chart notes unless something abnormal is noted, it seems contrary to good practice, in my view, to not at least note that rounds were performed or informal assessments were made, even if no abnormal findings were noted.

**52**  I accept the evidence of Ms. Lane, Mr. Senner and Dr. Cameron with respect to the insufficiencies of the charting performed.

**53**  I am satisfied that the charting performed by the defendant nurses failed to meet the standard expected of reasonable and prudent nurses.

1. Failure to Provide the Plaintiff with a Call Bell

**54**  As I have said above, I am satisfied that it is more likely than not that the plaintiff was provided with a call bell and the plaintiff has not proved this alleged breach.

CAUSATION

**55**  Having concluded that the plaintiff has proved the defendants were negligent in failing to follow PCA standard order with respect to monitoring and in failing to adequately chart, the next issue is whether or not there is a causal connection between those breaches and the respiratory distress and the aspiration suffered by the plaintiff.

**56**  There is no evidence before me, to which I can give any weight, that the defendants' breaches caused or materially contributed to the plaintiff's injuries.

**57**  Dealing first with the PCA standing order, had the nurses not been negligent, the plaintiff's vital signs would have been monitored at 10:45 and 11:45 p.m. The plaintiff effectively asks me to assume that such monitoring would have demonstrated a trend or shown a deterioration in the plaintiff's condition that the defendants could have acted upon, so that the aspiration or the respiratory distress could have been avoided. However, with the exception of bare statements by Ms. Lane that "the Defendant nurses ... should have been able to prevent this occurrence if monitoring ... were completed" and by Mr. Senner that "... the incident ... could have been prevented if monitoring would have been carried out ...", there is no opinion evidence before me as to what might have been detected by monitoring, or how that might have assisted in the prevention of aspiration or respiratory distress.

**58**  Dr. Cameron, the plaintiff's neurologist, said that it was unlikely that the plaintiff had suffered the respiratory arrest due to excessive morphine intake for more than several minutes prior to being found. Dr. Keyes, the defendant's neurologist, stated that the plaintiff developed aspiration pneumonia after inhaling blood and oral secretions into his lungs, which aspiration was a totally unpredictable event. Ms. Czech, in cross-examination, testified that it does not take long for a patient on morphine to get oversedated. She said that can happen quite quickly and suddenly. Not one witness testified that there would have been indications, by 11:45, that the plaintiff was about to encounter medical difficulties of any kind, let alone the specific ones that did occur.

**59**  Although vital signs should have been monitored at 10:45 and 11:45 p.m., there is simply no indication in the evidence that such monitoring would have revealed any signs of problems developing. The plaintiff complained of no nausea. He made no complaints of excess pain. He was dozing on and off, but that is normal for a patient in his circumstances. He was asleep when Ms. Wood left, and if he had not been fine she would have called for assistance. The informal observations made by the nurses at 10, 11:15 and approximately midnight did not demonstrate any cause for concern.

**60**  This is not a case in which it would be appropriate to infer causation, as a result of the defendant nurses failing to monitor and record vital signs at the required intervals, as there is evidence before me which is contrary to the inference the plaintiff asks me to draw, as in the case of in Smith et al. v. Grace et al., [*[2004] B.C.J. No. 583*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=), [*2004 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=) and in Kooner (Guardian ad litem of) v. Matsqui-Sumas-Abbotsford General Hospital, [*[2001] B.C.J. No. 1795*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-610F-00000-00&context=), [*2001 BCSC 1266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-610F-00000-00&context=).

**61**  With respect to the failure to chart, I similarly am unable to conclude that this breach can give rise to an inference of causation, and the plaintiff has, quite simply, failed to establish causation.

CONCLUSION

**62**  In short, although I conclude that the plaintiff has proved some breaches by the defendant nurses, I am unable to conclude that the plaintiff has established that their breaches caused his loss. As Satanove J. said in Smith, supra, at para. 71, "It is only when the [medical] complications are caused by the fault of the attending medical professionals that the courts can intervene to provide compensation".

**63**  Consequently, the plaintiff's claim is dismissed.

BEAMES J.

**End of Document**

[***J.S. (Litigation guardian of) v. British Columbia (Ministry of Children and Family Development), [2015] B.C.J. No. 682***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60NJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B.M. Greyell J. (In Chambers)

Heard: March 12, 2015.

Oral judgment: March 19, 2015.

Docket: S131396

Registry: Vancouver

**[2015] B.C.J. No. 682** | 2015 BCSC 575

Between J.S., an infant, by his Litigation Guardian, the Public Guardian and Trustee of British Columbia, Plaintiff, and Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Children and Family Development), Defendants

(51 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Disposition without trial — Leave — Trials — Conduct of — Adjournments — Application by Public Guardian and Trustee for leave to discontinue claim against pending adoptive parents allowed — Cross-application by Crown for adjournment dismissed — Action concerned infant's claim for damages from alleged assault by defendant parents — Province admitted liability, was prepared to proceed to damages assessment and if adjournment was granted, trial likely delayed three years, severely prejudicing infant — Given these factors, defendant parents' very late involvement in proceedings and complexity of issues they raised in response and separate action, discontinuance granted — Matter to proceed to damages assessment, and Crown retained right to bring third party proceedings.**

**Family law — Child protection — Civil actions and liabilities — Application by Public Guardian and Trustee for leave to discontinue claim against pending adoptive parents allowed — Cross-application by Crown for adjournment dismissed — Action concerned infant's claim for damages from alleged assault by defendant parents — Province admitted liability, was prepared to proceed to damages assessment and if adjournment was granted, trial likely delayed three years, severely prejudicing infant — Given these factors, defendant parents' very late involvement in proceedings and complexity of issues they raised in response and separate action, discontinuance granted — Matter to proceed to damages assessment, and Crown retained right to bring third party proceedings.**

**Government law — Crown — Actions by and against Crown — *Negligence* by Crown — Application by Public Guardian and Trustee for leave to discontinue claim against pending adoptive parents allowed — Cross-application by Crown for adjournment dismissed — Action concerned infant's claim for damages from alleged assault by defendant parents — Province admitted liability, was prepared to proceed to damages assessment and if adjournment was granted, trial likely delayed three years, severely prejudicing infant — Given these factors, defendant parents' very late involvement in proceedings and complexity of issues they raised in response and separate action, discontinuance granted — Matter to proceed to damages assessment, and Crown retained right to bring third party proceedings.**

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| Application by the Public Guardian and Trustee on behalf of the infant plaintiff for leave to discontinue or dismiss the claim against the pending adoptive parents. Cross-application by the Province to adjourn the trial. The action concerned the infant's claim for damages arising from the alleged assault by the defendant pending adoptive parents. The nine-year-old infant claimed to have sustained a serious brain injury causing permanent injuries. The infant claimed assault, negligent and breach of fiduciary duty against the defendant parents and claimed the Province failed in its duty to protect him, was negligent in placing him with the parents and failed to follow Ministry protocol and procedures. The Province admitted liability and was prepared to proceed to the damages assessment. The parents had since filed a response in which they denied ***negligence*** and claimed the infant's injuries resulted from self-harm activities that were known to the Ministry, and the police were negligent and discriminatory in their investigation. The parents claimed the PGT was acting outside its jurisdiction and the action was an abuse of process. The parents' counsel had commenced an action on behalf of their children, against the Province and others, in which they claimed the province was negligent in placing the infant with the parents due to his known self-harm activities, and the children were wrongfully removed from the parents' home as a result. The Province wanted to leave open its option to proceed against the parents under s. 4 of the ***Negligence*** Act.  HELD: Application allowed.  Cross-application dismissed. A plaintiff was entitled to control an action, including discontinuance, unless there were very unusual circumstances. If the scheduled damages assessment did not proceed and the trial was adjourned with the spectre of adding parties and joining the issues in the parents' children's action, the trial would likely not take place for another two or three years. The delay in determining the cost of future care would have a seriously detrimental effect on the infant's prognosis and treatment. Given the PGT and province were prepared to proceed with damages, prejudice to the infant from an adjournment, the province's admission of liability, the very late involvement of the defendant parents and the complexity of issues raised in their response and lawsuit, it was appropriate to grant leave. The Crown's application for an adjournment was thus dismissed, and the matter would proceed to the scheduled damages assessment. The notice of discontinuance would not affect the Crown's right to bring third party proceedings. Given the parents' response had not been validated and their late involvement in the proceedings, they were not awarded costs. Their request for an order barring further proceedings against them was also denied as it would prevent the Crown from bringing third party proceedings. |

**Statutes, Regulations and Rules Cited:**

Human Rights Act, [*RSBC 1996, CHAPTER 210, s. 7*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5KDP-V8P1-JPGX-S1FM-00000-00&context=)(2), s. 8

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

Rules of Court, Rule 9-8(2)

**Counsel**

Counsel for the Plaintiff: R.D. Gibbens.

Counsel for the Defendants J.W. and R.W (appearing by teleconference): P.I. Waldmann, M. Armstrong, C. Suliman, A/S.

Counsel for the Defendant Her Majesty the Queen in Right of the Province of British Columbia (Ministry of Children and Family Development): E.L. Ross, L. Drake, A/S.

**Oral Reasons for Judgment**

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| **B.M. GREYELL J. (orally)** |

**1**   These reasons concern two applications, one by the Public Guardian and Trustee of British Columbia (the "Public Guardian") on behalf of an infant, J.S., and one by the Province representing the Ministry of Children and Family Development.

**2**  The main action concerns a claim brought by the Public Guardian on behalf of J.S. for damages for ***negligence*** arising from an alleged assault to the infant plaintiff, J.S., by the defendants J.W. and R.W. (also known as R.P. but whom I will refer to in these reasons as R.W.) who were J.S.'s pending adoptive parents. The alleged assault occurred January 5, 2011.

**3**  The action was initially brought against J.W. and R.W. in whose care J.S. was at the relevant time, the Ministry and various named social workers, and other Ministry employees involved in the placing of children for adoption.

**4**  The action is set for trial commencing March 30, 2015 - less than two weeks from today.

**5**  The Province has applied to adjourn the trial. The Province is prepared to proceed with the damage assessment portion of the trial, but not with the issue of liability. I note at this time, and will review shortly, the Province has admitted the grounds of ***negligence*** asserted against it in the notice of civil claim.

**6**  The Public Guardian has applied for orders dismissing or discontinuing the claim against J.W. and R.W. The Public Guardian opposes the Province's application to adjourn the trial, submitting J.S. would be severely prejudiced by an adjournment.

**Background**

**7**  In order to determine the issues raised by the parties, it is necessary to first review the background of the proceedings and what I will describe as the recent events.

**8**  J.S. was born March 4, 2006, and is presently nine years old. As stated, his interests are being represented in this lawsuit by the Public Guardian.

**9**  The notice of civil claim was issued February 23, 2013. The claim alleges J.S. sustained a serious brain injury resulting in permanent injuries. He is described in the claim as having the following ongoing deficits: mild cerebral palsy, including fine motor coordination deficits, gross motor deficits, and difficulties with balance and coordination. He has intellectual disability resulting in impaired cognitive, social, and emotional development. He has epilepsy which is currently controlled. He has visual impairments and other impairments arising from the alleged brain injury.

**10**  The claim, as stated, alleges assault, ***negligence***, and breach of fiduciary duty against J.W. and R.W. and alleges the Province, the Ministry, and the named defendants, apart from J.W. and R.W., and the Director failed in their duty to protect J.S.'s safety and well-being, that they were negligent in placing J.S. with J.W. and R.W., that they knew or ought to have known R.W. and J.W. were unable or unfit to care for J.S., and that they failed to follow proper Ministry procedures, standards, and protocols regarding the placement of J.S. These are but a short list of the allegations of ***negligence*** and breach of duty asserted against the Crown and named defendants apart from J.W. and R.W.

**11**  The Province was served with the notice of civil claim and filed a response on July 22, 2013. The defendants J.W. and R.W. were served March 21 and March 26, 2013 respectively.

**12**  On August 14, 2013, Mr. Waldmann, who had then been retained by R.W. and J.W., wrote counsel for the Public Guardian advising he had been retained. Included in his letter, he wrote:

I will require several weeks to review the material, meet with [his clients] and provide a Response to Civil Claim.

**13**  Counsel for the Public Guardian responded on August 15, 2013, advising Mr. Waldmann that no default proceedings had been taken against J.W. or R.W. (Mr. Waldmann had asked for that information in his letter), that a response had been filed to the claim by the Province, and that the trial date had been set for 15 days to commence in Vancouver March 30 through April 15, 2015. That letter closed:

We also ask that you provide us with your Response to Civil Claim and List of Documents as soon as possible.

**14**  On September 5, 2014, a consent order (between the Public Guardian and the Province) was entered in which the Province was granted leave to file an amended response to civil claim in which the Province admitted liability for the ***negligence*** alleged against it.. The plaintiff was granted leave to dismiss the action against the various individually named defendant social workers and placement officers and to strike out the claim for breach of fiduciary duty against the Province.

**15**  The amended notice of civil claim was filed October 2, 2014. The amended claim was served on R.W. and J.W. October 16 and October 29 respectively.

**16**  On February 3, 2015, R.W. and J.W. filed a response to civil claim. In a portion of that response entitled "response to amended notice of civil claim facts," R.W. and J.W. deny ***negligence***, assert J.S.'s injuries were the result of self-injury and extreme behaviour over a lengthy period of time and that such self-harm activity was known to the Province and the Ministry. J.W. and R.W. also allege the Saanich Police Department ("Saanich") was negligent in its investigation of the January 5, 2011, injury and assert Saanich against them, contrary to s. 8 of the *Human Rights Act*, *R.S.B.C. 1996, c. 210* because of their First Nations ancestry.

**17**  J.W. and R.W. also say the Public Guardian is acting outside its jurisdiction, contrary to s. 7(2) of the *Act*, and that this action is an abuse of process against them.

**18**  On February 16, 2015, counsel for J.W. and R.W. commenced an action on behalf of the minor children of R.W. and J.W. against the Province, the Ministry, the Director of Child Welfare, Saanich, a physician who was the Director of the Child Protection Service Unit of B.C. Children's Hospital, and the same social workers and adoption workers initially named in J.S.'s lawsuit and against whom the consent dismissal order of September 30 had been entered. I will call this the "Children's Action".

**19**  In the Children's Action the plaintiffs say that the Public Guardian, the Province, the social and aboriginal services workers were negligent in placing J.S. in the care of J.W. and R.W. because of, *inter alia*, his known history of self-harm, which they failed to address, and that these workers wrongly removed these four children from J.W. and R.W.'s care. Again, allegations are made against Saanich that it conducted a negligent investigation concerning J.S.'s violent background, and allegations are made against the physician, Dr. Hlady, that she was negligent and reckless and breached her duty of care to the four children in issuing medical opinions that they remain separated from their parents.

**20**  Lastly, the defendants J.W. and R.W. have brought an application which is scheduled to be heard on the first day of trial, that is, March 30, for orders that the proceedings be transferred to the Victoria Registry and that the trial take place in Victoria. They seek leave to "regularize" (to use counsel's term) the filing of the response to civil claim. They also seek leave to issue third party notice. The application does not identify who the third party or parties are, but from the content of the response I infer that they are at least Saanich, Dr. Hlady, the Director, and other social workers and adoption placement officers who were initially parties to the main action.

**21**  On this motion, the defendants R.W. and J.W. submit the March 30 trial should be adjourned. They also seek an order adjourning their application of that date.

**22**  As earlier stated, the Public Guardian and the Province are prepared to proceed to trial March 30 on the assessment of J.S.'s damages. One of the significant issues between the Public Guardian and the Province was and remains the Public Guardian's claim for the cost of J.S.'s future care, which I am advised approaches or exceeds the maximum amount allowable under the law. Neither the Province nor the Public Guardian are prepared to proceed to trial on the issues raised by the defendants.

**Discussion and Decision**

**23**  I will commence with the Public Guardian's application to discontinue or, in the alternative, dismiss the claims against J.W. and R.W.

**24**  Although the Province has admitted liability, it does not consent to a consent dismissal order being entered. The Province argues it wants to keep its options open to proceed against J.W. and R.W. to pursue a claim under s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*.

**25**  Rule 9-8(2) provides the court may discontinue an action in whole or part against a defendant after a notice of trial has been filed in an action with the consent of all parties or by leave of the court. In this case, of course, a notice of trial has been issued. The parties do not consent, and hence the question is whether the court should grant leave to discontinue.

**26**  In my view, the law is clear as to when the court should grant leave to discontinue. A plaintiff, as *dominus litis*, is entitled to control his or her own action, including the right to discontinue that action against certain defendants unless there are special circumstances or, as described in one case, very unusual circumstances mitigating against such leave: see *Aiton v. Fisher*, [*2007 BCSC 1468*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1HC-00000-00&context=) at paras. 19 through 23, and *Schwartz et al. v. Riverside Forest Products Limited et al.*, [*2004 BCSC 1548*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0J4-00000-00&context=).

**27**  In determining whether there are special circumstances, the court should consider the rights and interests of all parties to the action.

**28**  In *Liquor Barn Income Fund v. Mather*, [*2011 BCSC 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1TT-00000-00&context=) at paras. 7 to 20, Madam Justice Fenlon reviewed the above principles and in that case, concluded it was not a special circumstance justifying refusal to grant leave to discontinue against some but not all defendants, that the continuing defendant might have to pursue a third party claim against a departing defendant. The facts of that case are somewhat similar to what is being requested by counsel for the Public Guardian in the matter before me.

**29**  In this case, if the presently scheduled damage assessment trial does not proceed on March 30 and is adjourned for a determination of both damages and liability with the spectre of adding third parties and joining the issues raised in the recently filed Children's Action, the trial will not proceed for likely two to three years hence.

**30**  As stated, one of the major issues between the Province and the Public Guardian concerns the cost of future care of J.S. As I understand it, there are several related aspects to this issue: the amount and the quality of future care. A determination of these issues will involve when such future care will commence and in what manner it will continue. A number of medical experts have provided opinions that a delay in the determination of these issues will have a seriously detrimental effect on the successful treatment and ultimate prognosis for J.S., as well as resulting in significant extra cost.

**31**  The application response of the Public Guardian sets out extracts from these opinions. I refer to but several.

**32**  Dr. Purtzki, a pediatric physiatrist, writes:

J.S. is a now 9-year-old boy who suffered a severe non-accidental brain injury at the age of almost 5 years. As a result, he has been left with severe physical and cognitive impairments.

As outlined in my report dated January 9, 2015, JS should be supported by a variety of therapeutic interventions, especially during the remainder of his childhood and adolescent development. The timeliness of these interventions is important for the following reasons: ...

and

It is important to provide Joshua with strong emotional supports and communication tools, starting now, to deal with these challenges ahead. ...

[I]t will take a lot of intensive, one to one practice to learn basics of communication and everyday living. Without additional support Joshua will likely not progress at all in his development; rather he will stagnate or regress.

She goes on:

In conclusion, time is of the essence during crucial developmental years for a child with a severe neurocognitive impairment. Delay in treatment of even 2 years is a 20% reduction in available time between now and age 19 when crucial brain development occurs. It is not necessarily possible to "make up" this time since the brain undergoes unique restructuring and maturation processes during these remaining 10 years.

I therefore strongly support for therapy to start as soon as possible for this child.

**33**  Ms. Janice Landy, a rehabilitation and life-care specialist, has filed a report which includes the following:

... J.S. is in need of a multi-disciplinary team of professionals working in a proactive, preventative manner to foster his development. A further delay in the provision of necessary recommended services and direct support may result in deterioration in his behaviour and an eventual increase in costs.

**34**  Moray McLean, an occupational therapist, wrote:

In my opinion an adjournment would have a significant negative impact on J.S.'s developmental trajectory and outcomes.

**35**  Dr. Douglas Cohen, a neuropsychologist:

Without proper treatment at the right stage both now and in the future it is not just the case that J.S.'s development will be stalled, but rather that he may very well irreparably miss those opportunities to reach his maximum potential.

**36**  Dr. Cohen wrote, in a section of his report entitled "cost aspects of care":

There is no way to recover lost past care in the common law. If there is a two to three year adjournment, the Plaintiff will lose between [$478,800] to [$530,000] ... on the Plaintiff's future care report ... or approximately $180,000.00 on the Defendant's future care report in lost care from his damage award ... *This will never be recovered*.

**37**  As I have said, the defendant Province has admitted liability and is prepared to proceed with the damage assessment trial. The Province's interest is to maintain its right to commence third party proceedings against J.W. and R.W.

**38**  I turn to the defendants R.W. and J.W.

**39**  In my view, these defendants have not established there are special circumstances such that the court should refuse to grant leave to the plaintiff to discontinue the action against them. In reaching this conclusion, I have taken into account the following factors.

**40**  J.W. and R.W.'s counsel has been aware of the trial date since August 15, 2013. At that time, he was requested to file his clients' response to civil claim and list of documents as soon as possible. Notwithstanding the response to civil claim was not filed until February 3, 2015, some two months before the trial is scheduled to commence.

**41**  I pause to note that nothing I say in these reasons is to be taken as "validating" the response filed by these defendants. That issue was not before me.

**42**  Applying the principles set out in *Aiton* and reaffirmed in *Liquor Barn*, given that the Public Guardian and the Province are prepared to proceed on March 30, the substantial prejudice arising to J.S. from an adjournment, the Province's admission of liability, the very late involvement of J.W. and R.W. in this litigation and the complexity of the issues raised in the response they have filed and in the Children's lawsuit, I grant leave to the Public Guardian to discontinue its claims against R.W. and J.W. and to amend the notice of civil claim by removing these parties from the style of cause.

**43**  I order a copy of these reasons to be transcribed on an expedited basis and placed in the court file so they are available to the trial judge.

**44**  It follows from this that the Crown's application to adjourn the trial is dismissed. The trial will proceed March 30 as an assessment of damages. The notice of discontinuance will not prejudice the Crown's right, in the ordinary course, should it so desire, to bring third party proceedings against whomever it chooses to bring those proceedings. Any normal defences such as statutory limitation period will apply in the ordinary course. That is an issue that has not been argued before me.

**45**  R.W. and J.W. have sought two orders, one for costs and, second, that a term be imposed that no further action be brought against them on the same or substantially the same cause of action. I decline to grant either order for several reasons.

**46**  First, these defendants' response has yet to be "validated," so their status in these proceedings is unclear.

**47**  Second, they have not been engaged in these proceedings until very lately, and that late engagement has been the effective cause of this application being made.

**48**  Finally, to grant the second order sought would effectively bar the Province from bringing third party proceedings which, as I have indicated, it may wish and may be entitled to do.

**49**  Accordingly, it would not be appropriate in this case to make the orders as requested.

**50**  MR. GIBBENS: Costs with regard to this application, My Lord?

**51**  THE COURT: It is my view that, without receiving submissions, costs should be costs in the cause.

B.M. GREYELL J.

**End of Document**

[***Julian v. Joyce, [2016] B.C.J. No. 1628***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KDN-X121-F2F4-G08H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.E. Watchuk J.

Heard: September 14-18 and November 2-4, 2015.

Judgment: July 29, 2016.

Docket: M155389

Registry: New Westminster

**[2016] B.C.J. No. 1628** | 2016 BCSC 1417

Between Walter Julian, Plaintiff, and Cecilia Joyce and Ehtesham Azad, Defendants

(100 paras.)

**Case Summary**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Care and control of vehicle — Proper lookout — Intersections — Turns — Left turn at intersection — Yielding — Right of way — Liability — Civil actions — Breach of rules of the road — *Negligence* — Action by plaintiff for damages for injuries sustained in motor vehicle accident in 2011 dismissed — Plaintiff's vehicle collided with defendant Joyce's vehicle, who was turning left, and then collided with defendant Azad's vehicle, who had been waiting to turn behind Joyce's vehicle — Joyce commenced her turn when it was safe to do so — Plaintiff breached obligation to yield — He also breached his obligation to stop his vehicle at amber light and to keep proper look-out — Joyce did not have sufficient opportunity to avoid collision — Plaintiff's *negligence* was sole cause of both collisions — Motor Vehicle Act, ss. 128, 174.**

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| Action by the 58-year-old plaintiff for damages for injuries sustained in a motor vehicle accident in 2011. The plaintiff's vehicle collided with the defendant Joyce's vehicle, who was turning left, and then collided with the defendant Azad's vehicle, who had been waiting to turn behind Joyce's vehicle. The plaintiff testified he was travelling at 30 km per hour and that his light turned amber when he was already past the crosswalk of the intersection. His testimony differed from his responses given on discovery. He had given four different accounts of the timing of the light change. Azad testified the light was amber when the plaintiff entered the intersection and Joyce began her turn and that the plaintiff hit Joyce's vehicle at a high velocity before spinning into his vehicle. Joyce's description of the accident was consistent with Azad's testimony.  HELD: Action dismissed.  The plaintiff was credible but his testimony was not reliable given several inconsistencies in his evidence. The defendants' evidence was consistent with the damage to the vehicles. The light was amber when the plaintiff entered the intersection. The plaintiff made the decision to proceed through the intersection either when he saw the light turn amber or when he realized it had turned amber. Joyce commenced her turn when it was safe to do so. The plaintiff was not so close as to constitute an immediate hazard. Joyce was the dominant driver and had the right of way. The plaintiff had an obligation to yield pursuant to s. 174 of the Motor Vehicle Act. He had also breached his obligation under s. 128 of the Act to stop his vehicle at the amber light and his common law duty to keep a proper look-out. Joyce did not have sufficient opportunity to avoid the collision. No ***negligence*** of Azad had been demonstrated. The plaintiff's ***negligence*** was the sole cause of both collisions. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 128*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0F5-00000-00&context=), s. 174

**Counsel**

Counsel for the Plaintiff: S.J. Henshaw, J. Gagnon.

Counsel for the Defendant, C. Joyce: J.C. McKechnie.

Counsel for the Defendant, E. Azad: F. Mohamed.

**Reasons for Judgment**

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| **J.E. WATCHUK J.** |

**INTRODUCTION**

**1**  The plaintiff, Walter Julian, claims damages for injuries arising from a motor vehicle accident involving two collisions that occurred sequentially on October 20, 2011 at the intersection of King George Boulevard and 76th Avenue in Surrey, British Columbia. He says that his injuries were the result of the ***negligence*** of both defendants, who in turn, deny their liability and allege ***negligence*** on the part of Mr. Julian. Both liability and quantum of damages are therefore in issue.

**2**  Mr. Julian was driving north on King George Boulevard. The vehicles driven by the defendants Cecilia Joyce and Ehtesham Azad were each southbound on King George Boulevard turning left onto 76th Avenue. In the first collision, Mr. Julian and Mrs. Joyce collided in the intersection of King George Boulevard and 76th Avenue. Shortly thereafter there was a second collision between the plaintiff and Mr. Azad who had been waiting to turn behind the Joyce vehicle.

**3**  The key question to be resolved is liability between Mr. Julian as the through driver and Mrs. Joyce as the driver turning left in a controlled intersection.

**4**  I will refer throughout to these collisions as the first collision, involving the plaintiff and Mrs. Joyce, and the second collision, involving the plaintiff and Mr. Azad. When I refer to the collisions collectively as involving all three parties to this action, I will use the term "accident".

**BACKGROUND**

**5**  At the time of the accident, approximately 9:00 a.m. on October 20, 2011, the roads were dry at the intersection of 76th Avenue and King George Boulevard. Mr. Julian was driving a white pickup truck owned by his employer. Mrs. Joyce was driving a green Chevrolet and Mr. Azad was driving a white Toyota Corolla. All three drivers were alone in their respective vehicles.

**6**  Immediately prior to the accident, Mr. Julian was northbound on King George Boulevard approaching the controlled intersection at 76th Avenue. Mrs. Joyce was stopped, partway into the intersection, in the southbound left turn lane of King George Boulevard preparing to make a left turn to travel east on 76th Avenue. Mr. Azad was stopped behind Mrs. Joyce, also preparing to turn left to proceed eastbound on 76th Avenue.

**7**  King George Boulevard prior to the intersection with 76th Avenue has four lanes of travel northbound. At about two car lengths south of the intersection the curb lane becomes a right turn lane, making a pedestrian island, and there are three lanes of traffic. At the intersection, one of the lanes is a left turn lane and there are two through lanes for traffic travelling north. The southbound lanes also include a left turn lane. 76th Avenue has two lanes of traffic in each direction separated by a median. The markings at the intersection consist of a wide white line across the three lanes of traffic which was described by the parties and witness as the line indicating the stop line for vehicles, and two narrower white lines between the wide white line and the intersection indicating the pedestrian crosswalk.

**8**  There was no expert or independent evidence regarding the light sequence at the intersection. It is not in dispute that there is an advance green light for traffic intending to turn left from King George Boulevard in each direction onto 76th Avenue. The sequence on King George Boulevard then continues with a green light, an amber (also referred to as yellow) light, and then red light.

**9**  At the trial each of the three parties testified as well as a witness, Jose Vasquez. As an aid in their evidence, Mrs. Joyce, Mr. Azad and Mr. Vasquez marked copies of the intersection map obtained from the City of Surrey Mapping Online System and accurate at the date of the accident. Although of some assistance, I am mindful that the markings indicating the vehicles are not to scale since, for example, a dot does not accurately represent the entire location of a pick-up truck.

**10**  There are notable differences in the evidence of the parties and the witness. I will summarise the evidence of each party and the witness, and then make findings of fact on the issues presented by the evidence with reference to some evidence in more detail. Finally I will apply the law to the facts as found.

**11**  To put the evidence in context, I will first review the law regarding the duties and obligations of motorists generally and those who are making left turns specifically, as well as the law regarding the determination of issues arising from collisions which involve a left turn.

**THE APPLICABLE LAW**

**12**  Sections 128 and 174 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* [*Act*], are the relevant statutory provisions:

**Yellow light**

128 (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,

1. the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety,

...

**Yielding right of way on left turn**

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| 174 |  | When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn. |  |

**13**  The common-law duties of motorists are described in *Stewart v. Dueck*, [*2012 BCSC 1729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2P6-00000-00&context=) at paras. 38-40:

[38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Hmaied v. Wilkinson*, [*2010 BCSC 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20XW-00000-00&context=) at para. 23.

[39] It is a well-settled proposition that drivers in this province are entitled to assume, within reason, that the other users of the roads in British Columbia will obey the law: *Mills v. Siefred*, [*2010 BCCA 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X493-00000-00&context=) at para. 26.

[40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard of care, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, [*2010 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=) at para. 21; *Kilian v. Valentin*, [*2012 BCSC 1434*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S25K-00000-00&context=) at para. 28.

**14**  In *Nerval v. Khehra*, [*2012 BCCA 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2JD-00000-00&context=) at paras. 12-13, Justice Harris cited with approval the trial judge's characterization of the relevant legal principles relating to left-turning vehicles:

[12] The trial judge characterized the relevant legal principles at paras. 19-23 of his reasons for judgment, which is convenient to set out below:

[19] The legal principles governing collisions involving left-turning vehicles are straightforward. The first question is whether Ms. Khehra [the through driver] constituted an immediate hazard prior to Ms. Nerval commencing her turn. The answer to that question will determine which of the two was the dominant driver prior to the collision.

[20] A motor vehicle is an immediate hazard if its driver must take a sudden or violent action to avoid the threat of collision if a servient vehicle is about to make a left turn entering or crossing the highway in the path of the approaching vehicle: [*Raie v. Thorpe* (1963), 43 W.W.R. 405 at 410, (B.C.C.A.)]. The time to assess the question of an immediate hazard is when the left-turning vehicle commences the turn: *Raie* at 414.

[21] If I conclude Ms. Khehra was the dominant driver, she may still be in breach of her duty of care to Ms. Nerval because she failed to take reasonable care when passing the other south-facing van on the right and entering into the Intersection at an unsafe speed when the view of the intersection was obscured by the white van.

[22] The burden of proving that the speed of the dominant vehicle caused or contributed to the accident rests in this case with the driver in the position of Ms. Nerval. In [*Pacheco (Guardian ad litem of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (B.C.C.A.)], the court described the burden as follows:

18 In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver. As stated by Cartwright, J. in [*Walker v. Brownlee* [*[1952], 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.)] at 461:

While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

[23] In *Burgess v. Fisher*, [*2009 BCSC 1766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24YS-00000-00&context=) at para 21, Barrow J. described the servient driver's duty as requiring that driver to assess how far away the through travelling vehicle is from the intersection and how fast it is travelling.

[13] Later in his reasons, the trial judge further articulated propositions which guided his analysis. First, he accepted the conclusions of Burnyeat J. in *Sandhu v. Gill*, [*[1999] B.C.J. No. 2742*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22WY-00000-00&context=) (S.C.) in paras. 9-15, that the obligation imposed on a left turning driver by s. 174 of the *Act* not to start a turn if there is an immediate hazard has priority over the obligation imposed on a through driver by s. 158 not to pass a vehicle on its right unless it safe to do so. Second, the resulting "onus" placed on the left turning driver is not absolute, and may be qualified by the conduct of the through driver: (at para. 85).

**15**  Citing the test in *Pacheco (Guardian of) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=), [*22 B.C.A.C. 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (B.C.C.A.), and its application to s. 174 of the *Act*, Justice Harris then continued:

[33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way. In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.

...

[35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them.

...

[38] Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that ***negligence*** on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.

**16**  In *Pirie v. Skantz*, [*2016 BCCA 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J58-W6W1-FG12-61NB-00000-00&context=) at paras. 13-14, Fitch J.A. discussed circumstances in which a through driver may be held wholly or primarily at fault:

[13] The appellant points to a number of cases in which a through driver was found to be either wholly or primarily at fault for the accident: see, for example, *Uyeyama v. Wittenberg*, [*[1985] B.C.J. No. 1883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61N3-00000-00&context=) (B.C.C.A.); *Kokkinis v. Hall*, [*[1996] B.C.J. No. 1560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) (B.C.C.A.); *Morgan v. Hauck* [*(1988), 27 B.C.L.R. (2d) 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-605J-00000-00&context=). In these cases, the through driver either ran a red light or was in a position to bring their vehicle to a safe stop before the intersection -- features conspicuously absent in the case at bar. I note that the trial judge referred to these authorities in her reasons for judgment, effectively adopting the position the appellant advances on appeal:

[38] However, the duty on a left turning driver under s. 174 of the *MVA* is not absolute. Left turning drivers are entitled to assume that other drivers will obey the rules of the road, absent any reasonable indication to the contrary. In particular, a left turning driver is not required to wait until he or she sees that all approaching drivers have stopped: *Kokkinis v. Hall* [*(1996), 19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) (C.A.) at para. 10.

[14] I take no issue with the appellant's submission that a through driver can, in appropriate circumstances, be found wholly at fault for an accident involving a driver who turns left on a stale yellow light. As a practical matter, a driver like the respondent, who is in a dominant position, will not typically be found to be liable for an accident: *Salaam v. Abramovic*, [*2010 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=) at para. 25. Having said that, where a through driver: (1) approaches an intersection at an excessive rate of speed or otherwise conducts himself in such a way as to deprive the left-turning driver of the ability to reasonably anticipate he is about to enter the intersection on a stale yellow light; (2) fails to bring his vehicle to a stop in circumstances where other vehicles travelling in the same direction have already done so; or (3) should have become aware of the left-turning driver's own disregard of the law in circumstances that afforded him a sufficient opportunity to avoid the accident through the exercise of reasonable care, the through driver may be found wholly or primarily at fault for the accident: *Pacheco (Guardian ad litem) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (B.C.C.A.); *Walker v. Brownlee*, [*(1952), 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.).

**17**  The question as to whether a left turning driver can rely on a through driver to stop was discussed by Newbury J.A. in *Kokkinis v. Hall* [*(1996), 19 B.C.L.R. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) at para. 10, [*71 B.C.A.C. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3BS-00000-00&context=) (B.C.C.A.):

I must say this argument has given me pause; but ultimately I resolve it by asking whether in law [the plaintiff] should be faulted for diverting her attention momentarily from oncoming traffic to check cross traffic at the point in time in question, i.e., as she prepared to start her turn -- to see if any of those cars had jumped the light or were going to pose a threat to her turn. Was this an unreasonable or careless thing to do? I think not, given both the realities of the situation (which of course occurred over only a few seconds) and past decisions of this Court that have imposed on left-turning drivers the duty to be aware not only of oncoming traffic, but also of cross traffic, pedestrians, and whatever else may be present in the intersection. To say that the plaintiff can be found at fault because she relied on the assumption that [the defendant] would stop, and because she checked cross-traffic, would in my view subvert the duty on [the defendant] to bring his vehicle to a safe stop at the amber light as the other traffic did. An amber light is not, as the current witticism suggests, a signal to accelerate or to pass traffic that is slowing to a stop. Indeed, as Mr. Justice Esson noted in *Uyeyama*, in a busy city like Vancouver and at a busy intersection like 25th and Granville, an amber is likely the only time one can complete a left turn. Drivers approaching intersections must expect that this will be occurring. Putting a burden on a left-turning driver to wait until he or she *sees* that all approaching drivers have stopped *would*, in my view, bring traffic to a standstill. We should not endorse such a result.

[Emphasis in original.]

**18**  In *Henry v. Bennett*, [*2011 BCSC 1254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-626K-00000-00&context=) at paras. 72-73, Justice Ballance addresses a similar issue. After citing *Kokkinis* she continued:

[72] Ms. Bennett was in a position remarkably similar to that of the plaintiff in *Kokkinis*. Although she did not see Mr. Henry prior to the collision, *Kokkinis* indicates that it does not necessarily follow that she was in any way negligent. Having said that, I wish to clarify that I do not read *Kokkinis* as standing for the proposition that left-turning drivers are entitled to proceed blindly on the assumption that oncoming drivers will obey the rules of the road, without regard to their concurrent obligation to act reasonably as the circumstances dictate. In my view, Ms. Bennett was entitled to proceed on the assumption that oncoming traffic, including Mr. Henry, would act in accordance with the law and come to a stop on the late amber, absent any reasonable indication to the contrary and provided she comported herself with reasonable care. Here, there was no contrary indication from Ms. Bennett's standpoint. Indeed, she could see that the SUV across from her had complied with the rules and she was aware as well that the flow of straight through traffic had ceased some seconds earlier. She had no reasonable indication that oncoming traffic in the form of Mr. Henry would proceed through the intersection in clear violation of the rules of the road. Moreover, I find that in all the circumstances she conducted herself prudently and with reasonable care in negotiating her left turn. In contrast, Mr. Henry knew or reasonably ought to have known that in all likelihood Ms. Bennett would have carried through with her left turn at the final stage of the amber light, and most assuredly when the signal turned red. He created an extremely unsafe situation in failing to come to a stop.

[73] I endorse the case authorities that cast doubt over the legitimacy of portraying a driver in Mr. Henry's shoes as having the presumptive right-of-way or otherwise qualifying as the dominant driver for the purposes of assessing liability using the *Walker* paradigm: see, for example, *Snow v. Toth*, [*[1994] B.C.J. No. 563*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0X0-00000-00&context=) (S.C.); *Shahidi v. Oppersma*, [*[1998] B.C.J. No. 2017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0H9-00000-00&context=) (S.C.); *Ziani v. Thede*, [*2011 BCSC 895*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22H0-00000-00&context=). The dominant/servient driver analysis in *Walker* is predicated on the footing that the dominant driver has proceeded lawfully and, it seems to me, is of utility in that circumstance only. I, therefore, question whether that framework is of any assistance to a driver like Mr. Henry, who has acted in breach of his statutory duty. In any case, it cannot be said that Ms. Bennett attempted to execute her turn in complete disregard of her statutory duty to yield, which is an integral component of the *Walker* analysis. Indeed, it is my view that Ms. Bennett can be validly characterized as the dominant driver in the circumstances. There is no cogent evidence to remotely suggest that she could have avoided Mr. Henry by the exercise of reasonable care. To formulate it in the terms of s. 174, Ms. Bennett posed an immediate hazard to Mr. Henry, which he should have appreciated, and it is he who ought to have yielded the right-of-way.

**THE EVIDENCE**

1. **Evidence of the Plaintiff**

**19**  Mr. Julian was 53 years old at the time of the accident. He worked as a foreman with a landscaping firm.

**20**  Mr. Julian was on his way to work. He had stopped at Tim Hortons a block and a half south of the intersection in order to pick up coffee for his crew. There were eight cups of coffee on the passenger seat.

**21**  The evidence of Mr. Julian at trial was as follows on direct examination:

1. As he approached the intersection the light for him was green and when he got up to the crosswalk it went amber and he couldn't stop. It went amber when he got to the other side of the crosswalk.
2. He was travelling at between 25 and 30 km/h. He didn't want to go too fast because he had coffee sitting on the front seat.
3. There was one vehicle to his left in the middle lane.
4. He continued into the intersection and all of a sudden there was a green car approaching from his left side. He slammed on his brakes and tried to swerve but she hit him.
5. He doesn't recall exactly where the accident happened but his vehicle came to rest on the east side of the intersection adjacent to the median on 76th Avenue, blocking the eastbound fast lane on 76th Avenue and part of the westbound left turn lane.
6. After the collision he was knocked out for about a minute and when he came to he saw Mrs. Joyce's vehicle headed for the curb on the north side of 76th Avenue and when he looked out his rear window he saw Mr. Azad's car but didn't know where it had come from.
7. He then got out of his truck and saw Mrs. Joyce's car still moving towards the far curb, where it ended up against the curb on the north right-hand side of the street.

