[***Pang v. Dhalla, [2011] B.C.J. No. 813***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1R6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.R. Dillon J.

Heard: March 23 and 24, 2011.

Judgment: April 29, 2011.

Docket: M090607

Registry: Vancouver

**[2011] B.C.J. No. 813** | 2011 BCSC 564 | 2011 CarswellBC 1037 | 201 A.C.W.S. (3d) 707

Between Peter Yan Ho Pang, Plaintiff, and Shenul Dhalla and BMW Canada Inc., Defendants

(23 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Action by Pang for damages for personal injuries sustained in a motor vehicle accident allowed in part — Pang sought $20,000 to $40,000 in non-pecuniary damages — Pang failed to establish that there was any impact or collision — However, the defendant Dhalla was negligent in changing lanes before ascertaining that it was safe and caused Pang to have to brake hard to avoid an accident — Pang sustained a minor exacerbation of pre-existing pain in his neck, shoulder and back which minimally affected his lifestyle — Pang awarded $5,000 in damages.**

**Damages — Types of damages — Non-pecuniary loss — Action by Pang for damages for personal injuries sustained in a motor vehicle accident allowed in part — Pang sought $20,000 to $40,000 in non-pecuniary damages — Pang failed to establish that there was any impact or collision — However, the defendant Dhalla was negligent in changing lanes before ascertaining that it was safe and caused Pang to have to brake hard to avoid an accident — Pang sustained a minor exacerbation of pre-existing pain in his neck, shoulder and back which minimally affected his lifestyle — Pang awarded $5,000 in damages.**

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 15-1

**Counsel**

Counsel for the Plaintiff: D. Shane and A.T. McLelan.

Counsel for the Defendants: A.A. Booth.

**Reasons for Judgment**

|  |
| --- |
| **J.R. DILLON J.** |

**1**   The plaintiff claims damages for injuries suffered in a motor vehicle accident of April 13, 2007 that is said to have been caused by the ***negligence*** of the defendant, Shenul Dhalla. The trial proceeded under Rule 15-1.

**2**  The plaintiff is a 40-year old accountant with university and professional training. He has resided in Canada and worked in a professional capacity for 24 years.

**3**  On April 13, 2007, the plaintiff had left a meeting with a client, Carol Lee, and was proceeding towards Richmond, B.C., southbound on Fir Street near 12th Avenue in his red Toyota. As he approached the intersection, A BMW X5 vehicle, that had been stopped behind left turning vehicles in the left lane, turned into the curb lane occupied by the plaintiff's vehicle. Whether there was an impact and whether the defendant signalled her turn into the curb lane are at issue.

**4**  Carol Lee was following the plaintiff and observed the event. However, she could not recall what lane she was travelling in or how far she was behind the plaintiff. She described that the BMW turned into the plaintiff's lane "as if she had not seen him", "as if nothing had happened", "as if there had been no impact". Ms. Lee initially testified that the driver of the BMW had not signalled the lane change, but later agreed that she assumed that this was so without the actual observation. Ms. Lee could not recall hearing a horn, a squeal of brakes, or any impact. Ms. Lee pursued the BMW and signalled the driver to pull over, which she did. Ms. Lee did not leave her vehicle and eventually continued on.

**5**  The plaintiff testified that he was southbound on Fir Street, travelling at about 45-50 kph, when he observed the BMW turn into his lane at slow speed. He testified that he slowed down, disengaged the transmission, and then hit his brakes suddenly to avoid an accident. He could not remember if he sounded his horn. He did not feel or hear an impact and did not know if there had been one. He said that he had enough distance to stop his vehicle. He brought his vehicle to a stop near the BMW and exchanged information and commentary with the defendant. He told the defendant that he did not know whether there had been an impact. He thought that that may have been observed scratches on his car; however, he also testified that those scratches had probably been there before.

**6**  The defendant testified that she was stopped on Fir Street behind vehicles making a left turn onto 12th Avenue. She stated in direct examination that she looked at her rear view mirror, signalled, observed a red car stopped, and then proceeded into the curb lane. She did not check her side mirror, the "blind spot". She did not sense that anything had happened until Ms. Lee motioned for her to pull over. The defendant spoke with the plaintiff and both looked to see whether there had been any damage to the vehicles. There were no marks or damage to the defendant's vehicle. Although there were scratches to the plaintiff's vehicle, the conversation proceeded as though they had been there before.

**7**  Based upon this evidence, the plaintiff has not proven that there probably was an impact or collision between the vehicles. At best, the plaintiff hard braked to avoid an accident after the defendant turned into his lane. From the actions of the plaintiff in slowing as it became apparent that the defendant was moving her vehicle into his lane and from the evidence of the defendant, I conclude that the defendant signalled her lane change. It cannot be determined that Ms. Lee was in a position to see or not to see a signal.

**8**  However, the defendant was negligent in changing lanes before ascertaining that it could be made safely without affecting the travel of another vehicle, in this case, the plaintiff's vehicle. The defendant had to hard brake to avoid an accident. If the defendant had looked at her blind spot, she would have determined that she could not safely enter the curb lane. Her failure to do so caused the plaintiff to hard brake.

**9**  Prior to the accident, in March 2007, the plaintiff attended at a chiropractor once a week to "try to straighten his back" where he experienced pain from time to time and to mange neck and shoulder pain. This pain had started about the time of a fall in 2002. As reported to a different chiropractor the day following the accident, the plaintiff had experienced continuous sharp, stabbing pain in his lower back and between his upper shoulders prior to the accident. The plaintiff had booked the appointment prior to the accident to mange and treat his pain even though this was not golfing season when the plaintiff testified that he typically experienced low back pain after golf. He described that the pain had started earlier in 2007 and he did not relate this pain to the incident the day before. The plaintiff also complained on that day that one leg was shorter than the other causing him to feel that his back was "twisted." Although the plaintiff said in direct examination that the pain related only to golf, involved only his lower back, occurred rarely, and was not a present description, the self description to his chiropractor speaks to the contrary and is preferred. The plaintiff stated upon cross-examination that all that he told the chiropractor and wrote in the self description related to symptoms prior to the accident. He did not mention the accident when he saw the chiropractor the day after the event. The plaintiff took prescription drugs for his pain even during the off season for golf. He had also suffered shoulder dislocation injuries in 1989 and then again in 2002.

**10**  Two to three days after the accident, the plaintiff testified that he experienced pain in his upper neck, shoulders and lower back. This was contrary to the statement to his chiropractor that the pain was continuous. He took the usual anti-inflammatory prescription that he took prior to the accident and Tylenol. When the symptoms did not improve, he attended the next day to a general practitioner, Dr. Lee, who referred him to physiotherapy.

**11**  The neck pain resolved within a few months after physiotherapy. The tightness in the shoulder also resolved within this time.

**12**  The plaintiff said that his back pain continued "on and off pretty much every day" for the next few months, feeling as though one leg was shorter than the other. He took the regular prescribed anti-inflammatory medication and attended at physiotherapy twice weekly. He found that the pain increased following physiotherapy. After 15-20 treatments, he stopped because the physiotherapist recommended that he see a specialist. The plaintiff felt that he had a "crooked back" and saw Dr. Lee who referred him to Dr. Hershler. The plaintiff then attended for acupuncture which helped his pain such that he felt much better and had only a little bit of pain by the end of 2007 because his back was "not as crooked."

**13**  The plaintiff took no medication for pain in 2008. He had taken little anti-inflammatory medication since May 2007. He did not golf, cycle, or hike, but mostly because he had two very young children. By the end of 2008, the plaintiff said that his back pain was 80-90% better with pain only once every month or two. The same patter continued in 2009, and by 2010 the pain had resolved.