**22**  On cross-examination Mr. Julian gave the following evidence which is summarized in chronological sequence:

1. His memory of the accident was somewhat clear and he was "pretty sure" of his evidence given on direct examination.
2. From exiting Tim Hortons until he saw Mrs. Joyce's vehicle he was doing about 30 km/h, and also between 25-30 km/h.
3. There were northbound cars in both the middle and left turn lanes.
4. He remembers seeing a car sitting in the left-hand turning lane waiting for its light.
5. As he approached the intersection it looked like they were stopped because "all I could see was brake lights and a brake lights off". But he couldn't tell if they were stopped or not, he just figured they were stopped.
6. Those vehicles "looked like they were going" but as he hit the crosswalk "they weren't moving anymore".
7. He never had to stop but the cars to his left were taking off and then must have seen Mrs. Joyce and slammed on their brakes. Those cars entered the intersection but stopped.
8. He was passing the car immediately to his left. He does not recall seeing it stopped. It started going into the intersection and got into the crosswalk.
9. There was a car to his left that stopped as Mr. Julian was right beside him.
10. The light went amber when he "entered the crosswalk". The front of his vehicle was across the north side of the crosswalk and his body was "in the crosswalk" when the light turned amber.
11. He grabbed the coffees when he saw the light turn amber.
12. When he first saw Mrs. Joyce's vehicle, she was "right in the middle of the intersection" about 5 to 10 feet away.
13. He does not know where Mrs. Joyce came from. He just figured she was turning left.
14. When he entered the intersection he started picking up a little bit of speed because he was in the intersection. He saw Mrs. Joyce and slammed on the brakes and turned to the right but she hit him.
15. He was stopped, or at least almost stopped, when Mrs. Joyce hit him.
16. He doesn't remember where his vehicle made contact with the Joyce vehicle.
17. His evidence about the light sequence given on discovery was wrong because he was confused by the questions.

**23**  On examination for discovery Mr. Julian's evidence was as follows:

1. As he left Tim Hortons he had eight coffees sitting in his passenger seat.
2. At that point there are two through lanes of travel, and at the intersection there is a third -- a left turn lane.
3. Before he got to the crosswalk on the south side of 76th Avenue, the light was amber until he was within a car length of the intersection, when it went green. He also says that it went green as soon as he hit the crosswalk. He had a green light when he crossed into the intersection.
4. As he approached the intersection there were two vehicles to his left, one in the northbound left turn lane and one in the northbound middle lane. Both were stopped and "just getting ready to go".
5. As he got in the intersection he saw Mrs. Joyce coming towards him; he tried to swerve right but she hit him.
6. The front of Mrs. Joyce's vehicle hit the front left corner of his vehicle.
7. **Evidence of the Defendant Cecilia Joyce**

**24**  Mrs. Joyce is 80 years old. The accident scene is about four or five blocks from where she has lived for ten years.

**25**  The evidence of Mrs. Joyce at trial on direct examination was as follows:

1. She has had a driver's licence for about 40 years and, with five children, has done a lot of driving in that time.
2. When she was waiting at the crosswalk to make her left turn, her car was "out a bit" from the crosswalk. The tail end of her car may have been in the crosswalk.
3. She didn't see the light turn amber; rather, she saw the light had turned amber and by reason of two cars stopped opposite her in the northbound centre and left turn lanes, and no one in the curb lane, she thought it safe to turn.
4. When she first saw Mr. Julian's vehicle, it was coming down the curb lane, near the rear of the stopped car in the centre lane.
5. Mr. Julian hit her.
6. She has no recollection of what part of his vehicle hit what part of her vehicle.
7. At the time of the accident, she was not in a hurry.

**26**  On cross-examination Mrs. Joyce testified as follows:

1. While she waited she was watching for eastbound traffic on 76th Avenue, then she looked up and saw the light had turned amber, then began her turn.
2. When she first saw Mr. Julian he was at about the back end of the first car in the northbound centre lane, about two car lengths away.
3. **Evidence of the Defendant Ehtesham Azad**

**27**  On the morning of the accident, Mr. Azad was driving to his place of work at President's Choice Financial at the Superstore on the southeast corner of King George Boulevard and 76th Avenue. He had just dropped his daughter off at school.

**28**  The evidence of Mr. Azad at trial was as follows:

1. He waited about 20 to 25 seconds to make the left turn from King George Boulevard heading south to east on 76th Avenue. He was a half car length behind a green car [driven by Mrs. Joyce]. His car was on the white line and angled a little bit so he could see oncoming traffic.
2. When the yellow light was there, Mrs. Joyce turned making a safe left turn.
3. The light was yellow when the truck entered the intersection.
4. The white truck hit the green car. The accident was at a very high velocity.
5. The white truck then spun and the back of the truck hit the front of his car when he was still at a full stop with his foot on the brake.
6. When he first saw the truck, it was approaching the intersection about two to three car lengths ahead of the green car, as clarified in cross-examination. It was in the inside through lane.
7. He has no recollection of a vehicle in the oncoming left turn lane.
8. After the collision both vehicles ended up in the intersection. He then pulled his car up and parked on 76th Avenue. The person [Mr. Julian] got out of the truck and was talking on the phone.
9. **Evidence of the Witness**

**29**  Mr. Vasquez was a witness to the accident. He was 58 years old at the time. He is a social worker and had previously worked as a truck driver. He is colour blind but testified that he can see light changes from red to green to yellow.

**30**  Mr. Vasquez testified on direct examination as follows:

1. He was at the southeast corner of the intersection, waiting for about 30 seconds to cross King George Boulevard from east to west. The pedestrian crossing is pedestrian activated. He pushed the button and waited for the walk sign.
2. He observed a white truck [driven by Mr. Julian] in the curb lane close to him travelling north. It was driving a "normal" speed, about 30 to 40 km/h.
3. A dark car, driven by Mrs. Joyce, was southbound ahead of the line crossing the pedestrian line, waiting for the light in order to turn left. Another white vehicle was behind the dark car, also waiting to turn.
4. The green turned to amber for north-south traffic and when Mr. Julian hit the pedestrian lines, he had no way to stop.
5. At the same time the dark car made the turn. When the light turned yellow "he goes automatically".
6. The white truck tried to avoid it and steered to the right but it hit the dark car.
7. The white truck ended up facing east on 76th Avenue.
8. When the white truck was already stopped, suddenly the white car hit the truck in the back, in the hitch, and the truck moved two to three metres.
9. After the accident, he saw the driver of the truck run to help the other drivers. He was wandering in confusion and that is "when I decide to help this poor man, because he had nothing to -- he wasn't responsible for what happen..." He thought this is not right. He gave the driver his contact information and offered to testify and tell everybody what happened.
10. He later provided a statement to ICBC.

**31**  On cross-examination his evidence was as follows:

1. As he waited, he was facing west and south. He testified that he was on the east side of 76th Avenue, and the south side of King George Boulevard, and then corrected his evidence, and corrected the east-west markings on the map. He admitted that east and west confuse him.
2. He first saw Mr. Julian's vehicle when he pushed the crosswalk button. He saw the Joyce vehicle, which he described as red, at the same time.
3. The front of Mr. Julian's vehicle was in the crosswalk between the two pedestrian lines when the light turned amber.
4. Mrs. Joyce began her turn when the light turned amber.
5. He saw cars stopped in the northbound middle and left turn lanes on King George Boulevard.
6. The white car [driven by Mr. Azad] was at a complete stop when he first saw it. After the first collision, the front of the white car drove into the white truck which had come to a stop on 76th Avenue east of King George Boulevard close to the median. It came to a rest beside the white truck at the median after the collision had moved the truck further east.
7. After the first collision, 20 seconds passed before the second collision. He testified of his interpretation of seconds by counting out loud.
8. When questioned regarding his statement to ICBC in which he had said that the white car was speeding, he said that it had sped up from its stop in order to clear the intersection.
9. He gave Mr. Julian his contact information because: "This man is innocent."
10. **Physical Evidence**

**32**  There was in evidence photographs of the vehicles taken following the accident. The photographs indicate that the damage was to the front left of Mr. Julian's vehicle and to the right passenger side of Mrs. Joyce's vehicle in the area of the front tire.

**33**  The damage on the Azad vehicle was to the left front above the bumper which appears undamaged. The left head light is damaged and the hood of the car is bent upwards from the impact.

**DISCUSSION**

1. **Findings of Fact**

**34**  It is necessary to make the following findings of fact from the evidence: the speed at which Mr. Julian was travelling; what other vehicles were in the vicinity of the intersection at the time immediately preceding the accident; what lane was Mr. Julian travelling in as he proceeded northbound on King George Boulevard; what was the location of the Julian vehicle when the light changed from green to amber and what was the colour of the light when Mr. Julian entered the intersection; what was the colour of the light when Mrs. Joyce made her left turn; in the first collision, which vehicle hit the other vehicle and what occurred with the Julian vehicle after the first collision; and finally, in the second collision, which vehicle hit the other vehicle.

**35**  In order to assess the evidence, I must consider the credibility and reliability of the witnesses. The factors to be considered when assessing credibility were summarized in *Hardychuk v. Johnstone*, [*2012 BCSC 1359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2PF-00000-00&context=) (citing *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=)):

[8] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner,* [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=), as follows:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [*[1926] 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont. H.C.); *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[9] Where, as here, a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury the court must be exceedingly careful in examining the evidence and assessing credibility: *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=). If deliberate falsehood is established it may be difficult to disentangle truth from deceit and some truthful aspects of the plaintiff's testimony may lose their force, particularly in the absence of corroboration. That being said, when a plaintiff is accused of deliberate deceit more than speculation or innuendo is required. A charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made: *Halteren v. Wilhelm*, [*2000 BCCA 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1KV-00000-00&context=); *Edmondson v. Payer*, [*2011 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XC-00000-00&context=); *Vasiliopoulos v. Dosangh*, [*2008 BCCA 399*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3MF-00000-00&context=).

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[11] The presumption of truthfulness will be displaced by convincing evidence of deliberate falsehood. Such evidence may take many forms. There is no hard and fast rule as to how falsehood on a plaintiff's part may be demonstrated in a personal injury action. In my view, however, in most such cases fairness will require that a plaintiff be given an opportunity to respond directly to an assertion of deliberate untruthfulness before his or her credibility, as distinct from reliability, is successfully impeached: *R. v. Lyttle*, [*2004 SCC 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B109-00000-00&context=); *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.).

**36**  It is not submitted by the defendants that the evidence of Mr. Julian is not credible; they say that his evidence is not reliable. I agree.

**37**  Mr. Julian testified in an engaging manner. He appeared to be earnestly attempting to solve the puzzle of what occurred in the accident. His positive demeanour did not vary from direct to cross-examination. However, Mr. Julian's evidence is fraught with inconsistencies in relevant areas. It is also contradicted by the photographic evidence.

**38**  While I cannot say that Mr. Julian is intentionally avoiding telling the truth, the many versions of events in the seconds leading up to and including the accident lead inexorably to a conclusion that Mr. Julian does not know what occurred as he was approaching and entered the intersection where he was involved in two collisions. Rather than say that he does not know, Mr. Julian attempted to reconstruct events from the perspective that he was unable to stop his vehicle safely when the light turned amber. Unfortunately, in doing so, the pieces of the puzzle were moved so often as to leave no clear picture of his observations and actions. I will therefore look for consistencies between his evidence and other evidence in order to determine what of his evidence can be accepted.

**39**  With regard to the evidence of Mrs. Joyce, she was an entirely credible and reliable witness. There were no inconsistencies between her testimony in direct and cross-examination, nor was there a variation in tone or demeanour. Mrs. Joyce was a calm and clear witness. Only in being questioned about distance measured in "car lengths" was she uncertain, and she attempted to answer the questions put to her in that regard. Her evidence is consistent with that of Mr. Azad with the exception of the lane of travel of Mr. Julian. I accept her evidence in its entirety.

**40**  Mr. Azad was also a credible and reliable witness. His evidence was internally consistent. It is only his evidence of the lane in which Mr. Julian was travelling, the inside lane, that I find that his recollection is not accurate as it does not accord with the evidence of the other three witnesses.

**41**  The witness, Mr. Vasquez, gave evidence in a manner that indicated that he was committed to his conclusion that fault for the accident was not with Mr. Julian. He had immediately determined that Mr. Julian was innocent, and assumed the role of advocate of that position in his evidence. Mr. Vasquez' demeanour in cross-examination displayed some antipathy to counsel. At times he was argumentative. For example, when questioned regarding his statement to ICBC he responded: "What you try to -- to trap me here?" He reluctantly agreed in cross-examination that he had seen cars stopped in the two other northbound lanes.

**42**  I turn to the findings of fact. With regard to the speed at which Mr. Julian was travelling, in direct examination he testified that he was travelling between 25 to 30 km/h. He did not want to go too fast because he had eight cups of coffee from Tim Hortons sitting on the front seat of the truck. In cross-examination he also said that for the block and a half from leaving Tim Hortons on King George Boulevard on the same side of the highway he was doing about 30 km/h.

**43**  After the light turned amber, he picked up speed. When Mrs. Joyce first observed him, he was travelling fast, and more than 30 km/h. The speed limit on King George Boulevard in this area is 50 km/h. Mr. Vasquez' evidence was that Mr. Julian was driving a normal speed, about 30 to 40 km/h. It is not possible on the evidence to make a finding of the speed at which Mr. Julian was travelling as he approached and entered the intersection after he saw the amber light other than to find that he accelerated from his previous speed of between 25 and 30 km/h.

**44**  I turn to the issue of the other vehicles at the intersection at the relevant time, particularly those in the northbound left turn and middle through lanes. Mrs. Joyce did not see the light turn amber as she was looking to her right at traffic travelling east on 76th Avenue. When she looked back at oncoming traffic the light had turned amber. The cars were stopped in those two lanes "and the next lane there was nobody in it. So I thought, well, it's safe enough to turn the corner." Mr. Vasquez observed the two stopped cars. Although Mr. Julian's evidence is inconsistent regarding where he was when he saw the two stopped cars, he testified in his Discovery and cross-examination that there were two cars stopped in the lanes adjacent to him.

**45**  I conclude that there were two northbound cars that were stopped in the left turn and middle through lanes. They had come to a stop on the yellow light.

**46**  The evidence with the exception of that of Mr. Azad is consistent that Mr. Julian was in the right through lane prior to the intersection, and I so find.

**47**  I next turn to the determination of the colour of the light as Mr. Julian approached and entered the intersection and when Mrs. Joyce made her left turn. The internally inconsistent evidence of Mr. Julian with regard to his position relative to the other cars' positions and the sequence of stopping is relevant.

**48**  In direct examination, Mr. Julian testified that there was a vehicle in the middle lane on his left side. On cross-examination, he was asked about his evidence on Examination for Discovery where he had testified that there was a car in the left turn lane and a car in the fast lane. Both cars were stopped as he approached. Both were "just getting ready to go" as the light turned green, and then they were all taking off at the same time through the intersection.

**49**  At trial, Mr. Julian stated that the two cars were "getting ready to go or they were stopping because of her." He also stated that he was not paying attention to the car on his left, but when he hit the crosswalk "they [the two cars] weren't moving anymore".

**50**  Mr. Julian was questioned regarding his response to further questions on Discovery. The questions and his response at trial are as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. At question 191 I -- you -- you had said to me they were just starting -- getting ready to go -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- and I say: |  |

... Okay. As you approached the intersection, were those two vehicles already stopped at it then; do you recall?

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | They were just starting to move. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Were they stopped as you approached? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. [as read] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's what it looked like to me because the car in front of me had turned [into the right turn lane] and all I could see was brake lights and a brake lights off. |  |

**51**  From this evidence, the conclusion is that the two other northbound cars were stopped as he approached the intersection. From his position, he could first see their brake lights on, then saw the brake lights go off when they started to move.

**52**  However, Mr. Julian's evidence continues with further internal inconsistencies:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- to confirm, Mr. Julian. So you're telling me on -- on discovery that they were stopped as you approached? That there's these two vehicles. You're coming up in the curb lane and to your -- apparently, according to this answer, just ahead of you and to your left you see two vehicles stopped? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | One in the left-turn lane, one in the -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | One in the fast lane, yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- middle lane, right? And is -- is that true? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | All right. So they're stopped? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I couldn't tell you if they were stopped or not. I just figured they were stopped. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Well, so -- so when you gave me this evidence on discovery, you weren't actually certain? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I wasn't actually certain if they were stopped or if they were moving. I was paying attention to my lane, what I was doing. I had a car turned. I was more worried about that. When I turned my head back -- because he turned I turned my head back, I was at -- I was at the crosswalk. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | All right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I looked up, it went yellow. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. So ... Sorry, I think I -- I read 192, "They were stopped as you approached," and you said, "Yes." And then I said to you, "You never had to stop; is that right?" And you said, "No." [as read] |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And I said, "All right." And you said, "They were stopped, it went green. They -- we were all taking off at the same time except for I had a little bit more because I was travelling already." [as read] |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So are you saying then -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I guess the cars that were on my left had seen her and had slammed on their brakes, but I was on the side of them already, I didn't see her. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, but you say they were -- "They -- we --" |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | "-- were all taking off at the same time except for I had a little bit more because I was travelling already." [as read] |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did they go through the intersection? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | They entered, but they stopped. When I -- I -- I don't remember what that car did on my left. I thought it was starting to enter the intersection when I was entering the intersection because we were pretty well the same. And then they -- I guess they had stopped and I kept going, and she was right there. Because she could -- the car on the left could see more what was going on than what I could. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, Mr. Julian, again, I -- I don't want -- it's important that you tell us what you actually recall and not reconstruct what you think happened. And -- and I want to ask you do you actually remember seeing a car -- let's talk about the two cars separately. The car immediately to your left in the through lane, was -- do you recall seeing it stopped at the intersection? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Do you recall seeing it? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Do you recall seeing it going into the intersection? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So it actually went into the intersection? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It started going into the intersection. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did it cross the crosswalk? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It got into the crosswalk. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And where was it as you approached the intersection? Were you passing it or was it beside -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I was passing it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You were passing it? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And what about the left turning car? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I don't know. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You remember seeing it? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I remember seeing a car in the left-hand turning lane sitting there waiting for its light. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And is the left-turn lane, does it have a separate signal? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I think so, yes. |  |

**53**  Mr. Julian states again that the two vehicles are stopped, and then says that he could not tell if they were stopped. He then says that it is his guess that the cars had seen Mrs. Joyce and slammed on their brakes but he was beside them at the time they stopped. Then he says that he does not remember what the car did on his left--he thought it was starting to enter the intersection when he was, but then he guesses that they had stopped and he kept going. He does not remember seeing the car to his left stopped at the intersection. He recalls seeing it and seeing it going into the intersection and crossing into the crosswalk. He was passing it as he approached the intersection.

**54**  Mr. Julian has given four accounts of the timing of the light change:

1. In his statement to ICBC, it was green to amber just as he reached the crosswalk;
2. At the Examination for Discovery, the light change was amber to green when he was a car length before the crosswalk;
3. At trial in direct examination, it was green to amber just after he crossed the crosswalk; and
4. In cross-examination, he testified that it was green to amber just as he entered the crosswalk.

**55**  It is clear that the light change was from green to amber. With regard to Mr. Julian's location at the time that the light changed from green to amber, his evidence at trial was both that it was just after he crossed the crosswalk and just as he entered the crosswalk. It was the evidence of Mr. Vasquez that the light turned to amber when Mr. Julian hit the pedestrian lines.

**56**  The lines in the intersection on King George Boulevard for both northbound and southbound traffic consist of a wide white line which is the stop line for vehicles followed by two narrower lines indicating the pedestrian crosswalk. When Mr. Vasquez and Mr. Julian referred to the position of his car in the intersection, they referenced the narrow white pedestrian crossing lines.

**57**  As set out above, there were two northbound vehicles in the middle and left turning lane at the time Mr. Julian approached and entered the intersection. I find that both of those vehicles had come to a stop and were stopped at the intersection when Mrs. Joyce saw that the light had turned amber.

**58**  The location of Mr. Julian at the time he Mr. Julian observed those vehicles to be stopped is of assistance in determining the state of the traffic light as he approached and entered the intersection. On the inconsistent evidence of Mr. Julian, he refers on two occasions to the adjacent northbound cars brakes and brake lights. At trial he stated in regard to his Discovery evidence of the cars being stopped and then going on the green light, that he saw "brake lights and a brake lights off." He also guesses that the cars had slammed on their brakes when they saw Mrs. Joyce. He both saw the car to his left stopped and did not see it stopped. He was passing it.

**59**  At Discovery, the evidence of Mr. Julian was as follows with regard to his location at the time of the light change which he observed to be from yellow to green:

177 Q All right. Now, you have told me, you've described to me how you were coming down King George Highway in the right-hand lane. Now as you left Tim Hortons and you come down, and say as you're approaching the intersection, what colour is the light, do you recall?

A Before I came, before I got to the crosswalk it was yellow and as soon as I hit the crosswalk it went green and I just --

Q Hang on a second. You said it went yellow then green?

A It was yellow when I came out and I was driving up the street like this and coming to the crosswalk. It was yellow before I got within one car length of that crosswalk and then it went green and I considered going through, but she came. It was green when I went through it. I was looking up and it was green. I started going and the car beside me were going to go.

**60**  There is a further inconsistency in this evidence. At first Mr. Julian says that the light changed to green as soon as he hit the crosswalk, and then in the next answer he says that: "It was yellow before I got within one car length of that crosswalk and then it went green..."

**61**  Further, Mr. Julian testified at trial in cross-examination:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And so I then say, "Let me just understand the light sequence from your understanding. So if everybody -- if the traffic was going on 76th and then the lights all went red for them, the first thing that would happen on King George Highway is there -- there would be an advanced green for this lane and -- and this lane; is that right?" And I believe I was pointing at the left-turn lanes; all right? "I don't remember anything about traffic coming this way or that way, or going that way. All I --" and this is your answer, "All I know is when I came up here it turned green and I proceeded to go through and she just came through. I had the green light when I crossed into that intersection. I slammed on the brakes, I tried to swerve her and miss her, I stopped, she didn't." [as read] Now, you were asked that question and gave that answer. Is that accurate? And -- and -- I don't want to trick you here. The -- the reason I'm asking that question, Mr. Julian, is because you say, "All I know is when I came up here it turned green." [as read] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It was green -- when I -- when I looked up -- after that car made the right-hand turn in front of me, I looked up, I was coming to the crosswalk, it was green. The next thing I know I looked up, it was yellow and I said -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- "Oh, shit," and I had coffees and I grabbed the coffees like this, I looked, she was there, and I swang the steering-wheel to the right, slammed on the brakes -- |  |

**62**  In this response, Mr. Julian does not state his location at the time he looked up and saw the light turn yellow.

**63**  The discovery evidence that the light changed for Mr. Julian, although from yellow to green, "before I got within one car length" of the crosswalk is consistent with the trial evidence that Mr. Julian saw the brake lights of the adjacent cars. It is also consistent with the evidence of Mrs. Joyce that the two northbound cars were already stopped when she turned and observed the light as amber. The sequence of events, I conclude, is that the light turned amber when Mr. Julian was more than a car length away from the crosswalk. The two northbound cars applied their brakes. Mr. Julian saw their brake lights come on and knew that they were stopping. He accelerated and passed them and continued to proceed into the intersection. He did not see Mrs. Joyce as he crossed the crosswalk and entered the intersection. He was aware that a sudden stop would result in spilling the eight cups of coffee on his passenger seat.

**64**  The vehicle to Mr. Julian's left had come to a stop after seeing the yellow light. Mr. Julian made a decision to proceed through the intersection either when he saw the light turn yellow or when he realised it had turned yellow. He increased his speed as he entered the intersection. He then saw Mrs. Joyce and attempted to avoid the collision by slamming on his brakes and swerving to the right. Mr. Julian's vehicle hit the vehicle driven by Mrs. Joyce. The collision at that point was unavoidable.

**65**  It is not possible to conclude on the evidence that Mr. Julian was into or across the crosswalk and into the intersection when the light turned yellow. If he had been, he could not have seen that the two northbound cars were stopped or observed the brake lights on those vehicles. Further, if he was in the intersection at the time the light changed to amber, he would have been past the point of impact before the Joyce vehicle arrived at that point from a further distance at a slower speed. He was, I conclude, further back on King George Boulevard when the light turned amber. The light was amber when he entered the intersection.

**66**  I turn now to the colour of the light for Mrs. Joyce when she made her left turn. The evidence of Mrs. Joyce is that she had pulled into the intersection awaiting the green light to turn amber. She was at a full stop with her foot on the brake. Her vehicle was situated "out a bit from the crosswalk." The tail end of her car might have been in the crosswalk. She did not see the light turn amber as she was checking traffic to her right which was proceeding eastbound on 76th Avenue.

**67**  When Mrs. Joyce looked back at the light and saw that it had turned amber, she proceeded from a full stop to make her left turn from King George Boulevard to 76th Avenue. This evidence is consistent with the testimony of Mr. Azad who was stopped behind her. He said: "... the car in front of me... She pulled a little farther forward and making a safe left. By that time the light was yellow." Later he agreed that she turned on the yellow light.

**68**  The evidence of Mrs. Joyce is consistent with the evidence of Mr. Julian at the Examination for Discovery. She testified in direct and cross-examination that there was nobody in the curb lane when she went to turn on the amber. When she first saw Mr. Julian he was going fast and faster than 30 km/h, consistent with his evidence that he increased his speed when he saw the yellow light before he was one car length back. Mrs. Joyce was unfamiliar with the term "car lengths", but she did agree that he was about two car lengths away from her at the time she first saw him.

**69**  When it was suggested in cross-examination that Mrs. Joyce did not look in the curb lane when she started her turn, she repeated that there was nobody in the curb lane. When asked if it was true that Mr. Julian hit her because she turned into him without looking, she replied repeatedly and emphatically: "No." She first saw him travelling fast after she commenced her turn at which point he had not yet entered the intersection. She testified that she would say that the light was red for the white truck that hit her, although she did not see a red light.

**70**  On the totality of the evidence, the light had turned amber when Mrs. Joyce commenced her turn.

**71**  The next issues relate to how each vehicle hit the other. In each of the scenarios described by Mr. Julian of the first collision, he states that the Joyce vehicle hit his vehicle. The photographic evidence of the location of the damage to the two vehicles is to the contrary. I find that the front left side of the Julian vehicle struck the passenger side of the vehicle driven by Mrs. Joyce.

**72**  The second collision occurred between the Julian and Azad vehicles. Mr. Julian does not recall the second collision. Mrs. Joyce did not see it. At the time of the second collision, Mr. Azad testified that he was at a full stop with his foot on the brake waiting behind the Joyce vehicle to make a left turn. He had pulled ahead and his car was at a slight angle.

**73**  Mr. Azad testified that the impact between the Julian and Joyce vehicles caused the Julian vehicle to spin and that is when the rear hitch of Mr. Julian's truck collided with the front of Mr. Azad's car. His evidence is consistent with the damage to his vehicle. Although the height of the rear hitch of the Julian vehicle is not known, the fact that the Azad vehicle was damaged only above and not on the bumper corroborates that the hitch hit his car.

**74**  I find that the Julian vehicle spun and struck the Azad vehicle when the Azad vehicle was stopped. Both vehicles then pulled over onto 76th Avenue out of the way of traffic.

**75**  In arriving at these conclusions, I have taken into account the evidence of the witness, Mr. Vasquez. I will explain why I have not accepted his version of both collisions in the accident. That he had strong views of liability for the accident does not necessarily mean that his conclusions are incorrect. However, the evidence of Mr. Vasquez is largely inconsistent with other evidence that I do accept.

**76**  Further, the opportunity of Mr. Vasquez to observe all that he testified to is not accepted. Although he admitted confusion about determining east and west, that was not problematic. However, it was not credible that he observed Mr. Julian approaching the intersection from the south toward his location, and at the same time observed Mrs. Joyce to the northwest. He testified that Mrs. Joyce commenced her left turn automatically when the light turned yellow. He could not have made that observation on the totality of his evidence. He made that assumption.

**77**  With regard to the first collision, Mr. Vasquez' evidence that the front of the Julian vehicle was in the crosswalk when the light changed is inconsistent with the accepted evidence of Mrs. Joyce that Mr. Julian was one car length back from the crosswalk when she first observed him. It is also inconsistent with Mr. Julian's evidence regarding seeing brake lights and the other two cars stopped or stopping.

**78**  Mr. Vasquez' evidence also omitted the fact, established by the testimony of Mr. Julian, that Mr. Julian increased his speed when he saw the yellow light.

**79**  With regard to the second collision, I do not accept Mr. Vasquez' evidence that it occurred 20 seconds after the first collision. Mr. Azad testified and I accept that he had not moved his vehicle from where he was waiting behind Mrs. Joyce when she proceeded and was in the first collision.

**80**  Further, I do not accept Mr. Vasquez' evidence that Mr. Azad speeded from a full stop into the Julian vehicle after it came to rest on 76th Avenue east of the intersection. It is inconsistent with the evidence of Mr. Azad that I do accept which is that the Julian vehicle spun after the first collision and hit the Azad vehicle with its trailer hitch. It is also inconsistent with the physical evidence of the location of the damage to the Azad vehicle. Mr. Vasquez' evidence of an improbable and unlikely event, I conclude, is demonstrably inaccurate (*Hardychuk* at para. 10).

**81**  With the best of intentions, Mr. Vasquez formed the immediate conclusion that Mr. Julian was innocent in both collisions. Many of his recollections are simply inaccurate.

1. **Application of the Law**

**82**  The first question arises from the operation of s. 174 of the *Act*. Did Mr. Julian constitute an immediate hazard prior to Mrs. Joyce commencing her turn? The answer to that question will be determinative of who was the dominant driver prior to the first collision. The time to assess the question of immediate hazard is when the left-turning vehicle commences the turn.

**83**  I accept the evidence of Mrs. Joyce that there was nobody in the curb lane when she commenced her turn. The curb lane is about two car lengths long approaching the intersection. At that time she saw the two cars stopped in the approaching left turn and through lanes and concluded that "it's safe enough to turn the corner." Her firm denial that she turned into Mr. Julian without looking is evidence that Mr. Julian was not there to be seen. There was "nobody in the curb lane"--Mrs. Joyce knew that there was not a vehicle there. I accept her evidence. Mrs. Joyce has discharged the burden on her to prove that she started to turn left when it was safe to do so.

**84**  Mr. Julian was not so close as to constitute an immediate hazard. Mrs. Joyce was therefore the dominant driver. She had the right of way. Mr. Julian had an obligation to yield pursuant to s. 174 of the *Ac*t.

**85**  Mr. Julian also had an obligation under s. 128 of the *Act* to cause his vehicle to stop at the yellow light unless the stop could not be made in safety. Could he have stopped safely?

**86**  On the totality of the evidence, I find that Mr. Julian was at least one car length back from the crosswalk when the light changed to amber. I make this finding based on his evidence that he saw the brake lights of the vehicles in the two adjacent lanes, and his reference to their braking. At Discovery, he testified that the light change, although from amber to green, occurred before he was one car length of the crosswalk. In order to see the brake lights illuminated, he had to have been somewhat further back than one car length due to the reaction time of the driver of the adjacent vehicle.

**87**  The City of Surrey Mapping Online System, accurate at the date of the collision, indicates that approximately two car lengths back from the crosswalk on King George Boulevard there are four lanes. After the right turn lane separates, the traffic at the intersection is reduced to three lanes being a left turn lane and two through lanes. The curb lane is approximately two car lengths long.

**88**  Without expert evidence of speeds and distances, it is not possible to determine with certainty the location of Mr. Julian when the light turned to amber. However, I conclude based on his evidence of observing brake lights, and the evidence of Mrs. Joyce that Mr. Julian was one car length back some short time after the light change when she first saw him after she had commenced her turn from a full stop and proceeded part way through the intersection that Mr. Julian was further back than one car length, but not more than two car lengths, as he was in the curb lane when seen by Mrs. Joyce and Mr. Vasquez, when the light changed to amber.

**89**  The evidence is not that her line of sight was blocked by the stopped cars. The evidence is that there was nobody in the curb lane, which is about two car lengths long, when she commenced her turn.

**90**  The two vehicles in the adjacent lanes had come to a stop. Mr. Julian saw them stopped and passed them. Mr. Julian had an opportunity to stop. If he had been travelling at 30 km/h, he could have easily stopped from more than one car length back when he saw the yellow light. Instead, when the light changed, he accelerated. He was aware that if he stopped the coffee on the passenger seat may have spilled. His reaction when he saw the light change was to grab the coffee. By not bringing his vehicle to a stop, he was in breach of his obligation under s. 128 of the *Act*.

**91**  When a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself (*Pacheco* at para. 18).

**92**  Has Mr. Julian established that Mrs. Joyce could have avoided the collision? Although it is not possible to determine his exact speed as he entered the intersection, he increased his speed when he saw the amber light. Mrs. Joyce saw Mr. Julian as he was one car length back from the crosswalk or about two car lengths from her as she was turning and said that he was travelling fast. She testified that: "When I first seen him he was just about ready to hit me." When asked if there was any evasive action that she took or was able to take to avoid a collision, she responded "no" -- "Because he come running through the light." Mr. Julian did not see Mrs. Joyce until he was in the intersection. He then applied his brakes and swerved to the right. However, his vehicle hit the vehicle driven by Mrs. Joyce. The location of the damage on both vehicles establishes that the front left side of the Julian vehicle hit the passenger side of the Joyce vehicle.

**93**  Mr. Julian, as the servient driver, has not established that Mrs. Joyce had a sufficient opportunity to avoid the collision. I accept the evidence of Mrs. Joyce that she could not take any evasive action. I do not find that Mrs. Joyce was negligent in these circumstances.

**94**  Mr. Julian, however, was negligent in his breaches of s. 128 and s. 174 of the *Act* and by breaching his common law duties to keep a proper look-out. He did not see the Joyce vehicle when it was there to be seen. Mrs. Joyce was entitled to assume that Mr. Julian would be aware of her vehicle in the intersection, see the other northbound vehicles stopped, and come to a stop as he was obligated to do.

**95**  These circumstances are strikingly similar to those in *Henry* where Justice Ballance found at paras. 72-73:

... In my view, Ms. Bennett was entitled to proceed on the assumption that oncoming traffic, including Mr. Henry, would act in accordance with the law and come to a stop on the late amber, absent any reasonable indication to the contrary and provided she comported herself with reasonable care. Here, there was no contrary indication from Ms. Bennett's standpoint. Indeed, she could see that the SUV across from her had complied with the rules and she was aware as well that the flow of straight through traffic had ceased some seconds earlier. She had no reasonable indication that oncoming traffic in the form of Mr. Henry would proceed through the intersection in clear violation of the rules of the road. Moreover, I find that in all the circumstances she conducted herself prudently and with reasonable care in negotiating her left turn...

... There is no cogent evidence to remotely suggest that she could have avoided Mr. Henry by the exercise of reasonable care. To formulate it in the terms of s. 174, Ms. Bennett posed an immediate hazard to Mr. Henry, which he should have appreciated, and it is he who ought to have yielded the right-of-way.

**96**  I reach the same conclusion in this case. Mrs. Joyce was entitled to proceed in her left turn on the assumption the Mr. Julian would act in accordance with the law and come to a stop on the late amber. There is nothing that she could have done to avoid the first collision.

**97**  With regard to the second collision, on the finding of fact that the Julian vehicle spun as a result of the first collision and its trailer hitch hit the Azad vehicle which was stationery, no ***negligence*** on the part of Mr. Azad has been demonstrated. The spinning of the Julian vehicle was a reaction to a collision caused by Mr. Julian.

**98**  In the result, I find that the ***negligence*** of Mr. Julian was the sole cause of both the first collision and the second collision. Liability for both collisions is assigned 100% to Mr. Julian. It is therefore not necessary to deal with the issue of damages.

**99**  The claims of Mr. Julian against both defendants are dismissed.

**100**  Unless there are matters of which I am not aware the defendants are entitled to their costs. If any party seeks a different cost result they should make written submissions within 30 days of the date of these Reasons. Any responsive submissions should be filed within 30 days thereafter.

J.E. WATCHUK J.

**End of Document**

[***Kirby v. Amalgamated Income Limited Partnership, [2009] B.C.J. No. 1555***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-621V-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R.W. Metzger J.

Heard: May 28-31, June 1, 4-8, 12-15, 26-29, July 3-6, July

9-12, 2007; and continuation to August 5, 2008.

Judgment: July 30, 2009.

Docket: 00-5447

Registry: Victoria

**[2009] B.C.J. No. 1555** | [*2009 BCSC 1044*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKJ1-F22N-X08G-00000-00&context=) | [*75 C.C.E.L. (3d) 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKJ1-F22N-X08G-00000-00&context=) | [*[2009] CLLC para. 210-040*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKJ1-F22N-X08G-00000-00&context=) | [*2009 CarswellBC 2010*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKJ1-F22N-X08G-00000-00&context=) | [*180 A.C.W.S. (3d) 278*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKJ1-F22N-X08G-00000-00&context=)

Between Ralph Kirby, Plaintiff, and Amalgamated Income Limited Partnership and 479660 B.C. Ltd., Defendants, and Christopher William James Boatman, Marjorie Jean Parker, and 479660 B.C. Ltd., Third Parties

(481 paras.)

**Case Summary**

**Employment law — Discipline and termination of employment — Termination by employer, with cause — Dishonesty and untrustworthiness — Incompetence — Action by plaintiff for damages for wrongful dismissal and unpaid wages and director's fees allowed in part, counterclaim by defendants for disgorgement of profits and restitution for misappropriation of funds and financial impropriety allowed in part and third party claim by plaintiff for indemnity dismissed — Although plaintiff's breaches of fiduciary duty, financial impropriety and incompetence alone insufficient to justify dismissal, cumulatively amounted to just cause — Defendants entitled to profits earned by plaintiff in breach of fiduciary duty, repayment of amounts borrowed by plaintiff without consent and reimbursement for various costs incurred through errors, omissions or incompetence of plaintiff.**

**Employment law — Wrongful dismissal — Action by plaintiff for damages for wrongful dismissal and unpaid wages and director's fees allowed in part, counterclaim by defendants for disgorgement of profits and restitution for misappropriation of funds and financial impropriety allowed in part and third party claim by plaintiff for indemnity dismissed — Although plaintiff's breaches of fiduciary duty, financial impropriety and incompetence alone insufficient to justify dismissal, cumulatively amounted to just cause — Defendants entitled to profits earned by plaintiff in breach of fiduciary duty, repayment of amounts borrowed by plaintiff without consent and reimbursement for various costs incurred through errors, omissions or incompetence of plaintiff.**

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| --- |
| Action by plaintiff for damages for wrongful dismissal and unpaid wages and director's fees, counterclaim by defendants for disgorgement of profits and restitution for misappropriation of funds and financial impropriety and third party claim by plaintiff for indemnity. The plaintiff was a stock broker. Sometime in the 1990s, he came up with a business concept that involved acquiring and holding units of mutual fund limited partnerships under the umbrella of a single limited partnership listed on a stock exchange. He assembled a board of directors and created a general partner, 479660 B.C. Ltd. ("479660"), and a limited partnership, Amalgamated Income Limited Partnership ("Amalgamated") to implement his business concept. 479660 retained the plaintiff to perform all of its duties, appointed the plaintiff President and Chief Operating Officer and the plaintiff began working for Amalgamated. The plaintiff had no job description, but was responsible for selecting target mutual fund limited partnerships and preparing takeover bid information, keeping records of transactions and preparing financial statements, filing reports and dealing with all securities commissions, maintaining accounting and business records, fulfilling tax reporting requirements and other duties. In January 1998, the plaintiff faxed a proposal to the board respecting his remuneration and other terms of employment, which was accepted at a board meeting, but not reduced to a formal contract in writing. In January 2000, the board discussed the issue of compensation owing to the plaintiff for past years and also proposed a one-year fixed-term contract, which was later accepted by the plaintiff. The plaintiff operated the business single handedly from 1995 until his termination in 2000, with little oversight from the board, although they noted the plaintiff's management deficiencies and at one point asked him to hire an administrative assistant. Throughout his employment with Amalgamated, the plaintiff continued to trade in securities for his own benefit using information he obtained in the course of his employment. In March 2000, the plaintiff received a statement of allegations from the Ontario Securities Commission alleging that both 479660 and Amalgamated had breached a number of formal filing and other requirements under the Securities Act. As a result of the allegations, there had been a trading halt and both 479660 and Amalgamated faced a formal hearing. The board became aware of the allegations around the time of the hearing and soon after sent the plaintiff a fax indicating that they would either accept his resignation or would terminate his employment for cause.  HELD: Action allowed in part, counterclaim allowed in part and third party claim dismissed.  The plaintiff was an employee initially employed under an unwritten fixed-term contract, which later became one of indefinite duration, and later a written fixed-term contract. The parties agreed to the essential terms of the contract and acted as though there was a contract in place. The plaintiff was not constructively dismissed as all changes made to the terms of his compensation were by mutual agreement, he was not coerced into accepting lower compensation for past services and the defendants did not fail to pay him compensation that had accrued and was owing. The plaintiff was entitled to $82,996 and $40,152 for outstanding compensation and $1,500 for outstanding fees plus interest, which was to be set off against any amount owing to the defendant. Although the plaintiff's breaches of fiduciary duty, financial impropriety and incompetence in keeping records and filing reports, were alone not sufficient to justify summary dismissal, cumulatively they amounted to just cause to summarily dismiss the plaintiff. The defendants were entitled to $97,360 plus interest for profits earned by the plaintiff in breach of his fiduciary duty, $7,916 plus interest for amounts borrowed by the plaintiff without consent and $77,646 for various costs incurred through the errors, omissions or incompetence of the plaintiff. The plaintiff was not entitled to indemnification from the third parties as one third party could not be faulted for the plaintiff's failure to meet his management responsibilities and although the other third party bore some responsibility for failing to adequately supervise the plaintiff with respect to collections of distributions receivable, no amount was awarded to the defendant in that regard. |

**Statutes, Regulations and Rules Cited:**

Business Corporations Act, [*SBC 2002, CHAPTER 57, s. 142*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-606Y-00000-00&context=)(1)(b)

Court Order Interest Act, *RSBC 1996, CHAPTER 79*

Employment Standards Act, [*RSBC 1996, CHAPTER 113, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5WC4-20K1-FCK4-G43T-00000-00&context=), s. 21, s. 65(2)

Securities Act, S.B.C. 1985, c. 83, s. 68(1), s. 86, s. 155(1)(d)

Securities Act, [*RSBC 1996, CHAPTER 418, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5YJS-1SN1-JC0G-60B8-00000-00&context=), s. 86(1), s. 136, s. 136.2, s. 155(1)(b)

Securities Act, [*R.S.O. 1990, c. S.5, s. 93.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5JVX-SYX1-F30T-B226-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: D.D. McKnight.

Counsel for the Defendants and Third Parties: P.C.M. Freeman, Q.C. and H.H.W. Urdahl.

**Reasons for Judgment**

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| --- |
| **R.W. METZGER J.** |

**INTRODUCTION**

**1**  The plaintiff, Ralph Kirby, seeks damages for wrongful dismissal. The defendants are Amalgamated Income Limited Partnership ("Amalgamated") and 479660 B.C. Ltd ("479660"). Mr. Kirby claims wages and benefits for a 24-month notice period, aggravated or punitive damages, director's fees, unpaid wages, special costs, and interest.

**2**  The defendants dispute the existence of a contract and argue that Mr. Kirby was an independent contractor, not an employee. However, if Mr. Kirby was an employee, the defendants assert that he resigned, or that they dismissed him for just cause. The reasons justifying Mr. Kirby's termination include breach of fiduciary duty, misappropriation of funds or financial impropriety, disobedience and incompetence, among other allegations.

**3**  The defendants also counterclaim for disgorgement of profits that Mr. Kirby allegedly earned in breach of his fiduciary duty, damages for incompetent performance of his employment contract and restitution for Mr. Kirby's alleged financial impropriety and misappropriation of funds.

**4**  In response to the counterclaim and as a general defence, Mr. Kirby claims, in third party proceedings, that Marjorie Parker, Christopher Boatman (both members of 479660's board of directors), and the defendants failed to supervise his work activities while he was associated with Amalgamated. He asserts that Ms. Parker and Mr. Boatmen should share liability if any amounts are owing pursuant to the defendants' counterclaim.

**5**  The defendants and third parties seek an award of costs calculated pursuant to Appendix B, Scale C and punitive damages for the breach of fiduciary duty.

**BACKGROUND**

***1.*** ***Relationship of the parties***

**6**  Mr. Kirby graduated in 1975 with a degree in business and obtained the designation of Fellow of the Canadian Securities Institute ("FCSI") in 1978. He has worked primarily as a stockbroker since 1975.

**7**  In the early to mid-1990s, Mr. Kirby submits he came up with a business concept that involved acquiring and holding units of mutual fund limited partnerships under the umbrella of a single limited partnership listed on a stock exchange.

**8**  Mr. Kirby obtained a document called the "Offer by Master Mutual Limited Partnership" ("Master Mutual"), which was a previous attempt by others to do much the same thing. Mr. Kirby instructed his solicitors to use the Master Mutual document as a working draft and directed them to sections of the document that required reworking. He published the new document as the Model ("Model"), which would form the basis of his investment scheme.

**9**  The Model's structure is a limited partnership in which the limited partners contract a general partner to operate and administer the business of each limited partner.

**10**  In order to implement his business concept, Mr. Kirby assembled a board of directors to create the "general partner." The general partner, 479660, was incorporated pursuant to British Columbia legislation on September 6, 1994. The initial board of directors included Mr. Boatman, Ms. Parker, Bud Foran, Bruce Mitchell, and Barry Kirkham, Q.C. The initial directors contributed just over $150,000 in total start-up capital, which was repaid.

**11**  Amalgamated was created as the "limited partnership" around the same time as the general partner's incorporation. Amalgamated and 479660, as its general partner, entered into a limited partnership agreement (the "Agreement") on November 18, 1994. The Agreement describes the business of the partnership as one that deals in securities.

**12**  Under this Model, 479660 retained Mr. Kirby to perform all its duties. Clause 2.10 of the Agreement delegates complete responsibility for the business operations of a limited partner to the general partner. Clause 7 of the Agreement outlines the powers, duties and obligations of the general partner. It reads, in part, as follows:

7.01 Power, Duties and Obligations

The General Partner has:

...

1. Unlimited liability for the debts, liabilities and obligations of the Partnership;
2. Subject to the terms of this Agreement and to any applicable limitations set forth in the Act and similar legislation in Canada, the full and exclusive right, power and authority to manage, control, administer and operate the business and affairs and to make decisions regarding the undertaking and business of the Partnership; and
3. The full and exclusive right, power and authority to do any act, take any proceeding, make any decision and execute and deliver any instrument, deed, agreement, or document necessary for or incidental to carrying out the business of the Partnership for and on behalf of and in the name of the Partnership.

An action taken by the General Partner on behalf of the Partnership is deemed to be the act of the Partnership and binds the Partnership.

**13**  Mr. Kirby made the first offer to acquire units through the exchange of various limited partnerships on behalf of Amalgamated in April 1995.

**14**  Mr. Kirby continued working as a stockbroker for Marleau Lemire Securities Inc. ("Marleau") from July 10, 1995 to May 15, 1998, but ran Amalgamated at the same time through an arrangement with Marleau.

**15**  As the business began to grow, Mr. Kirby found that he could no longer run Amalgamated "off the corner of his desk." In January 1998, he approached 479660's board of directors and suggested that he quit Marleau and work for the defendants on a full-time basis.

**16**  The board appointed Mr. Kirby to the position of President and Chief Operating Officer of 479660 and Mr. Kirby began working on a full-time basis for Amalgamated on January 15, 1998. He decided to pay himself $7,500 per month.

**17**  In March 1998, Mr. Kirby was appointed to 479660's board of directors.

**18**  Although he did not have a job description, the evidence is that Mr. Kirby was responsible for the following:

1. Selecting the target mutual fund limited partnerships ("LPs") for approval by the board;
2. Preparing all takeover bid information, including creating the bid circulars for each offer;
3. Preparing the models used to determine the relative values of each target LP, as described in the circular for each offer;
4. Communicating between Amalgamated and tenderers to the offers, transfer agents and LP issuers;
5. Signing treasury orders for the issuance of Amalgamated units to tenderers to the offers;
6. Keeping records of transactions associated with the offers or acquisitions of LPs for securities or cash;
7. Preparing Amalgamated's financial statements;
8. The filing of reports with all securities commissions, including the Ontario Securities Commission on behalf of Amalgamated. This included filing insider trading reports and early warning reports on LPs acquired, as well as disclosure information on Amalgamated;
9. Dealing with all securities commissions including the OSC, the Montreal Exchange and the Toronto Stock Exchange;
10. Filing press releases issued on behalf of Amalgamated;
11. Fulfilling Amalgamated's tax reporting requirements;
12. Establishing an accounting system and maintaining accounting and business records for Amalgamated;
13. Employing and supervising staff, consultants, lawyers or others hired to manage the affairs of Amalgamated.

**19**  In fulfilling the duties and obligations noted above, I find that Mr. Kirby was also charged with conducting these affairs as an agent of the general partner (479660), according to Clauses 2.06(v), 2.06(vii) and 7.09(a) of the Agreement.

**20**  Mr. Kirby's responsibilities remained the same from the inception of Amalgamated to his discharge in May 2000, irrespective of the official position he held while performing his duties.

**21**  The evidence establishes that Mr. Kirby operated the business single handedly from 1995 until his termination. Amalgamated was very successful under his stewardship.

**22**  In March 2000, Mr. Kirby received a draft statement of allegations from the Ontario Securities Commission ("OSC"). The OSC alleged that both defendant companies had breached a number of formal filing and other requirements under the *Securities Act,* [*R.S.O. 1990, c.S.5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G11-JN6B-S0DF-00000-00&context=) [Ontario *Securities Act*]. As a result of the allegations, there had been a trading halt and both defendants faced a formal hearing scheduled for May 11, 2000.

**23**  Mr. Kirby hired a lawyer to help him negotiate a settlement agreement with the OSC, however, this agreement was rejected. In the OSC's view, the proposed "sanctions [were] by no means proportionate to the seriousness of the egregious offences which are involved in this case."

**24**  The board submits it became aware of the OSC's allegations around the time of the hearing. In a letter dated May 11, 2000, Mr. Kirkham explains the OSC matter to the other directors, noting that Mr. Kirby was "personally at fault for all of the defaults which led to the charges, and he never brought any of us into the picture at our recent directors' meeting." Mr. Kirkham suggests in that letter that the board must consider whether Mr. Kirby should be "immediately dismissed" for cause.

**25**  On May 17, 2000, the board sent Mr. Kirby a fax accepting his resignation or, alternatively, terminating his employment for cause. Although the directors did not expressly articulate the cause that gave rise to Mr. Kirby's summary dismissal, they specifically stated that his "neglect of duty" for failing to disclose what was occurring with the OSC had prompted them to consider seeking a claim against him.

***2.*** ***The Business of Amalgamated***

**26**  In the 1990s, companies selling mutual funds were very successful. The companies charged investors about 1% or 2% to manage their individual portfolios. The commissioned salespeople were immediately owed 7% to 9% on the value of the portfolios they sold.

**27**  The mutual fund companies lacked sufficient immediate income to pay the commissioned salespeople, but had an excess of tax-deductible expenses.

**28**  The financial industry responded by creating a new form of security: the mutual fund limited partnership. Limited Partnerships (LPs were marketed as security instruments that could increase the liquidity needed to pay owed commissions.

**29**  Each year various mutual fund companies offered LPs for purchase. These would have distinct names. An investor would become a limited partner by paying the company a certain amount. In return, the investor would receive a certificate indicating that he or she had an equivalent share in the LP.

**30**  Acquiring a limited partner provided the mutual fund marketer with an immediate and direct infusion of cash, which could be used to pay outstanding commissions.

**31**  In return, the new limited partner would obtain access to an appropriate share of the mutual fund company's "excess" tax-deductible expenses, which the new partner could use to decrease its income and, therefore, its payable income tax. In addition, the new limited partner would become entitled to a proportionate share of the management fee that the LP charged to mutual fund investors, which was paid out as dividends. Mutual fund companies determined the dividend income at the time of the LP offering. The time period during which a limited partner was entitled to a share of the management fees would range in length from "in perpetuity" to a set number of years.

**32**  In the event that a mutual fund investor requested early redemption of his or her original investment, he or she had to pay a penalty. Unless the time period during which the investor was entitled to receive a share of the income had expired, this "penalty" money also went to the limited partners.

**33**  One shortcoming of LPs was that they had limited liquidity because they were not traded on recognized stock exchanges. A limited partner wanting to dispose of the investment had to rely on broker-to-broker or investor-to-investor contacts to do so. However, this "over the counter" trading was not an efficient method of exchange for investors. Investors generally preferred trading on recognized exchanges since exchanges were more likely to establish a fair trading price for their securities.

**34**  Again, in response to this concern, the financial industry began to consider creating an entity that could acquire LP certificates from investors by purchase or exchange, collect dividends from the LP issuers, and distribute those dividends to the new entity. The underlying purpose of the new entity was for it to obtain a listing on a stock exchange, thereby eliminating the inefficiencies of trading LPs over the counter. It would also result in fewer management and administrative fees.

**35**  Amalgamated was one of these new entities: a limited partnership and reporting issuer engaged in the business of acquiring, holding and trading LPs. Amalgamated was initially listed and traded on the Montreal Stock Exchange (from October 2, 1995 to December 6, 1999) and later on the Toronto Stock Exchange.

**36**  Amalgamated, in reality Mr. Kirby, would evaluate a selection of existing LPs. Mr. Kirby used his knowledge of the stock market and his Model to determine what he considered to be the "real value" of the LPs. He calculated the "real value" as the total future cash income from the certificate discounted to a present value.

**37**  Approximately once a year, Amalgamated would make a formal offer to exchange Amalgamated units for units of the LPs in compliance with the prevailing securities legislation. Amalgamated would thereby obtain an income stream.

**38**  For LP unit holders, the exchanging of their existing units for Amalgamated units enabled them to receive publicly traded shares and entitled them to a share of income from Amalgamated's entire portfolio, including income streams from all of its limited partnerships.

**39**  All of the traded certificates, which indicated the number of units held by the owner, became registered in the name of Amalgamated Income Limited Partnership.

**40**  When the holder of the LP exchanged his LP shares for Amalgamated units, the income stream from the LP went into what was called the "Original Pool." At the same time, Amalgamated used borrowed money to buy units "over the counter," which could often be purchased for cash at less than the "real value" of the units as Amalgamated, actually Mr. Kirby, calculated them. For example, Amalgamated would use its borrowed money at 7% to buy units that would yield a 20% income. The net income streams from these units were then directed into the "Performance Pool."

**41**  To make the exchange offers more attractive, Amalgamated then took 80% of its profit from the Performance Pool and put it into the Original Pool. Thus, the holder of the Amalgamated units would receive a proportionate share of the larger Original Pool income streams.

**42**  The remaining 20% of profit in the Performance Pool then went to the general partner, 479660, as a management fee. The general partner received additional payments amounting to less than 0.001% of the Original Pool.

**43**  Amalgamated did not retain any income in the process.

**44**  The risk to the investor exchanging units with Amalgamated's units was that Amalgamated might make poor investments yielding less than the cost of borrowing for the purchase of over-the-counter units.

**45**  The directors of Amalgamated promised the OSC that Amalgamated would not borrow more than 33% of the total value of the Amalgamated portfolio. That value was determined by calculating the potential future income of Amalgamated.

**46**  The redemption fees declined over time and most of the income streams had a time limited payout period. The federal government discontinued the tax write-off allowance for any future mutual fund limited partnerships in 1997.

***3.*** ***The process for exchanging units***

**47**  After deciding to accept Amalgamated's offer, there was a regulated process for executing and confirming the LP holder's transfer. The LP holder would tender a letter of acceptance along with a certificate or Schedule B (if either was issued by the limited partnership) to a designated trust company known as the Depository.

**48**  During 1998 and 1999, the Depository registered receipt of these documents and then forwarded them to Amalgamated to ensure they were complete. In turn, Amalgamated would forward those documents to the original issuer of the LPs so that the issuer would know that any income was to go to Amalgamated instead of the original LP holder. The Depository step was eliminated in 2000.

**49**  The LP issuer would then confirm that the transfer was complete. At that point, Amalgamated, in reality Mr. Kirby, would issue a treasury order to a designated transfer agent, who would send the appropriate number of Amalgamated units to the former LP holder. Amalgamated was not supposed to issue a treasury order before the above steps were completed, otherwise Amalgamated would not have confirmation of payment.

**ISSUES**

**50**  The issues are:

1. Was there a binding employment contract between Mr. Kirby and Amalgamated?
2. Was Mr. Kirby an employee or an independent contractor?
3. Was Mr. Kirby constructively dismissed?
4. Did Mr. Kirby resign?
5. Was Mr. Kirby wrongfully dismissed?
6. Is Mr. Kirby entitled to punitive damages for breach of his employment contract?
7. What money is owed Mr. Kirby?
8. Is Mr. Kirby liable for damages for breach of his employment contract?
9. Did the defendants fail to mitigate losses?
10. Are Mr. Boatman and Ms. Parker liable as third parties?
11. Is Mr. Kirby liable for misappropriation of funds?
12. Is Mr. Kirby liable for breach of fiduciary duty?

**ANALYSIS**

***1.*** ***Was there was a binding contract between Mr. Kirby and Amalgamated?***

**51**  The defendants submit that there was no binding contract with Mr. Kirby. They say that although Mr. Kirby proposed a compensation package and presented it to the board, he did not reduce this proposal to writing, as the board requested. The defendants submit that they were waiting for this proposal for final review, thus there was no contract between the parties, only an agreement to agree. In the alternative, they argue that if there was a contract, it was void for uncertainty.

**52**  Mr. Kirby submits that the board accepted his initial compensation proposal without modification. That is, there was an offer, acceptance and sufficient certainty of terms to constitute a binding contract.

**53**  An agreement between two parties to enter into an agreement by which "some critical part of the contract matter is left to be determined is no contract at all": *May & Butcher Ltd. v. The King*, [1929] All E.R. Rep. 679, [1934] 2 K.B. 17n (H.L.), p. 20.

**54**  However, agreements to agree must be "differentiated from others where there is a possibility that the parties may have reached a final agreement, even though some additional formality is envisaged": *Leong & Associates Actuaries & Consultants Inc. v. Watt*, [*2003 BCSC 1885*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60Y6-00000-00&context=), [*42 B.L.R. (3d) 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60Y6-00000-00&context=), at para. 84 [*Leong*], citing G.H.L. Fridman's *The Law of Contract*, 4th ed. (Scarborough, Ontario: Carswell, 1999), p. 67. That is, an agreement is "not unenforceable simply because it is oral and further documents are contemplated": *Leong* at para. 85.

**55**  Lord Tomlin said the following in *Hillas & Co., Ltd. v. Arcos, Ltd.* (1932), 147 L.T. 503, 43 L1. L. Rep. 359 (H.L.), at p. 364:

... the problem for a court of construction must always be so to balance matters that, without violation of essential principles, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.

This passage was affirmed by the Supreme Court of Canada in *Dawson v. Helicopter Exploration Co.*, [*[1955] S.C.R. 868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0YY-00000-00&context=), [*[1955] 5 D.L.R. 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0YY-00000-00&context=), and has been consistently approved by our Court of Appeal: *Valmet Paper Machinery Inc. v. Hapag-Lloyd AG*, [*2004 BCCA 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S336-00000-00&context=), [*204 B.C.A.C. 254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S336-00000-00&context=), at para. 31; *Native Citizens Fisheries Ltd. v. Walkus*, [*[1991] B.C.J. No. 3980*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M21K-00000-00&context=) (C.A.), at para. 46; *304498 British Columbia Ltd. v. Garibaldi Whistler Development Co.* [*(1989), 39 B.C.L.R. (2d) 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0CS-00000-00&context=), [*62 D.L.R. (4th) 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0CS-00000-00&context=) (C.A.), p. 335.

**56**  I reject Amalgamated's argument that acceptance of the proposal was subject to a formal written agreement.

**57**  In early January 1998, Mr. Kirby faxed the following proposal to the board respecting his remuneration and other terms of employment:

I have been offered a position with a 6-month guarantee of $120,000 with the expectation that I would earn $200,000 per annum on average (or higher). I would prefer to work full time for Al [Amalgamated] and see this entity, which we started from zero, truly achieve its potential. There are two methods to grow Al; I would suggest that what we need is an incentive system which encourages me to perform and that benefits Al. I would suggest the following components:

1. I be paid 1.5% of revenue for general management of Al (doing tax reports, regulatory reports, contact with holders and brokers and general management) (1998 estimate = $6,100,000\*0.015 = $91,500). Currently Marleau is paid 1% for my part time attention.
2. We can grow by purchases through the performance pool. I would suggest I be paid transaction fees of regular Marleau rates less actual costs (I would suggest we use my expertise and trade through a discount house). I would be compensated for my experience and trading efforts by earning the difference between what it would have cost to continue to trade through Marleau and what it actually costs. The incentive is for me to trade effectively. (Last year commissions totaled $15,946).
3. We can grow through new offers for the Original Pool. Currently the General Partner earns a Structuring Fee of 0.3% of the Relative Value tendered. If this fee were increased to 0.5% with 0.3% to be paid to me and 0.2% to the General Partner, the incentive would be for me to structure a successful offer and work toward as large a tender as possible. The Structuring fee for 1997 was $23,841. The structuring fee in the Master Mutual proposal by Scotia was 1%.
4. In order to grow through purchases for cash we will have to raise funds through sale of units or debt. In discussions with Brenark, they were requesting a fee of 6% for an issue of units. If we raise funds through any securities dealer there will be considerable fees. If through my contacts I am able to raise funds, be it debt or units I would suggest that l would also be paid a financing fee, albeit at a much lower rate (such as 2%) than if done through a dealer.

...

Please advise your comments. We will need to have a directors meeting to discuss and if thought appropriate, approve this proposal.

**58**  The minutes of the board's meeting on January 15, 1998, read, in part, as follows:

[Mr. Kirby] agreed that he would be willing to sign a contract for one year. If the contract were not renewed, there would be no severance package. Using the terms set out in the proposal, with [Mr. Kirkham's] assistance, [Mr. Kirby] will draw up a contract which *Lorne* [Webster] will sign and [Mr. Kirkham] co-sign. All agreed.

The board instructed [Mr. Kirby] to insure that procedures were in place that if necessary someone could carry on in a non expansive role if he was not available.

**59**  Nothing in the meeting minutes suggested that the board objected to any of the terms in Mr. Kirby's proposal, or that the board wished to see a final contract before giving final approval. On the contrary, the minutes showed that the board was satisfied with the proposal and resolved to be bound by it.

**60**  I find that the reference to Mr. Kirby "draw[ing] up a contract" in the board meeting minutes was a matter of "additional formality" and "in furtherance of a commitment already made," and not an agreement to agree, *per Leong*.

**61**  Further, the parties involved acted as though there was a contract in place between Mr. Kirby and Amalgamated. In fact, 28 months passed between the board meeting, held on January 15, 1998, and Mr. Kirby's dismissal.

**62**  I also reject the submission that the contract was void for uncertainty. The defendants base their argument on the assertion that several formulations of the incentive provisions had been advanced over the years by Mr. Kirby and his representative.

**63**  One of the issues in *Leong* was the purported uncertainty of the terms of the contract. At paras. 88-89, Sigurdson J. notes as follows:

88 The question, if something is not agreed, is whether it is vital or fundamental to the agreement. Mr. Justice Esson in *Boult Enterprises Ltd. v. Bissett*, [*[1985] B.C.J. No. 1872*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F5T5-M1W9-00000-00&context=), at para. 13 stated:

It cannot be that any unresolved matter, however minor, in a contract of this kind would lead to the conclusion that the parties agreed on nothing. In this case, for instance, the parties might have gone further and stipulated the size and design of the house to be built and stipulated a price, or a method for determining the price, to be paid to Boult for building that house. But almost certainly something would have been left to future agreement. It might be the colour and quality of paint or carpets, or the type of windows. Would failure to reach agreement on those details result in there being no contract? I think not. It is a question whether the unresolved matter was vital to the arrangement.

89 Was there an essential provision that was not agreed to?

**64**  The fact that the absence of a written contract leaves room for disagreement now does not mean that there was lack of agreement of any essential terms when the contract was first created. Such disagreement is a factor to consider, but is not determinative. What is critical is whether all the essential terms of the contract were in place when the contract was agreed to by the parties. I find that the essential terms were in place, namely, the terms in Mr. Kirby's proposal that were discussed at the meeting on January 15, 1998: a fixed-term contract for one year with no provision for severance pay.

**65**  I am satisfied that Mr. Kirby agreed to these terms, as he was present at the board meeting at the relevant time.

**66**  I find that Mr. Kirby's proposal formed a binding contract on January 15, 1998.

**67**  For clarity, the reference in the board meeting minutes "instruct[ing Mr. Kirby] to insure that procedures were in place that if necessary someone could carry on in a non expansive role if he was not available" was not a term of the contract. This instruction came after the board accepted the terms of the contract and represents the employer's first request of its new employee, Mr. Kirby.

***2.*** ***Was Mr. Kirby an employee or an independent contractor?***

**68**  Although Mr. Kirby submits that this issue is not relevant, as it was not pleaded, I am satisfied that the circumstances of this case are such that it is necessary to consider.

**69**  The defendants say that the extent to which Mr. Kirby was in charge of Amalgamated's operations precludes him from being considered an employee. As Mr. Kirby was not a typical employee in a typical company hierarchy, the board says he was not an employee, but was, instead, an independent contractor.

**70**  The onus is on Mr. Kirby to establish, on balance, that he was an employee: *Tajarobi v. Corporate Couriers Ltd.*, [*2006 BCSC 454*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2400-00000-00&context=), [*48 C.C.E.L. (3d) 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2400-00000-00&context=), at para. 63.

**71**  The method of determining whether a person is an independent contractor or employee is guided by the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [*2001 SCC 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M491-00000-00&context=), [*[2001] 2 S.C.R. 983*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M491-00000-00&context=). Mr. Justice Major summarizes proper contextual approach at paras. 47 and 48:

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A., [*[1986] 3 F.C. 553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RG1-JG02-S0W8-00000-00&context=), that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, [1968] 3 All E.R. 732, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

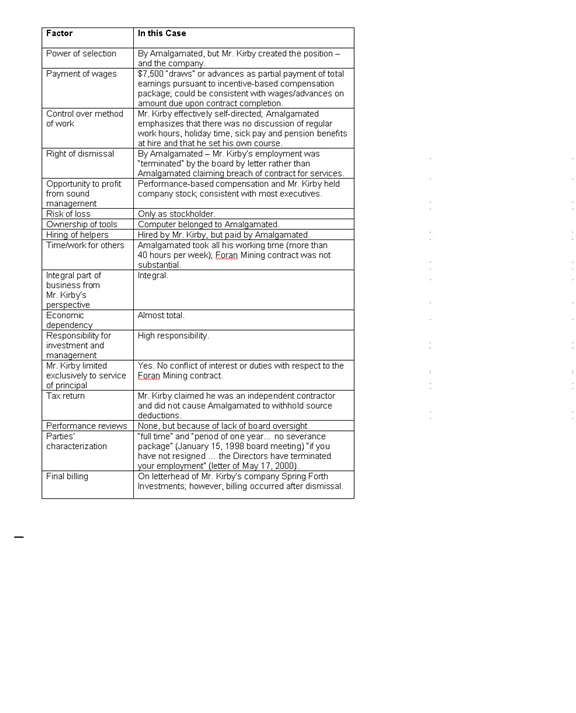
48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

**72**  When a person devotes substantially all of his or her time to the employ of one employer, a court will not likely find that the individual is an independent contractor. This conclusion is drawn from economic reality that the employed individual is more dependent on the employer in such situations: David Harris, *Wrongful Dismissal*, vol. 1, looseleaf (Toronto: Carswell, 1990, updated to 2009), p. 2-18.1, citing for example *Mancino v. Nelson Aggregate Co.*, [*[1994] O.J. No. 1559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-JP4G-614N-00000-00&context=), [*49 A.C.W.S. (3d) 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-JP4G-614N-00000-00&context=) (Gen. Div.).

**73**  Mr. Kirby was the *de facto* CEO and was responsible for all aspects of Amalgamated's business. A CEO, by definition, is under supervision only on an intermittent basis. Nevertheless, it would be a mistake to define Mr. Kirby as an independent contractor solely on the basis of the fact that he had a high degree of autonomy. The central question is whether, in this particular context, Mr. Kirby's relationship with Amalgamated would be more properly described as one of employee or independent contractor.

**74**  Although Mr. Kirby's position was not typical, Amalgamated was not organized in a typical way either. This was a small company whose directors provided the start-up capital. The board was, relatively speaking, more distant than is typical. The directors were not a professional board governing the operation of a separate business, but rather a group of investors giving high-level oversight to their investments.

**75**  In the circumstances of this case, I have considered the following factors:



**76**  Considering the totality of the circumstances and the factors set out above, I conclude that Mr. Kirby was an employee.

**77**  Even if, without deciding this point, Mr. Kirby was an independent contractor prior to 1998, I would not accept Amalgamated's argument that his status was unchanged when he began his full-time position.

***3.*** ***Was Mr. Kirby constructively dismissed?***

**78**  Mr. Kirby submits that he was constructively dismissed as early as January 2000, or alternatively, no later than April 8, 2000, on any of the following three basis:

1. The defendants coerced him into accepting substantially lower compensation for past services;
2. The defendants unilaterally changed the terms of his compensation; and
3. The defendants failed to pay him compensation that had accrued and was owing to him.

**79**  The defendants respond that this is a mischaracterization of what was a legitimate negotiation, which resulted in an agreement regarding Mr. Kirby's past services and future employment.

*3.1 Did the defendants constructively dismiss Mr. Kirby by coercing him to accept substantially lower compensation for past services?*

**80**  A unanimous Supreme Court of Canada endorsed the following definition of constructive dismissal in *Farber v. Royal Trust Co*., [*[1997] 1 S.C.R. 846*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3ST-00000-00&context=), [*145 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3ST-00000-00&context=), at para. 34:

[34] In an article entitled "Constructive Dismissal", in B.D. Bruce, ed. Work, Unemployment and Justice (1994), 127, Justice N.W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

The burden is on the employee to prove, on balance, that the term or condition breached was both part of the employment contract and fundamental to it: *Islip v. Northmount Food Services Ltd.*, [*[1988] B.C.J. No. 1161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2KC-00000-00&context=), [*20 C.C.E.L. 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2KC-00000-00&context=) (C.A.), p. 255.

**81**  I accept the principle expressed by Drost J. in *Boucher v. Paul S. Pollock Enterprises Ltd.*, [*2002 BCSC 1156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-254G-00000-00&context=), at para. 51, [*115 A.C.W.S. (3d) 630*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-254G-00000-00&context=):

[51] There are two methods by which a change may lawfully be made with respect to the terms of an employment contract. One is by giving reasonable notice of the change. The other is by mutual agreement and ... for that to occur one of the parties must be entitled to ask the other to consider a change without thereby repudiating the contract.

**82**  If a change is "made by the employer but accepted or agreed to by the employee" this will not constitute constructive dismissal: *Evans v. Listel Canada Ltd.*, [*2007 BCSC 299*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S43T-00000-00&context=), at para. 64, [*[2007] CLLC 210-018*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKH1-F22N-X531-00000-00&context=). However, the employee must have given free and informed consent of any unilateral change for which there is no consideration: *Greaves v. Ontario Municipal Employees Retirement Board* [*(1995), 15 C.C.E.L. (2d) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-F22N-X07R-00000-00&context=), [*129 D.L.R. (4th) 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-F22N-X07R-00000-00&context=), p. 361 (Ont. C.J.) [*Greaves*].

**83**  Furthermore, an employee facing a unilateral change to remuneration does not accept the change by merely continuing in his or her employment, as the law imposes a duty on the employee to mitigate. The court must take an objective approach to assessing "whether an employee has consented to relinquishing his or her legal rights by continuing to work" and allow the employee a "reasonable trial period" to assess the suitability of the "new arrangement before finalizing any decision to either accept the change or quit": *Kussmann v. AT & T Capital Canada, Inc.*, [*2000 BCSC 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25F-00000-00&context=), at para. 57, [*49 C.C.E.L. (2d) 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25F-00000-00&context=); aff'd with slight variation on another point at [*2002 BCCA 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G10K-00000-00&context=), [*100 B.C.L.R. (3d) 278*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G10K-00000-00&context=) [*Kussmann*]. Where an employee is no longer taking time to assess the situation, but has in fact already accepted the change, however, he or she may not subsequently invoke the "reasonable time" rule to invalidate that acceptance: *Balderson v. Marcels Equipment (Vancouver) Ltd.*, [*2005 BCSC 363*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M47B-00000-00&context=), at para. 13, [*138 A.C.W.S. (3d) 675*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M47B-00000-00&context=), aff'd. [*2005 BCCA 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2M2-00000-00&context=), [*144 A.C.W.S. (3d) 782*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2M2-00000-00&context=).

**84**  On January 29, 2000, the board discussed the issue of compensation owing to Mr. Kirby for past years. Later, at a board meeting on April 8, 2000, Mr. Kirby was offered $121,996 for 1998 and the same amount for 1999. The board also proposed a one year fixed term contract without severance for the year 2000 with a compensation package of $90,000 base salary, 3% of net income from the performance pool up to $1 million, and 10% of net income from the performance pool above $1 million. The method of calculating the incentive provision was not defined.

**85**  Mr. Kirby asked for time to consider these proposals.

**86**  In a letter dated April 14, 2000, Mr. Kirby accepted the $121,996 proposal for 1998, and submitted a counter-offer of $161,744 for 1999, which was the revenue component under his initial calculation. He also counter-offered a two year term for the new contract.

**87**  Between April 14 and 25, 2000, Mr. Kirby and the board agreed to "split the difference" for 1999 and Mr. Kirby accepted $141,000 for that year. During that same period, the board stated that it would not consider a two year contract in the absence of a business plan. Mr. Kirby then accepted a one year fixed-term contract commencing April 2000, on the terms initially proposed by the board.

**88**  The board dismissed Mr. Kirby on May 17, 2000.

**89**  Approximately two weeks after his dismissal, Mr. Kirby billed Amalgamated for the amounts agreed to for 1998 and 1999, noting that there would need to be some estimates of the amount due for 2000.

**90**  Mr. Kirby now says that the negotiations were coercive, and that there was a lack of free and informed consent for the change to his compensation, *per Greaves*.

**91**  I disagree with this characterization. In my opinion, the major contextual factor underscoring the negotiations was the absence of a formal written contract for 1998 and 1999. Amalgamated agreed that it owed Mr. Kirby compensation for 1998 and 1999. The dispute was over how much was owing.

**92**  Mr. Kirby should have been calculating amounts that he felt were due on at least a yearly basis, and submitting his calculations for approval by the board. However, he failed to do so.

**93**  From the defendants' point of view, a fundamental question flowing from the lack of written record was whether the 1998 proposal was even a contract. It was in this context that the board concluded at the board meeting on April 8, 2000, that they were "not bound" by the 1.5% revenue formula for 1999. Given these circumstances, I do not interpret those words as repudiation.

**94**  Here, the "discount" that Mr. Kirby agreed to was small, relative to the amount of the overall settlement. It was reasonable for Amalgamated to seek a final agreement on the amount due to Mr. Kirby. Each party then achieved certainty through the creation of a new contract for the year 2000.

**95**  I do not draw an inference of coercion from the amount of the discount.

**96**  Furthermore, there is no evidence of financial hardship, which might have caused Mr. Kirby to agree to a bad deal out of desperation, or any evidence of any other kind of coercion. Amalgamated did not threaten to dismiss Mr. Kirby if he did not agree to accept less for 1998 and 1999. Nor was the contract for 2000 contingent upon settling the amounts for 1998 and 1999.

**97**  In fact, I believe Mr. Kirby and Amalgamated had roughly even bargaining power, as the board relied heavily on him to produce a good return on its investments.

**98**  I find that the agreements were made willingly and are legally binding. Mr. Kirby was not coerced into agreeing to substantially lower pay, but negotiated the terms of the unwritten contracts.

**99**  Also, I do not accept Mr. Kirby's argument that his purported acceptance of the 1998 and 1999 settlements is ineffective because it was conditional on immediate payment and long-term employment. This contention is untenable in light of his accepting a fixed-term contract within the same month.

**100**  Nevertheless, even if this condition existed, the OSC crisis arose shortly after the agreements were made, which contributed to the board's decision to terminate his employment. At that point, the board believed it had claims against Mr. Kirby that offset the amount that it owed him.

**101**  This is not a case of Amalgamated refusing to pay Mr. Kirby what was owed to him to coerce him into a lesser contract. But for the OSC issue, which arose only weeks after the negotiations, I believe Amalgamated would have paid Mr. Kirby the amounts agreed to shortly after making the agreement.

**102**  I note that in 2000 Mr. Kirby claimed he was owed a lot less than he now claims in this action: the disagreement between the parties at that time was the difference between $121,996 and $152,086 in 1998, and the difference between $121,996 and $214,819 in 1999. Now Mr. Kirby says that he is owed $486,317 for 1998 and $275,622 for 1999. To fault Amalgamated for offering Mr. Kirby an amount closer to what Mr. Kirby claimed was owed to him in 2000, but less than he claims in this action, would be unjust, particularly as it was Mr. Kirby's responsibility to calculate these amounts and bring them to the board's attention.

*3.2 Did the defendants constructively dismiss Mr. Kirby from his employment by unilaterally changing the terms of his compensation?*

**103**  Mr. Kirby alleges that the defendants' conduct in changing or attempting to change the terms of his employment between January 2000 and April 2000 constituted constructive dismissal. Specifically, he argues that the defendants eliminated components of his remuneration package from the January 2000 contract, including "trading compensation" (also known as "trading savings"), "tender offer compensation" (also known as "structuring fee"), and "financings compensation".

**104**  I do not accept Mr. Kirby's argument that the mere "attempt on the part of an employer to change terms of employment ... constitutes constructive dismissal." With respect, I do not agree that the authorities that Mr. Kirby cites stand for this proposition.

**105**  A preliminary issue is whether the January 1998 contract, initially for a fixed term of one year, was still in effect in 2000. Mr. Kirby says that his employment became indefinite by virtue of s. 65(2) of the *Employment Standards Act*, *R.S.B.C. 1996, c. 113* [*ESA*]:

1. If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is
2. deemed not to be for a definite term or specific work, and
3. deemed to have started at the beginning of the definite term or specific work.

As I have found that an employment contract existed between the parties, I accept Mr. Kirby's argument. I find that as of April 1999, the January 1998 employment contract became one of indefinite duration, with a deemed start date of January 1998.

**106**  Nevertheless, I do not conclude that Mr. Kirby's acceptance of the fixed-term contract constituted constructive dismissal, since Mr. Kirby freely consented to the new fixed-term contract and its terms.

**107**  Respecting the modified terms of the agreement, one factor that I have kept in mind is the relatively modest size of the three components of compensation that Mr. Kirby waived in reaching a settlement for his compensation for 1998 and 1999.

**108**  I find that the primary intention of the parties under the 1998 contract was that Mr. Kirby would earn a fee for financing solicited through Mr. Kirby's private, non-bank contacts. Although I accept that Mr. Kirby did make use of his personal network to some extent to negotiate the Bank of Montreal loan, I find that he was not entitled to a financing fee in respect of that loan.

**109**  As noted by Amalgamated by its reference to the April 5, 2000, letter, no structuring fee was included in the 1999 offer.

**110**  The amount owing in respect of trading savings was no greater than $30,000, even by Mr. Kirby's calculation. There was a dispute about how the trading savings were to be calculated. The wording in the January 1998 contract described it as the "between what it would have cost to continue to trade at Marleau and what it actually cost." I am satisfied that what this means is that, to the extent that Mr. Kirby could perform transactions at a lower cost than Amalgamated had paid him when Mr. Kirby was at Marleau, these savings would accrue to Mr. Kirby. Nevertheless, the wording in the proposal raised reasonable disagreements about methods of calculation.

**111**  Mr. Kirby submits that he was not given a reasonable "trial period" to assess the suitability of the new arrangement before finalizing his decision to change or quit his job, *per Kussmann,* as, soon after these discussions, he was dismissed on May 17, 2000.

**112**  However, in the absence of an abuse of power or coercion, and in light of the evidence showing that Mr. Kirby willingly accepted the agreements for 1998 and 1999, Mr. Kirby cannot establish that he was considering the suitability of the new arrangement.

**113**  Mr. Kirby also says that relocating the corporate office to Victoria constituted constructive dismissal. However, this claim is unfounded, as it was only the administrative office that was to move to Victoria and Mr. Kirby was to continue working from his home in Ladysmith. In fact, the evidence shows that Mr. Kirby was enthusiastic about the administrative support of Mr. Boatman and an administrative assistant, as outlined in his April 14, 2000, letter.

*3.3 Did the defendants fail to pay Mr. Kirby any compensation that had accrued and was owing to him?*

**114**  Mr. Kirby argues that the defendants withheld his draw cheque for the month of April 2000, as well as other compensation that was owed to him under the compensation package he proposed and the board had accepted, and this constituted constructive dismissal.

**115**  Mr. Kirby points to this Court's acceptance, at para. 188 in *Leong,* of the following quotation from Geoffrey England and Roderick Wood, *Employment Law in Canada*, vol. 2, 3d ed., looseleaf (Markham: Butterworths, 1998), at '13:32:

The employer is impliedly (if not expressly) bound to continue paying the remuneration due under the contract, and any wage reductions or unilateral modifications to the pay structure (including reducing the number of working days per week) will establish a constructive dismissal. So, too, if the employer withholds previously earned compensation that is due and owing to the employee.

**116**  In *Leong*, Sigurdson J. found that failure to pay two weeks salary and making that payment conditional on the settlement of a separate contractual dispute constituted constructive dismissal.

**117**  By the board meeting on January 29, 2000, the board members knew that Mr. Kirby was entitled to some amount of compensation for prior periods, although they did not know exactly how much he was owed. However, Mr. Kirby's argument that this knowledge constitutes constructive dismissal is not tenable.

**118**  Mr. Kirby was content to receive draw cheques of $7,500 a month for over two years. Although this was a conservative amount and less than his entitlement under the January 1998 contract, he never told the board how much he felt was still outstanding. Mr. Kirby believed that there would be an accounting at some point in the future and that he would receive any amounts owing. However, Mr. Kirby never prepared such an accounting and cannot now fault the board for this.

**119**  If Mr. Kirby had presented the board with an accounting and requested the outstanding amounts, the board's non-payment, at that point, might have constituted a withholding of wages. That is not, however, what has happened in this case.

**120**  Mr. Kirby also submits that Amalgamated intentionally withheld his April 2000 draw cheque to pressure him into preparing certain reports. Again, this position is untenable.

**121**  Mr. Kirby submits that he was constructively dismissed no later than April 8, 2000. The date of the cheque at issue, however, is April 30, 2000. As this date follows that of the alleged constructive dismissal, it cannot be used as a basis for Mr. Kirby's claim. In any event, irrespective of the date of the cheque, there is no evidence to support Mr. Kirby's contention that he directed that $7,500 be paid to him, or that a board member refused to co-sign for it.

**122**  I reject this claim.

*3.4 Conclusion on constructive dismissal*

**123**  To summarize, Mr. Kirby has failed to establish that the defendants constructively dismissed him. All changes made to the terms of his compensation were by mutual agreement. He was not coerced to accept substantially lower compensation for past services. The defendants did not fail to pay him compensation that had accrued and was owing to him, but rather requested, in light of the OSC crisis, a set-off for amounts they believed Mr. Kirby owed them.

**124**  As there was no constructive dismissal, the 1998 and 1999 settlements are binding. Mr. Kirby is entitled to a total of $262,996 for 1998 and 1999, less any draws or other monies paid to him. In his May 29, 2000, letter and invoice he admits he has received $180,000. Therefore, his entitlement is $82,996 for those two years. The $82,996 will be set off against any amount owing to Amalgamated, should it be successful in any of its counterclaims.

**125**  It was Mr. Kirby's responsibility to submit an accounting and to request any funds beyond his draw cheques in respect of his remuneration. Thus, he is not entitled to interest on any unpaid amount until April 25, 2000. I direct that interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79* ("COI Act"), is payable from May 1, 2000, to the date of judgment. This is only in respect of Mr. Kirby's remuneration as an employee and does not foreclose his entitlement to further amounts.

***4.*** ***Did Mr. Kirby resign?***

**126**  The defendants submit that Mr. Kirby resigned from his employment. Mr. Kirby says he was dismissed.

**127**  The burden is on Mr. Kirby to prove dismissal on a balance of probabilities: *Khalil v. Infospec Systems Inc.,* [*2009 BCSC 547*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M255-00000-00&context=), at para. 20, [*[2009] B.C.J. No. 821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M255-00000-00&context=) [*Khalil*], citing *Osachoff v. Interpac Packaging Systems Inc.,* [*[1992] B.C.J. No. 849*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B16P-00000-00&context=), [*44 C.C.E.L. 156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B16P-00000-00&context=) (S.C.).