**14**  Dr. Lee reported that the plaintiff told him on April 16, 2007 that he had collided with a large SUV and was jolted by the sudden impact. The plaintiff said that he developed neck, shoulder and back pain and was dizzy with headache following the accident. The plaintiff told the doctor that he had been pain free before the accident. Upon examination, the plaintiff appeared to have tenderness in the neck and shoulders with good range of movement. The doctor's initial impression was that the plaintiff suffered a strain to the neck and shoulders. The plaintiff had not indicated any significant pain in his back. A month later, the plaintiff complained that his neck pain extended into his lower back. There were no more complaints of neck or shoulder pain. Spine alignment was normal. By June 2007, the plaintiff still complained of low back pain with spasm and was concerned about curvature of his spine. The doctor found certain tenderness but still normal range of motion. He sent the plaintiff for a CT scan of the lumbar spine. When the plaintiff returned on June 12 with a report from the physiotherapist expressing concern for the tilt of the plaintiff's spine, Dr. Lee referred the plaintiff to the specialist, Dr. Hershler. The CT scan showed a broad based posterior bulging of the L4-5 disc with no disc herniation *per se*. The plaintiff attended with his general practitioner twice more, in April 2008 and then November 2010. He had significantly improved and there were no abnormal findings despite the plaintiff's complaint of back spasm.

**15**  Dr. Lee expressed the opinion in his report of December 18, 2010 that the plaintiff suffered muscular and ligamentous injury involving the neck, shoulder and back and disc injury involving the lumbar L4-5 region. He said that this occurred only after the accident and that it was "highly probable" that the accident was the main cause. However, the doctor was not aware of previous back pain as it had not been reported by the plaintiff even though he had attended at a chiropractor two days before complaining of that very thing and had been specifically asked by the doctor about prior pain. The doctor testified that if the plaintiff had back pain prior to the accident, then he was not so sure that the disc injury was caused by the accident. He also agreed that any back pain could have been related to degeneration in the spine that was not related to the accident. He could not say for sure whether the diagnosis of Dr. Hershler of Scheuermann's disease was caused by the accident and said that many people are asymptomatic with the disease. He disagreed that a sudden stop could cause someone to become symptomatic.

**16**  Dr. Hershler is a physical medicine and rehabilitation specialist. He saw the plaintiff on September 25, 2007, March 5, 2008 and December 13, 2010. The plaintiff told Dr. Hershler that he was pain free and in good health at the time of the accident. The plaintiff told the doctor that he had braked suddenly to avoid a collision and then experienced pain and stiffness in the neck and low back within days of the accident. He also noticed tilting of his trunk. The plaintiff reported to be almost pain free by the date of the doctor's report on January 6, 2011. The doctor said that all symptoms dated from the motor vehicle accident on April 13, 2007; however, he was unaware of the prior complaints of the plaintiff or his attendance with health professionals due to lower back and other pain.

**17**  Dr. Hershler considered that the 2007 X-ray showed degenerative change to the spine which was confirmed in the 2007 CT scan to be degenerative changes in the lower thoracic region and lumbar spine known as Scheuermann's disease and a bulging of the L4-5 disc that was not impinging on any nerves. Dr. Hershler opined in his report that these conditions were caused by the accident of April 13, 2007. In so doing, he said:

It is important to note that, prior to the accident, Peter was totally pain free and in good health. He had never previous complained of back spasms or any tilting of his spine. He had played regular games of golf without a problem.

**18**  On cross-examination, the doctor clarified that Scheuermann's disease is inherited so that the plaintiff had this prior to the accident. He also said that he could not be as sure that the accident caused the disc bulge if symptoms existed prior to the accident. He agreed that the self report to the chiropractor of April 14, 2007 was the same symptoms that he relied upon to make his diagnosis. He could not connect the accident to a feeling that one leg was shorter than the other. He agreed that if the plaintiff had fallen in 2002 and required surgery for a dislocated shoulder, as he had, then the bulge could have been caused in that fall especially if spasm symptoms of pain in the lower back dated back to then or before the accident.

**19**  Neither Drs. Lee or Hershler found that the degenerative changes and Scheuermann's disease were causal factors for the plaintiff's subjective symptoms and disc injury because the plaintiff reported being asymptomatic before the accident. Their opinions that the disc bulge was caused by the accident were dependent upon the information that the plaintiff was pain free prior to the accident. The plaintiff's assertion to both doctors that he had been pain free prior to the accident was false. Because so much of their opinions depended upon this statement, one cannot conclude that the accident probably caused the disc injury or lower back pain.

**20**  In my view, the plaintiff has not proven that the braking of his vehicle to prevent an accident caused anything other than a minor exacerbation of pre-existing pain in his neck, shoulder, and lower back. Because of his failure to fully inform both doctors, their opinions about the accident causing a disc injury are seriously undermined. The minor nature of the injuries is supported by the fact that the plaintiff's neck and shoulder symptoms resolved within a few months, the plaintiff did not take time off work, and he needed little medication. The effect on lifestyle was minimal.

**21**  The defendant provided a range of damage for non-pecuniary loss of $2,500 to $5,000. The plaintiff described a range of $20,000 to $40,000. Having considered the cases provided, I conclude that an award of $5,000 is appropriate.

**22**  The plaintiff will be entitled to special damages for the cost of physiotherapy, chiropractic, and acupuncture treatments related to the exacerbation of his injuries after the accident and to the end of 2007. By this time, the sole condition related to his lower back and the treatments for acupuncture were consistent with the pace of treatments prior to the accident. Special damages are awarded in the amount of $1,918.

**23**  The parties may speak to the matter of costs.

J.R. DILLON J.

**End of Document**

[***Parchment v. British Columbia, [2015] B.C.J. No. 1236***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8K-Y431-JWR6-S2DY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.C. Grauer J.

Heard: March 19-20, 2015.

Judgment: June 12, 2015.

Dockets: 133175, 148126

Registry: Victoria

**[2015] B.C.J. No. 1236** | 2015 BCSC 1006

Between Oneil Parchment, Plaintiff, and Her Majesty the Queen in the Right of the Province of British Columbia, Defendant And between Attorney General of British Columbia, Petitioner, and Oneil Parchment, Respondent

(59 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Vexatious litigants — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Res judicata — Applications by Crown for order dismissing predicate action with vexatious litigant declaration and related relief allowed — Plaintiff was inmate who commenced several actions, human rights complaints and laid private informations alleging individuals involved in investigation that led to conviction for drug offences fabricated evidence and engaged in racist and defamatory behaviour — Proceedings were repeatedly dismissed — Plaintiff met criteria for vexatious litigant — 14 extant proceedings were stayed — Predicate action summarily dismissed — Order did not extend to private informations due to jurisdictional and constitutional issues — Criminal Code, ss. 504, 507.1 — Supreme Court Act, s. 18.**

|  |
| --- |
| Applications by the Crown for an order to strike or summarily dismiss the civil claim of the plaintiff, Parchment, and for an order prohibiting the plaintiff from instituting or continuing legal proceedings, including the swearing of private informations under the Criminal Code. The plaintiff was a self-represented inmate at the Vancouver Island Regional Corrections Centre. He was convicted of drug offences on the basis of evidence seized in breach of his rights, but admitted pursuant to s. 24(2). The plaintiff subsequently swore ten private informations against individuals involved with the investigation and his prosecution, alleging fabrication of evidence, racism and defamation. The plaintiff swore an additional 15 informations against various correctional officers and institutions. His complaints formed the basis of several human rights complaints and civil claims filed in Provincial and Supreme Court. The Crown sought a vexatious litigant declaration with related relief and an order striking or dismissing the current proceeding.  HELD: Applications allowed.  The plaintiff's proceedings repeatedly raised particular themes notwithstanding prior rulings against him finding that his claims were devoid of merit. The criteria for a vexatious litigant declaration were met. The plaintiff was barred from instituting further Provincial or Supreme Court proceedings without prior leave. The Crown was granted an order staying 14 other proceedings already initiated by the plaintiff, save for an appeal to the extent it remained in good standing. The order did not extend to the swearing of private informations due to jurisdictional concerns regarding the doctrine of paramountcy. The Crown was at liberty to apply to extend the order to private informations via a notice of constitutional question. The predicate action was bound to fail as no bona fide triable issue existed and the claims offended the principle of res judicata. The action was dismissed via summary judgment. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, Rule 9-5(1)(a), Rule 9-5(1)(d), Rule 9-6(4), Rule 9-6(5)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Constitutional Question Act, *RSBC 1996, c 68*,

Courts of Justice Act, RSO 1990, c C43, s. 140(1)(d)

Criminal Code, RSC 1985, c C-46, s. 504, s. 507.1

Supreme Court Act, [*RSBC 1996, c 443, s. 18*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B10R-00000-00&context=)

**Counsel**

The Plaintiff/Respondent on his own Behalf: Oneil Parchment.