**128**  Mr. Justice N.H. Smith succinctly summarizes the law on resignation in *Khalil* at paras. 16-18:

[16] The test for determining whether an employee's words amount to a resignation is an objective one. The court will consider what a reasonable person would understand from the statement in all of the surrounding circumstances. See: *Eichenberger v. Heath Consultants Ltd.* [*(1997), 33 C.C.E.L. (2d) 262*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M25F-00000-00&context=) at para. 10 (B.C.S.C.); *Brooks v. Vernon Women's Transition House Society*, [*2004 BCSC 1691*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0NJ-00000-00&context=) [*Brooks*]; *Assouline v. Ogivar Inc.* [*(1991), 39 C.C.E.L. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X32D-00000-00&context=) (B.C.S.C.); *Maguire v. Sutton* [*(1998), 34 C.C.E.L. (2d) 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1DJ-00000-00&context=) (B.C.S.C.).

[17] To be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear: *Danroth v. Farrow Holdings Ltd.*, [*2005 BCCA 593*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2SJ-00000-00&context=).

[18] A completed, voluntary act of resignation includes an offer and acceptance, or clear conduct so implying. Ambiguous actions by either party can taint the transaction and render it incomplete. See: *Maguire v. Sutton*, at paras. 50 and 54-55.

**129**  An apparent resignation made in "a spontaneous outburst of anger", and especially if accepted without proper deliberation, may not constitute true intention to resign: *Cox v. Victoria Plywood Co-operative Assn.*, [*[1993] B.C.J. No. 2788*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FG12-626B-00000-00&context=), [*2 C.C.E.L. (2d) 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FG12-626B-00000-00&context=) (S.C.), at paras. 17-18, quoting *Widmeyer v. Municipal Enterprises Ltd.* [*(1991), 36 C.C.E.L. 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPT1-F22N-X1DR-00000-00&context=), [*103 N.S.R. (2d) 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPT1-F22N-X1DR-00000-00&context=) (T.D.).

**130**  An employee may revoke an offer of resignation before it is accepted, particularly so if the offer is made in the heat of the moment: *Turner v. Westburne Electrical Inc*., [*2004 ABQB 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JT99-21KN-00000-00&context=), [*36 C.C.E.L. (3d) 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JT99-21KN-00000-00&context=), at para. 50.

**131**  An employer who receives an ultimatum from an employee may treat it as a resignation, or may instead attempt to come to an understanding by which the employee remains continuously employed: *Billows v. Canarc Forest Products Ltd.,* [*2003 BCSC 1352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20R2-00000-00&context=), [*27 C.C.E.L. (3d) 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20R2-00000-00&context=), at paras. 43 and 58.

**132**  Ms. Parker expressed concerns to the board about Mr. Kirby's performance of his duties.

**133**  Mr. Kirby, in anger, gave an ultimatum: either Ms. Parker would be removed as a director of Amalgamated, or he would quit. He sent a letter to the board, dated April 14, 2000, stating "I hereby submit my resignation as President of the General Partner." Mr. Kirby offered to buy Ms. Parker's shares.

**134**  The letter was initially delivered only to Ms. Parker, not to the board of directors. However, Mr. Kirby knew that Ms. Parker was a director. He also knew that she had communicated her concerns to the board before, and it was reasonable for him to assume she would communicate this letter to the rest of the board as well.

**135**  I find that Mr. Kirby delivered his letter to Ms. Parker in her capacity as a director.

**136**  I am satisfied that Mr. Kirby issued an ultimatum to Amalgamated on April 14, 2000. As a result, Amalgamated was entitled to refuse Mr. Kirby's demands and accept his April 14, 2000, letter as his resignation.

**137**  Instead, Mr. Kirkham held a meeting with both Mr. Kirby and Ms. Parker to work out an arrangement so that they could continue to work together. In a memorandum dated April 25, 2000, Mr. Kirkham discussed past and future compensation for Mr. Kirby, office space, a future business plan. He also mentioned the following arrangement:

On another issue, [Mr. Kirby] indicated he was not prepared to continue with the company if [Ms. Parker] remained a Director. After further discussion with [Ms. Parker] and [Mr. Kirby], this issue was resolved as follows: [Ms. Parker] will remain a Director, but will not attend Directors' meetings when [Mr. Kirby] is present.

**138**  The board did not convene a meeting to consider the arrangement.

**139**  In early May, the board became aware of the issues with the OSC. On May 17, 2000, the board sent a letter to Mr. Kirby, stating in part:

Subsequently the other Directors informed me that they were not prepared to accept that compromise [of Ms. Parker not attending meetings]. Your resignation would therefore seem to have come into effect.

In any event, if you have not resigned, this letter will confirm that the Directors have terminated your employment ...

**140**  I am satisfied, however, that a reasonable person would conclude, however, that Mr. Kirby's ultimatum had been satisfied by the compromise that resulted from the meeting mediated by Mr. Kirkham. By accepting that compromise Mr. Kirby revoked his offer of resignation.

**141**  These conclusions are supported by the April 25, 2000, memorandum, which deals not solely with the issue between Ms. Parker and Mr. Kirby, but also with matters that clearly indicate an expectation that Mr. Kirby would continue to work for Amalgamated. Indeed, Mr. Kirby continued with his employment duties for the three weeks between the April 25, 2000, meeting, and his termination on May 17, 2000.

**142**  Amalgamated argues that Mr. Kirkham could only propose a compromise, and that the board needed to ratify it before it could become effective. The board says that this never occurred because Mr. Mitchell objected. Thus, the defendants submit, Mr. Kirby's resignation was still open for acceptance on May 17, 2000.

**143**  I reject this submission for the following reasons. First, I am satisfied that the board was unanimous, if unofficially, in wanting Mr. Kirkham to find a compromise that would keep Mr. Kirby in the employ of Amalgamated. For this reason, Mr. Kirkham had, at least, the ostensible authority to do so.

**144**  Second, even if the evidence of Mr. Mitchell's objection is otherwise admissible for this purpose (a question that I do not decide), this is not relevant to the central legal question, which is whether there was revocation or rejection of Mr. Kirby's resignation.

**145**  Third, even if the proposed compromise required the board's approval before rejecting Mr. Kirby's resignation, this would not negate Mr. Kirby's implied revocation of his resignation. As either revocation by Mr. Kirby or rejection by Amalgamated is sufficient to prevent an acceptance of the resignation on May 17, 2000, the issue of board approval makes no difference.

**146**  Furthermore, Mr. Kirby's April 14, 2000, resignation offer was open for acceptance only for a reasonable time. Over a month had passed between Mr. Kirby's ultimatum and the board's purported acceptance of his resignation. I find that a reasonable person, viewing this situation objectively, would consider that the April 14, 2000, offer of resignation had lapsed by May 17, 2000.

**147**  Therefore, I find that the resignation offer of April 14, 2000, was both revoked and rejected no later than the April 25, 2000, meeting held between Mr. Kirkham, Ms. Parker and Mr. Kirby. Mr. Kirby was fired on May 17, 2000.

***5.*** ***Was Mr. Kirby wrongfully dismissed?***

**148**  Mr. Kirby alleges that the board wrongfully dismissed him and that he is entitled to damages for the period of reasonable notice. The defendants argue that they had just cause to summarily dismiss Mr. Kirby and, thus, he is not entitled to any compensation.

**149**  Specifically, the defendants allege they had just cause to dismiss Mr. Kirby for any of the following reasons:

1. Mr. Kirby breached his fiduciary duty to Amalgamated in the following ways:
2. he abused confidential information and competed with Amalgamated by trading in conflict with the interests of Amalgamated ("conflict of interest trades"); and
3. he failed to disclose the OSC's allegations to the board.
4. Mr. Kirby engaged in misappropriation or financial impropriety in that he:
5. engaged in insider trading;
6. made trades without consideration; and
7. borrowed funds without authorization.
8. Mr. Kirby was disobedient in that he failed to:
9. hire administrative assistance;
10. establish a business office in Victoria; and
11. establish a business plan.
12. Mr. Kirby was incompetent in that he:
13. failed to follow exchange protocol;
14. failed to keep adequate records;
15. failed to file insider trading reports; and
16. was a poor administrator;
17. Mr. Kirby:
18. contracted with Foran Mining, which was a conflict of interest given his position at Amalgamated;
19. forged documents;
20. was dishonest; and
21. perjured himself.

**150**  Mr. Kirby generally submits that the defendants have attempted to uncover every perceived error in order to manufacture a claim, as in *Smart v. McCall Pontiac Buick Ltd.*, [*[1999] B.C.J. No. 2111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1FP-00000-00&context=), at para. 85, [*91 A.C.W.S. (3d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1FP-00000-00&context=) (S.C.).

*5.1. Just cause generally*

**151**  At common law, an employer has the right to summarily dismiss an employee for just cause. Just cause constitutes conduct that is incompatible with those duties that go to the "root" of the employment contract, and consequently fractures the employment relationship in such a way that the employer cannot be expected to provide the employee with a second chance: *Leung v. Doppler Industries Inc.,* [*[1995] B.C.J. No. 690*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X10J-00000-00&context=), [*10 C.C.E.L. (2d) 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X10J-00000-00&context=), at para. 26 (S.C.), aff'd [*(1997), 27 C.C.E.L. (2d) 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21D5-00000-00&context=), [*86 B.C.A.C. 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21D5-00000-00&context=).

**152**  The employer bears the onus of demonstrating that cause exists for the employee's discharge: *Geluch v. Rosedale Golf Assn.*, [*[2004] O.J. No. 2740*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-F1H1-20WP-00000-00&context=), [*32 C.C.E.L. (3d) 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-F1H1-20WP-00000-00&context=), at para. 82 (S.C.J.) [*Geluch*]; quoted with approval in *Baumgartner v. Jamieson (c.o.b. Advertising in Print),* [*2004 BCSC 1540*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0HV-00000-00&context=), [*37 C.C.E.L. (3d) 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0HV-00000-00&context=), at para. 16 [*Baumgartner*]. The conduct at issue must be "real incompetence or misconduct," not "simple dissatisfaction with performance" or concerns about future conduct: *Geluch,* cited in *Baumgartner,* at para. 16.

**153**  The civil standard of proof remains even where the allegation of misconduct is grave in nature: *F.H. v. McDougall,* [*2008 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D5-00000-00&context=), [*297 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D5-00000-00&context=).

**154**  The most frequently cited definition of just cause is from *Port Arthur Shipbuilding Co. v. Arthurs,* [*[1967] 2 O.R. 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M45X-00000-00&context=), [*62 D.L.R. (2d) 342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M45X-00000-00&context=), p. 348 (C.A.), rev'd on other grounds [*[1969] S.C.R. 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22W3-00000-00&context=), [*70 D.L.R. (2d) 693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22W3-00000-00&context=), most recently affirmed in this province in *Valley First Financial Services Ltd. v. Trach*, [*2004 BCCA 312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3SS-00000-00&context=), at para. 91, [*198 B.C.A.C. 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3SS-00000-00&context=):

[91] ... If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.

**155**  Where the employer can establish that just cause exists, no notice or severance pay is required to dismiss the employee: *Geluch,* at para. 81.

**156**  The contextual approach is applied to determine whether misconduct constitutes just cause, as set out in *McKinley v. BC Tel*, [*2001 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M488-00000-00&context=), [*200 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M488-00000-00&context=); rev'g [*(1999), 67 B.C.L.R. (3d) 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1XN-00000-00&context=), [*42 C.C.E.L. (2d) 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1XN-00000-00&context=) (C.A.) [*McKinley*], as follows:

[48] ... whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[49] In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

...

[51] ... I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. ... This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.

**157**  Although the misconduct in *McKinley* was employee dishonesty, this test is applicable to other forms of misconduct: *van Woerkens v. Marriott Hotels of Canada Ltd.,* [*2009 BCSC 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B121-00000-00&context=), [*71 C.C.E.L. (3d) 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B121-00000-00&context=); *Wise v. Broadway Properties Ltd.*, [*2005 BCCA 546*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2F3-00000-00&context=), [*218 B.C.A.C. 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2F3-00000-00&context=); *Brazeau v. I.B.E.W.*, [*2004 BCCA 645*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0SW-00000-00&context=), [*248 D.L.R. (4th) 76*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0SW-00000-00&context=).

**158**  The second inquiry in the *McKinley* analysis is whether dismissal is proportionate to the severity of the misconduct:

[53] Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [*[1987] 1 S.C.R. 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23CX-00000-00&context=), where Dickson C.J. (writing in dissent) stated at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd*. *[1992] 1 S.C.R. 986*, and in *Wallace* [citation removed]. In *Wallace*, the majority added to this motion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".

...

[57] Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

**159**  In summary, the defendants must establish that Mr. Kirby's misconduct, and the nature and circumstances of the misconduct warranted dismissal: *Geluch,* at para. 85. This factual determination must be contextually examined with reference to the principle of proportionality.

**160**  Conduct that occurred prior to dismissal but discovered afterward can form just cause: *Lake Ontario Portland Cement Co. v. Groner*, [*[1961] S.C.R. 553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X313-00000-00&context=), [*28 D.L.R. (2d) 589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X313-00000-00&context=). However, allegations of "after-discovered" misconduct must be "scrutinized carefully as to its accuracy" and be "subject to strict proof": *Brunette v. A.V. Carlson Construction Co.*, [*[1993] B.C.J. No. 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2T1-00000-00&context=), 1993 CanLII 2042 (S.C.), at para. 49.

**161**  Unlike after-discovered misconduct, post-termination misconduct cannot form the basis for just cause: *Sjerven v. Port Alberni Friendship Center,* [*[1999] B.C.J. No. 1129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G474-00000-00&context=), [*43 C.C.E.L. (2d) 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G474-00000-00&context=) (S.C.).

**162**  Although additional allegations of cause enumerated after dismissal can be relied on by the defendants, the fact that they were not claimed at the time of termination will affect their weight: *Baumgartner,* at para. 16, quoting *Geluch.* The court must be cautious about finding for an employer who simply "dredges up" any and all incidents prejudicial to an employee in its defence to a wrongful dismissal claim: *Coventry v. Nipawin (Town)*, [*[1981] S.J. No. 1184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K751-FJDY-X1SW-00000-00&context=), [*12 Sask.R. 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K751-FJDY-X1SW-00000-00&context=), at para. 4 (Q.B.).

*5.2 General contextual factors for the just cause analysis*

**163**  Given the multiple allegations in this case, I have outlined general contextual factors that will apply to the analysis below.

**164**  The first contextual factor is that Mr. Kirby, as the *de facto* CEO and often the sole operating officer of Amalgamated, was responsible for dealing in securities. The degree of trust and integrity required of upper management employees in the investment industry is particularly high: *Ahmed v. RBC Dominion Securities Inc*., [*[1998] B.C.J. No. 1729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2MT-00000-00&context=), at paras. 108 and 124, [*82 A.C.W.S. (3d) 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2MT-00000-00&context=) (S.C.), *Templeton v. RBC Dominion Securities Inc.*, [*2005 NLTD 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8X1-FBV7-B4P5-00000-00&context=), [*43 C.C.E.L. (3d) 279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8X1-FBV7-B4P5-00000-00&context=), at para. 55 (T.D.) [*Templeton*]; *King v. Merrill Lynch Canada Inc.*, [*[2005] O.T.C. 994*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-JKB3-X11D-00000-00&context=), [*[2005] O.J. No. 5028*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-JKB3-X11D-00000-00&context=), at paras. 132-134 (S.C.J.) [*Merrill Lynch*].

**165**  There is a statutory standard for employee oversight in the corporate context. Pursuant to s. 142(1)(b) of the *Business Corporations* Act, *S.B.C. 2002, c. 57* ["B.C. *Business Corporations Act"*], a director must exercise the "care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances."

**166**  The second contextual factor is Amalgamated's particular "business culture." In *Varsity Plymouth Chrysler (1994) Ltd. v. Pomerleau*, [*2002 ABQB 512*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-F4GK-M3HC-00000-00&context=), [*23 C.C.E.L. (3d) 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-F4GK-M3HC-00000-00&context=), at para. 32, Erb J. stated that the contextual approach from *McKinley* was:

[32] ... a direction [from the Supreme Court of Canada] to trial judges to assess, in all the circumstances, whether the dishonesty is serious enough for dismissal for cause, not in a [general] way, but in the employer's particular business culture. What may be unacceptable to one business may be acceptable to another. ...

The employer's particular expectations of employee compliance in light of its standards or policies, therefore, form a key contextual basis for assessing the employee's misconduct.

**167**  To say that Amalgamated was casually administered is almost an understatement. Mr. Kirby was not diligent in attending to administrative and legal matters; he managed his time poorly, and made many errors in judgment. At one point, the board requested that Mr. Kirby hire an administrative assistant to address his management deficiencies.

**168**  At the same time, the directors themselves were not diligent in their oversight of Amalgamated as a company or Mr. Kirby as an employee. The defendants concede that little oversight occurred, and even suggest that the board's role was "limited to approval of Offers and financing" and not supervising Mr. Kirby's day-to-day functioning.

**169**  Mr. Kirby points out, for example, that the board's audit committee never met. Amalgamated says it had no reason to meet, as there was no reason to be suspicious of Mr. Kirby's administration: *Revelstoke Credit Union v. Miller*, [*[1984] 2 W.W.R. 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2SG-00000-00&context=), [*28 C.C.L.T. 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2SG-00000-00&context=), at para. 119 (B.C.S.C.). The defendants submit that they had a right to rely on Mr. Kirby's reporting: B.C. *Business Corporations Act,* s. 157(a); *Grindrod & District Credit Union v. Cumis Insurance Society, Inc.*, [*[1983] B.C.J. No. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S03M-00000-00&context=), [*4 C.C.L.I. 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S03M-00000-00&context=), at para. 9 (S.C.), aff'd [*[1985] B.C.J. No. 2229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61SC-00000-00&context=), [*10 C.C.L.I. 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61SC-00000-00&context=) (C.A.).

**170**  Mr. Kirby says, however, that the board preferred to have him deal with all the business of Amalgamated because the directors did not want to be bothered with it. The evidence establishes that the board remained indifferent to a number of issues, including the exact terms of Mr. Kirby's remuneration.

**171**  Although an employer's failure to supervise an employee is not a defence for Mr. Kirby's deficiencies, this is an important contextual factor. I am satisfied that the board bears some responsibility for consistently accepting and, at times, commending annual reports and other documents authored by Mr. Kirby.

**172**  A third contextual factor speaks to why there was so little oversight of Mr. Kirby and Amalgamated. The directors acted more like a group of investors watching over their investments than a professional board governing a business operation. Mr. Kirby's primary role, even as an employee of the company, was to increase each director's individual wealth. The board granted him a high degree of autonomy to carry out this goal. Thus, many of Mr. Kirby's "unilateral" actions in the administration of the company's affairs must be tempered by the directors' expectation that Mr Kirby would run Amalgamated single-handedly and inexpensively to maximize their personal profit.

**173**  Finally, this is a case of dismissal without warning or ultimatum to improve. I find that despite his excellence in growing the business of Amalgamated, Mr. Kirby's shortcomings on the administrative side were significant. There is also no question that the board was in a position to demand that Mr. Kirby improve and attend to certain matters that he was letting slide. Although the defendants are correct that "whether a prior warning and an opportunity to improve must have been granted ... depends on the circumstances and the quality of the misconduct," this fact will have bearing on the majority of allegations in this case: *Geluch,* at para. 95, cited in *Baumgartner,* at para. 16; *Leach v. Canadian Blood Services,* [*2001 ABQB 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X49H-00000-00&context=), [*7 C.C.E.L. (3d) 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X49H-00000-00&context=), at para. 117 (Alta. Q.B.).

*5.3 Note on facts of impugned trades*

**174**  The facts relevant to each alleged ground for dismissal are found in their respective section. However, the facts regarding certain impugned trades are relevant to multiple heads. Trades allegedly made in breach of fiduciary duty are detailed in Appendix A. Trades allegedly made without consideration, I have determined to be only two and they are set out under that section. Mr. Kirby does not dispute that he made the trades that the defendants' allege amount to insider trading, so I have not listed those specific trades. Whether or not the trades amount to insider trading is analyzed in its respective section.

**175**  At times Mr. Kirby purchased a block of LPs for himself that he subsequently tendered or sold in smaller blocks. In such cases, in order to assist with tracing, I have split the purchases into two and have proportionally attributed the proceeds to each sub-block even though it was perhaps on a single certificate. There has not been verification that units sold are represented by the exact same certificate as the units purchased and shown on the same row of the spreadsheet as, in my view, this is not relevant.

*5.4 Breach of fiduciary duty*

5.4.1 Was Mr. Kirby in a fiduciary relationship with Amalgamated?

**176**  Breach of fiduciary duty is a ground for summary dismissal. If Mr. Kirby has breached his fiduciary duty, he may also be liable in damages.

**177**  The duty of employees in fiduciary positions arises independently of the general duty of employees to their employer and is specific to their roles within a particular management structure. In a corporate context, a fiduciary duty may be imposed on persons other than directors, for example, senior management personnel or key employees: *Canadian Aero Service Ltd. v. O'Malley et al.,* [*[1974] S.C.R. 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B06N-00000-00&context=), [*40 D.L.R. (3d) 371*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B06N-00000-00&context=) [*Canadian Aero*].

**178**  Although there is no "single litmus-test" for determining a fiduciary relationship, at its core is "the idea of exercising a discretion that affects another, and the expectation that this will be done in that other's best interest": *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership,* [*2009 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B120-00000-00&context=), [*89 B.C.L.R. (4th) 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B120-00000-00&context=), at paras. 56-57. Generally, the fiduciary exercises relatively broad and independent discretion in the critical aspects of the employer's business operations, and the employer's business interests are particularly vulnerable to his or her actions: *Canadian Aero; Frame v. Smith,* [*[1987] 2 S.C.R. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=), p. 136, [*42 D.L.R. (4th) 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=); *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [*[1989] 2 S.C.R. 574*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=), [*61 D.L.R. (4th) 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6519-00000-00&context=).

**179**  In *Ruwenzori Enterprises Ltd. v. Walji*, [*2004 BCSC 741*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3TG-00000-00&context=), at para. 178, [*8 E.T.R. (3d) 209*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3TG-00000-00&context=); aff'd [*2006 BCCA 448*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1VT-00000-00&context=), [*274 D.L.R. (4th) 696*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1VT-00000-00&context=), Pitfield J. suggests the following test for determining whether an employee is also a fiduciary in the commercial context:

[178] In the corporate context, the inquiry must be this. Was the person who is alleged to be burdened by a fiduciary duty to a company merely an obedient servant, or a person vested with sufficient authority and responsibility in relation to the company's affairs to justify his or her characterization as an agent?

**180**  I am satisfied that Mr. Kirby stood in a fiduciary relationship with the defendants. Mr. Kirby was effectively the CEO of Amalgamated, maintaining the assessment Model, preparing the exchange offers, and choosing which LPs to target. Mr. Kirby did not just have discretion, but was essentially in control of the company. The defendants were vulnerable to him and expected that what Mr. Kirby was doing was in their best interests.

**181**  As a result, Mr. Kirby was bound by the duties and obligations that attach to a fiduciary relationship, namely loyalty, good faith and avoidance of a conflict of duty or self-interest: *Canadian Aero,* p. 384.

**182**  After finding that a fiduciary relationship exists, the court must examine the facts of the case to determine whether the corresponding obligations have been breached. The approach for determining whether the misconduct constitutes a breach of fiduciary duties in the commercial context is laid out on p. 391 of *Canadian Aero*:

... The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

5.4.2 Abuse of confidential information and competition in conflict with the interests of Amalgamated

**183**  The primary conduct the defendants impugn is what they call "Mr. Kirby's conflict of interest trades" and trades made "without consideration". In my view, the latter allegation is substantively one of financial impropriety, and does not depend on Mr. Kirby's fiduciary status. Accordingly, I will address that argument under the heading of misappropriation.

**184**  The allegation rightly framed as a breach of fiduciary duty is that Mr. Kirby profited through the course of his employment, and at the expense of Amalgamated, by personally acquiring LP units in which Amalgamated had an interest. Further, when acquiring these LP units, the defendants say that Mr. Kirby abused confidential information obtained in the course of his employment.

**185**  A fiduciary within a corporation is prohibited from obtaining property or a business advantage belonging to the company without its consent, or using confidential information obtained through employment to compete with it or to lure away its customers: *Canadian Aero*; *Lake Mechanical Systems Corp. v. Crandell Mechanical Systems Inc.* [*(1985), 9 C.C.E.L. 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F5T5-M1KF-00000-00&context=); [*31 B.L.R. 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F5T5-M1KF-00000-00&context=) (S.C.).

**186**  First, although any member of the public could inquire about LPs available for sale "over the counter," the defendants are correct that this information was not "public" in the sense that it was not on a posted price list. That is, if a private investor wanted to purchase LPs, that investor would contact a broker who would, in turn, attempt to find a seller through that broker's professional contacts.

**187**  Part of Mr. Kirby's job was to make inquiries about the availability of LPs on behalf of Amalgamated. Thus, while Mr. Kirby was not privy to the information solely because of his position within Amalgamated, he learned about the availability of LPs through the course of his employment. In this context, even though it is extremely difficult, if not impossible, to distinguish which inquiries Mr. Kirby made on behalf of Amalgamated or himself, I am satisfied that he personally profited from some of these inquires.

**188**  Thus, I agree with "malgamated that it had devoted itself to originating and bringing to fruition a particular business deal" and that Mr. Kirby used information gained through his employment to get a windfall for himself: *Canadian Aero,* p. 382.

**189**  Second, the defendants say that Mr. Kirby breached his fiduciary duty by purchasing LPs in the "over the counter" market for himself, and then exchanging them for Amalgamated units, which had a higher value. The defendants say that purchasing units for his own account was in a direct conflict with his fiduciary obligation, and that he ought to have acquired those shares for Amalgamated.

**190**  The alleged profit from these trades is approximately $105,000 [see Appendix A].

**191**  I find that the evidence supports the defendants' allegation that Mr. Kirby purchased LPs in the over-the-counter market for himself during the course of his employment, and that he often exchanged those LPs for the more valuable Amalgamated units.

**192**  Mr. Kirby argues that since he purchased many of the LPs for himself during the currency of an offer, there could be no breach. This is because Amalgamated was not permitted to exchange LPs for cash instead of Amalgamated units during the outstanding formal offer. Thus, it is arguable that Mr. Kirby's purchases during such periods were not in direct competition with Amalgamated.

**193**  Amalgamated responds that Mr. Kirby should have directed any LP holders who wanted cash to tender their LPs to Amalgamated's offer and thus keep the "profit" for Amalgamated, instead of purchasing those units for himself. The word "profit" is problematic, however, since LP unit holders preferring a cash transaction may not have wished to exchange those units for stocks, as stocks could have decreased in value.

**194**  Amalgamated also says that if an LP holder wanted cash, Mr. Kirby should have told the LP holder that Amalgamated would be willing to purchase their units for cash at the close of an outstanding formal Offer. However the Ontario *Securities Act* suggests he would not have been permitted to do this, as it included the following provision at the time (currently s. 93.1 of that Act):

An offeror shall not offer to acquire, or make or enter into an agreement, commitment or understanding to acquire beneficial ownership of any securities of the class that are subject to a formal take-over bid or securities convertible into securities of that class otherwise than under the bid on and from the day of the announcement of the offeror's intention to make the bid until the expiry of the bid.

**195**  I am satisfied that Mr. Kirby's LP purchases constituted a conflict of interest, as he was in competition with his employer. Absent board condonation or authorization, Mr. Kirby's actions constituted a breach of fiduciary duty in these circumstances.

**196**  Mr. Kirby says his actions were either authorized or that the board "condoned" his actions. In considering his argument, I keep in mind that Amalgamated did not suffer any harm from Mr. Kirby's purchases and exchanges. In fact, Amalgamated benefited from Mr. Kirby's actions because they assisted in his objective: growing the LP assets under Amalgamated's management.

**197**  Mr. Kirby says that the company's articles of incorporation explicitly allowed him, as a director, to acquire target LPs for himself. Mr. Kirby points to Article 66 of 479660's Articles of Incorporation, for which he was a director:

A director of the Company may be or become a director or officer of, or otherwise interested in, any corporation promoted by the Company or in which the Company is interested, as shareholder or otherwise, or any corporation which owns or controls shares of the Company, and will not be liable to account to the Company for any remuneration or other benefit received by him as a director or officer, of or from his interest in, such other corporation.

**198**  Amalgamated says that since the words "or other benefit" follow the word "remuneration" in Article 66, the "other benefit" refers to other forms of remuneration, such as bonuses or honorariums. I disagree with such a narrow reading of this article.

**199**  I am satisfied that Mr. Kirby's interpretation of this provision is correct. The target LPs were "associated" companies and were "promoted by" Amalgamated. As a result, Article 66 authorized Mr. Kirby, as a director, to be "interested in" them without accounting for any "benefit received" from his interest in them. This Article must be interpreted as permitting directors to act in what would typically constitute a conflict of interest as, otherwise, the provision of explicit immunity would have no effect.

**200**  Mr. Kirby also says that the board was aware of his purchases and, thus, there was also "condonation" of his behaviour: *Geluch,* at para. 119. Mr. Kirby relies on *Sheehan v. British Columbia Hydro & Power Authority* [*(1999), 72 B.C.L.R. (3d) 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4KS-00000-00&context=), [*89 A.C.W.S. (3d) 71*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4KS-00000-00&context=) (S.C.) [*Sheehan*], to support this claim.

**201**  In *Sheehan*, the president and CEO of B.C. Hydro was dismissed for conflict of interest after failing to advise Hydro's board of and obtain its approval for the investment by his wife's company in another company with which B.C. Hydro was conducting or planning to conduct business. Even though the plaintiff received reports warning of potential conflicts of interest and knew the Crown corporation's secretariat opposed the purchases, he did not bring the purchases of shares at issue to the attention of B.C. Hydro's board of directors. The purchase of these shares politically embarrassed B.C. Hydro, which constituted actual harm.

**202**  Mr. Justice Brenner (as he then was) concluded that the plaintiff was obliged to bring the matter to the attention of the full board and that his failure to do so constituted an error in judgment (at para 151). However, the errors in judgment were not sufficient to justify termination of the plaintiff, who had an "exemplary" record for 19 years (at paras. 165-167).

**203**  Pertinent to this case, the trial judge concluded that summary dismissal was not justified because of the "state of knowledge of the Hydro board and the responsible minister" about the share purchasing (at paras. 165-167). Specifically, Brenner J. found that Mr. Sheehan "made no effort to conceal the share purchases," that his connection to his wife's company was well known, and that "Hydro's own records identified the shareholders" in the target company (at para. 154). He additionally found that "[t]he directors knew that employees at Hydro were purchasing shares," the Chairman of the board was "aggressively selling to the employees" and the responsible Minister had knowledge of the foregoing (at paras. 165-166). Notwithstanding these circumstances, no one expressed any concern.

**204**  Mr. Kirby says that the board in this case had a similar level of knowledge. He says his acquisitions, along with those of other directors of Amalgamated, were expressly disclosed in the offering circulars, which were each reviewed and approved by all the members of the board.

**205**  I find that Mr. Kirby only declared his LP ownership in the first offering circular from 1995. In that circular, Mr. Kirby, Mr. Mitchell, Mr. Boatman and Mr. Kirkham all disclosed LP ownership. It is not reasonable to say that the board knew about all of Mr. Kirby's personal trading activities on the basis of this one circular. I am satisfied that Mr. Kirby never explicitly informed the board of his LP purchases or sought approval in respect of them.

**206**  However, as Mr. Kirby points out, the other directors acquired and exchanged target LPs for Amalgamated units long after those initial exchanges were reported in the first circular. In particular, Mr. Kirby acquired target LPs in the same manner for Ms. Parker when he was managing her investments. The board condoned Ms. Parker's personal trading transactions, thus, they cannot now fault Mr. Kirby for his trades.

**207**  A central contextual factor in assessing this alleged misconduct is the business culture and purpose of Amalgamated. In this circumstance, the directors acted more like investors than members of a professional board. From the perspective of the board, the purpose of Amalgamated was to increase each director's individual wealth, including that of Mr. Kirby. I am satisfied that this specific activity was condoned by the board.

**208**  On this basis, I am satisfied that Mr. Kirby was behaving reasonably in the circumstances.

**209**  Even if there were no approval or condonation, I am satisfied that Mr. Kirby's actions should, at most, be characterized as an error in judgment. He did not breach clear rules of fidelity: *Sheehan,* at para. 164. Nor was there intentional "deceitful and deceptive conduct": *Christensen v. McDougall,* [*[2001] O.T.C. 697*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-JKHB-61SN-00000-00&context=), at para. 69, [*14 C.C.E.L. (3d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-JFSV-G3CW-00000-00&context=) (Ont. S.C.J.).

**210**  In summary:

1. Mr. Kirby personally profited;
2. Mr. Kirby listed Ms. Parker's trades but not his own;
3. Mr. Kirby had many opportunities to inform the board of his over-the-counter trades;
4. Mr. Kirby was the company's most senior employee and the board relied on him completely to conduct his and the company's affairs in an appropriate manner;
5. The company profited from Mr. Kirby's over-the-counter trades;
6. The board never stopped or commented on Ms. Parker's over-the-counter trades;
7. Article 66 of the general partner's Articles of Incorporation (479660) authorized directors to acquire target LPs; and
8. The board's oversight of the company's affairs was cavalier at best.

Weighing these factors together, I am satisfied that there was no breakdown of the employment relationship on this particular ground of breach of fiduciary duty. I believe that had this been the sole misconduct at issue, the board would not have terminated Mr. Kirby's employment.

5.4.3 Non-disclosure of OSC crisis

**211**  The defendants allege that Mr. Kirby failed to disclose the following matters to the board:

1. The OSC's allegations and the "undertakings" given by Mr. Kirby to the OSC;
2. That Mr. Kirby had caused Amalgamated units to be issued to himself without paying for them or exchanging LP units that he purported to own, and that he had used Partnership funds to purchase Amalgamated units which he had not repaid;
3. That Mr. Kirby was trading while in a conflict of interest, and breaching the insider trading prohibitions of the *Securities Act,* *R.S.B.C. 1996, c. 418*, [British Columbia *Securities Act*]; and
4. That Mr. Kirby had accepted a position with Foran Mining during his term of employment with Amalgamated.

**212**  In my view, only the first of these allegations merits consideration under the head of non-disclosure. The additional allegations are effectively allegations of misappropriation or financial impropriety, and not breach of fiduciary duty *per se*. The final allegation is framed as a breach of fiduciary duty, but I do not believe that it has any merit, as I discuss below.

**213**  Further, I note that in their opening statement, the defendants alleged that Mr. Kirby was guilty of failing to disclose to the board the substance of management letters written by the accountant, Mr. Kraskin, to Mr. Kirby in 1998, 1999, and 2000. The defendants did not seriously press this issue, and I accept that Mr. Kirby, as the manager of Amalgamated, generally acted upon those letters and did not consider them to rise to a level that required board involvement. I do not find any misconduct on account of the management letters.

**214**  Where an employee is in a fiduciary role, non-disclosure forms a strong basis for summary dismissal, as the employer is vulnerable to the fiduciary's particular knowledge or abilities: *Ruwenzori,* at paras. 184-185.

**215**  Although I disagree with the defendants' submission that prejudice is "inherent" in a failure to disclose, I accept that prejudice can be established where the non-disclosure deprived the employer of the "opportunity to remedy a problem": *Carroll v. Emco Corp.*, [*2006 BCSC 861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1GM-00000-00&context=), at para. 10, [*50 C.C.E.L. (3d) 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1GM-00000-00&context=), aff'd [*2007 BCCA 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-243W-00000-00&context=), 55 C.C.E.L. (3d) 176.

**216**  The substance of the defendants' argument is that Mr. Kirby failed to disclose to the board the OSC allegations and his subsequent dealings with the OSC. The board says Mr. Kirby owed it a duty to disclose these matters because the allegations and his actions represented an impending risk of serious harm to the two companies. The defendants suggest that Mr. Kirby sought to hide his incompetence and maintain his position for his personal benefit. They further suggest that his actions constituted fraudulent or negligent misrepresentation.

**217**  I find that the pleadings are broad enough to discuss non-disclosure, as the defendants allege that Mr. Kirby reported only good news, and generally failed to report bad news or serious concerns.

**218**  Mr. Kirby received a draft statement of the OSC's allegations in March 2000. The allegations were that both defendants had breached numerous formal filing and other requirements under the Ontario *Securities Act.* As a result of these allegations, there had been a trading halt, and both defendants faced a formal hearing, scheduled for May 11, 2000. The OSC staff advised Mr. Kirby that they were prepared to receive submissions from both defendants on a "with prejudice" basis.

**219**  Instead of notifying the board about these allegations, Mr. Kirby retained counsel on behalf of Amalgamated to negotiate a plea agreement with the OSC staff. Mr. Kirby purported to represent 479660 in the process himself. Mr. Kirby's intention was to plead guilty to the allegations. Mr. Kirby says that his counsel told him that the OSC would simply "rubber stamp" the settlement.

**220**  The OSC rejected the settlement, noting "the sanctions suggested [were] by no means proportionate to the seriousness of the egregious offences" involved in the case and that the defendant 479660's actions, or lack thereof, constituted a "callous disregard" for statutory obligations. The OSC published the notice of the rejection of the proposed settlement on its website on May 11, 2000, after the hearing.

**221**  The board says that it was not until around May 11, 2000, that it learned about the allegations. The directors became concerned about the guilty plea and its impact on their personal reputations and those of the defendant companies. I find that their strong reaction to this potential consequence was the major factor leading to Mr. Kirby's dismissal.

**222**  The thrust of Mr. Kirby's response is as follows: it was reasonable for him to conclude that he could deal with the OSC issue that arose in May 2000 on his own based on his experience with the board, the business culture of the company, and his dealings with past regulatory issues.

**223**  Mr. Kirby says that the board wanted and expected him to deal with all regulatory matters on his own and he had dealt with all previous warnings effectively. The only time the board became involved in regulatory matters, he suggests, was when its approval was required. For example, he dealt with the OSC's concerns related to the 1995 offer with the assistance of a lawyer, but no director. In 1998, by contrast, he presented amendments to the board for approval. On that occasion, Mr. Kirby informed the board that the amendments were required because of concerns raised by the OSC.

**224**  Mr. Kirby testified that at no time did the board ever tell him that he should not deal with the OSC by himself.

**225**  Mr. Kirby supports his decision not to disclose the guilty plea to the board as follows:

... [W]ith respect to the OSC allegations, which [Mr. Kirby] considered to be a far less serious threat to [Amalgamated] than some that he had previously handled successfully without involving the Board ... having retained counsel and having negotiated a settlement agreement in short order, an agreement that the lawyer that he had retained had informed him would be "rubber-stamped", it was his judgment that involving the Board was not necessary.

And even if it is found that in so exercising his judgment he was in error ... such errors in judgment are not cause for summary dismissal.

... What would the Board have done if [Mr. Kirby] had delivered copies of the Statement of Allegations and draft Notice of Hearing ... Given the track record of the Board and utter indifference that they had evidenced for the affairs of [Amalgamated] from its inception, it is submitted that they would in all likelihood have simply directed the Plaintiff to deal with it. In the case of the OSC allegations, the Board would probably have directed the Plaintiff to retain a lawyer and attempt to negotiate the best settlement possible. That is what he did.

**226**  Mr. Kirby agrees that the May 2000 OSC issue was, in retrospect, injurious and even perhaps qualitatively different from previous threats. However, he asserts that an objective observer would not conclude that Mr. Kirby's non-disclosure of the guilty plea constituted just cause, given the company's business culture and knowing how, historically, it had been managed.

**227**  The defendants say that Mr. Kirby's speculation is irrelevant. They do not dispute the fact that they gave Mr. Kirby practically unfettered discretion and assumed he would deal with regulatory matters without seeking board input or approval. What the defendants allege is that in exercising his discretion, Mr. Kirby had a duty to report details of any important matters to the board.

**228**  In this instance, the directors say they had a right to know that Mr. Kirby was going to plead the companies guilty to the various offences. Instead, Mr. Kirby denied them the information that was necessary to make an informed decision. This was a critical non-disclosure, given the gravity of the situation and the potential consequences for not just the company, but the personal and business reputations of each individual director. For example, the OSC had the ability to prevent any of the board members from participating further in the business of any issuer, as a director or an officer.

**229**  I note that Mr. Boatman knew that the OSC had sent a draft document of allegations to Mr. Kirby in March 2000, but did not report this information to the rest of the board. However, it is difficult to say whether Mr. Boatman's decision not to bring it to the board's attention was an informed one or not, given Mr. Kirby's explanation. That is, when Mr. Boatman visited Mr. Kirby's home office in March 2000 and saw the OSC document, Mr. Kirby told him that the allegations primarily concerned technicalities regarding unpaid filing fees.

**230**  Mr. Kirby's answer was deliberately evasive.

**231**  Relying on Mr. Kirby's answer, Mr. Boatman did not ask him any further questions and decided that the matter was not important enough to bring to the board's attention. Mr. Boatman says he was "sufficiently confident" in Mr. Kirby's abilities, and decided to let Mr. Kirby deal with the OSC matter on his own.

**232**  Mr. Boatman does not have a background in securities and so it is not clear how much he understood after seeing the OSC documents and hearing from Mr. Kirby. As a result, I place no weight on Mr. Boatman's decision to not inform the board. If anything, Mr. Boatman's evidence on this issue underscores the extent to which he and the other directors trusted Mr. Kirby in his role at Amalgamated.

**233**  The board was also aware of some of the growing OSC issues prior to March 2000 and the allegations at issue. For example, the board knew that Mr. Kirby had not filed insider trading reports on time and that there were fines attached to this failure, based on Ms. Parker's January 2000 letter and the telephone conference held with the board on January 17, 2000. Mr. Kirkham knew that regulators were demanding $70,000 "on basis of past takeover bids," but did not ask Mr. Kirby to explain why. The board's careless approach to management, Mr. Kirby submits, is fatal to this alleged ground for dismissal. Having failed to inquire for further particulars, Mr. Kirby says the board cannot fault him for non-disclosure.

**234**  Notwithstanding the directors' knowledge of those issues, I am satisfied that none of them knew about Mr. Kirby's planned guilty plea or its potential consequences.

**235**  Although the context of the business culture and the relationship between the board and Mr. Kirby are important, the threat of the OSC allegations changed substantively when the settlement agreement was rejected and Mr. Kirby unilaterally decided to plead the defendants guilty. Even if it were highly probable that the directors would have agreed to this result, it was incumbent on Mr. Kirby to bring such a serious matter to the board's attention.

**236**  I do not accept Mr. Kirby's argument that he could not have properly disclosed the OSC allegations to the board because it was confidential. If, in fact, OSC permission was required to share that document with the board, Mr. Kirby should have sought permission. He did not do so.

**237**  I am satisfied that Mr. Kirby's decision not to inform the board of the guilty plea was motivated by self-interest and the preservation of his reputation as a successful investor and manager. He simply did not want to tell the board how serious the situation was.

**238**  In my view, the non-disclosure of the OSC allegations is more than a mere error of judgment. The OSC allegations were a significant matter and required swift, informed and decisive action by Amalgamated. This amounted to a breach of fiduciary duty.

**239**  I turn to the question of whether this non-disclosure gave rise to a breakdown in the employment relationship. The circumstances of this case indicate that the board was totally dependent on Mr. Kirby's unilateral exercise of discretion. The board was the vulnerable party, as Mr. Kirby was the only person who completely understood what was going on in the company. To not inform the board in December 1999 of the potential seriousness of the OSC allegations, Mr. Kirby "... is fundamentally or directly inconsistent with the employee's obligations to his or her employer": *Mckinley,* p. 187.

**240**  Had this been Mr. Kirby's only error, then I might be inclined to conclude that the employment relationship had not been destroyed. However, in the context of other factors, which I discuss below, this is not my ultimate conclusion.

*5.5 Misappropriation or financial impropriety*

5.5.1 Insider trading

**241**  The defendants say that Mr. Kirby was justly dismissed for breach of the insider trading prohibition from 1996 until April 2000. The value of all impugned trades alleged to constitute insider trading amount to about $105,000.

**242**  Mr. Kirby agreed in cross-examination that he made each of the trades listed in the expert report of Mr. Holley, however, he says that his actions constitute, at the most, "technical breaches" of securities legislation, and do not rise to the level of insider trading.

**243**  The prohibition against insider trading prevents an "insider," or an individual who has a "special relationship" with an issuer, from using special knowledge (a material fact or material change, as defined in securities legislation) gained because of the individual's insider position, for the purposes of trading. Insiders are often senior managers or directors of the issuer in question.

**244**  Mr. Kirby was an insider in respect of Amalgamated, which was a reporting issuer in all the provinces of Canada: he was the *de facto* CEO from 1996-2000 and Amalgamated's president from 1998-2000. He knew all of the company's confidential information and, in particular, all information related to the Model and offers.

**245**  Unauthorized trading is a serious breach of securities regulations and is sufficient to justify termination: *Merrill Lynch*, at para. 131. In addition, insider trading is a breach of fiduciary duty at common law, which has been effectively codified in securities legislation: Mark Ellis, *Fiduciary Duties in Canada*, looseleaf (Toronto: Thompson Carswell, 2004, updated to 2007), p. 15-41.

**246**  During the time period of the alleged trades in question, from 1996 to 2000, two separate and now repealed provisions outlined the insider trading prohibition in British Columbia. Section 68(1) of the *Securities Act,* S.B.C. 1985, c. 83, in effect until April 21, 1997, reads as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 68. | (1) |  | No person that |  |

1. is in a special relationship with a reporting issuer, and
2. knows of a material fact or material change with respect to that reporting issuer, which material fact or material change has not been generally disclosed,

shall purchase or sell

1. securities of that reporting issuer,
2. a put, a call, an option or another right or obligation to purchase or sell securities of the reporting issuer, or
3. a security, the market price of which varies materially with the market price of any securities of the reporting issuer.

**247**  The 1985 Act was repealed and replaced by the *Securities Act*, *R.S.B.C. 1996, c. 418*. Under the 1996 Act, the prohibition contained the same wording under s. 86(1). The former s. 86 (itself repealed in 2006) is mirrored in Ontario's legislation.

**248**  Breaching the insider trading prohibition, at the time of the alleged trades, constituted an offence under s. 155(1)(b) of the 1996 Act and s. 155(1)(d) of the 1985 Act, and gave rise to civil liability under s. 136. A person would not have been liable under s. 136 if he or she had no reasonable grounds to believe that the material fact or change had not been generally disclosed (s. 136.2).

**249**  Under s. 1 of the British Columbia *Securities Act*, "material facts" are facts that would reasonably be expected to have a significant effect on the market price or value of securities issued or proposed to be issued. This is a "broader definition" than material changes, which only refers to "changes in the 'business operations, assets or ownership of the issuer' that would reasonably be expected to have an effect": *Pezim v. British Columbia (Superintendent of Brokers)*, [*[1994] 2 S.C.R. 557*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3DS-00000-00&context=), p. 597, [*114 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3DS-00000-00&context=) [*Pezim*]. Not all changes are material; material changes are "set in the context of making sure that issuers keep investors up to date": *Pezim,* p. 598. The definition of material changes also differs if the issuer is an investment fund or something other than an investment fund, pursuant to s. 1 of the current Act.

**250**  All the material facts and changes that the defendants say Mr. Kirby used for the purposes of trading relate to Amalgamated's offers. Prior to an offer being made public, the defendants say that the material facts and changes were:

1. The fact that the offer would be made, and
2. The terms of that offer, including the attributed valuation of Amalgamated units and the target LPs.

During the currency of an offer, the defendants say that the material facts and material changes were the number and nature of LP unit holders who accepted the offer.

**251**  I accept Mr. Holley's expert evidence that such information is typically communicated to the offering party by the intermediary/depository on an ongoing basis, which Amalgamated was in this case. Mr. Kirby would have received this information. On the strength of Mr. Holley's opinion and Ms. Parker's testimony that Mr. Kirby "tracked the responses," I find that Mr. Kirby received regular updates from the relevant depository of this information during the currency of an offer.

**252**  The defendants stress the enormous impact that each offer could have had on Amalgamated's business. For example, before the second offer, Amalgamated had approximately $7 million in assets and 1.3 million units outstanding, which were collectively worth a market capitalization of $10 million. The second offer had the potential, although not a realistic one, to result in the issuance of over 20 million new Amalgamated units, collectively worth over $140 million.

**253**  Mr. Holley's report and testimony affirm that a security's market price can be affected by, among other things, a transaction's substance, size, timing, and probability of completion. I accept Amalgamated's submission that the essential information relating to the terms of any of the offers, that is, their potential effect, and the rate of uptake, that is, their actual effect, constituted material facts or material changes if they altered the information available to investors in a way that was likely to have a significant effect on the market's collective perception of the issuer and its future prospects.

**254**  Mr. Kirby argues that neither the issuance nor the amendments to any of the offers significantly affected the market price of Amalgamated. Although I accept his evidence, the pertinent question, pursuant to the definition under the Act, is whether the information "could reasonably be expected" to have such an effect.

**255**  Similarly, although the market price of Amalgamated units increased from $5.75 to $5.85 on the first day after the trading halt, suggesting that the market was not overly concerned by the OSC allegations and draft notice of hearing, it does not necessarily follow that this information was not material. Mr. Holley's agreement on cross-examination that "the market is always right" does not negate this conclusion.

**256**  Mr. Kirby submits that the information could not reasonably be expected to have such an effect because no person could have reasonably expected any of the offers to have anywhere close to 100% acceptance. In fact, the percentage of total target LPs acquired in each of the five offers ranged from 4.3% to 5.7%. Although these statistics counter Mr. Holley's reference to the significant impact that 100% acceptance of any of the offers would have had, it does not negate this Court's conclusion that an objective observer could reasonably expect that the market price of Amalgamated would be significantly impacted by the information.

**257**  I find that information relating to the terms of each offer and its actual rate of uptake did constitute material facts or material changes. This information would have had significant impact on Amalgamated's asset base, earnings, unit holder base and liquidity, and therefore, would reasonably be expected to significantly affect the market price or value of Amalgamated units.

**258**  It follows that I accept that the terms and timing of each offer or amendment constituted material facts or material changes until such time as they were publicly released. It also follows that I accept that the information known to Mr. Kirby related to the rate of acceptance of each offer constituted material facts or material changes until such time as this information was publicly released.

**259**  I note that Mr. Kirby says that Mr. Holley's interpretation of the legislation is "coloured" by his past employment as a former executive director, deputy superintendent, and compliance officer with the British Columbia Securities Commission. His background is a factor for understanding and weighing his evidence, but there is no evidence that Mr. Holley is biased. Mr. Kirby did not produce an alternate expert opinion on this question and, in any event, I am satisfied that I would have arrived at the same conclusion even without any expert opinion evidence on this issue.

**260**  Although the actual impact on Amalgamated's market price is not a defence to the allegation of insider trading, it is one factor to consider in determining whether Amalgamated was justified in summarily dismissing Mr. Kirby. That is, little or no impact on the market price would support Mr. Kirby's argument that if he did commit any acts of insider trading, they were, at most, innocent and technical breaches that were not prompted by a sinister intention to misuse insider information in order to profit at the expense of the market.

**261**  Amalgamated replies that ignorance of the law is no excuse, particularly for an experienced stockbroker such as Mr. Kirby, who has an FCSI designation.

**262**  I do not hesitate in concluding that Mr. Kirby breached insider trading prohibitions, and do not need to rely on the Holley report to reach this finding. Mr. Kirby knew of the content of offers at least weeks in advance of them being made public. He was regularly updated by the relevant depository about the rate of uptake of Amalgamated's offers.

**263**  This conclusion does not automatically give an employer the right to dismiss. The *McKinley* principle of proportionality still applies. While an "innocent" insider trade will still be a breach of the Act, the nature and circumstances of such a breach are clearly relevant in the just cause analysis.

**264**  For example, Mr. Holley agreed in cross-examination that he was "sure" that it was "conceivable" that, similarly to Mr. Kirby, he could have innocently breached the Act or regulations during his time as a trader prior to joining the B.C. Securities Commission. This admission is appropriate, and simply underscores the fact that not every technical breach of a statutory provision ought to be, or at law is, grounds for summary dismissal.

**265**  A number of features of this factual matrix should be noted as factors in the *McKinley* analysis.

**266**  As noted above, a high degree of integrity is required in the investment industry and must be kept in mind: *Templeton; Merrill Lynch Canada.*

**267**  The breaches were monetarily small.

**268**  The impugned trades were simply part of Mr. Kirby's ongoing personal securities trading; they constituted errors of omission (failure to cease his regular trading activities during periods when he had insider information) rather than commission (intentionally going out of his way to make irregular trades based on insider information). There is nothing that makes these trades stand out against the background of his general trading activities.

**269**  Most of Mr. Kirby's breaches were minor or technical. It is not clear to me that the securities commissions in either Ontario or British Columbia would have exercised their prosecutorial discretion in respect of these breaches. Although Amalgamated is entitled to raise the allegation of insider trading in defence to Mr. Kirby's wrongful dismissal claim, a finding that there were some technical breaches of insider trading prohibitions should not be understood as having the same kind of stature as a prosecution before a Securities Commission.

**270**  On this basis, I have no trouble concluding that, although there were breaches of insider trading prohibitions in this case, they did not in and of themselves give rise to a breakdown in the employment relationship, either due to the breaches themselves, or due to any concern that Amalgamated says it had relating to its corporate reputation.

5.5.2 Trades without consideration

**271**  The defendants' allegation of misappropriation is for what this Court has termed "trades without consideration." Amalgamated submits that Mr. Kirby failed to give consideration for various blocks of Amalgamated units that he issued to himself, which he says were issued in exchange for LPs that he tendered to Amalgamated's offers. That is, the LPs that Mr. Kirby tendered to Amalgamated's offers did not belong to him, but instead, to registered owners or other third parties.

**272**  The consequence of the alleged procedural breaches, the defendants say, is that on those occasions when, for whatever reason, the LP issuer did not confirm the transfer to Amalgamated, Mr. Kirby would be holding both the LP and the Amalgamated units issued in respect of it, resulting in a misappropriation.

**273**  Fraud or theft, including the misappropriation of funds, is usually cause for summary dismissal. However, an innocent explanation for the apparent misappropriation, including the manner in which the employer runs its business, the manner in which the industry runs generally, or another reasonable basis for believing that it was acceptable, may lead to a different result:  *Kreager v. Davidson* [*(1992), 74 B.C.L.R. (2d) 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-633Y-00000-00&context=), [*44 C.C.E.L. 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-633Y-00000-00&context=) (C.A.) [*Kreager*].

**274**  Mr. Kirby's status as a fiduciary did not impact his obligation as an employee to not misappropriate his employer's property. However, because Mr. Kirby was a fiduciary, there is an evidentiary presumption against him. That is, in the absence of evidence that Mr. Kirby owned the units that he says he tendered in exchange for Amalgamated units, he is bound to account for them: *Regal (Hastings) Ltd. v. Gulliver,* [1942] 1 All E.R. 378, p. 392 (H.L.), quoted in *Canadian Aero*, pp. 382-383.

**275**  Although Mr. Kirby ought to have kept better records, I am satisfied that he was the beneficial owner of all the LPs that he tendered to Amalgamated's offer. Mr. Kirby's trader account statements support his testimony. He did a credible job tracing units from purchase through to tender.

**276**  Mr. Holley's testimony satisfies me that little reliance can be placed on the name of the registered owner because the LP certificates are often held in "street" form. In this manner of dealing, certificates are endorsed similarly to a cheque so they can change hands without being registered at each step. In addition, transfer agents often have LP certificates registered in their own name, sometimes as a result of a power of attorney from the underlying owner, and simply make block transfers to a different transfer agent. Once a certificate is in street form, it can be traded electronically on the strength of the power of attorney and the paperwork concerning the actual certificate and the registered owner may take time to catch up. Mr. Kirby pointed to documents from actual transfers at issue in this case that support his position in this respect.

**277**  Transfer agent and depository errors prevented some of the LPs from being registered in Amalgamated's name until Mr. Kirby and Amalgamated followed up some years later. That brokerage houses frequently made mistakes was corroborated by Ms. Parker and Mr. Boatman's evidence.

**278**  There is no record of any complaints by registered owners of the LPs at issue to transfer agents, depositories, or the ultimate recipient of the LPs that their LPs had been stolen. I would expect there to be some such evidence if that were the case.

**279**  The terms of reference of the Holley report were broad enough to include this allegation, but there is nothing in that report supporting Amalgamated's position.

**280**  Where errors did occur, they were to a small number of trades, relative to the large volume of trades that Mr. Kirby conducted in the pertinent period.

**281**  Irrespective of the evidence corroborating Mr. Kirby's position, Amalgamated argues that any occasion for which there was an incomplete tender that resulted in Mr. Kirby's retention of both the Amalgamated and underlying LP units, and receipt of distributions for both types of units, amounted to misappropriation of funds and justified summary dismissal.

**282**  Although Mr. Kirby was not entitled to keep both unit forms in such circumstances, I am satisfied that the counterclaim is the appropriate place to rectify this windfall. With respect to just cause, however, I find that Mr. Kirby intended to give Amalgamated what he attempted to give, and those situations for which he retained both forms of units were because of his administrative sloppiness, not intentional misappropriation. I conclude that Amalgamated has not proven its claim that Mr. Kirby effectively stole Amalgamated units.

**283**  The defendants also submit that Mr. Kirby received units of Amalgamated in error after his dismissal. Although any amounts misappropriated must be returned, his actions respecting those units cannot form the basis for just cause, as they occurred after the defendants terminated his employment.

**284**  I note that although Mr. Kirby was not entitled to withhold monies, he was entitled to considerable monies for past remuneration. His actions, in the circumstances, are proportionate to Amalgamated's decision to withhold funds owing to Mr. Kirby for remuneration from 1998 and 1999, which is based on its perceived entitlement pursuant to its counterclaim.

5.5.3 Unauthorized borrowing

**285**  As with the allegations of trades without consideration, I am satisfied that the allegation of unauthorized borrowing properly gives rise to a counterclaim, but does not constitute just cause for summary dismissal. Assuming, without deciding, that Mr. Kirby's fiduciary status would cause him to become an "associate" or "affiliate" of the general partner within the meaning of Article 2.06 of the Agreement, most of what is now called "borrowing" was merely the unintentional result of sloppy paperwork.

**286**  Even to the extent that Mr. Kirby was "running a tab," this must be considered in light of the fact that Amalgamated owed Mr. Kirby compensation for previous work. As with the rest of his past remuneration, the directors were apparently content to let things proceed as they trusted that any amounts outstanding would be reconciled in the future.

**287**  The loose manner in which these matters were handled persisted in part because of the casual attitude of the board, including the lack of oversight by the audit committee. In my view, the "unauthorized borrowing" allegation arose only in retrospect for the purposes of this litigation.

*5.6. Disobedience*

**288**  Amalgamated says that Mr. Kirby was disobedient in failing to hire an administrative assistant, failing to establish a business office in Victoria, and failing to establish a business plan, when directed to do so.

**289**  An employee's wilful disobedience of clear, reasonable, and lawful orders is grounds for summary dismissal:  *Stein v. British Columbia (Housing Management Commission)*, [*[1992] B.C.J. No. 280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61NY-00000-00&context=), [*65 B.C.L.R. (2d) 181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61NY-00000-00&context=) (C.A.) [*Stein*]. According to MacKinnon J. in *Heyes v. First City Trust Co.,* [*[1981] B.C.J. No. 1529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2CR-00000-00&context=), at para. 15, 2 A.C.W.S. (2d) 104 (S.C.), the onus is on the employer in such cases:

[15] ... to establish that there were acts wilfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well known by the employee as being necessary in the fulfillment of the employer's objectives.

**290**  Wilful disobedience must be distinguished from careless faults or minor errors, which can only be grounds for dismissal if the carelessness also amounts to incompetence: *Dusconi v. Fujitsu-ICL Canada Inc.* [*(1996), 19 C.C.E.L. (2d) 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1WS-00000-00&context=), [*22 B.C.L.R. (3d) 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1WS-00000-00&context=), at para. 6 (S.C.).

**291**  None of the defendants' allegations rise to the level of justifying summary dismissal. Far from being "wilful and unequivocal," the evidence shows that Mr. Kirby made steps to address each complaint. Although these changes were not fully executed by the time of dismissal, I am satisfied that this is not because of disobedience, but rather because of a number of issues, including the short period of time between the defendants' "directives" and Mr. Kirby's dismissal, and the fact that several staff members hired to address the problems did not work out.

**292**  Mr. Kirby's behaviour in any of these respects does not amount to misconduct, let alone misconduct justifying summary dismissal. Even if Mr. Kirby's efforts were "sub-par," as Amalgamated suggests, given the lack of clear objectives, timelines, and warnings about the consequences for failing to comply, I would not find that Mr. Kirby's actions were wilful disobedience.

*5.7 Incompetence*

**293**  An employer may dismiss an employee for incompetence, as this amounts to a repudiation of the employment contract: *Rowe v. Keg Restaurants Ltd.,* [*[1996] B.C.J. No. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2D0-00000-00&context=), [*18 C.C.E.L. (2d) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2D0-00000-00&context=) (S.C.), citing *Steward v. Intercity Packers Ltd.*, [*[1988] B.C.J. No. 2442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4G5-00000-00&context=), [*24 C.C.E.L. 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4G5-00000-00&context=) (B.C.S.C.). As noted above, mere dissatisfaction with an employee's job performance does not justify dismissal: *Rowe; Ellchuk v. International Stage Lines Inc.* [*(1989), 28 C.C.E.L. 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0C0-00000-00&context=), [*17 A.C.W.S. (3d) 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0C0-00000-00&context=) (B.C.Co.Ct.).

**294**  Although Mr. Kirby was indeed a poor manager, this is not grounds for summary dismissal: *Mitchell v. Paxton Forest Products Inc.*, [*2001 BCSC 1802*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4FC-00000-00&context=), [*111 A.C.W.S. (3d) 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4FC-00000-00&context=), at para. 68; aff'd [*2002 BCCA 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-606J-00000-00&context=), [*174 B.C.A.C. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-606J-00000-00&context=).

**295**  To dismiss an employee for incompetence, the employer must show, on balance, the following (*Lee v. Parking Corp. of Vancouver* [*(1998), 39 C.C.E.L. (2d) 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2KB-00000-00&context=), [*56 B.C.L.R. (3d) 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2KB-00000-00&context=), at para. 23 (S.C.) [*Lee*], adopted from *Bogden v. Purolator Courier Ltd.* [*(1996), 19 C.C.E.L. (2d) 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-JK4W-M34K-00000-00&context=), [*182 A.R. 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-JK4W-M34K-00000-00&context=) (Alta. Q.B.) [*Bogden*]):

1. The level of job performance that it required and that the level required was communicated to the employee.
2. That it gave suitable instruction to the employee to enable him to meet the standard.
3. That the employee was incapable of meeting the standard.
4. That there had been a warning to the employee that failure to meet the standard would result in his dismissal (*Van Houwe v. Intercontinental Packers Ltd.* [*(1987), 59 Sask.R. 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JP4G-624K-00000-00&context=) (Q.B.)).

**296**  There is no need to explicitly articulate to the employee that his or her future employment is in jeopardy; the pertinent question is whether or not the communication was made "in such a way that the employee should conclude that he stood in danger of being terminated": *Thomas v. Canex Foods Ltd.*, [*2000 BCSC 748*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61FD-00000-00&context=), at para. 18, [*[2000] B.C.J. No. 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61FD-00000-00&context=).

**297**  Here, the defendants gave Mr. Kirby no warnings or deadlines that would justify dismissal for incompetence. I am satisfied that whatever was communicated to Mr. Kirby amounted to a mere admonishment at the most and that he was not given any clear objectives or a deadline for improvement. At no time was there any indication that a failure to meet specific objectives would jeopardize his employment.

**298**  I note that at the April 8, 2000, meeting, held partly because of Ms. Parker's concerns regarding Mr. Kirby's performance, there was no suggestion that Mr. Kirby was incompetent.

**299**  Further, as noted above, if the employer fails to direct and supervise the employee, the courts will be cautious about acceding to the employer's submission that it was entitled to summarily dismiss for incompetence. In *Lee,* at para. 23, McEwan J. also adopts from *Bogden* the principles that the employer must:

1. Show that it gave suitable instruction to enable the employee to meet the standard; and
2. Establish that it did not do anything to contribute to the employee's problems, such as fail to support or motivate the employee.

**300**  The failure to provide supervision is not a defence, but it is an important contextual factor. In this case, the board was content to let Mr. Kirby operate the company as he saw fit, so long as each member's individual investment in the company was paying them well. It is unreasonable for the directors to say that Mr. Kirby had been grossly incompetent for years, only after they learned of a regulatory problem.

**301**  The defendants say their perspective changed when they realized that Mr. Kirby had not been disclosing to them any bad news about the company. In my view, however, what changed was the directors' decision to spend time and effort supervising the company. Prior to this realization, the directors had effectively abandoned their responsibilities. Had they been more engaged in the past, they would have learned of the many matters that needed addressing.

**302**  I note that Mr. Kirkham recognized as early as 1997 that the board was not being diligent. Mr. Boatman acknowledged that procedures that were being put in place, after he took over the administration of the business, should have previously been in place. However, board oversight did not improve between 1997 and Mr. Kirby's dismissal in May 2000.

**303**  The defendants also submit that there are examples of "gross" incompetence that allowed Amalgamated to summarily dismiss Mr. Kirby without a warning: *Rieckhoff v. DC Diagnosticare Inc.*, [*2001 BCSC 850*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-240R-00000-00&context=), [*[2001] B.C.J. No. 1233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-240R-00000-00&context=), at paras. 50-51. These are as follows:

1. Failure to follow exchange protocol;
2. Failure to keep adequate records;
3. Failure to file insider trading reports; and
4. Administrative errors.

5.7.1 Failure to follow exchange protocol

**304**  These matters come under Amalgamated's general head of alleged "financial impropriety" and relate again to Mr. Kirby's purchase of LPs on his own account, and his tendering of those LPs to Amalgamated's offers. The issue here is not whether the mere fact of making those purchases constituted a breach of fiduciary duty as a substantive matter, nor whether the LPs that he tendered belonged to him, but rather whether the manner in which those trades were conducted and recorded justified dismissal.

**305**  The correct protocol for such transfers is as follows. First, an LP holder would tender a letter of acceptance to the depository along with a certificate or schedule B, which the depository would then forward to Amalgamated. Mr. Kirby, for Amalgamated, would then verify that the documentation was complete, and would then forward it to the LP issuer who, if satisfied, would send confirmation of the transfer to Amalgamated. Only then was Mr. Kirby, on behalf of Amalgamated, permitted to issue a treasury order authorizing its transfer agent to issue units of Amalgamated to the LP holder.

**306**  The defendants allege that Mr. Kirby broke protocol by issuing treasury orders prior to receiving the requisite confirmation of transfer from the LP issuer. The treasury orders in question involved Amalgamated units issued to Mr. Kirby in exchange for LPs that he tendered to Amalgamated's offers. Mr. Kirby issued an order to a brokerage firm, which carried out his instructions. That, Amalgamated says, constitutes cause in itself.

**307**  Amalgamated says that Mr. Kirby's breach of the protocol included knowingly endorsing treasury orders as true when he knew they were not.

**308**  Compounding the cause, says Amalgamated, is that Mr. Kirby failed to keep adequate records, either for the company, or for himself. Apart from depriving the defendants of evidence of his misappropriation of funds, Amalgamated says this constitutes a distinct ground for dismissal for cause.

**309**  Mr. Kirby did breach the protocol on numerous occasions. He did so by issuing Amalgamated units to himself before receiving confirmation that the underlying LPs had been accepted for registration to the benefit of Amalgamated.

**310**  I recognize that there were also some occasions where Mr. Kirby issued Amalgamated units to himself a few days prior to tendering the underlying LPs. I expect that on some of these occasions he gave the instructions for both on the same day, but they were implemented out of sequence.

**311**  On the whole, I am satisfied that the breaches of protocol were a matter of Mr. Kirby cutting administrative corners because, in his overworked state, he had lost track of the tenders for which he had received confirmation. At most, this amounted to carelessness. It certainly did not amount to fraud.

**312**  These breaches of the protocol underscore the importance of having appropriate administrative assistance and are best described as carelessness deserving of a warning or an ultimatum. I would not characterize it as gross incompetence or incompetence deserving of summary dismissal without warning.

5.7.2 Failure to keep adequate records

**313**  Mr. Kirby submits that the only evidence supporting a finding of incompetence is Mr. Boatman's observation that his office appeared disorganized, and that when Mr. Boatman took possession of the corporate records, the files were not organized in a fashion that he could understand them.

**314**  I accept that Mr. Kirby had a duty to maintain sufficient records for the purposes of the auditor and audit committee. However, it is not clear that there was a particular standard required for other operating records. Mr. Kirby maintained records in the forms of spreadsheets and lists on his computer for tracking such things as distributions payable. Some were produced in hard copy; many others were contained on Zip disks.

**315**  Disputing the allegation that he did not make adequate records of his personal tenders to Amalgamated's offers, Mr. Kirby states that the company's records are supplemented by his brokerage statements and memory. The defendants say that since Mr. Kirby is a trader who conducts a great volume of trades on his own account, "the mere fact that in his brokerage statements there is a listing of a certain number of units of a particular LP issuer and the number may correspond to an alleged exchange" is insufficient.

**316**  For example, on one occasion over 1,200 units from two different LPs were removed from Mr. Kirby's account with the intention of exchanging them for Amalgamated units. However, these were not transferred. The evidence is that the LPs were initially transferred, but the brokerage removed them from Amalgamated's account because of a problem with their documentation. Once Mr. Kirby addressed this issue, the brokerage returned them to Amalgamated. Amalgamated did not point to any other occasion when the brokerage statements were not accurate.

**317**  In my opinion, this event supports the unreliability of the intermediaries and potential prejudice caused by Mr. Kirby's choice not to follow exchange protocol.

**318**  However, Amalgamated did not satisfy me that there was a minimum standard of record keeping that someone in Mr. Kirby's position should have maintained. Amalgamated relied primarily on the evidence of other allegations of cause and asked the court to draw an inference from the existence of those other allegations that the records that Mr. Kirby kept were deficient.

**319**  I also do not accept the contention that Mr. Kirby's fiduciary status substantively increased the obligation to keep appropriate records.

**320**  I note that there is no evidence of the board expressing concern over Mr. Kirby's bookkeeping standards.

**321**  The records that Mr. Kirby maintained might have elicited a warning. In such an instance, the board would have needed to issue a directive that Mr. Kirby improve record keeping and bring it to a specific standard, then clearly identify what that standard was. Amalgamated has not satisfied me that the records Mr. Kirby maintained were so incompetent as to warrant summary dismissal.

**322**  I note that any dissatisfaction Amalgamated had, in retrospect, with the statutorily mandated corporate records (as opposed to operating records) did not constitute incompetence on Mr. Kirby's part. That form of record keeping is a duty of the corporate secretary, who was, at different times, Ms. Parker and Mr. Boatman. It is obvious that multiple directors, as shareholders, must have known that the share subscriptions had not been executed. I give no weight to those grounds.

5.7.3 Failure to file insider trading reports

**323**  The OSC crisis arose because Amalgamated had failed to submit 150 insider trading reports. The OSC allegations could have been averted had the insider trading reports been filed more promptly. Amalgamated submits that the lack of priority that Mr. Kirby gave to the insider trading reports issue after learning that they were required amounts to incompetence.

**324**  I agree with Mr. Kirby that the 150 missed filings are not 150 separate errors, but one error. I also recognize that Mr. Kirby had retained counsel for that purpose, who made many filings for him on May 8, 2000.

**325**  Regulatory compliance was Mr. Kirby's responsibility and part of his job description. It was a term of the 1998 employment contract that Mr. Kirby would "attend to all regulatory requirements." This required Mr. Kirby to attend to the regulatory requirements himself or to delegate that responsibility and oversee that work. Mr. Kirby attempted to fulfil these requirements personally rather than delegate the responsibility to someone else.

**326**  Amalgamated says that the OSC warned Mr. Kirby of this problem in June 1998 and July 1999. I note that prior to this time, Mr. Kirby also failed to comply with the disclosure requirements of the Montreal Stock Exchange throughout 1996 and 1997. The Montreal Exchange and its lawyers had to remind Mr. Kirby repeatedly to file the appropriate reports, and even threatened to issue a cease trading order.

**327**  I am satisfied that Amalgamated has made out a *prima facie* case of gross incompetence on Mr. Kirby's part, as failing to file these reports had serious consequences for the employer. Absent a justification on Mr. Kirby's part, this would justify summary dismissal for incompetence without a warning.

**328**  Mr. Kirby responds that the failure to file the reports is not due to his own incompetence. Mr. Kirby says that he reasonably relied on legal advice that the insider trading reports were not required, but that this advice was inaccurate.

**329**  Mr. Kirby says that once he realized that the insider trader reports had to be filed, it was too late to avoid the late fees. He concluded that other matters should receive attention first, including the annual reports, the prospectus, the next takeover bid, the quarterly reports, and pursuing the accounts receivable. He submits that his fault was that he did not, in hindsight, prioritize it as he ought to have. Mr. Kirby argues that it was an error in judgment.

**330**  Mr. Kirby testified that he was "shocked" when the statement of allegations from the OSC first arrived around March 23, 2000, because he thought that progress was being made on the issue. At that point, he retained a lawyer who negotiated a tentative settlement, and then told Mr. Kirby that he expected that it would be "rubber-stamped" at the subsequent telephone conference with OSC staff. This, of course, is not what occurred.

**331**  Amalgamated was not a major operation with established policies developed by in-house counsel. Instead, Mr. Kirby sought guidance from lawyers on an *ad hoc* basis. Given the size of Amalgamated, Mr. Kirby cannot be faulted for proceeding in that manner.

**332**  I am satisfied that Mr. Kirby was incompetent in the handling of his responsibilities to file the appropriate reports with the OSC. However, given the relaxed business culture established and created by both Mr. Kirby and the board, it would be neither accurate nor just to blame Mr. Kirby's leadership for the company's problems in this area.

**333**  Had this been the only argument with respect to just cause, Mr. Kirby's level of incompetence might not have been viewed such that it warranted summary dismissal. However, in the circumstances of this case, his incompetence respecting this particular matter does affect my overall conclusion on cumulative cause.

5.7.4 Administrative errors

**334**  Simply falling behind in administrative matters is not grounds for dismissal without warning. The evidence in this case is that in the spring of 2000, the administrative problems arose quicker than Mr. Kirby could handle them. Mr. Kirby should have hired a competent administrative assistant. Nevertheless, the evidence does not rise to the level required to justify summary dismissal on this ground.

**335**  It is unfortunate that the board was not more involved in the running of Amalgamated. Had they been more involved, they would have likely insisted on the hiring of administrative assistance early enough that the problems would have been addressed before they led to the crisis that resulted in Mr. Kirby's dismissal.

**336**  Where an employer accepts a certain standard of performance over a long period of time, it cannot, without warning, use such conduct as cause for dismissal: *Dewitt v. A. & B. Sound Ltd.*, [*[1978] B.C.J. No. 1204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62BN-00000-00&context=), [*85 D.L.R. (3d) 604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62BN-00000-00&context=), p. 605 (S.C.). Similarly, if an employer permits a cavalier atmosphere to persist in a certain aspect of its business, for example, by failing to enforce a written policy prohibiting certain conduct, then it cannot rely on a continuation of that conduct to justify summary dismissal unless it subsequently gave clear, unequivocal direction that the behaviour must stop: *Cole v. Merrill Lynch Canada Inc.*, [*[2005] O.J. No. 6245*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDW1-F57G-S159-00000-00&context=), [*154 A.C.W.S. (3d) 1103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDW1-F57G-S159-00000-00&context=).

**337**  In the context of the business culture and the board's consistent lack of oversight of Mr. Kirby's management, I cannot conclude that this argument forms a basis for just cause.

*5.8 Other allegations*

5.8.1 Foran Mining contract

**338**  The defendant argues that Mr. Kirby, in taking a contract with Foran Mining, engaged in other employment that conflicted with his commitment to Amalgamated. I find no merit in this allegation.

5.8.2 Forged documents

**339**  Mr. Kirby concedes that on one occasion he signed Ms. Parker's name as a witness to his own signature on a Schedule B, which related to the transmission and receipt of consideration for Amalgamated units issued pursuant to an LP holder's offer. Amalgamated says there were two such documents. In my view nothing turns on that. Mr. Kirby conceded that he wrote that signature in a different colour of ink, in a different handwriting, and in a manner "to look like someone independent, not [Mr. Kirby], had signed that document."

**340**  I am satisfied that Mr. Kirby intended to deceive the transfer agent, but I characterize this as a procedural deception. That is, Mr. Kirby failed to follow the correct procedure in having his authorizing signature properly witnessed.

**341**  There was no dispute that Mr. Kirby could have accomplished this act legitimately, nor was this something that he was hiding from the board. Schedule Bs were signed with great frequency in the defendants' business and Ms. Parker regularly witnessed Mr. Kirby's signature. Her signature was not required as an authorizing signature, but only as a witness.

**342**  The particular Schedule B was properly signed by Mr. Kirby as the authorizing signatory. Amalgamated had received the consideration in question and was indeed required, through Mr. Kirby, to sign the Schedule B. I am satisfied that Ms. Parker would have witnessed the document had Mr. Kirby properly waited for an opportunity to have her do so.

**343**  The nature of Mr. Kirby's actions and its context must be considered under *McKinley* to determine whether or not that misconduct resulted in a breakdown in the employment relationship. Although it was indeed unlawful for him to forge Ms. Parker's signature, Mr. Kirby's actions were more toward the "innocent" side of the forgery spectrum.

**344**  In my view, Mr. Kirby's decision to forge Ms. Parker's signature could not have reasonably resulted in a breakdown of the employment relationship. It was not "theft, misappropriation or serious fraud": *McKinley,* at para. 51. It was an error in judgment deserving of rebuke and warning, but did not reveal a character of dishonesty or wilful flouting of the law. In my view, alleging this incident as grounds for summary dismissal is an example of "dredging up" failings of the employee over the course of the employment relationship.

5.8.3 Dishonesty

**345**  Although dishonesty was alleged in the pleadings as a cause for dismissal, the matter was not pressed in final argument, nor were specific instances pointed to as constituting grounds for dismissal on this basis, other than those concerning the OSC issue or the forgery of Ms. Parker's signature, which this Court has addressed separately in these reasons.

**346**  On the whole, I am satisfied that dishonesty has not been established. The evidence demonstrates that Mr. Kirby cut administrative corners and made careless errors respecting disclosure, but not that he was dishonest.

5.8.4 Perjury

**347**  Although mentioned in submissions, the matter was not pressed in argument, and has not been established on the evidence.

*5.9 Cumulative effect*

**348**  A summary of my determinations on the defendants' allegations of termination for cause is as follows:

1. Breach of fiduciary duty:
2. Abusing confidential information and competing with Amalgamated: I have concluded there was a serious error in judgment but not likely sufficient in and of itself to result in summary dismissal.
3. Failing to disclose the OSC allegations to the board: this was a serious error. Absent other factors, it likely would not have resulted in a breakdown of the employment relationship on its own, however, it is a significant factor in this Court's overall conclusion.
4. Misappropriation or financial impropriety:
5. Trades without consideration: does not warrant summary dismissal;
6. Unauthorized borrowing: the "borrowing" was, in reality, only sloppy administration and not grounds for summary dismissal;
7. Insider trading: there was definitely a breach of the insider trading rules, but I am satisfied those breaches were minor and technical in nature and, in and of themselves, would not have resulted in a breakdown of the employment relationship.
8. Disobedience: the failure to follow the board's direction to hire administrative assistance and not checking to see if this was done indicated the board's usual lack of follow-up.
9. Incompetence:
10. Failure to follow the exchange protocol: these actions were the kind that would attract a serious warning;
11. Failure to keep adequate records: this lack of attention to detail was the type of behavior that called for a warning and retraining;
12. Failure to file insider trading reports: although Mr. Kirby relied on legal advice on the necessity of filing insider reports, he failed to file the appropriate reports for years. This behaviour in and of itself was not sufficient to attract summary dismissal, however it is critical to the analysis of cumulative cause;
13. Poor administration: Mr. Kirby's inadequate administrative skills were not sufficient to attract summary dismissal.
14. Other allegations:
15. Foran Mining contract: work was not in conflict of interest;
16. Forgery: I have concluded that forgery did occur but it was a procedural deception of minimal practical consequence;
17. Dishonesty: although some of the circumstances could raise such a suspicion, dishonesty has not been proven.
18. Perjury: not established by the evidence.

**349**  Where each individual failing would not be sufficient to justify summary dismissal, their cumulative effect may: *Ma v. Columbia Trust Co.*, [*[1985] B.C.J. No. 582*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F4GK-M104-00000-00&context=), [*9 C.C.E.L. 300*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F4GK-M104-00000-00&context=), at para. 37 (S.C.), aff'd recently in *Baumgartner*. However, I remain mindful of the statement of Taylor J. in *Goldberg v. Western Approaches Ltd.,* [*[1985] B.C.J. No. 937*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F956-S0TC-00000-00&context=), [*7 C.C.E.L. 127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F956-S0TC-00000-00&context=), p. 135 (S.C.):

The Court must be alert to a danger inherent in the setting up of cumulative failings to establish a cause for dismissal where, as here, it is admitted that none would alone have amounted to such cause. Inadequacies and errors of judgment which a close review of the records may disclose in most employees must not in this way be put together and accepted as grounds for termination.

**350**  I am satisfied that the defendants have brought forward every instance of misconduct that they believed totalled just cause.

**351**  Although Amalgamated owes its life, and its owners owe their substantial profits, to Mr. Kirby for his business acumen and hard work, past success is a minor consideration when compared to serious misconduct. In reviewing my conclusions on each of the defendants' allegations and applying the contextual approach, I am satisfied that, cumulatively, there was just cause to summarily dismiss Mr. Kirby.

**352**  It was the totality of the OSC issue in May 2000 that warranted Mr. Kirby's summary dismissal. Specifically, the breakdown in the employment relationship was caused by Mr. Kirby's initial attempts to cover up his own administrative mess respecting the securities filings, an act that almost rose to incompetence worthy of dismissal without a warning. This would not have likely been sufficient on its own, but was compounded by Mr. Kirby's non-disclosure of the OSC allegations, the consequences of the allegations and, in particular, his decision to plead guilty to those allegations on behalf of the defendants without informing them. Under these circumstances, the defendants' trust in Mr. Kirby as an employee and a fiduciary was destroyed to the extent that it would be unreasonable to suggest that they ought to have given Mr. Kirby a second chance.

***6.*** ***Is Mr. Kirby entitled to Wallace or punitive damages for breach of contract?***

**353**  In *Wallace v. United Grain Growers,* [*[1997] 3 S.C.R. 701*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WB-00000-00&context=), [*152 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WB-00000-00&context=), the Supreme Court of Canada held that the length of notice awarded in wrongful dismissal actions can be increased if the employer's conduct in the dismissal caused emotional distress or adversely impacted the employee's future employment prospects. Having found just cause for Mr. Kirby's dismissal, however, the consideration of notice and the so-called *Wallace* damages also relating to bad faith are purely academic: *Pavlis v. HSBC Bank Canada,* [*2009 BCSC 498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M21V-00000-00&context=), [*72 C.C.E.L. (3d) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M21V-00000-00&context=).

**354**  Similarly, given the above findings on cause, it is unnecessary to address Mr. Kirby's claims respecting aggravated and punitive damages for the defendants' failure to pay wages owing and vacation pay, and provide a Record of Employment.

***7.*** ***What is Mr. Kirby owed?***

*7.1 Monies owed to Mr. Kirby: January 1, 2000 - May 17, 2000*

**355**  I have found that the 2000 fixed-term contract is binding. Thus, monies owed for January 1, 2000 to April 1, 2000, should be calculated based on the remuneration due under the 1998 contract. This is not possible as Mr. Kirby and the company settled on lump sums for remuneration in 1998 and 1999 without detailing the calculations for the incentive portion.