Counsel for the Defendant/Petitioner: Peter Ameerali.

**Reasons for Judgment**

J.C. GRAUER J.

**I. INTRODUCTION**

**1**  Before me are applications in two proceedings arising out of civil claims and private informations filed by Mr. Oneil Parchment, who at the time of the hearing was incarcerated at the Vancouver Island Regional Corrections Centre ("VIRCC") and is self-represented.

**2**  The first, in the matter of *Parchment v Her Majesty the Queen in Right of the Province of British Columbia*, Victoria Registry No. 133175, is an application to strike all or portions of Mr. Parchment's notice of civil claim, and to dismiss his action summarily pursuant to Rule 9-6(4) and (5) of the *Supreme Court Civil Rules*. I will refer to this as the "Victoria action".

**3**  The second, in the matter of *British Columbia (Attorney General) v Parchment*, Vancouver Registry No. S148126, is an application pursuant to section 18 of the *Supreme Court Act*, *RSBC 1996, c 443*, and the court's inherent jurisdiction, for an order prohibiting Mr. Parchment from instituting or continuing legal proceedings in the Supreme Court or the Provincial Court, including the swearing of private informations under sections 504 and 507.1 of the *Criminal Code* RSC 1985, c C-46. I will refer to this as the "Vancouver petition".

**4**  To keep things simple, I will refer to both the Attorney General, as petitioner in the Vancouver petition, and Her Majesty the Queen in Right of British Columbia, as defendant in the Victoria action, as "the Attorney General". They are, of course, represented by the same counsel from the British Columbia Ministry of Justice.

**II. PROCEDURAL HISTORY**

**5**  These applications first came on for hearing before Mr. Justice Bernard in New Westminster on December 12, 2014. Mr. Parchment sought, and was granted, an adjournment to January 29, 2015. Mr. Justice Bernard made that date peremptory upon Mr. Parchment, and ordered him to file his materials by January 6, 2015.

**6**  The applications then came on for hearing before me on January 29, 2015, and Mr. Parchment again sought an adjournment. He had been released on December 23, 2014, and re-incarcerated on January 6, 2015. He complained of difficulties in preparing his materials, though he filed no materials to support that position. In the end, I granted a further adjournment and seized myself of the applications. The hearing was reset for March 19 and 20, 2015, and was again made peremptory on Mr. Parchment.

**7**  At the outset of this hearing, Mr. Parchment sought a third adjournment, and further sought leave to cross-examine certain persons, and to call various witnesses.

**8**  One of the difficulties he raised was an inability to have his affidavits sworn. With the consent of counsel for the Attorney General, I accepted his affidavits in the form in which they were presented, on Mr. Parchment's assurance that they were true to the best of his information and belief. I also accepted as part of the materials properly before me Mr. Parchment's proposed amended notice of civil claim in the Victoria action notwithstanding the objection of counsel for the Attorney General.

**9**  I denied Mr. Parchment's request for an adjournment, and declined to permit him to cross-examine witnesses or call his own witnesses. I observed that these applications did not call for findings of fact, and I reasoned that if it appeared from Mr. Parchment's affidavits and submissions that I could not properly and fairly decide the issues before me without hearing from these witnesses, then the proper course would be to dismiss the applications. As matters proceeded, it became abundantly clear that the evidence Mr. Parchment sought to elicit either through cross-examination or through his own witnesses would add nothing of relevance to the issues I had to determine.

**10**  As will shortly become apparent, Mr. Parchment has commenced a number of civil proceedings in both the Provincial Court and this Court, and has sworn a number of private informations. These proceedings are all pertinent to the vexatious litigant application in the Vancouver petition. As the Victoria action is one of these proceedings, I propose to consider the Vancouver petition first, before turning to the specific relief requested in relation to the Victoria action.

**III. THE VANCOUVER PETITION**

**A. Background**

**11**  On January 8, 2010, Mr. Parchment was convicted by a jury of one count of possession of cocaine for the purpose of trafficking, and one count of possession of heroin for the purpose of trafficking (the "PPT charges"). An earlier trial on the same charges had concluded in a mistrial.

**12**  The drugs in question had been found on Mr. Parchment's person by one Constable Gelderblom. In the course of his trials, Mr. Parchment applied for the exclusion of the drugs from evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms* on the ground that his section 8 *Charter* rights had been breached. In *voir dires* conducted in each of Mr. Parchment's two trials, two different Justices of this Court concluded that his section 8 rights had been breached, but that the evidence was nevertheless admissible. Mr. Parchment was represented by counsel throughout these proceedings, while the federal Crown was represented by Mr. Brian Jones.

**13**  Acting in person, Mr. Parchment appealed his convictions. He took the position that the Crown had improperly withheld evidence, compromising his ability to defend himself, that the police officers who gave evidence at his trial, particularly Constable Gelderblom, had given contradictory evidence that misled the judge, and that employees of this Court, and the transcription service, participated in a cover-up by altering audio recordings of the trial proceedings and transcripts of those proceedings in order to conceal the efforts of Constable Gelderblom to fabricate evidence.

**14**  Mr. Parchment's appeal was dismissed: *R v Parchment*, [*2013 BCCA 215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20DD-00000-00&context=).

**15**  In the years following his 2010 conviction, before his appeal, Mr. Parchment swore ten private informations pursuant to section 504 of the *Criminal Code* against persons involved with the investigation and prosecution of his PPT charges. He alleged a number of criminal offences involving the falsification or fabrication of evidence, similar to those he raised on his appeal.

**16**  In addition, during his time in custody, Mr. Parchment has sworn, or attempted to swear, fifteen informations against the "Corrections Branch" and various correctional officers regarding his treatment.

**17**  Mr. Parchment's same complaints about his treatment while in custody have also been the subject of seven complaints filed before the Human Rights Tribunal ("HRT"), a number of civil claims filed in the Provincial Court (Small Claims Division), and in this Court (in addition to the Victoria action).

**B. Issues**

**18**  The following issues arise in relation to the Attorney General's application:

1. Has Mr. Parchment habitually commenced vexatious legal proceedings so as to trigger section 18 of the *Supreme Court Act*, and the court's inherent jurisdiction to control its own process?
2. If so, then In addition to prohibiting the commencement of further civil proceedings without leave of the court, would it be a proper exercise of the court's inherent jurisdiction to order what would be, in effect, a stay of all existing civil proceedings?
3. Does the court have jurisdiction under section 18 of the *Supreme Court Act* to prohibit Mr. Parchment from swearing private informations under the *Criminal Code* without the leave of the court, and if so, should it do so?

**1. Habitual Commencement of Vexatious Proceedings?**

**19**  By section 18 of the *Supreme Court Act:*

1. If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

**20**  In *S(M) v S(PI)* [*(1998), 60 BCLR (3d) 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2N9-00000-00&context=) (CA), Hall J.A. reviewed the purpose of section 18 of the *Supreme Court Act*:

[13] Section 18 of the *Supreme Court Act* has been in the *Act* for a great many years. The section gives the court the needed ability to control its own process. It enables the court to put in place an order to prevent a citizen or citizens from being subjected to an endless blizzard of litigation. A great number of court applications have been filed by this appellant over a course of several years. In my judgment, the history disclosed here afforded an ample foundation for the conclusions reached and the order made by the learned judge of first instance. It is obviously of the utmost importance that there be unfettered access to the courts by citizens but I should think that a corollary of that is that continuing abuse of this most valuable and deeply enshrined democratic right should be dealt with decisively to preserve the rights of all. There is a right to invoke the jurisdiction of the Supreme Court but it is not a right that is without limit. In my opinion, s. 18 of the *Supreme Court Act* affords to judges of the Supreme Court the authority to order in proper cases that a persistent litigant must seek leave before being able to launch court proceedings. It is a necessary power to ensure the proper administration of justice.