**356**  Monies due from April 1, 2000, until Mr. Kirby's dismissal for cause on May 17, 2000, should be calculated under the terms of the new contract. Again, the incentive definitions were never agreed upon. However, the December 14, 2001, President's Report by Mr. Boatman indicates that the compensation due to Mr. Kirby for the year 2000, if he had not been terminated, would have amounted to $187,071. I am satisfied that this amount was inclusive of any incentives.

**357**  Therefore, I am satisfied that a fair and just determination of the monies owed to Mr. Kirby can be obtained by using the numbers supplied by the defendants. As Mr. Kirby worked for 4.5 months in 2000, I have determined he is owed $40,152 ($187,071 x 4.5/12 = $70,152 less the $30,000 he has already received), plus Court Order Interest from June 1, 2000.

*7.2 Director's fees*

**358**  Mr. Kirby is entitled to director's fees of 4.5/12 x $4,000 = $1,500, plus Court Order Interest from June 1, 2000.

*7.3 Vacation pay*

**359**  I am satisfied that Mr. Kirby has failed to meet the onus of establishing either that the $7,500 monthly draw was exclusive of vacation pay or that he did not receive vacation pay during the period January 15, 1998 to May 17, 2000, via the alternate route of continuing to receive the full amount of his draws during vacations.

***8.*** ***Summary of counterclaims***

**360**  The defendants seek, by counterclaim, damages for breach of contract. Specifically, they seek in excess of $1,000,000 for the following:

1. Costs paid to the OSC which related to investigating the filing omissions and irregularities;
2. Costs paid for accounting and related services that were required as a result of Mr. Kirby's alleged ***negligence*** and incompetence;
3. Costs paid for legal representation of the defendants in the OSC matter;
4. Costs paid for a report that was demanded by the OSC as a condition of settlement;
5. Costs paid for services performed to "unravel" what the defendants say was an "administrative mess created and left by Mr. Kirby";
6. A portion of the costs charged for creating a trial balance that ought to have been available for audit purposes;
7. Damages as compensation for cumulative losses by write downs of the assets and distributions receivable;
8. Repayment of funds that were borrowed by Mr. Kirby, without consent, from Amalgamated;
9. Repayment of distributions paid for special warrants issued to Mr. Kirby after his dismissal;
10. Repayment of distributions paid for units Mr. Kirby received without consideration;

**361**  The latter three claims are addressed under the heading of misappropriation, not breach of contract. The defendants also claim restitution for breach of fiduciary duty, which is addressed later in these reasons.

***9.*** ***Is Mr. Kirby liable for damages for breach of his employment contract?***

*9.1 Employee liability for breach of employment contract*

**362**  Mr. Kirby argues the counterclaims are frivolous and that the defendants have "turn[ed] over every rock" following his dismissal to "pin" any business costs or loss on him. He also disputes that the defendants have a basis for their damages claims at law.

**363**  Mr. Kirby says that an employer may sue an employee for "lost profits" only in narrow circumstances, that is, where there has been "deceit, fraud or the like": *per* Brenner J. (as he then was) in *Aeichele v. Jim Pattison Industries Ltd.* [*(1992), 44 C.C.E.L. 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-62M6-00000-00&context=), [*35 A.C.W.S. (3d) 695*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-62M6-00000-00&context=) (B.C.S.C.), at. paras. 34-36 [*Aeichele*], affirming the principle stated in *Perry v. Papillon Restaurant Ltd.,* Kelowna 497/79 (S.C.) [*Perry*].

**364**  Mr. Kirby also relies on s. 21 of the *Employment Standards Act* which prohibits an employer from "offloading" business costs or expenses to an employee: *Re Sitter,* [*[2000] B.C.E.S.T.D. No. 515*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F83-3VB1-JBT7-X2KN-00000-00&context=), at para. 18. The provision reads as follows:

1. Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
2. An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
3. Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

There are currently no regulations that permit an employer to require an employee to pay business costs.

**365**  However, neither *Aeichele* nor *Perry* seem to thoroughly canvass the law on this point. Indeed, the *Aeichele* principle seems inconsistent with "the general principles of contract law which do not recognize any such limitation on the right to sue for non-repudiatory breaches of contract": Geoffrey England & Roderick Wood in *Employment Law in Canada*, vol. 2, loose-leaf (Markham: LexisNexis, 2005), S. 11.109.

**366**  Furthermore, s. 21 of the *Employment Standards Act* does not bar recovery of debts incurred by an employer because of employee ***negligence*** or, depending on the facts of the case, gross incompetence. Although these claims are rare, I am satisfied that an employer may recover damages from employees in contract under broader circumstances than Mr. Kirby suggests.

**367**  At the same time, I do not accept the defendants' claim that an employer may recover any and all losses or damages suffered by an employer caused by the incompetence or "simple" ***negligence*** of that employee. The defendants rely on *D.H. Overmyer Co. of Canada v. Wallace Transfer Ltd.,* [*[1975] B.C.J. No. 1171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-628J-00000-00&context=), [*65 D.L.R. (3d) 717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-628J-00000-00&context=) (C.A.) [*Overmyer*], for this proposition. In *Overmyer*, the employer was sued by its landlord for failing to give notice when terminating a lease. The employer added its general manager as a third party because it was the manager's responsibility to terminate the lease and he had failed to do so.

**368**  The employer in *Overmyer* successfully recovered the rent due for the notice period from its employee. The majority addresses the legal issue on p. 718 as follows:

The failure to give the notice in proper time was, in my opinion, ***negligence***. In failing to do what he was clearly required to do he failed to exercise his managerial duties with reasonable care and skill and as a consequence he is liable for the loss suffered by his employer by having to pay the December rent for the leased premises amounting to $4,185. ... The case of *Lister v. Romford Ice & Cold Storage Co. Ltd.*, [1957] A.C. 555, [1957] 1 All E.R. 125 [H.L.], followed in this Province by *Texada Towing Co. Ltd. v. Minette* [*(1969), 9 D.L.R. (3d) 286*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G0NN-00000-00&context=), [*71 W.W.R. 417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G0NN-00000-00&context=) [S.C.], is clear authority for such a judgment. I respectfully disagree with the learned trial Judge when he indicated that the degree of ***negligence*** here falls far short of the degree of ***negligence*** that is required.

Although the failure to give notice constituted ***negligence***, the majority also expressly says that the employee had "fail[ed] to do what he was clearly required to do and failed to exercise his managerial duties with reasonable care and skill," suggesting the recovery is grounded in breach of contract.

**369**  There is not a great deal of subsequent case law commenting on an employee's liability for failure to perform with due care, and the majority of such cases involve vicarious liability for negligent acts, for example *Texada Towing Co. Ltd. v. Minette* [*(1969), 9 D.L.R. (3d) 286*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G0NN-00000-00&context=), [*71 W.W.R. 417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G0NN-00000-00&context=) (S.C.) [*Texada*]; *Mainland Sawmills Ltd. v. U.S.W. Local 1-3567*, [*2007 BCSC 1734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21WK-00000-00&context=), [*163 A.C.W.S. (3d) 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21WK-00000-00&context=).

**370**  In this province, Kelleher J. discussed the application of *Overmyer* outside of a strictly vicarious liability context in *Jalan v. Institute of Indigenous Government*, [*2005 BCSC 590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0P5-00000-00&context=), [*[2005] B.C.J. No. 929*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0P5-00000-00&context=). In that case, the employer argued that its employee was liable for damages caused as a result of negligently issuing a letter of tenure to the plaintiff. The Court found the employee owed a duty of care in the circumstance, but dismissed the claim because the employer was also partially at fault for the chain of events leading to the damages claim.

**371**  Other jurisdictions seem more willing to interpret *Overmyer* as permitting recovery in contract absent a vicarious liability claim. In *Petrone v. Marmot Concrete Services Ltd.*, [*[1996] A.J. No. 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-FC1F-M0R0-00000-00&context=), [*18 C.C.E.L. (2d) 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-FC1F-M0R0-00000-00&context=) (Q.B.) [*Petrone*], for example, the defendant employer was able to recover $45,000 for the cost of destroying and reconstructing a sidewalk, which had been defectively constructed because of the employee's failure to supervise another employee. Nevertheless, subsequent courts have questioned whether *Petrone* stands for "routine" recovery from an employee in cases where there is no vicarious liability: *Daley v. Depco International Inc.*, [*[2004] O.T.C. 526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-F1H1-20YV-00000-00&context=), [*37 C.C.E.L. (3d) 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-F1H1-20YV-00000-00&context=) (S.C.J.).

**372**  The second contested issue is the level of "incompetence" that can give rise to damages in the context of a claim grounded in contract law. Indeed, the vast majority of cases that consider employee liability justify damages when the acts or omissions in question are more than "casual acts" of ***negligence*** or incompetence, such as in *Texada* or *Petrone*. For example, the Ontario Court of Appeal's recent review of *Petrone* characterized the employee's act as "tantamount to wilful misconduct": *Douglas v. Klinger* (*litigation guardian of*), [*2008 ONCA 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64H8-00000-00&context=), [*294 D.L.R. (4th) 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64H8-00000-00&context=), at para. 33, leave to appeal refused, [*[2008] S.C.C.A. No. 363*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F22N-X2V7-00000-00&context=).

**373**  Complicating this debate is the reliance by many courts on Seaton J.A.'s dissent in *Overmyer,* who questioned the extension of liability to an employee's "simple" negligent conduct. On p. 723, he says as follows:

In the event of an injury to a stranger it is reasonable that the person who caused that injury ought to bear the loss even if his error be only slight. But the same reasoning is not applicable to the employer-employee situation. If by the slightest error an employee causes loss, that is one of the risks of the enterprise that the employer accepts. No employee is infallible and the employer allows for that. He takes it into account when he insures and when he supervises that employee and when he estimates his costs. Losses due to employee error are one of the expenses of the business.

On pp. 724-725, he continues:

If an employee, by lack of care, causes loss to his employer, I do not think that it should be presumed that the employee will be liable, and I do not think that we should look at decisions on other employment contracts for the answer. We should look at the hiring to see what was said and at the circumstances to see what might properly be implied. It follows that this employment and this error must be looked at to see what terms were in the contract and whether they were breached.

Seaton J.A. would have limited this principle to cases in which the employee is hired to do a particular "skilled" job and where the loss flows from a failure in the doing of that very "skilled" work (p. 721). Since the employee in *Overmyer* was a general manager who failed in his managerial duties, it could be that the case does not stand for more than Seaton J.A. suggests. Both *Texada* and *Lister v. Romford Ice & Cold Storage Co. Ltd.* [1957] A.C. 555, [1957] 1 All E.R. 125 [H.L.] [*Lister*] involved employees who had a certain degree of responsibility connected to their employment.

**374**  Many courts have affirmed Seaton J.A.'s position and have followed his approach when assessing similar claims. For example, the Ontario District Court turned to the terms of the specific contract to guide the imposition of employee liability in *Dominion Manufacturers Ltd. v. O'Gorman*, [*[1989] O.J. No. 485*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCN1-JW5H-X2PG-00000-00&context=), [*24 C.C.E.L. 218*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCN1-JW5H-X2PG-00000-00&context=) (Div. Ct.) [*Dominion*]. The Court concluded that the employer could not recover amounts spent to prepare year-end closing schedules or alleged losses resulting from the employee's alleged failure to adequately supervise the collection of accounts, because those claims did not fall within the duty described by Seaton J.A. in *Overmyer*. However, the Court allowed the employer to recover over $13,000 for penalties, fines, and interest charges flowing from the employee accountant's failure to remit payroll deductions, taxes, and bills. Again, recovery in that case seemed connected to the particular failure, given that the employee was hired as an accountant.

**375**  There are strong policy rationales suggesting that employee liability should be limited, even in the context of vicarious liability. The court in *Dominion*, for example, openly suggests that the majority's decision in *Overmyer* constitutes bad policy and only encourages litigation between employers and employees. General policy principles were laid out by La Forest J. in his partial dissent from *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, *[1992] 3 S.C.R. 299*, *97 D.L.R. (4th) 261*, pp. 280-318 [*London Drugs*]. Mr. Justice La Forest argues the employer is better able to minimize and distribute the risk, that the risk should lie with the one who creates and stands to profit from it, and that there are other means of deterring employee ***negligence*** without imposing liability. Concurring with the majority, McLachlin J. (as she then was) notes her "admiration" for La Forest J.'s position, but concludes that his position would change the law in more than an incremental way, and such a change was best left to the Legislature (p. 320).

**376**  I am satisfied that the jurisprudence does not support the interpretation of *Overmyer* as urged by the defendants. Given the ambiguity and brevity in the majority reasons in *Overmyer*, the conflicting case law on this point, and the policy reasons outlined by the *Overmyer* dissent, legal scholars, and justices, including La Forest J. in *London Drugs,* I am not prepared to interpret *Overmyer* as authority for the proposition that an employer may recover any and all losses or damages suffered by an employer caused by an employee's mere error, incompetence or simple ***negligence***. In my view, something more than ***negligence*** *simpliciter* is required to recover damages for incompetent performance.

**377**  In *Canada Packers Inc. v. Kennedy*, [*[1983] S.J. No. 643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6W1-JGBH-B0N1-00000-00&context=), [*27 Sask.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6W1-JGBH-B0N1-00000-00&context=) (Q.B.) [*Canada Packers*], Batten C.J., relying on Seaton J.A.'s dissent in *Overmyer,* concluded that recovery of damages in contract was possible where there was a substantial failure by the employee to fulfil a contractual promise. In *Canada Packers*, the employee was responsible for collections and received money, but failed to remit those amounts to his employer. With respect, I adopt the approach articulated by Batten C.J, at para. 15:

[15] ... [I]t is necessary to look carefully at the particular circumstances of the case in order to find the exact terms of the relationship between the employer and employee. The onus is then on the employer who seeks to claim damages against the employee to prove to the satisfaction of the court firstly, the terms of the contract explicit or implied between them, and secondly, the breach of the term or terms by the employee and thirdly, the damages occasioned by or as a direct consequence of such breach, in order to obtain judgment against the employee. ...

**378**  Turning to the terms of the contract, the owner must establish that the employee failed to do something specifically promised or obviously implied in his or her employment contract. A claim for damages cannot be grounded in the argument that the employee did not perform as well as the employer expected. The position or skills the employee holds or purports to hold in the employment situation will be relevant, particularly if the act or omission is directly connected to the expectations of his or her employment.

**379**  Although dissatisfaction in job performance may lead an employer to dismiss an employee with reasonable notice or payment in lieu, more must be required to establish a claim for damages. The central question must be whether the error or omission was sufficient enough to attach liability, that is, was it negligent to the extent that it caused damage to the employer. Breaches permitting recovery would likely include misconduct that also justifies summary dismissal, since such conduct correlates to an employee's breach of a fundamental term of the contract. However, this analysis must be factually driven.

**380**  Finally, the recovery of damages is only possible if the loss is directly connected to the breach, that is, it is actual and demonstrable. Damages for which the employer is partially responsible are not recoverable.

*9.2 Corporate immunities and indemnities*

**381**  Mr. Kirby generally responds to the counterclaims by arguing that the general partner's Articles of Incorporation extends indemnification to him for company loss.

**382**  Contrary to Mr. Kirby's submission, all of the counterclaims relate to his actions as an employee, not a director. As a result, Mr. Kirby may not rely, as he wishes, on Article 70, since this only provides immunity to directors in their role as directors. Although the provision allows the board to extend indemnification to an employee, the board did not do so and I will not impute that they did so on the submission that they, in good faith, ought to have.

**383**  Mr. Kirby may rely on Article 68(1), however, as it indemnifies any director for "costs, charges or expenses" incurred irrespective of his position as an employee, so long as he satisfies the two conditions outlined by the Article:

The Company will indemnify every person who is or was a director of the Company or is or was serving at the request of the Company as a director of another corporation of which the Company is or was a shareholder, and may to the extent that the board determines indemnify any person who is or was an officer, employee or agent of another corporation or partnership, joint venture, trust or other enterprise, and the heirs and personal representatives of any such person, against all costs, charges and expenses actually incurred by him, including an amount paid to settle an action or satisfy a judgment in a civil, criminal or administrative action or proceeding whether brought by the Company, by such other corporation, partnership, joint venture, trust or other enterprise, or by any other person, and whether or not he is made a party by reason of his having so been or having so served as a director, officer, employee or agent, if

1. he acted honestly and in good faith with a view to the best interests of the Company or such other corporation, partnership, joint venture, trust or other enterprise, and
2. in the case of a criminal or administrative action or proceeding, he had reasonable grounds for believing that his conduct was lawful.

**384**  Mr. Kirby may rely on this Article to indemnify himself from expenses that arose in his capacity as an employee while he was a director on the board of the general partner, that is, from March 18, 1998 to May 16, 2000. However, where Mr. Kirby seeks to rely on this Article, he bears the onus to demonstrate that he acted, first, "honestly and in good faith", and second, "with a view to the best interests of [Amalgamated]".

**385**  Finally, Mr. Kirby seeks to rely on section 7.07 of the Agreement, which reads as follows:

The Partnership hereby indemnifies and holds harmless the General Partner, its officers, directors, shareholders, employees or agents from and against all costs, expenses, damages or liabilities suffered or incurred by reason of the acts, omissions or alleged acts or omissions arising out of the activities of the General Partner on behalf of the Partnership under this Agreement or in furtherance of the interests of the Partnership, but only if the acts, omissions or the alleged acts or omissions on which the actual or threatened action, proceeding or claim are based were believed by the General Partner to be within the scope of the authority conferred by this Agreement and were not performed or omitted fraudulently or in bad faith and are not attributable to fraud, bad faith, wilful misfeasance or the reckless disregard of the obligations of the General Partner under this Agreement.

**386**  The defendants effectively concede that Mr. Kirby may rely on section 7.07. However, they contend that Mr. Kirby does not meet the conditions of the indemnity outlined under the section. I find the conditions of the acts or omissions that are indemnified must:

1. Arise out of the activities of the general partner on behalf of the Partnership or in furtherance of the interests of the Partnership;
2. Be in the scope of the authority of the general partner; and
3. Not be attributable to fraud, bad faith, wilful misfeasance or the reckless disregard of the obligations of the general partner.

**387**  If Mr. Kirby relies on this provision, he must establish the first two elements. If he establishes a *prima facie* claim to indemnity, the burden shifts to the defendants to show, on balance, that the act or omission was one of fraud, bad faith, wilful misfeasance, or reckless disregard.

*9.3. Damages flowing from alleged breaches of employment contract*

**388**  I accept the framework established in *Canada Packers* to establish a claim for damages. The onus is on the defendants to demonstrate each of the three elements of the test for each item in its counterclaim. As no written contract was executed between the parties, to succeed in its counterclaims, the defendants must point to a duty that Mr. Kirby explicitly agreed to take on in the 1998 proposal, which became the contract between the parties, or show there was an implied term in the employment contract.

**389**  The approach I use to assess the counterclaims is as follows:

1. For each item in the counterclaim, the defendants must prove, on balance, the following:
2. the existence of an express term of the employment contract, or one that is implied by law or by necessity;
3. that Mr. Kirby breached that term; and
4. that damages flowed from that breach.
5. Where Amalgamated meets this three-part test, Mr. Kirby can defend on either of the following bases:
6. Article 68(1)(a): he can defend certain costs and charges incurred if he can establish on the balance of probabilities that he acted honestly and in good faith, and secondly that he acted with a view to the best interests of Amalgamated; or
7. Section 7.07:
8. if Mr. Kirby can establish that the acts or omissions: arise out of the activities of the General Partner on behalf of the Partnership or in furtherance of the interests of the Partnership, and are in the scope of the authority of the General Partner; then
9. the onus shifts to Amalgamated, which must demonstrate that the act or omission was committed by fraud, bad faith, wilful misfeasance or the reckless disregard of the obligations of the General Partner.

**390**  Mr. Kirby defends each counterclaim by denying all three elements of the *Canada Packers* test: the existence of term, a breach, and expenditure caused by the breach.

**391**  With respect to the contract generally, I note that Mr. Kirby did not explicitly accept any risk to reimburse Amalgamated for expenses incurred in the operation of the business or business losses. Even if Mr. Kirby had agreed to such a contractual arrangement, I would have found that term to be void, unenforceable or unconscionable, at least insofar as business costs are concerned: ss. 4 and 21 of the *Employment Standards Act; Re Sitter; Meridian Food Products Ltd. v. British Columbia (Director of Employment Standards)*, [*[1993] B.C.J. No. 1026*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3B1-00000-00&context=).

9.3.1 Costs paid to the OSC for investigating filing omissions/irregularities

**392**  The OSC crisis arose because Mr. Kirby failed to submit 150 insider trading reports. Amalgamated now claims $20,000 for amounts it paid to the OSC for investigating the filing omissions and irregularities.

**393**  It was a term of the 1998 employment contract that Mr. Kirby would attend to all regulatory requirements. This required Mr. Kirby to attend to the requirements himself or, as president, delegate that responsibility. He insisted on carrying out this duty himself, and only sought out advice on an *ad hoc* basis.

**394**  Mr. Kirby says he believed that he was being attentive to regulations at the time, and was shocked when he found out about the OSC statement of allegations. Although I am satisfied that Mr. Kirby relied on legal advice that was inaccurate, this is not a satisfactory answer, given that once Mr. Kirby realized that the insider trader reports had to be filed, he still did not do so.

**395**  Mr. Kirby says that since it was already impossible to avoid the late fees, he concluded that filing the report was not as pressing as other matters. Although the informal business culture of the organization, small size and lack of established policies helps contextualize Mr. Kirby's decisions, this is also not a persuasive answer.

**396**  I find Mr. Kirby breached the explicit term of his contract that he attend to these requirements.

**397**  With respect to damages, Mr. Kirby says that prior to his termination and with the assistance of the lawyer he retained to address the OSC matters, he negotiated the $20,000 demanded by the defendants from an initial assessment of $30,000. He also points to Amalgamated's 2001 Annual Report, which states that "[o]verall, the effect on distributions [for the OSC matter] was minimal" to suggest that he should not be liable for this amount. However, this does not persuade me that the defendants are not entitled to recoup amounts that were paid to address Mr. Kirby's breach of contract.

**398**  I am satisfied that the defendants have been able to demonstrate the actual losses flowing from his breach of contract.

**399**  I now turn to the possibility that Mr. Kirby's actions are indemnified. With respect to Article 68, I am satisfied that even if Mr. Kirby acted in good faith, he failed to act with a view to the best interests of Amalgamated, as he consistently failed to file the insider trading reports, even after it became clear to him that the consequences of failing to do so would have serious impact on the defendant companies and the board of directors.

**400**  Respecting s. 7.07, the defendants say that the omission to file the insider trading reports was outside the scope of the general partner's authority, because it was clearly inconsistent with Mr. Kirby's obligation to fulfil securities regulations.

**401**  I find Mr. Kirby liable for $20,000 plus Court Order Interest from June 1, 2000.

9.3.2 Costs paid for accounting and related services

**402**  Amalgamated claims under this head costs that would not have been required but for the ***negligence*** and incompetence of Mr. Kirby. Amalgamated says that most of the expenditures were to bring up to standard the accounting system and record keeping.

**403**  Mr. Kirby says that the total charged for services rendered for the OSC matter was $1,565.20 and that the accounts do not identify the services with enough clarity to even argue that they were caused by an act or omission on his part. Mr. Kirby says the evidence demonstrates that the accounting records were not in a poor state. Instead, he argues that they were just not kept in the specific manner desired by Mr. Boatman.

**404**  He says the only evidence of possible deficiencies in the accounting system is Mr. Kraskin's evidence that the accounting system established by Mr. Kirby did not have a double entry system and that the spreadsheets were not reconciled to the general ledger. However, he argues that any such upgrade was necessary only because of the growing size of the company, not because of any act or omission on his part.

**405**  I am not satisfied that the defendants have demonstrated that Mr. Kirby breached his contract, or that there is any link between any such breach and the damages they now claim. This Court does not know exactly what Norgaard Neale Camden did for Amalgamated, but to the extent that it was a systems upgrade, the board's decision to incur a capital expenditure to improve its systems cannot be laid at the door of Mr. Kirby unless it is actually attributable to Mr. Kirby's act or omission.

**406**  Furthermore, it bears repeating that the board also failed to address the issue of record keeping and accounting over the course of many years and failed in its responsibility to supervise the enterprise. Given this context, I am not satisfied that Amalgamated spent any more than it would have had to incur to address this matter while Mr. Kirby was an employee.

**407**  I find that Mr. Kirby is not liable for any of this expense.

9.3.3 Costs of legal representation for the OSC matter

**408**  Amalgamated claims $72,000 from Mr. Kirby for legal representation of the limited and general partners.

**409**  Mr. Kirby characterizes these costs as unexpected business costs that should not be passed along to him as an employee. In any event, Mr. Kirby says that Amalgamated has not proven that he breached a term of his contract or that there is any link between his acts or omissions and the damages the defendants claim.

**410**  These amounts did not arise because Mr. Kirby breached his contract, but rather because of the initial erroneous legal advice he received respecting the regulatory requirements for the insider trading reports. In any event, I am satisfied that this expense is of the sort that a business should be able to absorb as a business loss, and is not recoverable.

**411**  Even if these amounts arose out of a breach, however, I would not find that there is sufficient evidence to link the legal fees claimed to the OSC matter. There is no evidence of a written fee agreement, and there is inconsistent evidence with respect to the amount of legal services actually attributable to addressing the OSC allegations. For example, as Mr. Kirby points out, both Mr. Boatman and Mr. O'Nions, while under cross-examination, conceded that almost $14,000 of this claim related to opinions and services related to a takeover bid.

**412**  I find that Mr. Kirby is not liable for any of this expense.

9.3.4 Costs for report demanded by the OSC as a condition of settlement

**413**  The defendants claim $27,660.92 from Mr. Kirby for a report demanded by the OSC as a condition of settlement of the allegations. Amalgamated says that the manual demanded by the OSC was a filings manual, and was required because of Mr. Kirby's failure to properly file or provide Amalgamated's lawyers with complete information.

**414**  Mr. Kirby says that Amalgamated has not proven a breach on his part, and has not proven causation between any act or omission on his part and the damages claimed.

**415**  Although Mr. Kirby concedes that Amalgamated paid this amount to prepare the compliance manual, he says it would have been required in absence of the allegations. And, since Mr. Kirby was not qualified to produce the compliance portion of the manual, he says Amalgamated would have had to hire an outside party to complete that task in any event.

**416**  Amalgamated says that this manual is distinct from the operations manual that Mr. Kirby states would have been required in any event.

**417**  I find the report is simply a compilation of some statutes completed by a lawyer. Although it was required by the OSC, Amalgamated has not demonstrated that this is a result of Mr. Kirby's errors.

**418**  I am not satisfied that this is an expense attributable to Mr. Kirby's breach of contract.

9.3.5 Costs paid for administrative services

**419**  Amalgamated claims $93,449.67 from Mr. Kirby for services paid to Mr. Boatman's company, which was incurred in "unravelling the administrative mess created and left by Mr. Kirby." Amalgamated attributes $20,000 of this amount to defending the OSC allegations and in negotiating a settlement with the OSC. Amalgamated attributes $30,000 of this amount to "extra expense and costs ... to remedy" what they allege to be the poor state of accounting systems and procedures attributable to Mr. Kirby. This latter claim mirrors Amalgamated's first counterclaim.

**420**  I am satisfied that Amalgamated has not proven a breach, nor proven a link between any act or omission on Mr. Kirby's part and the damages claimed. Causation cannot be established on invoices that simply show lump sum charges for "management, financial and administrative services." Furthermore, there is no evidence from Mr. Boatman respecting the extent to which these services were related to the OSC matter, as opposed to his services as Mr. Kirby's successor at Amalgamated.

**421**  As Mr. Kirby notes, many of the disbursements claimed, for example those for computer software, equipment, and supplies, and van rental, gas and parking, relate to setting up the Victoria office of Amalgamated and retrieving records and equipment from Mr. Kirby's home office in Ladysmith following his termination.

**422**  I am satisfied that Mr. Kirby is not liable for any of these expenses.

9.3.6 Costs charged for trial balance preparation

**423**  Amalgamated claims an unspecified amount from Mr. Kirby for "a portion of the costs ... for creating, during audit, a trial balance that ought to have been available for audit purposes." Amalgamated appears to be seeking $20,000 under this head.

**424**  I am satisfied that Amalgamated has not proven a breach or causation between any act or omission by Mr. Kirby and the damages it claims. As Mr. Kirby points out, the evidence is that the "extras" performed for 1999, that is, costs to get the books into the shape that Mr. Kraskin wished before commencing his audit, were only $1,800, and that someone other than Mr. Kirby should have been hired for this purpose in any event.

**425**  I award $1,800 to the defendants because Mr. Kirby conceded this amount at trial, plus Court Order Interest from June 1, 2000.

9.3.7 Damages as compensation for cumulative losses

**426**  Amalgamated claims $750,000 from Mr. Kirby for "compensation for cumulative losses by write downs of the assets and distribution receivable": $100,000 to 1997, $200,000 to 1998, and $450,000 to 1999. The claim is based on Mr. Kraskin's management report in which Amalgamated says that Mr. Kirby's "poor accounting and record keeping" caused Amalgamated to suffer write downs for income loss.

**427**  Mr. Kirby defends this claim on a number of bases. First, Mr. Kirby says that he cannot be liable for any write downs attributable to his acts or omissions prior to his employment. I do not see how this could constitute a defence in the circumstances of this case, as Mr. Kirby performed the same role before and after he became a full-time employee.

**428**  More substantively, Mr. Kirby says that Amalgamated has not proven a breach on his part, and has not proven causation between any act or omission on his part and the damages claimed.

**429**  Senior employees, officers, and directors do not, as a matter of course, guarantee the accounts receivable of their employer. Bad debts are a risk of doing business. Only by proving breach and causation can Amalgamated charge Mr. Kirby for any of these amounts.

**430**  As to breach, I will not repeat Mr. Kirby's argument that his accounting systems were not deficient. He says that the Kraskin reports discuss "adjustments" made by Mr. Kraskin in 1997, 1998, 1999, which reflected "reserves" for amounts accrued, but not received by year-end, and that these reserves are not attributable to poor accounting or record keeping on Mr. Kirby's part.

**431**  Mr. Kirby says that any mention in the management reports of a lack of consistent review of distributions receivable is counterbalanced by Mr. Kraskin's admission on cross-examination that Mr. Kirby tracked distributions receivable through his spreadsheets. Mr. Kirby points to a document that he created for the 1997 audit, which shows Amalgamated's LP holdings, distributions accrued, and distributions received. Mr. Kirby says that the difference of approximately $84,000 was rounded up by Mr. Kraskin to the $100,000 reserve that Amalgamated is claiming.

**432**  Although Amalgamated could have made significant expenditures to obtain software that would have replaced reliance on spreadsheets, Mr. Kirby submits that the spreadsheets did an acceptable job. Mr. Kraskin accepted this assertion, even though he would have preferred a more integrated system.

**433**  I do not believe it was wrong for Mr. Kirby to use spreadsheets, which is a more economical tool, given Amalgamated's unique business and modest size.

**434**  I am satisfied that Mr. Kraskin did not find any substantive problems with Mr. Kirby's record keeping or organization, thus, the defendants cannot fault Mr. Kirby for not adopting an expensive accounting system. Although it was open to Amalgamated to upgrade its system after Mr. Kirby's termination, such an upgrade is not causally connected to any act or omission on Mr. Kirby's part. I would characterize this simply as a business expense.

**435**  As to causation more generally, I am satisfied that neither the management report nor the evidence at trial drew a link between any accounting deficiencies on Mr. Kirby's part and lost distributions.

**436**  Furthermore, "lost" distributions were not uncommon, occurring often as a result of tendered LP transactions not being perfected. Distributions could be lost as a result of tendering LP holders changing their minds, administrative errors on the part of various intermediaries, transfer agents, and depositories, or misunderstandings by tenderers to an offer respecting Amalgamated's receipt of the income. None of these things are related to an act or omission on Mr. Kirby's part.

**437**  Respecting quantum, Mr. Kirby notes that the defendants have never revised the figure they seek, notwithstanding the fact that a substantial portion of the reserves were recovered prior to trial. In fact, Mr. Kirby says the defendants failed to present evidence of how much was indeed recovered. On cross-examination, Mr. Boatman would only say that "a lot" of the 1999 reserve had been subsequently recovered. Mr. Kirby says that Amalgamated "actually withheld evidence" of recovery of distributions receivable of at least $100,000.

**438**  Furthermore, Shawn Strandberg, who was hired by Mr. Boatman to pursue distributions receivable, was not called by the defendant. Mr. Kirby asks this Court to draw an adverse inference from the failure to call Mr. Strandberg, who could provide evidence respecting why the distributions could not be recovered, which is critical to the question of causation. I do draw such an adverse inference.

**439**  I do not hold Mr. Kirby liable for any of these amounts, as neither breach nor causation have been proven.

*9.4 Did the defendants fail to mitigate the above losses?*

**440**  Mr. Kirby says that if the defendants have a *prima facie* entitlement to damages under the above heads, that they lost that entitlement by failing to mitigate their losses. Mr. Kirby advances three arguments respecting the defendants' failure to mitigate:

1. The defendants refused to accept Mr. Kirby's offers to assist with the completion of ongoing business and work in progress or assist the orderly transition to new management after termination;
2. The defendants failed to pursue the recovery of accounts receivable in a timely manner or at all;
3. The defendants failed to take steps to effect the completion of incomplete transfers of units, and obstructed Mr. Kirby in his attempts to effect the completion of those incomplete transfers.

**441**  First, I am satisfied that it was appropriate for Amalgamated not to accept Mr. Kirby's assistance post-termination, as he may have been liable for amounts and distributions not received as a result of the incomplete transfers.

**442**  Second, since this Court has not awarded damages for the claims to which Mr. Kirby's argument on mitigation applies, it is unnecessary to address this issue. However, as it is relevant to the third party claim, I reject the claim that Mr. Boatman, specifically, failed to pursue the completion of transfers.

*9.5 Are Mr. Boatman and Ms. Parker liable as third parties?*

**443**  Mr. Kirby says that if he is held liable on any of the counterclaims relating to the business operations of Amalgamated, that Mr. Boatman and Ms. Parker should share in that liability.

9.5.1 Mr. Boatman

**444**  Mr. Boatman was Mr. Kirby's successor at the helm of Amalgamated through a contract with his company. Mr. Kirby says that Mr. Boatman should share in liability for a number of reasons.

**445**  I see some merit in the claim that Mr. Boatman failed to supervise collections of distributions receivable, as he was a member of the audit committee from March 1, 1995, onwards. As I have noted above, the audit committee never met. Given that Mr. Boatman has a degree in advanced management from Harvard University and spent many years as a senior executive at B.C. Hydro and its subsidiaries, he should have been aware of the importance of the committee's work.

**446**  However, I have not awarded any amount to Amalgamated with respect to the reserve issue. If I had, I would have apportioned a further one-half of Mr. Kirby's 50% liability to Mr. Boatman and the audit committee on this basis.

**447**  In addition, if the accounting systems fell below the legal standard required of Mr. Kirby, that is a shared responsibility between management and the audit committee. That is, either Mr. Kirby or any member of audit committee could have called a meeting. Nevertheless, I have not awarded any amount to Amalgamated on the accounting counterclaim. Had I done so, I would have apportioned 50% liability to Mr. Boatman and the audit committee.

**448**  Mr. Kirby says that to the extent that he is found liable in respect of management or supervision of the management, that Mr. Boatman is equally liable for failing in his legal and fiduciary duty to ensure that the general partner was being properly managed.

**449**  Mr. Boatman's examination for discovery transcript and curriculum vitae shows that he has management and board experience. In this regard, Mr. Kirby says that Mr. Boatman failed in his duty to truly investigate the allegations made by Ms. Parker against Mr. Kirby. All Mr. Boatman did was to visit Mr. Kirby's home office for a one-hour visual inspection, and to see that he had a support worker. Mr. Kirby says that he failed to do what he ought to have done to determine whether the company was being run properly, for example, by looking into records or files. I do not agree that the directors share responsibility for Mr. Kirby's poor management and make no award on this ground.

9.5.1 Ms. Parker

**450**  Ms. Parker was the original sole director and secretary of the general partner, but was also often Mr. Kirby's *de facto* assistant. Mr. Kirby argues that she is attempting to downplay her involvement, but, in fact, took on significant responsibility in completing transfers and collecting distributions receivable, assisting with tax reporting, pulling offers together, and answering phones.

**451**  I find that Ms. Parker was the least knowledgeable of the directors. She took positions in the organization that she was not qualified to fill on the advice and urging of Mr. Kirby, and on the understanding that he, in fact, would do all the work. In her official roles, Mr. Kirby prepared the documents for her to sign.

**452**  Mr. Kirby says that if he is found liable on any of the following counterclaims, Ms. Parker should equally bear that liability on two bases. First, Mr. Kirby says that Ms. Parker failed to keep the corporate records in good standing in her role as corporate secretary. Although I agree that Ms. Parker had that responsibility, none of the counterclaims relate to those records. Second, Mr. Kirby says she is liable for failing to hire and retain adequate and continuous assistance because she helped to interview and supervise helpers. However, I do not believe that Ms. Parker can be faulted for Mr. Kirby's failure to meet his management responsibilities.

**453**  Both third party claims are dismissed.

***10.*** ***Is Mr. Kirby liable for misappropriation of funds?***

**454**  While Amalgamated presented the following counterclaim matters under the "breaches of employment contract" heading, they are clearly different from those addressed under the *Canada Packers* approach. The question here is how much Amalgamated says Mr. Kirby wrongfully appropriated. Amalgamated, thus, only needs to establish that Mr. Kirby is currently holding its property to receive these amounts.

*10.1 Funds borrowed from Amalgamated by Mr. Kirby*

**455**  As this amount was conceded by Mr. Kirby, I award the sum of $7,916, plus interest pursuant to the COI Act, from June 1, 2000. I find that Amalgamated has not proven any other amount of borrowing, authorized or unauthorized.

*10.2 Distributions paid to Mr. Kirby for special warrants*

**456**  The evidence is that the amount received in respect of the special warrant distribution was $23,453. I award Amalgamated that amount, plus interest pursuant to the COI Act from June 1, 2000.

*10.3 Distributions paid to Mr. Kirby on units for which no consideration is alleged*

10.3.1 New trades without consideration

**457**  Amalgamated claims $186,906.00 as "distributions paid to Mr. Kirby on units for which he is not able to demonstrate that he paid consideration." This includes $25,000 for the duplicate issue of warrants. This is dealt with later, so the defendants' claim is for $161,906. Elsewhere Amalgamated claims for the value of the units themselves as well.

**458**  Mr. Kirby also says that following a meeting between himself, Mr. Boatman, and their respective counsel in March 2001, it was agreed that he would attempt to complete any outstanding transfers relating to Amalgamated units that Mr. Kirby then held. He says that Amalgamated, in fact, obstructed him from doing so. Amalgamated thought that Mr. Kirby was meddling for his own benefit rather than attempting to set right incomplete transfers. I find that any such suspicion was understandable in the circumstances. However, I do not intend to give effect to Mr. Kirby's obstruction argument, given that Amalgamated attempted to complete all transfers.

**459**  I previously found that Mr. Kirby was the beneficial owner of all the units that he tendered to Amalgamated's offers, even if he was not listed as the registered owner. However, where, for whatever reason, a transfer of an LP to Amalgamated was not completed, such that Mr. Kirby was left holding both the LP and the Amalgamated units issued in respect of it, Amalgamated has a legitimate counterclaim against him.

**460**  For those transfers where the delay between the issuance of the Amalgamated units and the confirmation of successful transfer of the LP to Amalgamated was greater than 90 days, I award Amalgamated interest in the amount of $500 plus Court Order Interest from June 1, 2000, for the total amount of the delay on the LPs known as Gundyco, purchased on August 18, 1998; and RBC, purchased on August 24, 1998.

**461**  For those LP transfers that never completed, Brant Investments, purchased on August 17, 1998, and Derek Spiers, purchased August 28, 1998, I award Amalgamated the market value of the Amalgamated units issued to Mr. Kirby as of the date they were issued, together with all the distributions paid on those units. Brant Investments amounts to $10,832 (852 Amalgamated units at $6.70 = $5,708 + distributions of $5,124) and Derek Spiers amounts to $21,061 (1,656 Amalgamated units at $6.70 = $11,095 + distributions of $9,966). Mr Kirby owes the defendants $31,893 plus Court Order Interest from June 1, 2000.

***11.*** ***Cheque issue***

**462**  Amalgamated claims $10,000 for "loss of interest and costs in attempting to have cheques issued." Mr. Kirby says that he owed no duty to Amalgamated in this regard. He states that Mr. Boatman's failure to file a redirection notice with the post office means there was a failure to mitigate, and that Mr. Boatman's own evidence is that the cheques would have been deposited to a no-interest operating account. He also says that Amalgamated incurred no expense in retrieving the cheques.

**463**  Mr. Kirby is not liable for this expense.

***12.*** ***Is Mr. Kirby liable for breach of fiduciary duty?***

**464**  As noted above, I am satisfied that Mr. Kirby breached his fiduciary duty to Amalgamated.

**465**  A court may order a fiduciary to pay compensation for losses caused by a breach of fiduciary duty or account for any benefits that were taken from that breach. The "former is measured by the wrongdoer's gain, the latter by the injured party's loss": *Tang Min Sit v. Capacious Investments Ltd.,* [1996] 1 All E.R. 193, p. 197 (H.L.).

**466**  In this case, the defendants claim an unspecified amount of damages for breach of fiduciary duty, largely related to the acquisition, sale, and holding of LPs and Mr. Kirby's exchange of these units for Amalgamated ones. They ask for an accounting of profits personally obtained by Mr. Kirby while a fiduciary and employee of Amalgamated.

**467**  Mr. Kirby suggests that ordering an accounting would be cumbersome and fruitless. He argues that the evidence at trial showed that his trading resulted in a net loss, and that there was no evidence to the contrary. However, this calculation is based on the Amalgamated unit price at trial, which is inappropriate given that Amalgamated's current assets are significantly different from what existed at the time of the exchanges.