**21**  In *The Law Society of BC v Dempsey*, [*2005 BCSC 1277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1G9-00000-00&context=) at paras 160-161, Williams J. listed some of the principles that guide the exercise of the Court's discretion on an application such as this:

[160] The principles that guide the exercise of the Court's discretion on such an application were discussed in *Lang Michener Lash Johnston v. Fabian* [*(1987), 59 O.R. (2d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M1FG-00000-00&context=) at para. 20 (Ont. H.C):

1. the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction constitutes a vexatious proceeding;
2. where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
3. vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
4. it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
5. in determining whether proceedings are vexatious, the Court must look at the whole history of the matter and not just whether there was originally a good cause of action;
6. the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
7. the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

**22**  These principles have been regularly cited with approval in this province in both this Court and in the Court of Appeal: see *Dempsey v. Peart*, [*2004 BCCA 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X06R-00000-00&context=).

**23**  That these principles are applicable to the proceedings pursued by Mr. Parchment cannot be denied. There are particular themes repeatedly raised by Mr. Parchment, and which he continues to raise notwithstanding rulings against him. These include:

1. his original allegations of wrongdoing, including perjury and fabrication of evidence, on the part of the police officer, prosecutor and court officials involved in his original conviction, dismissed by the Court of Appeal, but repeated (and dismissed) in other complaints, claims and informations;
2. allegations of racism and cover up against the Corrections Branch, particularly in terms of failure to stop racist activities by a chapter of the Ku Klux Klan. These allegations have been the subject of unsuccessful complaints before the HRT, a number of private informations, small claims actions and the Victoria action. These began with an assault of Mr. Parchment in prison that he alleges was carried out by two inmates (one aboriginal and one Arabic) at the behest of the KKK, although the assault, curiously, has not itself been part of his claims;
3. allegations framed in different ways, including defamation, but which consist of an alleged breach of duty by Corrections officers in failing to correct false rumours spread about Mr. Parchment by other inmates, to his detriment; and
4. allegations that amount to medical malpractice or misfeasance in relation to dietary matters, botched procedures and the denial of access to skin cream, raised in complaints before the HRT, claims brought in Provincial Court, and the Victoria action.

**24**  The Victoria action is in many ways illustrative. The notice of civil claim sets out, in essence, three claims. The first alleges that Mr. Parchment was assaulted by persons directed by a chapter of the KKK, and claims that the province failed in its duty to do something about the presence of a KKK chapter and its promotion of racism at VIRCC. The second alleges that the province filed affidavits in response to Mr. Parchment's complaints before the HRT that defamed him. The third claims that the province refused to 'set the record straight' about Mr. Parchment's criminal history, about which untrue rumours were being spread. This, he alleged, exposed him to risk from the general prison population.

**25**  Later in the document, a sum in the amount of $100,000 is claimed as damages for medical ***negligence***, although no material facts are pleaded to support such a claim.

**26**  All of these are also the subject of private informations that Mr. Parchment has laid under the *Criminal Code*, and were the subject of claims before the HRT, and in small claims proceedings. They have not met with success. Some of these claims do not raise any cause of action known to law (an alleged tort of discrimination; and a duty to correct rumours started by others), while others are doomed to fail (the contents of affidavits filed before the HRT would be subject to absolute privilege), or lack any factual foundation (***negligence***, medical and other).

**27**  Neither the stay of an information nor the dismissal of a human rights complaint or small claims action has deterred Mr. Parchment from laying new informations or starting new actions based upon the same allegations. The claim for damages from the withholding of skin cream, for instance, was dismissed in Provincial Court: see the decision of the Honourable Judge Bayliff in *Parchment v British Columbia*, [*2014 BCPC 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G74-D9V1-F2TK-22F6-00000-00&context=).

**28**  In these circumstances, I am satisfied that the requirements of section 18 of the *Supreme Court Act* have been met. I order that Mr. Parchment is barred from instituting any further legal proceedings in this Court or in the Provincial Court without first obtaining leave of the court.

**2. Stay of Existing Civil Proceedings?**

**29**  Section 18 of the *Supreme Court Act* refers only to barring a litigant from instituting proceedings. It does not provide for an order staying existing proceedings. This is because the Court's inherent jurisdiction does not encompass the power to prohibit litigants from starting actions. It has, however, always extended to controlling litigation that already exists, and to preventing the abuse of the court's process. Does it extend to imposing stays in cases that are not directly before the court so that their merits cannot be fully reviewed?

**30**  In Ontario, the vexatious litigant provision of the *Courts of Justice Act,* RSO 1990, c C43, section 140(1)(d), specifically authorizes a judge to order that where a person has been found to be a vexatious litigant, "a proceeding previously instituted by the person in any court not be continued".

**31**  There is no such provision in our *Supreme Court Act*. A similar order, preventing a litigant not only from instituting proceedings without leave, but also from filing applications in any existing legal proceedings without leave, has nevertheless been made and upheld on appeal: *Attorney General of B.C. v Lindsay*, [*2007 BCCA 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4BC-00000-00&context=).

**32**  What is clear is that such an order must be express: *Pearlman v Vancouver Police Department and Constable Ben Stevens #2177*, [*2012 BCSC 1179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S29K-00000-00&context=), and ought not to be made where the other claims appear to be unrelated: *Rose v Canada (Royal Canadian Mounted Police)*, [*2009 BCSC 1750*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24TP-00000-00&context=) at para 34.

**33**  As far as I am able to determine from the record put before me, three Provincial Court claims commenced by Mr. Parchment have been dismissed, as has a Supreme Court action commenced in the Nanaimo Registry. This leaves, as active files, the Victoria action and Action No. 050562 commenced in the Kamloops Registry of the Supreme Court on August 29, 2014, with the style of cause of *Parchment v Her Majesty the Queen in Right of the Province of British Columbia, Monika Niklasin the class and Sentry Health Services Corporation* (the "Kamloops action").

**34**  In addition, I am advised that Mr. Parchment has purported to commence a number of actions in both the Provincial Court and the Supreme Court in which he has yet to effect proper service on the named defendants. The files for some of these claims contain nothing other than applications for indigent status, suggesting that they have yet to be properly commenced. Where affidavits in support are contained in the file, those affidavits demonstrate that the matters to be raised are duplicative of claims previously raised and dismissed.

**35**  The Victoria action and the Kamloops action are among those proceedings I have considered in concluding that it is appropriate to declare Mr. Parchment a vexatious litigant and pronounce an order under section 18 of the *Supreme Court Act*. I will consider the Victoria action separately below.

**36**  In the circumstances, I am satisfied that these additional civil claims are born of the same vexatious conduct and should be stayed. I order that Mr. Parchment take no further steps in the following actions without first obtaining the leave of the court:

1. BCSC Action No. 050562 (Kamloops);
2. BCSC Action No. 111545 (Victoria);
3. BCSC Action No. 143195 (New Westminster);
4. BCSC Action No. 143196 (New Westminster);
5. BCSC Action No. 132404 (Victoria);
6. BCSC Action No. 71129 (Nanaimo);
7. BCSC Action No. 142335 (Victoria);
8. BCSC Action No. 28035 (Chilliwack);
9. BCSC Action No. 72952 (Nanaimo);
10. BCSC Action No. 28286 (Chilliwack);
11. BCSC Action No. 50557 (Kamloops);
12. BCSC Action No. 28308 (Chilliwack);
13. BCSC Action No. 1445712 (Prince George); and
14. BCPC File No. 39224 (Kamloops).

**37**  I do not extend this order to Mr. Parchment's appeal filed in the Chilliwack Registry of the Supreme Court under file number 62303-1, to the extent it remains in good standing.

**3. Jurisdiction to Prohibit the Swearing of Private Informations?**

**38**  It is in this area that Mr. Parchment has proven himself to be most vexatious. He has sworn innumerable private informations, many against police officers and Crown counsel relating to the alleged falsification or fabrication of evidence in relation to the investigation and prosecution of the original charges against him, others against corrections officers alleging fabrication of evidence in connection with his human rights complaints, and still others against various other corrections personnel, justices of the peace and court administration staff. Often they follow the dismissal of proceedings such as his civil actions, and human rights complaints, and relate to the conduct of those matters. Most of them have been dismissed; others have been stayed.

**39**  I find it abundantly clear on the record that in swearing these informations, Mr. Parchment has engaged in the habitual commencement of vexatious proceedings. The question is whether section 18 of the *Supreme Court Act* gives me the jurisdiction to order that Mr. Parchment must not swear any further private informations without leave of the court. This raises a number of issues.

**40**  Counsel for the Attorney General argues that the term "legal proceeding" used in section 18 is wide enough to encompass the process of laying of an information pursuant to section 504 of the *Criminal Code*:

**504.** Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

1. that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
2. is or is believed to be, or
3. resides or is believed to reside, within the territorial jurisdiction of the justice;
4. that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

...

**41**  Despite earlier, and arguably distinguishable, authority to the effect that a vexatious litigant order under the *Supreme Court Act* cannot prevent a litigant from laying in information before a justice (see, for instance, *Mortimer v Barrisove*, [*[1977] 6 WWR 383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-JC5P-G152-00000-00&context=) (BCSC)), modern authority supports the proposition that it is the laying of an information that constitutes the commencement of criminal proceedings (*Ambrosi v British Columbia (Attorney General)*, [*2014 BCCA 123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61YX-00000-00&context=) at para 19; *R v McHale*, [*2010 ONCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFB1-JJYN-B3GV-00000-00&context=) at para 43); see also *Attorney General of B.C. v Lindsay*.

**42**  Nevertheless, whether a vexatious litigant order can apply to the commencement of criminal proceedings remains in doubt: compare, for instance, *Stanny v Alberta*, [*2009 ABQB 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-F65M-60YX-00000-00&context=) and *R v Thorburn*, [*2010 ABQB 390*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-F2MB-S174-00000-00&context=).

**43**  For my part, I have two difficulties with resolving this issue in favour of the Attorney General.

**44**  First, there is a constitutional issue. Criminal law is within the exclusive jurisdiction of Parliament. The *Criminal Code* provides for the laying of an information by any person, subject only to the requirement of a reasonable belief concerning the commitment of an indictable offence. In such circumstances, the justice "shall" receive the information. The *Supreme Court Act* is a provincial statute, and arguably, an interpretation of section 18 that would extend to prohibiting the laying of an information under the *Criminal Code* would offend the doctrine of paramountcy by intruding into the realm of criminal procedure.

**45**  The Attorney General submits that I need not trouble myself with such concerns as Mr. Parchment had given no Notice of Constitutional Question pursuant to the *Constitutional Question Act*, *RSBC 1996, c 68*, a submission that I found remarkable given that Mr. Parchment was hardly in a position to raise the matter. Given my conclusion on this issue, I need not take the constitutional question any further. If I felt it necessary, however, I would give notice myself and require the matter to be fully argued with the assistance of *amicus curiae*.

**46**  Second, there is the process issue. Although it may be said that it is the laying of an information that constitutes the commencement of criminal proceedings, the fact remains that the court's process is not thereby engaged the same way as it is with the commencement of civil proceedings. On the contrary, section 507.1 of the *Criminal Code* sets out its own gatekeeping process. A judge or designated justice to whom the private information must be referred shall consider whether to compel the appearance of the accused on the information. That judge may issue a summons or warrant only after hearing and considering the allegations of the informant and the evidence of witnesses, with notice to the Attorney General. There is also the power of the Attorney General to stay proceedings. The question then becomes, how many keepers must guard the gate? On what basis should the court interpose itself at the front, as well as at the back, of this preliminary process?

**47**  That Mr. Parchment has laid many private informations of dubious merit cannot be doubted. His actions in this regard are clearly vexatious. That he will continue act in this manner seems probable. But at this point, I see little to be gained by requiring him to go before a judge of this court to get leave to go before a justice to lay an information, when any information he lays is in any event subject to the scrutiny of a judge or designated justice. As the Court of Appeal put it in *Ambrosi*:

[23] Section 507.1 requires that the referral be heard by a judge or a designated justice; that the informant lead evidence of his or her allegations on each essential element of the offence (see also, *McHale* at para. 74); and that notice be given to the Attorney General, and that the Attorney General be permitted to participate, cross-examine and call witnesses, and present evidence.

[24] These additional safeguards ensure that "spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution" (*McHale* at para. 74).

See also *Lindsay v British Columbia (Attorney General)*, [*2005 BCSC 1494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B297-00000-00&context=) at para 11, and *Thorburn* at para 72.

**48**  In these circumstances, given the exceptional nature of the relief sought, the fact that this jurisdiction is to be exercised with great caution, the existence of procedural safeguards in the *Criminal Code,* and taking into account Mr. Parchment's inability to mount a proper argument on the constitutional and procedural issues, I am not persuaded that it would be appropriate to impose an additional layer of gatekeeping even assuming I have the jurisdiction to do so.

**49**  Accordingly, I decline to extend the order I have made, requiring Mr. Parchment to obtain the leave of the court before instituting further legal proceedings in any court, to the laying of private informations under section 504 of the *Criminal Code*.

**IV. THE VICTORIA ACTION**

**50**  The Attorney General applies for an order striking all or part of Mr. Parchment's notice of civil claim pursuant to Rule 9-5 (1)(a) and (d), and further for an order dismissing the claim by way of summary judgment pursuant to Rule 9--6(4) and (5).

**51**  The law applicable to such applications is well-settled. See, for instance, *Bajwa v British Columbia Veterinary Medical Association*, [*2012 BCSC 878*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24DG-00000-00&context=), and the cases cited therein.

**52**  I have already described above the nature of the claims Mr. Parchment has pleaded in this action. As discussed there, I am satisfied that all of them are bound to fail, and that no *bona fide* triable issue exists. They offend the principle of *res judicata*, put forward causes of action unknown to law, are unsupported by material facts, or are by their nature subject to valid defences in law such as absolute privilege and the effluxion of time. Accordingly, the Attorney General is entitled to succeed in its application for summary judgment dismissing the claim, and it is accordingly dismissed.

**V. CONCLUSION AND SUMMARY**

**53**  Pursuant to section 18 of the *Supreme Court Act*, Mr. Parchment must not, without leave of the court, institute a legal proceeding in this Court or in the Provincial Court of British Columbia. This does not extend to the laying of private informations under section 504 of the *Criminal Code*.

**54**  The Attorney General is at liberty to reapply to extend the application of this order to the laying of private informations under section 504 of the *Criminal Code* in the event of continued abuse of that provision by Mr. Parchment, provided that the matter proceeds as though appropriate Notice had been given under the *Constitutional Question Act* as discussed in these reasons, and an *amicus curiae* is appointed to assist the Court, given Mr. Parchment's limited ability to argue his position on this important issue fully.

**55**  Further, nothing in this order precludes Mr. Parchment from appealing this order, or from responding to a proceeding commenced by another litigant.

**56**  In addition, Mr. Parchment is prohibited from taking any further steps in the following actions without first obtaining the leave of the court:

1. BCSC Action No. 050562 (Kamloops);
2. BCSC Action No. 111545 (Victoria);
3. BCSC Action No. 143195 (New Westminster);
4. BCSC Action No. 143196 (New Westminster);
5. BCSC Action No.132404 (Victoria);
6. BCSC Action No. 71129 (Nanaimo);
7. BCSC Action No. 142335 (Victoria);
8. BCSC Action No. 28035 (Chilliwack);
9. BCSC Action No. 72952 (Nanaimo);
10. BCSC Action No. 28286 (Chilliwack);
11. BCSC Action No. 50557 (Kamloops);
12. BCSC Action No. 28308 (Chilliwack);
13. BCSC Action No. 1445712 (Prince George); and
14. BCPC File No. 39224 (Kamloops).