**468**  Although I am satisfied that the defendants did not suffer any damages as a result of Mr. Kirby's breach, this is not a bar to recovery. As noted by Laskin C.J. in *Canadian Aero,* p. 392:

[l]iability ... for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the ... contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain.

**469**  Notwithstanding the conclusion that Mr. Kirby's breaches did not rise to the level of justifying his summary dismissal, he is liable to account for the $105,000 in profits he earned in breach of his duties even though they were not gained at the expense of the company, "on the grounds that a director must not be allowed to use his position as such to make a profit even if it was not open to the company": *Canadian Aero*, pp. 383-384.

**470**  An accounting of profits sets out to determine the net profit received by a fiduciary as a result of the breach. This may be a complicated undertaking in some circumstances, as the term "profit" refers to the net of reasonable and necessary expenses incurred by the fiduciary to earn the profit: *Macmillan Bloedel Ltd. v. Binstead* [*(1983), 22 B.L.R. 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JWR6-S16K-00000-00&context=), [*14 E.T.R. 269*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JWR6-S16K-00000-00&context=), p. 293 (S.C.). However, once the claimant has established the revenue arising from the wrongdoing, it is the wrongdoer who must demonstrate what deductions are reasonable in the context. As reflected in Mr. Kirby's argument, accounting of profits may be refused on the ground that it is too complex or impractical to determine.

**471**  Nevertheless, I am satisfied that it is necessary to attempt a calculation. In my view, the defendants are entitled to the difference between what Mr. Kirby paid for his LPs and the value of the Amalgamated units that he received in exchange at the time of the exchange. This assumes that Mr. Kirby could have turned around and sold his Amalgamated units for cash without depressing the share price. The total amount of all exchanges is $105,877.85. At the same time, not all of Mr. Kirby's acquisitions and exchanges occurred in close succession. In my opinion, the profit gained by Mr. Kirby for LPs that he held for a significant length of time before exchanging them cannot be as easily ascertained or ascribed to his breach of fiduciary duty. Of the total amount of exchanges, $42,582 of Mr. Kirby's profit involved exchanges that were made after a significant delay. For this significant delay, I will reduce the $105,878 by $8,518.

**472**  Accordingly, the total award for profits earned in breach of fiduciary duty owed by Mr. Kirby to the defendants is $97,360. There will be Court Order Interest from June 1, 2000.

**473**  The circumstances of this case do not warrant an award of punitive damages for breach of fiduciary duty.

**CONCLUSION**

**474**  I find that Mr. Kirby was terminated for just cause on May 17, 2000.

**475**  Mr. Kirby is owed the following:

1. $82,996 plus Court Order Interest from May I, 2000, for outstanding remuneration agreed to under the 1998 and 1999 contracts;
2. $40,152 plus Court Order Interest from June 1, 2000, for remuneration outstanding for the year 2000; and
3. $1,500 plus Court Order Interest from June 1, 2000, for outstanding director's fees.

**476**  The defendants are owed the following, pursuant to their counterclaims:

1. $97,360 plus Court Order Interest from June 1, 2000, for profits earned in breach of fiduciary duty;
2. $20,000 plus Court Order Interest from May 1, 2000, for costs paid to the OSC related to investigating the filing omissions and irregularities;
3. $1,800 plus Court Order Interest from June I, 2000, as conceded by Mr. Kirby for costs charged for trial balance preparation;
4. $7,916 plus Court Order Interest from June 1,2000, for amounts Mr. Kirby borrowed without consent from Amalgamated;
5. $31,893 plus Court Order Interest from June 1, 2000, for distributions paid to Mr. Kirby for LPs transfers that never completed;
6. $500 plus Court Order Interest from June 1, 2000, for interest caused by the delay in transferring of LPs;
7. $23,453 plus Court Order Interest from June 1, 2000, as repayment of the special warrants received in error after dismissal;

**477**  The amounts owed by each party may be adjusted by way of a set off.

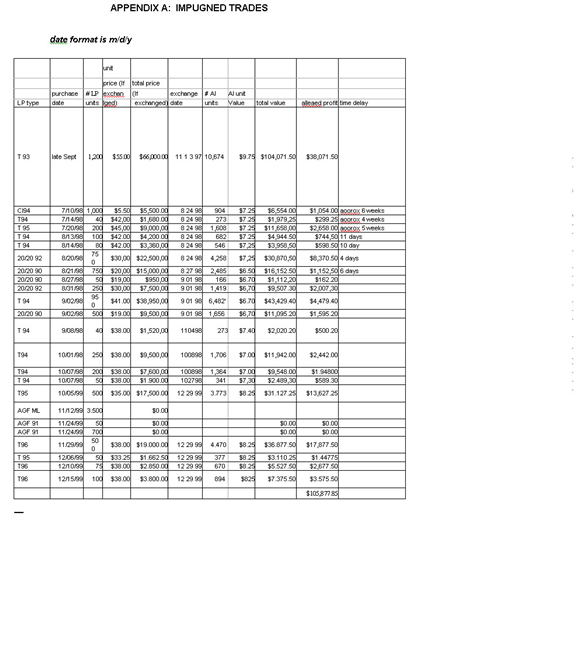
**COSTS**

**478**  Given the conclusions I have drawn I see no reason to award Mr. Kirby special costs.

**479**  There has been mixed success as the defendants were successful in their just cause position and Mr Kirby was successful in that the majority of the defendants' counterclaims were dismissed. I urge the parties to come to some agreement on costs.

**480**  The third parties were successful against Mr Kirby and will have their costs.

**481**  Any party is at liberty to apply to speak to costs if there is no agreement.



R.W. METZGER J.

**End of Document**

[***Kumar v. Picco, [2007] B.C.J. No. 2463***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21NM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B. Brown J.

Heard: June 5-8, 11-12 and 14, 2007.

Judgment: November 19, 2007.

Docket: S053725

Registry: Vancouver

**[2007] B.C.J. No. 2463** | 37 C.B.R. (5th) 29 | 163 A.C.W.S. (3d) 154 | 2007 CarswellBC 2737 | 2007 BCSC 1669 | 53 C.C.L.T. (3d) 300

Between Gurdev Kumar, Plaintiff, and Louis T. Picco and Louis T. Picco, Inc., Defendants

(70 paras.)

**Case Summary**

**Professional responsibility — Professions — Other — Accountants — Action by the plaintiff Kumar against the defendant accountant Picco for negligent misrepresentation allowed — The defendant prepared reports on a company the plaintiff planned to purchase — The reports failed to disclose substantial unpaid provincial sales tax owed by the company — The plaintiff lost his $250,000 deposit — The defendant's work fell below the standard expected of a chartered accountant — The defendant's liability was 25 per cent; the plaintiff was awarded $62,500 against the defendant.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Action by the plaintiff Kumar against the defendant Picco for negligent misrepresentation allowed — The defendant, an accountant, was negligent in preparing reports on a company the plaintiff planned to purchase — The reports failed to disclose substantial unpaid provincial sales tax owed by the company — The defendant was liable for 25 per cent of the plaintiff's loss of his $250,000 deposit; the plaintiff's contributory *negligence* was assessed at 75 per cent — The plaintiff was awarded $62,500 against the defendant.**

**Tort law — Fraud and misrepresentation — Negligent misrepresentation — Action by the plaintiff Kumar against the defendant Picco for negligent misrepresentation allowed — The defendant, an accountant, was negligent in preparing reports on a company the plaintiff planned to purchase — The reports failed to disclose substantial unpaid provincial sales tax owed by the company — The defendant was liable for 25 per cent of the plaintiff's loss of his $250,000 deposit; the plaintiff's contributory *negligence* was assessed at 75 per cent — The plaintiff was awarded $62,500 against the defendant.**

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| Action by the plaintiff Kumar against the defendant Picco for negligent misrepresentation -- In 2004, the plaintiff sought to purchase a business; he decided to purchase a Hyundai dealership, owned by a company called Adriano's Performance Imports -- The defendant was API's accountant and sat in on negotiations -- He prepared review engagement reports for API for 2001 to 2004, he submitted reports for 2001 and 2003 to the plaintiff -- In October, 2004, the plaintiff paid a deposit of $250,000 directly to API for the purchase of the company -- He claimed that he relied upon the defendant's reports and his assurance that the deposit was adequately secured by a promissory note -- The purchase fell through when the plaintiff discovered that API owed $747,735 in unpaid provincial sales tax, which was not included in the reports prepared by the defendant -- The plaintiff demanded return of his deposit in December, 2004 -- The deposit was not returned and API and its owner subsequently became bankrupt -- The defendant denied making the representations claimed, and argued that he thought the plaintiff's lawyer would advise against paying the deposit directly to API -- The defendant argued that the plaintiff was contributorily negligent -- HELD: Action allowed -- The defendant was liable for negligent misrepresentation with respect to the reports -- The plaintiff was owed a duty of care by the defendant, and had reasonably relied upon the reports in deciding to pay the deposit -- The defendant's work fell below the standard expected of a chartered accountant in failing to discover and report the unpaid PST -- The plaintiff had not established that the defendant made the representations claimed about the promissory note -- The plaintiff was assessed 75 per cent contributory ***negligence***; the defendant was 25 per cent liable -- The plaintiff was awarded $62,500 against the defendant. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, s. 2(c)

**Counsel**

Counsel for the plaintiff: D.M. Smart.

Counsel for the defendants: D.B. Wende.

**Reasons for Judgment**

|  |
| --- |
| **B. BROWN J.** |

**1**   Mr. Gurdev Kumar claims against Mr. Picco and his company, Louis T. Picco Inc. (for ease of reference, I will refer to Picco and his company collectively as Mr. Picco) for negligent misrepresentation. Mr. Kumar says that the review engagement reports prepared by Mr. Picco on the financial statements of the company which Mr. Kumar planned to purchase were prepared negligently. Mr. Kumar further says that Mr. Picco negligently advised him that the purchase deposit would be adequately secured by a promissory note from the company and its principal.

**2**  Mr. Kumar says that as a result of these negligent misrepresentations he paid a deposit of $250,000 directly to the company, secured by a promissory note from the company and its principal. When the purchase deal fell apart, the company and the principal failed to return the deposit and subsequently became bankrupt. Mr. Kumar's entitlement to the return of the deposit is not disputed in this action. Mr. Kumar seeks damages from the defendants.

**I. BACKGROUND**

**3**  In 2004, Mr. Kumar was looking for a business to purchase. His family had been involved in the automobile industry in India and he was looking for an automobile dealership to purchase in the Vancouver area. Mr. Kumar learned that the Hyundai dealership in Burnaby may be for sale and he and his son, Karun Kumar, met with Mr. Pellegrino, the principal of the business. Mr. Pellegrino's company, Adriano's Performance Imports Inc. ("API") owned the operating business for the dealership. Another one of Mr. Pellegrino's companies, Kanwyn Enterprises Inc. owned the land and buildings.

**4**  In June 2004, Mr. Kumar and his son began meeting with Mr. Pellegrino with a view to purchasing both companies, thereby acquiring the dealership, the land and the buildings. The negotiations continued into November, 2004.

**5**  Mr. Picco attended several of the meetings with the Kumars and Mr. Pellegrino as API's accountant. Mr. Picco is a chartered accountant. API engaged Mr. Picco to issue review engagement reports on API's financial statements for the years ended August 31, 2001 to 2004 (the "Reports"). Mr. Pellegrino told the Kumars that he was not good with numbers, and referred them to Mr. Picco for questions about API's finances.

**6**  The Kumars say that in the course of the negotiations, Mr. Picco made various statements about the value of the business, such as telling them that people would be lined up to buy the business and producing calculations of the value of the business. They say that on or about September 16, 2004 Mr. Picco told Mr. Kumar that the purchase deposit of $250,000 would be adequately secured by a promissory note from API and Mr. Pellegrino.

**7**  The Kumars say that they received the 2002 and 2003 Reports on September 7, 2004. They say that Mr. Picco brought the Reports to a meeting, took them from his briefcase and handed them to Mr. Pellegrino, who passed them to the Kumars. Mr. Kumar says that he relied on the Reports and on Mr. Picco's assurance that a promissory note would be adequate security when he paid the deposit directly to API in two instalments on September 28 and October 4, 2004.

**8**  Mr. Picco denies producing the Reports in the manner that the Kumars describe. He says that he thought that the Kumars had the Reports much earlier. He denies making the statements that the Kumars attribute to him, and particularly the comment regarding the security of the promissory notes. He says that Mr. Kumar had his own accountants and a lawyer to provide him with advice and that the lawyer had prepared draft purchase agreements which contemplated the deposit to be held in trust by the plaintiff's lawyer. Mr. Picco says that although Mr. Pellegrino asked Mr. Kumar to pay the deposit directly to API, Mr. Picco was confident that Mr. Kumar's lawyer would advise against this course. Mr. Picco says that he was surprised when he learned that Mr. Kumar had paid the deposit directly to API. Mr. Picco acknowledges that the Kumars were referring to the Reports in their negotiations with Mr. Pellegrino.

**9**  On approximately November 2, 2004, Mr. Kumar received the 2004 Reports. Neither the previously received Reports for 2003 and 2003 nor the newly received Reports for 2004 showed a liability of $747,735.62 for unpaid provincial sales tax. This liability was assessed by the provincial government on September 29, 2003. Mr. Kumar says that had he known of this large liability, he would not have paid the deposit.

**10**  API and Mr. Pellegrino became bankrupt in 2005.

**II. ISSUES**

**11**  The issues are:

1. Are the defendants liable to the plaintiff for negligent misrepresentation on the Reports and statements regarding the adequacy of the promissory notes?
2. If so, was the plaintiff contributorily negligent?
3. What are the plaintiff's damages?

I will deal with each of these issues in turn.

**III. NEGLIGENT MISREPRESENTATION**

**12**  The plaintiff pleads this action as negligent misrepresentation. At the outset, it is useful to note that negligent misrepresentation and negligent misstatement are in fact the same cause of action and the two terms are often used interchangeably. As explained by Linden J.A. in ***R. v. Premakumaran***, 2006 F.C.A. 213 para. 18:

Since the now-famous decision in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), courts have recognized that an action in tort may lie, in appropriate circumstances, for damage caused by negligent misstatement or negligent misrepresentations.

**13**  In ***Queen v. Cognos Inc****.,* [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) para. 34, the Court identified five elements of negligent misrepresentation that a plaintiff must establish:

1. there must be a duty of care based on a special relationship between the representor and the representee;
2. the representation must be untrue, inaccurate or misleading;
3. the representor must have acted negligently in making the representation;
4. the representee must have relied in a reasonable manner on the negligent misrepresentation; and
5. the reliance must be detrimental to the representee in the sense that damages resulted.

**14**  In ***Hercules Management Ltd. v. Ernst & Young***, [*[1997] 2 S.C.R. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VR-00000-00&context=) para. 22, 24 and para. 36-37, the Court elaborated on the "special relationship" required to found a duty of care:

22 ... In the context of a negligent misrepresentation action, then, deciding whether or not a *prima facie* duty of care exists necessitates an investigation into whether the defendant-representor and the plaintiff-representee can be said to be in a relationship of proximity or neighbourhood.

24 ... To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in *Cognos, supra*, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

[Emphasis added]

**15**  After a comprehensive analysis at para. 36-37 of the application of the *Anns/Kamloops* test to the tort of negligent misrepresentation, the Court restated its conclusions at para. 41:

The foregoing analysis should render the following points clear. A *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable. Even though, in the context of auditors' liability cases, such a duty will often (even if not always) be found to exist, the problem of indeterminate liability will frequently result in the duty being negated by the kinds of policy considerations already discussed. Where, however, indeterminate liability can be shown not to be a concern on the facts of a particular case, a duty of care will be found to exist. [Emphasis added]

**16**  Thus, the first ***Cognos*** element of negligent misrepresentation, a duty of care owed by the representor to the representee, has been elaborated on in ***Hercules Management*** to include elements of foreseeability and reasonableness of reliance. Therefore, to succeed in this case, Mr. Kumar has to prove the following elements:

1. Mr. Picco owed Mr. Kumar a duty of care based on a special relationship between them, such that:
2. Mr. Picco ought to have foreseen that the Mr. Kumar would rely on his representations; and
3. such reliance by Mr. Kumar on Mr. Picco's representations would be reasonable in the circumstances of this case.
4. Mr. Picco's representations were untrue, inaccurate, or misleading.
5. Mr. Picco was negligent in making these representations.
6. Mr. Kumar's reliance on Mr. Picco's negligent misrepresentations was reasonable.
7. Mr. Kumar has suffered damages because of his reliance on Mr. Picco's negligent misrepresentations.

**17**  Mr. Kumar argues that Mr. Picco has made two negligent misrepresentations:

1. the Reports; and
2. oral statements regarding the sufficiency of promissory notes given by API and Mr. Pellegrino to secure the deposit paid Mr. Kumar to API.

**18**  Because the nature of these representations is fundamentally different, each one has to be independently analyzed against the elements of negligent misrepresentation set out above. For the sake of convenience, I will first deal with the second representation.

**A. Statements Regarding Promissory Notes**

**19**  The defence argues that the alleged misrepresentation that the $250,000 deposit would be adequately secured by two promissory notes from API and Mr. Pellegrino was not made and, in the alternatives, that the plaintiff could not reasonably rely upon such a representation when he knew it was not correct. The plaintiff had his own legal advisor who recommended that the deposit be paid into trust, not advanced to the company directly.

**20**  I do not accept the plaintiff's evidence that Mr. Picco told the Kumars that the deposit would be adequately secured by promissory note from API and Mr. Pellegrino. There would be no reason for him to do so. He knew that Mr. Kumar had his own lawyer and accountant, and would expect Mr. Kumar to take their advice. I do not believe that the Kumar's were intending to deceive the court, rather, I believe that they are mistaken: these statements were likely made by Mr. Pellegrino. Mr. Picco was present at the time, and the Kumars have mistakenly attributed the statements to him. I accept Mr. Picco's evidence that he did not make these statements.

**21**  As I found that these representations were not made by Mr. Picco, I do not need to analyze this particular allegation any further.

**B. The Reports**

*1. Duty of Care*

**22**  Mr. Kumar argues that he had a special relationship with Mr. Picco so that Mr. Picco owed him a duty of care. Mr. Kumar says that the following factors are sufficient to establish the special relationship and the duty of care:

1. Mr. Picco was aware that Mr. Kumar had the financial statements and was relying on them;
2. Mr. Picco was directly involved in several discussions regarding the financial statements and the value of API;
3. Mr. Picco explicitly or implicitly approved of Mr. Kumar using the financial statements;
4. Mr. Picco provided the statements to Mr. Pellegrino, who then immediately handed them to the Kumars without protest from Mr. Picco;
5. Mr. Picco knew that the Kumars were told that Mr. Picco was a qualified chartered accountant;
6. Mr. Picco made no attempt to restrict the use which the Kumars were making of the financial statements;
7. Mr. Picco was directly involved in discussions and negotiations regarding the value of the business and indicated or implied that he had sufficient knowledge about the business to comment on it and knew the value of the business;
8. Mr. Picco made statements directly to Mr. Kumar regarding the adequacy of promissory notes as security for the deposit; and
9. Mr. Picco made statements regarding the value of the business to the Kumars to the effect that there was a "line-up of people" ready to buy the business.

**23**  The defendants do not emphasize the duty of care in their argument. They say that Mr. Picco did not anticipate that the Reports would be used by Mr. Kumar for the purpose of deciding whether to make a deposit directly to API. Rather, Mr. Picco anticipated that Reports would be used by Mr. Kumar's own accountants, Morrow & Company, as part of their "due diligence" with respect to the purchase of API.

**24**  I am satisfied that Mr. Picco owed the plaintiff a duty of care. There is no issue with foreseeability of reliance because Mr. Picco actually knew that Mr. Kumar was using the Reports in his deliberations about buying the business. Mr. Picco attended meetings where the parties used the Reports in their negotiations.

**25**  Such reliance is clearly reasonable in the circumstances as Mr. Picco did not attempt to limit Mr. Kumar's use of the Reports or suggest that they were to be used only by Morrow & Company, Mr. Kumar's accountants. While the Reports were not initially prepared to assist Mr. Kumar in his deliberations, Mr. Picco knew that they were being used for that purpose and did not demur. There is, in these circumstances, no concern of indeterminate liability.

***2. Were the Reports Untrue, Inaccurate, or Misleading***

**26**  Having found a duty of care owed by Mr. Picco to Mr. Kumar, I have to now determine whether the representations, the Reports, were "untrue, inaccurate, or misleading".

**27**  The defence argues that the plaintiff has failed to prove that the Reports were "untrue, inaccurate or misleading" because there is no evidence that the PST balance shown on the 2002/2003 balance sheets was materially in error.

**28**  The defence further argues that the plaintiff must prove, on a balance of probabilities that a further review would have disclosed an incorrect PST balance at the end of the year. The defence says that the plaintiff could easily have established the amount of PST which was unpaid each month from September 2001 to January 2003 and has failed to do so.

**29**  The plaintiff does not have to establish the amount of PST owed to prove that the Reports were untrue, inaccurate or misleading. In the Reports, Mr. Picco provided an unqualified opinion on API's financial statements:

My review was made in accordance with generally accepted standards for review engagements and accordingly consisted primarily of enquiry, analytical procedures and discussion related to information supplied to me by the company.

...

Based on my review, nothing has come to my attention that causes me to believe that these financial statements are not, in all material respects, in accordance with generally accepted accounting principles.

**30**  It is this assurance that Mr. Kumar relied on, which was at least inaccurate and misleading (as discussed below).

***3. Were the Representations Negligently Made***

**31**  To determine whether Mr. Picco was negligent in making these representations, I must determine if the Reports were prepared in accordance with the appropriate standard of care.

**32**  With respect to the standard of care, the plaintiff argues that the applicable professional standards are set out in the Canadian Institute of Chartered Accountants' Handbook (the "CICA Handbook"). The CICA Handbook requires an accountant, on a review engagement, to "perform a review, with a limited objective of assessing whether the information being reported on is plausible in the circumstances within the framework of appropriate criteria". The plaintiff says that Mr. Picco failed to determine whether the PST account reported by the API's management was "plausible".

**33**  The defence says that a professional is not held to a standard of perfection, but that he or she owes a duty of care to exercise the skill, care and diligence which may reasonably be expected of a professional of ordinary competence, measured by the professional standard of the time.

**34**  The defence says that Mr. Picco was retained to provide review engagement reports, not audit reports; meaning that the scope of the review is less and the level of assurance is lower than on an audit. A review engagement provides a negative assurance that nothing has come to the accountant's attention which causes him or her to believe that the financial statements are not in all material respects in accordance with generally accepted accounting principles ("GAAP"). A review engagement assesses whether the information being reported is plausible.

**35**  The plaintiff relies on the report of Brian Gardiner, CA, CFE. Mr. Gardiner is of the opinion that Mr. Picco did not meet the standard of care for a chartered accountant in the preparation of the Reports for 2001-2004. Mr. Gardiner relies on the standards applicable to review engagements in the CICA Handbook:

**8100.15 Review standards**

...

1. The public accountant should perform a review with the limited objective of assessing whether the information being reported on is plausible in the circumstances within the framework of appropriate criteria. Such a review should consist of:
2. enquiry, analytical procedures and discussion; and
3. public accountant's knowledge of the business carried on by the enterprise and the results of the enquiry, and analytical procedures and discussion cause him or her to doubt the plausibility of such information.

...

**8100.17 Knowledge of the Entity's Business**

To judge whether the information being reported on is plausible in the circumstances, the public accountant must be in a position to assess whether the information obtained during the course of the engagement is plausible. This requires sufficient [less than]knowledge[greater than] of the enterprise and the business in which it is involved to make intelligent enquiries and a reasonable assessment of responses and other information obtained.

**8100.19 Review Procedures**

A review consists primarily of:

1. making enquiries concerning financial, operating, contractual and other information, and considering responses that, in addition to oral responses, may take the form of listings, schedules or other documents;
2. applying analytical procedures such as comparing the current and prior period information and considering the reasonableness of financial and other inter-relationships. Analytical procedures performed during a review engagement would normally be less extensive than analytical procedures performed during an audit.
3. Having discussions with appropriate officials of the enterprise concerning information received and the information being reported on.

8100.20 When the public accountant doubts the plausibility of the information being reported on, sufficient additional or more extensive procedures would be carries out to resolve such doubt or confirm that a reservation is required.

**36**  Mr. Gardiner refers as well to the CICA review engagement checklist which asks "[h]ave sales, withholdings, GST and other taxes been considered?" In the checklist for each year's file Mr. Picco has answered 'Y' to this question, indicating that these items have been considered. Mr. Picco's files also contain copies of API's monthly self-assessment remittance forms for PST for 2002 and 2003; copies of the general ledger printout for account 2200, the PST payable account, for fiscal year ending August 31, 2002; and documents 1894 and 1895 where Mr. Picco recast fiscal activity recorded within general ledger account 2200. Mr. Gardiner concludes that Mr. Picco did not test the reasonableness of the PST account; he simply checked the last month's self-assessment against the accounts payable in the ledger. Mr. Gardiner opines that a simple reasonableness assessment of multiplying monthly sales by 7% PST ($700,000 monthly sales x 7% PST= $49,000) would have demonstrated that API's monthly self-assessments of $3,000 to $6,000 for PST were suspect, and this would have required further inquiry.

**37**  Mr. Gardiner further says that in 2002 Mr. Picco requested a printout of the detail for the general ledger account 2200 because he felt that the PST payable of $24,626.71 was large. Mr. Gardiner notes that this PST liability would account for annual new car sales of $700,000, which the company was reporting on a monthly basis. Mr. Gardiner concludes that Mr. Picco's failure to consider that the sales figures reported by API did not accord with API's self-assessed PST liability and remittance was well below the standard expected of a chartered accountant.

**38**  The defence relies on the opinion of Catherine Greyell, CA. Ms. Greyell, too, refers to the CICA Handbook, including the following provisions:

8100.05 ... In this section, the word "plausible "is used in the sense of appearing to be worthy of belief based on the information obtained by the public accountant in connection with the review.

...

8299.02 The public accountant's enquiry, analytical procedures and discussion ... would normally include:

...

1. performing analytical procedures, which could include:
2. comparing the financial statements with those of the immediately preceding period and with any budgets for the current year; and
3. considering interrelationships of key elements of financial statements that would be expected tot conform to a predictable pattern based on the experience of the enterprise;

and obtaining explanations for the relationships and individual items that appear to be unusual.

**39**  Ms. Greyell opines:

In assessing the PST work completed by Mr. Picco, I draw my opinions not only from my past experience, but also from the standards established by my office ... no specific checklist or questions exist in our review of balances owed by a company with respect to PST. The PST payable balance is evaluated in a manner consistent with other accounts payable balances ... our work would typically include ... an explanation for the variance between the current period end balance and the prior period end balance and possibly (depending on the amount of the payable and/or the explanation for change in balance) a reconciliation to the company's remittance advice.

Ms. Greyell explained that this means checking the current year against the preceding year, and accepting the balance as plausible if there is no significant difference.

**40**  She continues:

Unless a professional accountant has specific concerns with respect to PST and the plausibility of information provided by management, he/she would not be expected to perform a reconciliation to sales on the PST remitted to the Ministry of Finance in a given year. In my opinion, given that the working paper files appear to suggest that nothing caused Mr. Picco to question the plausibility of the PST balance, I would not have expected Mr. Picco to perform a reconciliation of PST to sales in any of the years 2001 to 2004 inclusive.

**41**  I am satisfied that Mr. Picco's conduct fell below the standard of care required of a public accountant on a review engagement.

**42**  I adopt the reasoning of the Ontario Court of Appeal in ***Bloor Italian Gifts Limited v. Dixon*** [*(2000), 48 O.R. (3d) 760*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4VT-00000-00&context=) para. 27-31 (C.A.), a case very similar to this:

[27] To establish whether Dixon's conduct fell below the standard of care required of a public accountant on a review engagement, it is necessary to assess whether the applicable standard of care would have resulted in the discovery of the retail sales tax problem at issue. In determining the standard of care required of Dixon in these circumstances, the Canadian Institute of Chartered Accountants Handbook ("CICA Handbook") is of great assistance. The CICA Handbook sets out the professional standards that apply to accountants in conducting a review engagement. The CICA Handbook explains that a review engagement consists "primarily of enquiry, analytical procedures and discussion related to information supplied to the public accountant by the enterprise with the limited objective of assessing whether the information being reported on is plausible within the framework of appropriate criteria". 'Plausible' is defined as "appearing to be worthy of belief based on the information obtained by the public accountant in connection with the review". The CICA Handbook also stipulates that an accountant must apply "analytical procedures such as comparing the current and prior period information and considering the reasonableness of financial and other inter-relationships ... Explanations for relationships and individual items that appear to be unusual would be obtained by directing inquiries to appropriate personnel of the enterprise, the responses to which the public accountant is entitled to accept without examination of supporting evidence as long as such responses appear plausible."

[29] In addition, the CICA Handbook requires that the accountant has sufficient knowledge of the business to make intelligent inquiries and further that the accountant possess an appreciation of matters that could have a significant effect on the information being reported on. The accountant must also ensure proper supervision over any assistants he employs.

[30] A checklist prepared by the CICA includes the possible existence of any sales tax liability, assessed or not, as an item into which the accountant ought to inquire. Another checklist item requires the accountant and his staff to inquire about how sales tax and other taxes are determined and recorded.

[31] Professional standards of conduct such as those prescribed in the CICA Handbook provide a persuasive guide as to what constitutes the standard of reasonable care for a professional: See ter Neuzen v. Korn, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) at 696-698.

**43**  The CICA Handbook establishes the standards of Mr. Picco's profession. It requires him to attain sufficient knowledge of the business in issue to be able to *"make intelligent enquiries and a reasonable assessment of responses and other information obtained".* In this case, that would involve knowledge of the volume of sales by API, and of the application of provincial sales tax to those sales. Within this framework, Mr. Picco is required to determine whether the information being reported on is plausible, i.e., appears to be worthy of belief. I accept the opinion of Mr. Gardiner that to assess the plausibility of the PST payable, Mr. Picco should have undertaken some rough calculation of its reasonableness. In the words of the trial judge in ***Bloor*** at para. 32:

... it would not have required much effort on the part of the accountant at year-end to multiply the sales shown on the financial statement by seven or eight percent, depending upon the year, and compare it with the sum of the twelve RST payments made during the year and thereby test the 'plausibility' or 'reasonableness' of the amount of taxes actually paid.

**44**  It would be difficult to determine that a number reported by the company is plausible without some assessment. Here, I accept Mr. Gardiner's opinion that Mr. Picco should have done a rough calculation by, at a minimum, multiplying sales by 7% to assess that plausibility of the reported PST payable. While this would likely be an overestimate, as there would be some sales where PST is not payable at all and other sales where tax is not payable on the full purchase price, it would be a rough calculation against which to measure the reported number.

**45**  Ms. Greyell's description of the practice of comparing one year end number against the preceding year end number is a short form for assessing plausibility: it assumes that if the last year end number is plausible, and this year end number is not significantly different, then it, too, is plausible. As a side note, I question whether this abbreviated route is really sufficient to meet the CICA Handbook requirement of assessing plausibility, as the accountant in this example takes no step to determine the plausibility of the number itself, he or she simply compares it to the preceding year. However, for the reasons that follow, I do not need to determine this point in this case.

**46**  In any event, the abbreviated form may not be appropriate in all circumstances, as Ms. Greyell acknowledged in cross-examination. Preparing the Report on the 2002 financial statement, Mr. Picco had specifically requested a printout of the PST payable account for that year. He reviewed it in detail, identifying remittances made each month from September 2001 to August 31, 2002 to address his concern that the PST payable reported by API had grown from $598 on April 15, 2002 to $24,626.71 on August 31, 2002. Mr. Picco noted on his working paper that "client did not make sufficient PST payments during the last 1/2 of the year and balance has grown steadily. ..." Ms. Greyell was questioned about Mr. Picco's review of this document. She acknowledged that Mr. Picco would know that API had gross monthly new vehicle sales of approximately $600,000 per month and against those sales, the monthly PST payable/remittance reported by API would not be plausible and should have raised a doubt about its plausibility, which would in turn have required Mr. Picco to obtain an explanation from API. Ms. Greyell conceded that Mr. Picco, by failing to seek an explanation, failed to meet the standard for a reasonable public accountant. This concession also informs the 2003 review engagement. Taking Ms. Greyell's approach to plausibility, the failure to inquire in 2002 affects the 2003 Report as well: if the 2002 number cannot be said to be plausible, then it cannot be used as a benchmark for plausibility for 2003.

**47**  The PST payable set out in the 2002 (and 2003, as derived from 2002) financial statement was implausible. Mr. Picco should have inquired further and did not. The Social Service Tax Return Worksheet completed by API showed sales of $517,135.17 in August 2003. If all were taxable, the PST to be remitted for that month would be $36,199.45. If half of those sales were taxable, $18,000 should have been remitted. However, API reported tax collectable of $5,523.23. Thus, the magnitude of the inaccuracy of the PST payable may well have been in the order of $180,000 to $360,000 per year for 2002 and 2003, using the August 2003 worksheet as a guide.

**48**  However, that is not really the issue. Mr. Kumar was not looking to Mr. Picco to tell him what the PST payable was, but to tell him that, after performing a review to appropriate standards, nothing had come to his attention that caused him to believe that the financial information being reported on was not in all material respects in accordance with generally accepted accounting principles. It was the assurance that the Reports were "made in accordance with generally accepted standards for review engagements" and that "nothing has come to my attention that causes me to believe that these financial statements are not, in all material respects, in accordance with generally accepted accounting principles", that was inaccurate and misleading and, I conclude, was negligently made.

**49**  Mr. Picco's review was not made in accordance with the generally accepted standards for review engagements. Generally accepted standards would have required him to investigate further, as Ms. Greyell properly conceded. Mr. Picco could not provide the unqualified opinion as he did: it was a negligent misrepresentation.

***4. Reasonable Reliance***

**50**  Having concluded that the Reports were negligent misrepresentations, I have to determine whether Mr. Kumar's reliance on the Reports in his decision to pay the deposit to API was reasonable.

**51**  Mr. Kumar says that he reasonably relied on the financial statements:

1. He had no reason to believe or suspect that the financial statements were inaccurate or improperly or negligently prepared.
2. He knew that Mr. Picco was a qualified chartered accountant and had been doing work for API for several years. It was reasonable for him to believe that Mr. Picco had detailed knowledge regarding API's financial circumstances.
3. The 2002/2003 financial statements indicated that API was making a modest profit, paying its liabilities in a timely way and was solvent.
4. Mr. Kumar was not relying on the financial statements for the purpose of determining a purchase price. Rather, he was relying on the statements to the extent of determining that the company had value for the purpose of making an advance payment of $250,000.
5. Mr. Picco had also made statements and provided a document which indicated that API had a value in excess of $2.8 million.
6. The Kumar's understood that Mr. Pellegrino was also the owner of Kanwyn, which owned the land and buildings, which had significant value. They had no information that Mr. Pellegrino was in personal financial difficulties.
7. The reasons offered by Picco and Pellegrino for a direct deposit to API were apparently legitimate: the payment would assist the company through a short-term cash flow problem and result in a more valuable asset on purchase.

**52**  The defence argues that Mr. Picco could not have reasonably foreseen that the plaintiff would rely on the Reports when deciding whether to pay the deposit directly to API and could not contemplate that the plaintiff would use the Reports for precisely this purpose.

**53**  The defence says that while Mr. Pellegrino asked the plaintiff to make the deposit directly to API, Mr. Picco believed that the plaintiff would not do so because he had independent legal advice. He did not anticipate that the Reports would be used as a basis for making a direct deposit to the vendor.

**54**  In my view, Mr. Kumar reasonably relied on the reports. Mr. Picco, an independent accountant, provided an opinion or comment on API's financial statements, and it is this opinion or comment that Mr. Kumar relied on. He was looking to Mr. Picco to assure him that the financial statements were in accordance with the GAAP. As the CICA Handbook notes in section 8100.06:

The negative assurance form of reporting used for review engagements ... informs the reader that, although sufficient evidence has not been obtained to enable the public accountant to express an audit opinion, a review has been completed in accordance with the standards of this Section and nothing has come to the attention of the public accountant that causes him or her to believe that the information being reported on is not, in all material respects, in accordance with appropriate criteria.

**55**  Such an assurance can only be given when the standards have been met (s. 8100.15). If the accountant is not able to give the assurance, he or she may issue the report with a reservation (s. 8100.32). No reservation was issued in this case and thus Mr. Kumar, as the reader of the Reports, could reasonably assume that API's financial statements were in fact reviewed in accordance with the generally accepted standards and that there was nothing amiss.

**56**  Mr. Picco's evidence may be summarized as "I never thought that you would give the deposit directly to the company, regardless of its financial condition; I thought that your lawyer would tell you not to do that." That issue is properly one of contributory ***negligence***, not reasonable reliance.

**57**  On the facts before me, I am satisfied that it was reasonable for Mr. Kumar to rely on the Reports and the assurance they provided when advancing the deposit. He had no reason to believe that the Reports were not properly prepared. Mr. Picco had been the company's accountant for several years and attended the meetings between the Kumars and Mr. Pellegrino, provided information and answered questions about the finances of the business. Mr. Picco knew that Mr. Kumar was relying on the Reports in his deliberations regarding purchase of the business and should have anticipated that Mr. Kumar would look at the Reports as one of the factors in deciding whether to advance the deposit.

***5. Were Damages Suffered Because of Reliance***

**58**  Finally, it must be determined whether Mr. Kumar has actually suffered damages because of his reasonable reliance on Mr. Picco's negligent misrepresentations.

**59**  On the facts before me, I conclude that he did. Unless Mr. Kumar was satisfied as to the financial condition of the company (and the Reports would be at least one factor in this decision), it is unlikely that a deposit would be paid, whether in trust or otherwise.

**IV. CONTRIBUTORY *NEGLIGENCE***

**60**  The defence argues that if Mr. Picco is liable for negligent misrepresentation, then the court must apportion a significant amount of contributory fault to the plaintiff. The defence further argues that Mr. Pellegrino and API committed a fraud on both Mr. Picco and the plaintiff and a significant portion of fault must be borne by them.

**61**  The defence argues that the plaintiff was contributorily negligent in that he failed to follow his own solicitor's advice with respect to payment of the deposit by providing the money directly to Mr. Pellegrino. In this respect, Mr. Kumar has acknowledged that his actions were "foolish".

**62**  The defence relies on ***Leischner v. West Kootenay*** [*(1986), 70 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=) (C.A.). The defence argues that pursuant to s. 2(c) of the ***Negligence Act***, a plaintiff who contributed to his own loss can only obtain several judgments against the defendants liable for his loss, in proportion to that for which the defendant was at fault. The defence suggests that 90% of the fault should be attributed to Mr. Pellegrino and the balance of 10% divided by the plaintiff and the defendants.

**63**  The plaintiff argues that making a simple error in judgment is not the same as contributory ***negligence***, relying on ***Hongkong Bank of Can. v. Touche Ross & Co.*** [*(1989), 36 B.C.L.R. (2d) 381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JF75-M3S4-00000-00&context=) para. 18-19 and para. 50 (C.A.):

18 ... But, though the trial judge did not deal in specific terms with the question of whether the bank was careless in failing to call for an audited statement as of 30th June 1982 before authorizing the loan, he did deal with that question in general terms as part of an overall consideration of the bank's conduct in making the loan, in these words [p. 6]:

There is certainly some validity in the criticisms levelled against the plaintiff in making the loan. In my view, even without hindsight, there was an error in judgment in extending the line of credit. However, I find insufficient lack of care and prudence on the part of the bank to justify a finding of ***negligence*** in making this loan.

19 On the questions of fact arising from the evidence there is, in my opinion, no mistake in the conception of the evidence by the trial judge such that this court would be justified in reconsidering the evidence and concluding that the authorization of the loan by the bank on the basis of the material before it was a failure to take reasonable care for its own safety. That being so, the trial judge's conclusion that the bank was not contributorily negligent in relation to the authorization of the loan must stand.

...

50 But when the victim has no reason to know or foresee that he is or may be in danger from the negligent act of another, the perpetrator of the negligent act cannot complain that the victim did not take reasonable care. The respondent had no reason before April 1983 to doubt the accuracy of the audit. Once the respondent knew of the undisclosed liability, it did have a duty to take reasonable care in handling the loan but no argument was made to us that the respondent's conduct after it learned of the ***negligence*** of the appellant was imprudent.

[Emphasis added]

**64**  The plaintiff says that there may be contributory ***negligence*** where the plaintiff has suffered loss as a result of a misrepresentation, but that would be an unusual case. I cannot say whether this case is an unusual one or not, as I conclude that Mr. Kumar was clearly contributorily negligent.

**65**  However, I am not able to accede to the defence's argument regarding attribution of fault to Mr. Pellegrino. It may well be that Mr. Pellegrino was fraudulent, as the defence argues, and intentionally hid the PST assessment and liability from Mr. Picco. However, I have no evidence on this issue, beyond the PST assessment document and the bankruptcy of API. Any conclusion that I would reach would be speculative. Mr. Pellegrino and API are not parties to this action. I have no idea what they may have to say on the issue. It may be that API never received the assessment, or that the assessment was disputed, or that Mr. Pellegrino himself had no knowledge of the matter. In the absence of evidence, I cannot make findings on this issue.

**66**  Secondly, Mr. Kumar was not relying on Mr. Pellegrino to advise him of the company's finances, he was relying on Mr. Picco's Reports. While Mr. Picco may have a claim against Mr. Pellegrino/API for failing to advise him of the PST assessment, as the retainer agreement required Mr. Pellegrino/API to do, that failure did not cause Mr. Kumar's loss. Had Mr. Picco performed the review engagement to the appropriate standards of care, it is reasonable to conclude that the Reports would not have been issued without reservation, as they were.