**57**  This stay does not prevent Mr. Parchment from proceeding with his appeal filed in the Chilliwack Registry of the Supreme Court under file number 62303-1, to the extent it remains in good standing.

**58**  The Victoria action, BCSC No. 133175, is dismissed.

**59**  The Attorney General may forward its form of order to the appropriate registries to be brought to my attention before entry, without the need for obtaining Mr. Parchment's signature.

J.C. GRAUER J.

**End of Document**

[***Pritchard v. Van Nes, [2016] B.C.J. No. 781***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JM8-YV01-F22N-X0V3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

A. Saunders J.

Heard: October 7 and 8, 2015.

Judgment: April 20, 2016.

Docket: S28019

Registry: Chilliwack

**[2016] B.C.J. No. 781** | 2016 BCSC 686

Between Douglas James Pritchard, Plaintiff, and Katherine Anne Van Nes (Vaney), Defendant

(139 paras.)

**Case Summary**

**Damages — For torts — Affecting the person — Defamation — Method of publication — Internet — Action by plaintiff for assessment of damages allowed — Tensions arose between plaintiff and defendant neighbor over property use, culminating in defendant making posts on Facebook inferring plaintiff had her backyard and children under video surveillance — Defendant's online posts and remarks by friends insinuated plaintiff, a teacher, was a pedophile — Defendant's friend emailed plaintiff's principal, leading to controversy within school community — Defendant's reckless comments caused substantial damage to plaintiff's personal and professional reputation — She was liable for republication and friends' defamatory comments — Plaintiff awarded general damages of $50,000, plus punitive damages of $15,000.**

**Tort law — Defamation — Defamatory statements — Innuendo — Publication — In mass media — Internet — Republication — Action by plaintiff for assessment of damages allowed — Tensions arose between plaintiff and defendant neighbor over property use, culminating in defendant making posts on Facebook inferring plaintiff had her backyard and children under video surveillance — Defendant's online posts and remarks by friends insinuated plaintiff, a teacher, was a pedophile — Defendant's friend emailed plaintiff's principal, leading to controversy within school community — Defendant's reckless comments caused substantial damage to plaintiff's personal and professional reputation — She was liable for republication and friends' defamatory comments — Plaintiff awarded general damages of $50,000, plus punitive damages of $15,000.**

|  |
| --- |
| Action by the plaintiff, Pritchard, against the defendant, Van Nes, for a permanent injunction, assessment of damages and costs. The parties were neighbours from 2008 onward. In 2011, tensions arose over the defendant's use of her property after she installed a large fish pond along the rear property line. In the course of their dispute, the defendant made several postings on Facebook about the plaintiff on one day in June 2014. She accused him of using cameras and mirrors to keep her backyard and children under 24-hour surveillance. In fact, there was no such surveillance system. The defendant had more than 2,000 friends linked to her Facebook account. She called the plaintiff a nutter and a creep. The defendant's comments and her friends' responses inferred that the plaintiff's conduct was consistent with that of a pedophile. One of the defendant's friends forwarded her post to the middle school that employed the plaintiff as a music teacher. The resulting controversy had professional and personal consequences for the plaintiff and his family. The plaintiff filed a Notice of Civil Claim seeking damages for nuisance and defamation. The nuisance claim related primarily to the constant noise emanating from the defendant's fish pond. The defendant did not defend the action and the plaintiff obtained default judgment. He sought an order for a permanent injunction limiting the operation of the fish pond waterfall, assessment of damages, and costs.  HELD: Action allowed.  The noise associated with the fish pond waterfall constituted a private nuisance that interfered with the plaintiff's use and enjoyment of his land in a substantial manner. The plaintiff was awarded damages totaling $2,500 and granted a permanent injunction prohibiting use of the waterfall during nighttime hours. With respect to the defamation claim, the defendant's allegations regarding the plaintiff's behaviour and the attacks on his character were completely false and unjustified. The remarks had a defamatory meaning via innuendo. Despite her attempt to delete the posts from her own Facebook page, the defendant did not offer a retraction or apology and did nothing to counteract the viral spread to others' online pages. The defendant was liable for republication of her remarks within Facebook by her friends, for her friends' defamatory comments in reply to her posts, and for the email sent by her friend to the plaintiff's school principal. The defendant's thoughtless and reckless actions caused serious damage to the plaintiff's reputation. He was entitled to a substantial award of damages. The plaintiff was awarded general damages of $50,000 plus punitive damages of $15,000. The evidence did not support a finding of malice. The plaintiff was entitled to his costs assessed at Scale B. |

**Counsel**

Counsel for the Plaintiff: B. Vickers.

Appearing on her own behalf: K.A. Van Nes.

**Reasons for Judgment**

|  |
| --- |
| **A. SAUNDERS J.** |

**Introduction**

**1**  The plaintiff, Mr. Pritchard, is a school teacher. He and his family have been neighbours of the defendant Ms. Van Nes' family since 2008. There have been tensions between them since 2011. Those tensions have given rise to allegations of the defendant using her property in such a manner as to constitute a nuisance, interfering with the plaintiff's enjoyment of his property.

**2**  The tensions also led to the defendant making a number of postings concerning the plaintiff on the internet social platform Facebook, on June 9, 2014. The comments included statements calling Mr. Pritchard a "nutter" and a "creep", and accusing him of using a system of cameras and mirrors to keep her backyard, and her children, under 24-hour surveillance. Ms. Van Nes had more than 2,000 Facebook "friends", any of whom may have had copies of Ms. Van Nes' posts transmitted to their own Facebook pages. Ms. Van Nes also had her privacy settings set to "Public", allowing her posts to be viewed not only by her more than 2,000 "friends", but by all Facebook users. Numerous comments made by Ms. Van Nes' "friends" contained more explicit denunciations of the plaintiff's alleged behaviour.

**3**  In totality, the posts on the defendant's Facebook page made by the defendant and by others, in their natural meaning and by innuendo, bore the meaning that the plaintiff was a paedophile.

**4**  The defendant's initial post to her Facebook page was copied by one of the defendant's "friends" and forwarded to the principal of the school where the plaintiff teaches.

**5**  I will say at the outset that the defendant's allegations concerning Mr. Pritchard's behaviour and these attacks on his character were completely false and unjustified. Mr. Pritchard has, as a consequence of the defendant's thoughtless, reckless actions, suffered serious damage to his reputation, and for the reasons set out herein he is entitled to a substantial award of damages.

**6**  Mr. Pritchard filed a Notice of Civil Claim on June 13, 2014 against Ms. Van Nes, claiming damages for nuisance and defamation. Ms. Van Nes did not defend the action, and on July 29, 2014 Mr. Pritchard obtained default judgment against her for damages and costs to be assessed.

**7**  In this trial, Mr. Pritchard seeks orders for a permanent injunction, assessment of damages, and special costs. Ms. Van Nes attended at trial. She did not seek an adjournment and did not seek to have the default judgment set aside. Despite her not having defended the action, she was granted leave to cross-examine witnesses and to make a closing submission to the Court.

**Background**

**8**  At the time of these events, in 2014, Mr. Pritchard was a 52 year-old middle school music teacher, having been in that position for about 3 years. He holds Bachelor of Arts, Bachelor of Education and Master of Education degrees. The school has about 600 students.

**9**  In 2008, Mr. Pritchard, his wife, and two sons moved in next door to Ms. Van Nes and her family in Auguston, a subdivision of Abbotsford, B.C. Both parties continue to reside as neighbours till this day. At that time he was working for the RCMP as a curriculum developer. He did volunteer work with the middle school's jazz band program when one of his sons was attending there, became attracted to the music program, and eventually applied for and obtained a teaching position at the school. Mr. Pritchard continues to work at the middle school today.

**10**  Prior to the Facebook post, Mr. Pritchard actively participated in extra-curricular activities, working with junior and senior concert bands involving over 100 students, a student choir, a jazz band, a rock band, and three drum lines involving over 70 students. As testified to by his school principal, Mr. Horton, the music program at the middle school grew significantly because of Mr. Pritchard's efforts. As evidenced in appreciation letters Mr. Pritchard received prior to the Facebook post, he has been much admired by his students, the students' parents, and his colleagues.

**Evidence as to Nuisance Claim**

**11**  Problems between the two neighbours began in 2011 when Ms. Van Nes and her husband installed a large fish pond along her rear property line. The structure is on two levels, with water flowing along its length of approximately 20 or 25 feet, and flowing over two waterfalls. The nuisance claim is largely based on the constant noise emanating from the water cascading over the rocks, which the plaintiff and his wife testified has disrupted their sleep. The plaintiff's evidence is that the waterfall has run day and night almost continuously since its construction in 2011; there was a brief period in the summer of 2012, when the defendant shut off the flow of water at night after the plaintiff complained to the municipality, but its operation was soon restored to 24 hours a day, 7 days a week.

**12**  The plaintiff testified that during winter months he has been able to mitigate the effect of noise by shutting his windows. However, during the summer months he is left in a dilemma, as, without air conditioning, he is left to choose between closing the windows and overheating or having to endure the constant noise from the waterfalls.

**13**  After the plaintiff began to complain to the defendant about the waterfalls, their relationship deteriorated. There followed a number of incidents of unneighbourly conduct on the part of the defendant and her family members. The nuisance claim is also based in part on these incidents, which the plaintiff submits were done with the intent of interfering with his use and enjoyment of his property. A detailed recounting of these events is unnecessary, but some description will assist in delineating the extent of the nuisance claim as a whole and in providing context for the defamatory Facebook posts. Those incidents, from the testimony of the plaintiff and his wife consisted of the following:

1. The Van Nes' would host late night parties, which disrupted the sleep of Mr. Pritchard and his family. On one occasion in the summer of 2012, a few days after the plaintiff made a second complaint to the Van Nes' about the waterfalls, a loud explosion was heard in Ms. Van Nes' backyard during a party; the next day, she told the plaintiff it had been a 1/4-stick of dynamite;
2. Ms. Van Nes' two sons on more than one occasion would enter Mr. Pritchard's backyard without permission;
3. The properties were not fenced, and on numerous occasions the Van Nes' dog wandered into his yard and defecated. Ms. Pritchard testified that she has made 24 complaints about the dog to the municipality: 10 before the June 2014 Facebook posts, and another 14 between June and October or November 2014; and,
4. On several occasions, the Van Nes' would park one of their vehicles, or would allow visitors to park their vehicles, in front of a fire hydrant located in the plaintiff's front yard, partially blocking or impeding access to the plaintiff's driveway. Some of these incidents were reported by the plaintiff to the police. On the last of these occasions, Mr. Pritchard had been out driving with his teenage son, who was preparing for his driver's license road test. On returning home, they found their driveway had been partially blocked by a pickup truck, and his son had to manoeuvre around it. As soon as they were parked, the defendant appeared and began swearing and screaming at Mr. Pritchard's son, "My husband is parked illegally ... go ahead and call the [expletive] police"; as if goading the Pritchards to make yet another complaint with the authorities.

**14**  I would note that the timing strongly suggests this incident was a motivation for the initial Facebook posts, which were made two days later. In her statement to the Court at the conclusion of the trial, Ms. Van Nes characterized her posting to Facebook as a form of "venting". The fact that she was shouting and swearing, without provocation, seems to indicate, if not hostility, then at least a great deal of frustration with the state of the relationship with her neighbours, and the timing would appear consistent with her choosing to use Facebook as an outlet to express her feelings concerning same.

**15**  Given the entry of the default judgment, I take the allegations of fact with respect to the private nuisance claim in the Notice of Civil Claim to be unchallenged, and accept them as true: *Sands and Associates Inc. v Dextras*, [*2009 BCCA 430*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B28K-00000-00&context=), at paras. 13-14; and *Learmouth* *v.* *Statham,* [*2014 BCSC 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1B6-00000-00&context=), at para 11.

**16**  Mr. Pritchard seeks a permanent injunction preventing Ms. Van Nes from keeping her waterfall operating from 10pm until 7am, as well as an award of general damages for his nuisance claim as a whole.

**Evidence as to Defamation Claim**

**17**  There are three other facts which must be understood as providing context to the Facebook posts.

**18**  The first is that in response to a request from the municipality that she document her various complaints about the defendant's family with photographs, Ms. Pritchard took a few photographs and videos of the waterfall and of the defendant's dog being in her backyard, using her cell phone. The Pritchards do not have, and have not ever had, any form of video surveillance system monitoring the defendant's property or their own property.

**19**  The second is that Ms. Pritchard had hung a decorative mirror from the eaves at the rear of her house. This was intended only as a form of *feng shui* ornamentation. It was not a device to monitor the defendant's property.

**20**  The third is that between the parties' backyard property line and the edge of the waterfall structure closest to the plaintiff's property, the defendant had positioned a children's "play centre" with swings, slide and a climbing apparatus. The defendant's posts, as will be seen, stated that Mr. Pritchard had asked the municipality to require the Van Nes' to position the play centre closer to his property. Mr. Pritchard denies this, and I accept his evidence.

**21**  On June 9, 2014, Ms. Van Nes published a Facebook post with two photographs of Mr. Pritchard's backyard and the aforementioned decorative mirror. Superimposed on the photos were the words:

My neighbour has mirrors hanging outside his home ... Doug also videotapes my kids in the backyard 24/7! Well Doug ... Meet my mirror!

**22**  She also posted to her Facebook page the following remarks (with punctuation as in the original):

Some of you who know me well know I've had a neighbour videotaping me and my family in the backyard over the summers ... . Under the guise of keeping record of our dog ...

Now that we have friends living with us with their 4 kids including young daughters we think it's borderline obsessive and not normal adult behavior ...

Not to mention a red flag because Doug works for the Abbotsford school district on top of it all!!!!

The mirrors are a minor thing ... It was the videotaping as well as his request to the city of Abbotsford to force us to move our play centre out of the covenanted forest area and closer to his property line that really, really made me feel as though this man may have a more serious problem.

**23**  Over the next 21 hours, this posting prompted 57 further posts - 48 made by 36 different "friends" of the defendant, and 9 by the defendant herself. Some of the more egregious of the postings are as follows (with spellings and punctuation as in the originals):

1. From the defendant:

I'm guessing I may have to move the play centre if the city deems that necessary ... however it will most likely get move to somewhere else as I refuse to put the kids closer to this nutters yard.

1. From a "friend":

If it's on covenanted land, that makes sense. But I'd still question if what he's doing is legal.

To which the defendant replied:

I know the police says it is, but so disturbing to hear the video camera moving back and forth when I'm close to the property line.

I interject to note there was no such video camera.

1. From a "friend":

creepy ...

1. From a "friend" who the plaintiff, in his testimony, identified as a retired Abbotsford school principal, a city councillor, and a father of one of his students:

in order for him to video your children I believe he has to have your permission to do so?? You may want to check that but other than that ... send an enraged Father!

1. From a "friend":

Katie WTF!!!!!!! no one is thinking this is out of norm in the law world cmon on!!!!! freeeeeeeeky

1. From a "friend":

Sounds like a freak to me!

1. From a "friend":

#creeper

1. From a "friend" who the plaintiff, in his testimony, identified as a local real estate agent - a point of some significance, as Ms. Pritchard works in that industry, as a mortgage broker:

This is extremely disturbing, and maddening! If you have some kind of intervention and would like more of a presence, I am more than happy to show up.

1. From a "friend":

This is abnormal behaviour. Contact police again until they come talk to him.

1. From a "friend":

Yikes. Creepfest.

1. From a "friend":

I'm sure the local police would like to chat with him. Scumbag!

1. From a "friend":

OMG ... this guy was my neighbour it would 'his' nightmare!!!

I have a lot of tolerance but not for someone doing this ... call your local peeps and the local media. Guarantee the huge attention will at least embarras him.