**67**  I accept the defendant's argument that Mr. Kumar was contributorily negligent. Mr. Kumar had been involved in several other business transactions in Canada. Mr. Robinson was his solicitor and had acted for him on these other matters. As Mr. Kumar knew, in each of those transactions the deposit was held in trust until the transaction completed. Mr. Robinson was also acting for Mr. Kumar on this transaction. Mr. Robinson prepared draft agreements for this transaction which contemplated that the deposit would be held in his trust account until completion. Mr. Kumar knew that the deposit would be protected if it was held by Mr. Robinson. Mr. Kumar and his son discussed the matter and Mr. Kumar decided to pay the deposit directly to API. On his instruction, Kuran Kumar revised the draft agreement, changing the deposit payment from a deposit to Mr. Robinson's trust account to direct payment to API. Mr. Kumar and Mr. Pellegrino signed the revised agreement. Mr. Kumar did not seek advice from Mr. Robinson or from his accountants regarding this change.

**68**  In my view, the majority of the fault for Mr. Kumar's loss lies with him. He did not act appropriately to protect his own interests. I assess 75% of the fault to Mr. Kumar and 25% to Mr. Picco.

**V. DAMAGES**

**69**  The damages in this case are quite straight forward. Mr. Kumar advanced a deposit of $250,000. He demanded return of the money in December, 2004. The money was not returned. Mr. Pellegrino and API both became bankrupt. There is no real prospect of recovery of the deposit in the bankruptcy. Therefore, Mr. Kumar's loss is $250,000 and Mr. Picco is liable for 25% of this loss.

**VI. CONCLUSION**

**70**  In conclusion, Mr. Kumar will have judgment against the defendants for $62,500, interest, and costs at scale B, unless there are matters of which I am not aware.

B. BROWN J.

**End of Document**

[***Lennox v. New Westminster (City), [2012] B.C.J. No. 555***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62CG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.J. Fitch J.

Heard: December 13 and 14, 2011; January 12, 2012.

Judgment: March 21, 2012.

Docket: S065390

Registry: Vancouver

**[2012] B.C.J. No. 555** | 2012 BCSC 410 | 95 M.P.L.R. (4th) 261 | 2012 CarswellBC 778 | 214 A.C.W.S. (3d) 272

Between Eileen Lennox, Plaintiff, and The City of New Westminster, Defendant

(75 paras.)

**Case Summary**

**Municipal law — Actions by and against — Actions against municipality — Action by Lennox for damages for injuries sustained in a trip and fall on a sidewalk dismissed — Lennox tripped over an elevation difference between sidewalk panels — Lennox submitted that the City was negligent in not repairing the sidewalk in accordance with its unwritten policy, which was to make repairs in response to specific complaints — However, complaints received by the City were not sufficiently specific as they did not relate to the particular sidewalk defect — Accordingly, the City did not act unreasonably in failing to effect repairs at that location prior to Lennox's fall.**

**Municipal law — Liabilities of municipality — *Negligence* — Duty of care — Inspection of public property — Types — Property maintenance and operation — Sidewalks — Trip and fall — Action by Lennox for damages for injuries sustained in a trip and fall on a sidewalk dismissed — Lennox tripped over an elevation difference between sidewalk panels — Lennox submitted that the City was negligent in not repairing the sidewalk in accordance with its unwritten policy, which was to make repairs in response to specific complaints — However, complaints received by the City were not sufficiently specific as they did not relate to the particular sidewalk defect — Accordingly, the City did not act unreasonably in failing to effect repairs at that location prior to Lennox's fall.**

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| Action by Lennox for damages for injuries sustained in a trip and fall on a sidewalk. In May 2006, Lennox tripped over an elevation difference between sidewalk panels in New Westminster. As a result, she fractured and dislocated her left shoulder, extensively bruised her left hip and suffered facial injuries. Lennox took the position that the City was negligent in not repairing the sidewalk before her fall in accordance with its unwritten policy. Under the unwritten policy, the City would make repairs in response to specific complaints even if the faults were insufficient to trigger repair under the City's written Policy Guideline. The City took the position that no specific complaint was made about the sidewalk and that there was no absence of reasonable care on its part.  HELD: Action dismissed.  Complaints received by the City were not sufficiently specific as they did not relate to the particular sidewalk defect. Accordingly, the City did not act unreasonably in failing to effect repairs at that location prior to Lennox's fall. Even if there had been a specific complaint, the Court still would not have found the City liable for ***negligence*** as the unwritten sidewalk policy went well beyond the requirements of a reasonable sidewalk inspection programme and the City implemented its inspection and repair policy in a reasonable manner. |

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 9-7, Rule 18A

**Counsel**

Counsel for the Plaintiff: S.E. Gibson.

Counsel for the Defendant: C.L. Forth.

**Reasons for Judgment**

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| **G.J. FITCH J.** |

**A. Introduction**

**1**  On May 30, 2006 at about 1:30 p.m. the plaintiff, Eileen Lennox, tripped over an elevation difference between sidewalk panels in front of 451 Fader Street in the City of New Westminster. Ms. Lennox fractured and dislocated her left shoulder, extensively bruised her left hip and suffered facial injuries in the ensuing fall. She was 69 years of age at the time of the trip and fall. Unfortunately, she died on November 16, 2011 after a brief battle with an aggressive form of cancer.

**2**  The narrow issue in this case is whether the City of New Westminster was negligent in not repairing the sidewalk in front of 451 Fader Street before the plaintiff's fall in accordance with its unwritten or "customer service" policy. Under this unwritten policy the City would make repairs in response to specific complaints about sidewalk faults, even when the faults complained about were insufficient in size to trigger repair by the City under its written Policy Guideline on the Inspection and Maintenance of City Sidewalks (the "Sidewalk Policy").

**3**  Among the questions to be decided in this action is whether a specific complaint was made to the City about the sidewalk fault in front of 451 Fader Street before the plaintiff's fall such as to trigger application of the unwritten policy. The evidence of Thomas Bolderson and Barry Stephenson, both of whom lived on the 400 block of Fader Street, regarding complaints they made to the City in 2005 before the plaintiff's fall, is particularly germane to the resolution of this question. If a specific complaint was made to the City in 2005 about a sidewalk fault at the location of the trip and fall, it remains to be determined whether the City, in all the circumstances of this case, is liable in ***negligence*** for not effecting repairs in front of 451 Fader Street before the fall occurred.

**4**  At the end of the day, both parties were content that this litigation be resolved by way of Summary Trial pursuant to Rule 9-7. I, too, am satisfied that the record before me, as it was developed on this application, permits the making of necessary factual findings and the just determination of the issues that arise in this case.

**B. Detailed Overview**

**5**  At the time of the fall, the plaintiff was wearing closed, flat heeled shoes and her prescription eyewear. She was walking north on the west side of Fader Street after attending an appointment at the Royal Columbian Hospital in New Westminster. Her car was parked at the curb on Fader Street near the location of the trip. As Ms. Lennox approached the front of 451 Fader, her right foot caught on the height differential between two adjacent concrete sidewalk panels. She fell on her left side causing the injuries described above. A large tree located on the boulevard between the sidewalk and curb shaded the area of the sidewalk where the trip occurred.

**6**  The City of New Westminster has approximately 400 kilometers of sidewalks. Most of the streets in the City are lined with trees.

**7**  Prior to the development of its written Sidewalk Policy, the City had an unwritten policy of repairing sidewalks in response to public complaints but did not conduct any scheduled sidewalk inspections.

**8**  On January 6, 1997, City council formally approved the written Sidewalk Policy. The stated purpose of the policy is to provide the Engineering Operations Department with an assessment of the condition of the sidewalks within the City in order to identify and repair any defects or hazards on the sidewalks and to establish repair priorities. Pursuant to this written policy, all sidewalks are designated as Zone A or Zone B, based on the volume and type of pedestrian traffic in that location. Sidewalks adjacent to higher traffic commercial, school and hospital vicinities are designated Zone A sidewalks and are inspected annually. Zone B sidewalks are generally found in residential and industrial areas and are inspected once every three years. The sidewalk upon which the plaintiff fell is a Zone B sidewalk. As such, the City's Sidewalk Policy requires that it be inspected once every three years.

**9**  All sidewalk defects or hazards identified on inspection are classified on a two level rating scale. A vertical differential between adjacent sidewalk panels that is between 10 and 25 mm. in height is classified as a Level 1 fault or defect. Level 2 defects are those that exceed 25 mm. in height. Ten millimetres was chosen as the starting point for recording defects because there is a normal variance in sidewalk construction of up to 10 mm. Height differentials between sidewalk panels up to 10 mm. are, as a result, not considered defects under the written policy. Level 1 defects are classified as "serviceable" under the Sidewalk Policy. The term "serviceable" was meant to reflect the City's determination that a sidewalk with a Level 1 defect can be used safely by a pedestrian with reasonable care and attention. Level 2 defects are classified as "requiring immediate repair/not serviceable". Level 2 defects identified during a scheduled sidewalk inspection are marked for public notice, usually by spray painting the defect with brightly coloured paint, and scheduled for immediate repair. Level 1 defects are documented, reviewed on the next scheduled inspection and placed on the list for repair as resources allow.

**10**  Sidewalk inspections are carried out by City employees who are trained to visually check for trip hazards, including height differences between sidewalk panels. Where a crack, separation or differential is identified, the defect is measured at its widest, highest or deepest point using a specially designed tool to the end of determining whether it is a Level 1 or Level 2 fault. An inspection form is filled out recording the date of the inspection, the street name and the address that is closest to the sidewalk defect identified. The inspector indicates on the form whether the defect is a Level 1 or Level 2 fault.

**11**  Additionally, the inspector is required to rate the overall condition of the sidewalk on each block on a scale of 1 to 10, with 1 being a sidewalk that is new or in excellent condition with a projected lifespan of 50 or more years, and 10 being an extensively patched sidewalk which should be replaced within a year. Among the factors an inspector will consider in assigning a 1 to 10 rating to the overall condition of the sidewalk on a block are: the age of the sidewalk as evidenced by cracks and uneven panels, the presence of trees nearby and the existence of or potential for sidewalk damage related to root growth, the volume of pedestrian traffic on the block being rated, and whether the area is scheduled for future development.

**12**  Sidewalk inspection forms are collected at the end of each day by the Streets Supervisor who notes the location of Level 2 faults and makes arrangements for a City work crew to attend at that location as soon as possible to repair it. All Level 2 faults identified during a sidewalk inspection are repaired. If a crew is at a particular location repairing a Level 2 fault and there is a Level 1 fault in an adjacent sidewalk panel, they will often undertake repairs to the Level I fault at the same time because it is cost effective to do so. Repairing a height differential between sidewalk panels can involve grinding the higher panel down or levelling the difference by filling it in with asphalt. The inspection form contains columns for recording of the type of repair undertaken and the date upon which those repairs were completed.

**13**  The sidewalk upon which the plaintiff fell was inspected on February 3, 2005, about 16 months prior to her fall. The Fader Street Inspection Form indicates that 3 Level 1 faults were identified on the west side of the 400 block of Fader Street including a Level 1 fault in front of 451 Fader. Five Level 1 faults were identified on the east side of the 400 block of Fader, including one in front of 450 Fader and one in front of 452 Fader. As no Level 2 faults were identified on the block, no immediate repairs were required to be undertaken pursuant to the written Sidewalk Policy.

**14**  Thomas Bolderson resides at 450 Fader. He has lived on the street since 1929. Barry Stephenson resides at 448 Fader. He has lived there for about 50 years. As noted above, Mr. Bolderson and Mr. Stephenson both provided evidence on this summary trial relating to complaints each of them made to the City in 2005 about the negative impact the roots of cherry trees planted along the boulevard on Fader Street were having on the condition of the sidewalks on their block.

**15**  The east and west sides of the 400 block of Fader Street were both assigned an overall rating of 4 out of 10 during the February, 2005 inspection. The predicted lifespan of a sidewalk in that condition is 20 to 30 years. On the next regularly scheduled inspection in the spring of 2008, the condition of the sidewalk in the 400 block of Fader Street was rated as 5 out of 10 with a predicted lifespan of 15 to 20 years.

**16**  Between January 1, 2005 and December 31, 2006, 531 Level 1 faults were identified through sidewalks inspections conducted by City staff.

**17**  It is common ground that between the February 3, 2005 sidewalk inspection and June 8, 2006, when the City first received notice of the plaintiff's fall, no sidewalk repairs were undertaken in front of 451 Fader Street.

**18**  The plaintiff does not, at this stage of the proceeding, take issue with the appropriateness of the City's written Sidewalk Policy or its operational implementation. I have, nevertheless, set out the terms of the written Sidewalk Policy in some detail as it provides important context in assessing the plaintiff's claim that the City was negligent in failing to implement its unwritten policy that citizen complaints about specific Level 1 sidewalk faults be addressed through timely repair.

**19**  The written Sidewalk Policy provides that if any defects or hazards on sidewalks are reported outside of a regularly scheduled inspection, either by a member of the public or an employee of the City, the reported defect or hazard shall be inspected as soon as possible and repaired in accordance with the above classifications. The language of the written Sidewalk Policy suggests that repairs would only be effected in response to a citizen complaint if, upon inspection, the defect motivating the complaint was determined to be a Level 2 fault.

**20**  Despite the language of the written Sidewalk Policy, the evidence the City put before me on this summary trial establishes the existence of an unwritten policy whereby the City undertakes the repair of specific Level 1 sidewalk defects about which public complaint is made. Greig Dodgshon, the City of New Westminster's Streets Supervisor, explained this unwritten policy in an affidavit sworn November 13, 2009 and filed for use on this summary trial:

In addition to performing repairs of all Level 2 faults following the Sidewalk Inspection, all sidewalk faults for which the City receives a complaint, regardless of Level and including Level 1 faults, are re-inspected and repaired using funds from the Operating Budget. This is done in order to provide a basic level of customer service to the taxpayers of the City, to promote citizens calling in because they know something will be done, and to ensure that **the particular fault complained of** does not result in future problems [emphasis added].

**21**  A similar explanation of the unwritten policy was provided by City employee Stephen Day, who was instrumental in the development of the written Sidewalk Policy. In an affidavit sworn November 16, 2009, Mr. Day explained the unwritten sidewalk repair policy of the City in language virtually identical to that used by Mr Dodgshon:

In addition to the sidewalk defects that are discovered and recorded during the Sidewalk Inspection pursuant to the Sidewalk Policy, any complaints of sidewalk defects received by the City are inspected by a member of the Streets Branch of the Engineering Operations Department as soon as possible, are marked for public notice by spray painting them with a brightly [sic] colour, and scheduled for immediate repair, regardless of the differential.

**22**  This affidavit evidence was given before the City learned that complaints about the condition of the sidewalks on Fader Street had been made by Mr. Bolderson and Mr. Stephenson in 2005, prior to the plaintiff's fall. In subsequent affidavits tended on behalf of the City, it would appear that efforts were made to re-characterize the unwritten policy in such a way as to suggest that only complaints about defects found to constitute Level 2 faults would be repaired. I note that no explanation was given for these two different versions of what the unwritten policy of the City requires. Fortunately, counsel for the City quite properly conceded that if a specific complaint was made about a sidewalk defect at the location of the plaintiff's fall, the City, acting pursuant to its unwritten policy, would have repaired that defect even if it was only a Level I fault. In light of this concession, it is unnecessary for me to say more about this issue.

**23**  Counsel for the plaintiff also contends that City officials, after learning that complaint had been made by residents of Fader Street in 2005 about the state of repair of the sidewalks on the 400 block, sought to re-characterize the unwritten policy by emphasizing, for the first time, that in order to trigger its application the complaint had to relate to a specific area on the sidewalk, such as in front of a particular address. I do not accept the contention of the plaintiff's counsel on this point. As I read the evidence tendered on behalf of the City, the point has consistently been made, both before and after it learned of the complaints, that repairs pursuant to the unwritten sidewalk policy are undertaken only when a "particular" fault is identified at a specific location. It only stands to reason that the City, having already conducted its regularly scheduled inspection and repair of Level 2 faults, would require that complaints about particular sidewalk defects be specific enough to enable a further targeted inspection and repair.

**24**  As noted above, the City learned of the plaintiff's fall on or about June 8, 2006. Consistent with his normal practice, the Streets Supervisor, Mr. Dodgshon, attended at the scene of the fall and measured the differential between the sidewalk panels in front of 451 Fader Street. The fault at its highest point measured between 23 and 24 mm. Such a defect is classified as a Level 1 fault under the written Sidewalk Policy. The plaintiff does not take issue in this proceeding with the City's evidence that the differential that caused the fall was a Level 1 fault. As is its practice, the City repaired the Level 1 fault in front of 451 Fader after the plaintiff's fall.

**C. History of the Proceeding**

**25**  The Writ and Statement of Claim were filed on August 22, 2006.

**26**  On November 13, 2009, the City applied under old Rule 18A for dismissal of the plaintiff's trip and fall action by way of summary trial. The key factual issue for determination at that time was whether the sidewalk defect in front of 451 Fader Street was a Level 1 or Level 2 defect. In light of the conflicting body of affidavit evidence on this issue, Dickson J. concluded that the Rule 18A application should be dismissed because the matter was not suitable for determination by way of summary trial.

**27**  As noted above, the contentious factual issue before Dickson J. is not before me. Counsel for the plaintiff expressly abandoned that part of the action which rested on an alleged breach of the City's written Sidewalk Policy and, specifically, on the contention that a Level 2 sidewalk fault existed in front of 451 Fader Street when the trip and fall occurred. The plaintiff now rests her ***negligence*** claim solely on the failure of the City to repair the sidewalk defect in front of 451 Fader Street, as required by its unwritten policy, after receiving complaints from Fader Street residents about the condition of the sidewalk in areas along that block. As the existence of these complaints was not known at the time of summary trial application before Dickson J., issues relating to compliance by the City with its unwritten "customer service" policy were not argued at that time. I make these observations to highlight that the issue before me (and the suitability of this action for determination by way of summary trial) is very different from the issue that was before Dickson J. in 2009.

**28**  Following dismissal of the summary trial application, the action proceeded to a six day jury trial in April, 2010. Very shortly before the trial commenced, counsel for the plaintiff learned of the pre-trip and fall complaints made to the City by Mr. Bolderson and Mr. Stephenson. Both were called at trial to demonstrate the City's failure to comply with its unwritten sidewalk repair policy when complaints are received from members of the public.

**29**  The jury found the City not liable and the plaintiff's action was dismissed.

**30**  The plaintiff appealed alleging misdirection in the question the trial judge submitted for the jury's consideration. The Court of Appeal allowed the appeal and ordered a new trial on grounds that the question asked of the jury may have erroneously caused them to conclude that the plaintiff had to establish ***negligence*** on the part of the City in carrying out their operational responsibilities under both, as opposed to either of the written and unwritten policies: [*2011 BCCA 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1V6-00000-00&context=).

**31**  The City's subsequent application for leave to appeal to the Supreme Court of Canada was dismissed: [*[2011] S.C.C.A. No. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JBDT-B45Y-00000-00&context=).

**32**  This matter came before me on the plaintiff's application under Rule 9-7 for an order that the City was negligent in carrying out its operational responsibilities under the unwritten sidewalk policy. In the course of this summary trial application, it was disclosed that if the plaintiff was unsuccessful in fixing the City with liability for ***negligence*** in failing to carry out its unwritten sidewalk policy, her counsel would seek to proceed with a full trial on the question of whether the City was negligent in carrying out its operational responsibilities in accordance with the written Sidewalk Policy. I expressed a disinclination to approach the litigation in slices and suggested that the proper and most cost-effective course would be to have both issues determined at the same time and by way of a full trial. At this point, counsel for the plaintiff determined to abandon the action insofar as it encompassed an allegation that the City was negligent in carrying out its operational responsibilities pursuant to the written Sidewalk Policy. As noted above, both parties agree that the sole question before me - whether the City was negligent in carrying out its operational responsibilities under the unwritten sidewalk policy - could fairly and properly be determined by way of summary trial procedure.

**D. The Evidence Regarding Compliance by the City with its Unwritten Sidewalk Policy**

**33**  To establish that the City was negligent in failing to carry out its operational responsibilities under the unwritten sidewalk policy, the plaintiff adduced the evidence given by Mr. Bolderson and Mr. Stephenson on the first trial as well as affidavits both of them swore after the Court of Appeal's judgment ordering a new trial. Both counsel agreed that in order to do justice in the case, the Court should permit cross-examination of Mr. Bolderson on the question of whether a specific complaint was made by him to the City before the plaintiff's fall about state of repair of the sidewalk in front of 451 Fader Street. Cross examination of Mr. Bolderson took place before me on January 12, 2012. On the same day, I heard *viva voce* evidence from the City's Streets Supervisor, Greig Dodgshon, on the substance, scope and operational implementation of the unwritten sidewalk policy and how complaints are managed as between the Parks Department and the Street Branch of the City.

**34**  What follows is a summary of the evidence relevant to one of the questions I must decide - whether a specific complaint was made to the City about the sidewalk fault in front of 451 Fader before the plaintiff's trip and fall.

1. **Thomas Bolderson**

**35**  Mr. Bolderson testified on the first trial that he lived at 450 Fader Street, "right across the street" from 451 Fader. Flowering cherry trees grow on the grass boulevard on the east and west sides of Fader Street in the 400 block. Mr. Bolderson testified that one of these trees is directly in front of his property and another is in front of 451 Fader. He testified that in 2005 he contacted the City about five times to complain that the sidewalk was being heaved up by root growth of the cherry trees. He reported his concerns about the sidewalk because he had seen people tripping and feared that "somebody's going to get hurt sooner or later ..." He was eventually referred to the Parks Board who sent one of their employees out to investigate his complaint. Mr. Bolderson told the Parks Board employee that there were other areas along the same block where the sidewalk was similarly affected by root growth where the cherry trees were planted. The Parks Board employee said that someone from the City would be out to look at the problem but Mr. Bolderson testified that he did not see anyone for quite some time. He testified that the City eventually attempted to repair the sidewalk fault in front of his house - first by using asphalt and then, a couple of years later, by grinding down the uneven panels. City records reflect that the grinding occurred on May 27, 2008, following a regularly scheduled sidewalk inspection conducted earlier that year which then identified a Level 2 fault in front of Mr. Bolderson's home. In cross-examination, Mr. Bolderson agreed that he never specifically complained to the City about the sidewalk in front of 451 Fader Street. Further, he acknowledged that he does not walk on the other side of Fader very often.

**36**  In his subsequent affidavit sworn May 6, 2011, Mr. Bolderson deposed that he pointed out to the Parks Board employee other areas on the block, "including directly across the street" that he was concerned about because of the obvious impact tree root growth was having on the condition of the sidewalks.

**37**  Evidence was adduced on the summary trial before me which establishes that Mr. Bolderson does not live directly across the street from 451 Fader Street. Rather, he lives directly across the street from 449 Fader. A large cherry tree is planted on the boulevard in front of 449 Fader almost directly across from the one that grows on the boulevard in front of Mr. Bolderson's property. Another cherry tree is located in front of 451 Fader. As will become apparent, however, in light of the *viva voce* evidence given by Mr. Bolderson before me on this summary trial, set out below, the evidence as to what residential address was directly across the street from Mr. Bolderson's house takes on less significance.

**38**  Mr. Bolderson testified before me that he called the City about five times over a five week period in 2005. He reiterated that he phoned the City about the state of repair of the sidewalk outside his residence but also told them that there were other places along the block where the cherry trees were causing the sidewalk panels to heave. When the Parks Board employee attended at Mr. Bolderson's residence in response to his complaint, the two of them went outside to look at the sidewalk in front of his residence. While they were out there, Mr. Bolderson pointed from his side of the street to cherry trees at four different locations on Fader Street - two across the road, one next door to him and one down the street. He did so in order to direct the attention of the Parks Board employee to the locations at which similar sidewalk problems were occurring, or had the potential to occur, as a consequence of tree root growth. On the evidence before me, it is clear that when Mr. Bolderson pointed to the two locations across the street, he was pointing to the cherry trees located in front of 449 and 451 Fader Street.

**39**  It is also clear that Mr. Bolderson, in identifying these four locations, was not suggesting that there were sidewalk faults at each of these locations. Rather, he was pointing out both existing sidewalk faults and areas where the potential for future sidewalk damage was apparent because tree roots were coming up through the ground. For example, he acknowledged that when the Parks Board employee attended in response to his complaint in 2005, there was no sidewalk fault in front of 449 Fader. He identified this location as a potential problem area given his view that the cherry tree roots would, over time, inevitably heave the sidewalk panels at that location too.

**40**  Mr. Bolderson also confirmed in cross-examination before me that the City eventually responded to his complaint sometime in 2006 by putting asphalt between the sidewalk panels in front of his house to reduce the size of the lip. There are no records before me documenting Mr. Bolderson's complaint, the completion of the repair or whether this repair was undertaken before or after the plaintiff's fall on May 30, 2006. I would note, however, that the only inference to be drawn from the fact that repairs were undertaken is that the Parks Board communicated Mr. Bolderson's concern about the sidewalk in front of his house to the City's Street Branch.

1. **Barry Stephenson**

**41**  Mr. Stephenson resides at 448 Fader Street, across the street from and two houses north of 451 Fader. He testified on the first trial that cherry trees were planted on both sides of the block about 20 years ago. There are seven cherry trees on each side of the 400 block. About five years after they were planted, problems began to develop as tree branches were growing over power and telephone lines. He then noticed that the sidewalks began lifting as a consequence of root growth and that this was occurring on both sides of the street.

**42**  Mr. Stephenson contacted the City in 2005 and complained about the fact that cherry tree branches in front of his house were interfering with his power, telephone and cable lines. The head arborist of the City attended in response to his complaint. As they were talking, Mr. Stephenson also mentioned that tree roots had lifted up his driveway, the sidewalk in front of Mr. Bolderson's house and that root growth was affecting the sidewalk along the whole block. Mr. Stephenson wanted the trees cut down and suggested this to the arborist. The arborist advised him that the City would not be doing so. The arborist also told Mr. Stephenson that someone would come out to inspect the sidewalks. Mr. Stephenson acknowledged that he did not specifically complain to the arborist about a sidewalk defect in front of 451 Fader Street. In cross-examination, Mr. Stephenson acknowledged that he has seen City employees blacktopping and grinding sidewalk panels along Fader Street.

**43**  The City's Parks Department records reflect that a complaint was received from Mr. Stephenson on March 8, 2005 (about 15 months before the plaintiff's fall) which was recorded in these terms: "multiple trees along the blvd need to be cut back as they are touching or pulling on the power lines connected to his home. The roots are also lifting the sidewalks & his driveway & he's not happy."

**44**  It is apparent that the City promptly responded to Mr. Stephenson's primary complaint by pruning away the cherry tree branches from the service lines on his property. There is no written record confirming that Mr. Stephenson's remarks about the condition of the sidewalks on the block were communicated from the Parks Board to the Street Branch and no evidence before me that the Street Branch conducted an inspection or any sidewalk repairs in response to Mr. Stephenson's call.

**45**  Mr. Stephenson testified before the jury that prior to May, 2006 the sidewalks on the west side of Fader were dangerous because they were lifting and that some of them were "like a skateboard park". He testified that he expressed these concerns to the arborist. He further testified that in one area there was a 3 inch differential between sidewalk panels and in another area an 8 to 10 inch slope. While I have no doubt that Mr. Stephenson was genuinely concerned about the impact the cherry tree roots were having on the condition of the sidewalk on his block, I would note that there was no evidence before me of the existence of any trip approaching 3 inches on the Fader Street block. Further, Mr. Stephenson's evidence on this point is inconsistent with the Sidewalk Inspection Form and with the photographs before me depicting the state of the sidewalk in front of 451 Fader shortly after Ms. Lennox's fall.

1. **Greig Dodgshon**

**46**  Mr. Dodgshon, the City's Street Branch supervisor and the person responsible for responding to public complaints about sidewalk defects, also gave *viva voce* evidence before me on this summary trial.

**47**  In his first affidavit sworn November 13, 2009 and filed for use on the original summary trial application before Dickson J., Mr. Dodgshon deposed that he had "reviewed the City's records and, between February 3, 2005 and June 8, 2006, no complaints were received which would have triggered a re-inspection and repair of the ... sidewalk in the vicinity of 451 Fader Street." It is apparent from this that the Street Branch of the Engineering Operations Department of the City, which is responsible for administration of the written and unwritten sidewalk policy, did not receive from the Parks Department any *written* record of the complaints made by either Mr. Bolderson or Mr. Stephenson about the condition of the sidewalk along the 400 block of Fader Street. As noted above, neither the fact of these complaints nor the existence of documents reflecting the Stephenson complaint were identified until shortly before the start of the jury trial, well after Mr. Dodgshon's original affidavit had been sworn.

**48**  In a subsequent affidavit sworn November 29, 2011 and filed for use on this summary trial application, Mr. Dodgshon clarified that, "no complaints were *documented* by the Street Branch which would have triggered a re-inspection and repair the sidewalk in the vicinity of 451 Fader Street" [emphasis added]. Mr. Dodgshon deposes in his second affidavit that when the City receives a more general complaint about the condition of a sidewalk, its practice is to first investigate the condition of the sidewalk as a whole to determine whether it requires replacement. This investigation consists of reviewing the Sidewalk Inspection Form from the last regularly scheduled inspection for that block. If the condition of the sidewalk was described as a level 5 or less on the scale, then the entire sidewalk will not be replaced.

**49**  Mr. Dodgshon testified before me that if the public complaint is about trees, including tree roots, the Parks Board responds to that complaint. If the Parks Board identifies a sidewalk problem, the matter is referred to him. He has no recollection of receiving from the Parks Board a referral relating to the complaint made by Mr. Bolderson in 2005.

**50**  He confirmed that his customer service policy is to fix Level 1 sidewalk defects about which a specific complaint is made by a member of the public. Repair work undertaken with respect to Level 1 faults is not recorded. I would pause to note that this likely explains why there is no record of the asphalt repair done to the sidewalk panels in front of Mr. Bolderson's house in 2006.

**51**  Mr. Dodgshon agreed in cross-examination that if a member of the public identifies three or four trees affecting sidewalk panels on a block, this might be a specific enough complaint to trigger application of the unwritten policy. He also agreed that a tree location can convey more specific information about the location of an alleged sidewalk defect than providing a residential address.

**E. The Position of the Parties**

**52**  The parties appear to be *ad idem* that there is a sufficient proximity between a municipal government and those who walk its streets that the latter reasonably expect sidewalks to be reasonably maintained and the former foresees the risk of harm if it does not do so. Thus, a *prima facie* duty of care arises.

**53**  Mr. Gibson, for the plaintiff, takes no issue with City's sidewalk policies *per se*. He accepts that those policies are reasonable and reflect a *bona fide* and unreviewable exercise of the City's discretion: *Just v. British Columbia*, [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=).

**54**  He argues, however, that the City was negligent in its operational implementation of the unwritten sidewalk policy. He argues that the plaintiff was severely injured when she tripped over a sidewalk defect that the City, had it exercised reasonable care in all the circumstances known to it, would have fixed prior to the date of the fall. Counsel contends in this regard that the attention of the City was specifically drawn to sidewalk faults on the 400 block of Fader Street in 2005, before the plaintiff's fall, by both Mr. Bolderson and Mr. Stephenson. He argues that these were not generalized complaints about the state of repair of the sidewalk in the entirety of the 400 block of Fader, but specific complaints directed at the impact a handful of the cherry trees planted on Fader Street were having on the sidewalk panels. Contextualizing the complaints in this fashion, he argues that the evidence as a whole supports a finding that a specific complaint was made about the sidewalk at the particular location of the trip and fall before May 30, 2006. He argues that the City breached the applicable standard of care when it failed to inspect the sidewalk in response to either of these complaints, and when it failed to take the remedial steps contemplated by its own unwritten sidewalk policy.

**55**  Ms. Forth, for the defendant, argues that the plaintiff has not demonstrated an absence of reasonable care on the part of the City in its operational implementation of the unwritten sidewalk policy.

**56**  First, she argues that the plaintiff has failed to show that a specific complaint was made about the sidewalk in front of 451 Fader Street before the plaintiff's fall on May 30, 2006.

**57**  But in addition, she takes the position that the issue before this Court is not restricted to the narrow question of whether Fader Street residents made a specific complaint about a sidewalk defect in front of 451 Fader before the plaintiff fell. Rather, she submits that all of the surrounding circumstances must be taken into account in determining whether the City has shown reasonable care in implementing the policy: *Just v. British Columbia* at para. 30. She argues that all the circumstances must take account of: the fact that the City had already complied with its written Sidewalk Policy, the nature and purpose of the unwritten "customer service" policy, the generalized nature of the complaints received by Mr. Bolderson and Mr. Stephenson, the timing of those complaints in relation to the last regularly scheduled Sidewalk Inspection and the evidence that the City did, in fact, respond to Mr. Bolderson's complaint about the sidewalk panels in front of his house by first blacktopping the panels in 2006 and then grinding the panels down in 2008 when the initial repair work proved unsatisfactory. Ms. Forth argues that even if the Court were to find a failure by the City to adhere to its unwritten customer service policy of repairing Level 1 defects reported by the public, a ***negligence*** finding would not necessarily follow. She submits that the Court should be extremely wary about increasing the standard of care owed by the City where its unwritten sidewalk policy goes substantially above and beyond what the written policy actually requires. Put differently, counsel for the defendant argues that when a City takes upon itself a level of care or customer service well beyond what would merely be reasonable in the circumstances, failure to discharge that enhanced level of service is not necessarily negligent. To hold to the contrary would be to substitute for the standard of reasonable care a standard of perfection.

**F. Discussion**

**58**  I propose to start my analysis of the issues in this case by considering, first, whether a specific complaint was made to City officials by the Fader Street residents Bolderson and Stephenson in 2005 about the defect in the sidewalk panel in front of 451 Fader.

**59**  To put the complaints lodged by Mr. Bolderson and Mr. Stephenson in context, it must be recalled that the City had completed its regularly scheduled inspection of the sidewalk in the 400 block of Fader Street on February 3, 2005. The City was aware, as a result of this inspection, that a number of Level 1 faults had been identified on the block including two in front of 459 Fader, one in front of 451 Fader, one in front of Mr. Bolderson's house at 450 Fader, and one in front of the house next to Mr. Bolderson at 452 Fader. The City had also conducted an evaluation of the condition of the entirety of the sidewalk on the 400 block of Fader and concluded that the sidewalk was not in need of immediate replacement but had a predicted lifespan of 20 to 30 years.

**60**  Mr. Stephenson's call to the City was made on March 8, 2005, scarcely a month after City had discharged its operational responsibilities under the written Sidewalk Policy by inspecting and evaluating for repair purposes the entirety of the 400 block on Fader Street.

**61**  I make three observations about Mr. Stephenson's call to the City. First, it is apparent that his primary complaint, and what motivated his call, was that the cherry tree branches were interfering with his power lines. That is, no doubt, why an arborist from the City responded to his complaint. He testified that he "also mentioned" to the arborist that tree root growth was lifting up his driveway, the sidewalk panels in front of Mr. Bolderson's residence as well as other portions of the sidewalk on the block. These concerns were clearly secondary in nature. The City acted on the primary complaint lodged by pruning the trees away from Mr. Stephenson's power lines. Second, Mr. Stephenson characterized his own complaint about the condition of the sidewalk on Fader Street as a complaint about the "whole block". Finally, Mr. Stephenson was clear that he never drew the arborist's attention to, or made specific complaint about, a sidewalk defect in front of 451 Fader. In my view, it was not unreasonable for the City to take no further action in response to the "mention" Mr. Stephenson made about the impact tree root growth was having on the sidewalks along the whole block. This is particularly so given that the City had just completed its inspection of this block, knew of the existence and location of Level 1 sidewalk faults on Fader Street, including the one in front of 451 Fader, and knew that the block was clear of Level 2 defects requiring immediate repair.

**62**  With respect to Mr. Bolderson, I am satisfied that he drew the attention of the City's Parks Board representative to particular trees that were causing, or had the potential to cause, the sidewalk panels to heave. Mr. Dodgshon acknowledged that pointing to a particular tree as the location of the problem may, in fact, provide more detailed information about where the defect is than would be conveyed by supplying a residential address.

**63**  Having said this, it must be recalled that Mr. Bolderson was doing more than pointing out existing sidewalk defects. By his own evidence, he was also pointing out locations where no sidewalk defects were present but where the potential for a sidewalk defect to arise over time existed by virtue of the fact that a cherry tree was planted in that location. He did not, in speaking with the Parks Board representative, specifically complain about an existing defect in front of 451 Fader Street. Again, it was not, in my view, unreasonable for the City not to embark on a broader investigation of all of the problems and potential problems Mr. Bolderson was identifying, particularly given that a complete Sidewalk Inspection had been undertaken by the City that same year. Finally, it is noteworthy that the City did intervene to effect repairs to the Level 1 fault in front of Mr. Bolderson's residence in response to his complaint. In doing so, the City was operating in compliance with its unwritten sidewalk policy.

**64**  In light of my finding that the City did not receive a sufficiently specific complaint about a particular sidewalk defect in front of 451 Fader before the trip and fall, it cannot be said that they acted unreasonably in failing to effect repairs at that location before May 30, 2006.

**65**  While this finding is sufficient to dispose of the litigation, I prefer not to rest my decision solely on this basis.

**66**  Even if the unwritten policy was engaged by a specific complaint about a sidewalk defect in front of 451 Fader Street before the plaintiff's fall, I would still find the City not liable for ***negligence*** in this case. My reasons for coming to this conclusion are briefly set out below.

**67**  I agree with counsel for the defendant that all of the circumstances must be taken into account in determining whether the City exercised reasonable care in the operational implementation of its sidewalk policy. Demonstrated non-compliance with municipal policy will be a factor and, in some cases, an important one in the determination of a ***negligence*** claim. But non-compliance with an inspection policy, like the unwritten sidewalk policy in the case at bar, will not, standing alone, necessarily lead to a ***negligence*** finding: see *Stojadinov v. Hamilton (City)* [*(1998), 41 M.P.L.R. 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCN1-FK0M-S2WB-00000-00&context=) (Ont. H.C.). In my view, regard must be had to the policy itself, its purposes and the mischief it seeks to prevent in order to determine how non-compliance with that policy should be factored into the assessment of whether reasonable care has been exercised.

**68**  In case at bar, it is clear that adherence by the City to its written Sidewalk Policy is to the end of ensuring that pedestrians using the sidewalks with ordinary care can do so safely.

**69**  The objectives of the unwritten policy may overlap to some extent with the written policy but its animating purposes are quite different and have less to do with the maintenance of safe walkways than with the promotion of good relations between the City and its residents. As Mr. Dodgshon explained, the unwritten policy exists "to provide a basic level of customer service to the taxpayers of the City, to promote citizens calling in because they know something will be done, and to ensure that the particular fault complained of does not result in future problems." To the extent that the City takes upon itself, in its unwritten policy, the task of repairing Level 1 faults about which public complaint is made, it does not do so because those faults are deemed to constitute a present danger to pedestrians using reasonable care and attention. As noted above, Level 1 faults are characterized as "serviceable" under the written policy. As Mr. Day explained, the word "serviceable", was "meant to indicate that a sidewalk with a Level 1 default [sic] could be used safely with due care and attention." Rather, the City undertakes to fix Level 1 defects about which public complaint is made primarily to promote good relations and communication between the citizens of New Westminster and their local government and to ensure that sidewalk imperfections do not become hazards in the future. Given the primary purpose of the unwritten policy, it does not follow that non-compliance with it reflects a departure from the standard of care of that a reasonable municipality would have exercised.

**70**  Moreover, I agree with counsel for the defendant that when a municipality takes upon itself a level of service that exceeds what would be reasonable in the circumstances, courts should be exceedingly slow to characterize the failure to discharge that enhanced level of service as ***negligence***. In the case at bar, the unwritten sidewalk policy goes well beyond the requirements of a reasonable sidewalk inspection programme. As a matter of public policy, the law should encourage steps taken by municipalities to proactively address concerns that may give rise to public safety issues in the future where those steps go beyond what is merely reasonable in the circumstances.

**71**  The plaintiff's ***negligence*** claim, grounded in the failure of the City to comply with its unwritten sidewalk policy by investigating and repairing a Level 1 sidewalk fault in front of 451 Fader Street in response to a public complaint, cannot be assessed in isolation. Rather, it must be assessed in light of all of the surrounding circumstances and factual findings I have made, including:

1. The existence of a reasonable written Sidewalk Inspection and Repair Policy with which the City complied before, at the time of, and after the trip and fall;
2. The fact that the City had completed its regularly scheduled inspection of the sidewalk in the 400 block of Fader Street a month before Mr. Stephenson's complaint and in the same year that Mr. Bolderson's complaint was received;
3. The fact that the City was aware, as a consequence of its inspection, of the existence of a number of Level 1 sidewalk defects in the 400 block of Fader Street, including the one in front of 451 Fader that Ms. Lennox ultimately tripped over;
4. The fact that Level 1 sidewalk faults are "serviceable" in the sense that they can be navigated by pedestrians using due care and attention;
5. The evidence that the City responded to Mr. Bolderson's specific complaint about the sidewalk panels in front of his house and effected repairs by filling in the height differential with asphalt;
6. The fact that the plaintiff's ***negligence*** claim rests entirely on non-compliance by the City with an unwritten "customer service" policy by which it undertakes a level of responsiveness and service in the inspection and maintenance of municipal sidewalks that goes well beyond what would constitute a reasonable operational programme.

**72**  In all of the circumstances, I am unable to find that the plaintiff has carried the burden of demonstrating ***negligence*** on the part of the City in failing to repair the Level 1 defect in the sidewalk in front of 451 Fader before Ms. Lennox's trip and fall on May 31, 2006.

**73**  Municipalities have a duty to keep the sidewalks in a reasonable state of repair to enable persons using them with ordinary care to do so safely. As has repeatedly been said in trip and fall actions of this kind, the fact that an accident has taken place, even one as regrettable as that experienced by the plaintiff, does not necessarily mean that the sidewalk was in a state of non-repair or that the municipality failed to act reasonably in the implementation of its sidewalk inspection and maintenance policy. In the case at bar, it is not contested that the City of New Westminster had in place a reasonable sidewalk inspection and repair policy that reflects the application of a *bona fide* exercise of discretion. In my view, the City also implemented its inspection and repair policy in a reasonable manner.

**74**  For these reasons, I would dismiss the claim.

**75**  The defendant is entitled to its costs.

G.J. FITCH J.

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