To which the defendant replied:

Super stressed! I was just told my oldest will be taught music by him in middle school ... Ewe

1. From a "friend":

Sounds like he's a total douchebag. You should get a camera and set it to watch him, and live feed it to the internet as well. But play hardcore gay porn sounds over the video feed ...

To which the defendant replied:

Oh Robert you make me laugh man!

1. From a "friend":

sounds like a person whom is very mentally

disturbed//pedo wise ..scary [expletive]

1. From a "friend":

Sounds like a peeper to me. This way beyond creepy! Would be tempted to put a sign on the lawn with an arrow pointing at his house that says "john smith is video taping my children and there is no legal way to stop him" See what the general public does with that.

To which the defendant replied:

I just find it creepy that someone is willing to put so much time and energy into catching a dog wandering, child misbehaving or parking violation ... Not saying he's 100% a dirty birdy, just a creep

**24**  As may be seen from the foregoing quotations, Mr. Pritchard was expressly referred to as a "pedo", "creeper", "nutter", "freak", "scumbag", "peeper" and a "douchebag".

**25**  Two particularly disturbing posts were from a "friend" of the defendant identified as "Rick Parks". They stated:

why don't you just send this picture to his principal? He may have a legal right to video tape your children but is he not responsible as a teacher to not be a "creep" with his current and future students. Use his position as a teacher against him. I would also send it to the newspaper. shame is a powerful tool.

And:

PS I have shared this picture on my own timeline with my own thoughts - I would encourage others to do so as well. Why don't we let the world know about Doug and his actions so other children, who he may teach in the future, are aware of what he does in his spare time.

The latter post concluded with a "smiley face" emoticon.

**26**  It would appear that this Mr. Parks took it upon himself to attempt to shame the plaintiff, as on the morning of June 10, 2014, the day after the initial post by the defendant, a "Rick Parks" sent an email message to the plaintiff's school principal. The email attaches the image, from Ms. Van Nes' initial post, of the mirror, with the superimposed print. The email was date stamped as having been sent at 11:28 a.m., which would appear to correspond to approximately an hour to an hour-and-a-half after the two "Rick Parks" posts were made on Ms. Van Nes' page. It bears the subject line, "Subject: Mr. Doug Pritchard". It reads:

Hello Dexter

I am just letting you know that this photo is making its way around facebook as we speak. The photo shows a picture of one you teacher's homes. The photo also shows that he has set up mirrors and a video camera in order to spy on his neighbours. I have no idea why he would do this but people are coming to their own conclusions very quickly. (apparently he has issues with their dog) The home on which he is spying contains small children. these children will be attending your school in the very near future and will be forced to take music with Doug. I hope you can imagine how unsettled that makes the mother of these children feel.

I think you have a very small window of opportunity before someone begins to publicly declare that your school has a potential paedophile as a staff member. They are not going to care about his reasons - they care that kids may be in danger.

I am not sure how you want to or can deal with this but it is at your doorstep whether you like it or not.

I have no connection to your school or to Doug. I do know the neighbor.

I wish you all the best as you deal with this.

**27**  It bears repeating that contrary to what Mr. Parks said in his email, the photo posted on the defendant's Facebook page did not show that the plaintiff had set up mirrors and a video camera to spy on the defendant.

**28**  On the afternoon of June 10, 2014, a member of the community, Ms. Regnier, went to the school to tell Mr. Pritchard about the posts. Ms. Regnier's two children had been students of the plaintiff and had participated in his extra-curricular band and drum line programs. She felt that he was an excellent teacher, someone who, as she testified, had brought the music program to life. She gave evidence that she went to the school to tell Mr. Pritchard there were posts on Facebook accusing him of paedophilic-like behaviour. Ms. Regnier did not know Ms. Van Nes; she testified that some of her own "friends" had commented on Ms. Van Nes' post, and their comments showed up in Ms. Regnier's "news feed". She recognized the neighbour being described in the posts as Mr. Pritchard. She perceived that Mr. Pritchard was being accused of being a paedophile. Ms. Regnier accompanied Mr. Pritchard to the office of the school principal, Mr. Horton, to inform him.

**29**  Mr. Horton testified that had, by this time, received Mr. Parks' email. Mr. Horton contacted his superior, who, Mr. Horton testified, seemed shocked, asking Mr. Horton whether he believed the allegations; Mr. Horton said he did not, although he testified that he was concerned as the allegations reflected poorly on him and the school. He testified that if the allegations were substantiated, Mr. Pritchard would have had his teaching license revoked.

**30**  Mr. Pritchard then telephoned his wife, who accessed Ms. Van Nes' Facebook page and printed out the posts and Ms. Van Nes' "friends" list. The plaintiff and his wife attended at a police station to file a complaint.

**31**  That evening, as Mr. Pritchard testified, Ms. Van Nes' husband came to their door. Mr. Pritchard asked him to leave their property; his response was, "What's she done now?" Again, Mr. Pritchard asked him to leave, and he did. A short time later a police officer came by the plaintiff's home in a cruiser to take the details of the complaint. All of the offending posts on Ms. Van Nes' page could still be viewed on Ms. Pritchard's phone just before the officer arrived, but by the time they attempted to access the page again to show the content to the officer, the posts were no longer accessible, having apparently been deleted. That was at about 8:30pm on June 10, 2014. The posts had been on Ms. Van Nes' Facebook page for roughly 27 1/2 hours.

**32**  However, the deletion apparently accomplished nothing in respect of the copies of Ms. Van Nes' posts that had by this time proliferated over Facebook. This would have included copies that made their way onto the Facebook pages of the defendant's "friends" who provided comments, and potentially other "friends" of hers whose own pages were set up to receive notifications of posts made by her. Copies also would also have spread to the pages of any others with whom the initial posts had been "shared", or persons such as Ms. Regnier who had had their Facebook page configured to receive posted comments of the defendant's "friends". Mr. Pritchard testified that the following day, June 11, after Ms. Van Nes had deleted the comments from her own page, Ms. Regnier returned to the school and showed Mr. Pritchard that Ms. Van Nes' initial post with the photograph of the mirror, and the comment that he was videotaping her kids "24/7" could still be seen on Ms. Regnier's own Facebook page. The phrase "gone viral" would seem to be an apt description.

**33**  Mr. Pritchard testified as to the impact this incident has had. There was at least one child of one of Ms. Van Nes' "friends" who commented on the posts, who was removed from his music programs. The next time he organized a band trip out of town and sought parent volunteers to be chaperones, he was overwhelmed with offers; that had never previously been the case. He feels that he has lost the trust of parents and students. He dreads public performances with the school music groups. Mr. Pritchard finds he is now constantly guarded in his interactions with students; for example, whereas before he would adjust a student's fingers on an instrument, he now avoids any physical contact to shield himself from allegations of impropriety. He has cut back on his participation in extra-curricular activities. He has lost his love of teaching; he no longer finds it fun, and he wishes he had the means to get out of the profession. He considered responding to a private school's advertisement for a summer employment position but did not because of a concern that the posts were still "out there". Knowing that at least one prominent member of the community saw the posts and commented on them, he feels awkward, humiliated and stressed when out in public, wondering who might know about the Facebook posts and whether they believe the lies that were told about him.

**34**  Mr. Pritchard also testified as to how frightened he was that some of the posts suggested he should be confronted or threatened. Mr. Pritchard and his wife both testified that a short time after the posts, their doorbell was rung late at night, and their car was "keyed" in their driveway, an 80 cm scratch that cost approximately $2,000 to repair. His wife also testified to finding large rocks on their driveway and their front lawn.

**35**  They also both testified that their two sons, both of whom attended the school where their father teaches, are aware of the Facebook posts, and have appeared to be upset and worried as to the consequences.

**36**  Mr. Pritchard testified that he thinks it is unlikely that he could now get a job in another school district. He acknowledged that in fact he has no idea how far and wide the posts actually spread, but he spoke with conviction as to this belief, and I find the fact that he holds this belief to be an illustration of the terrible psychological impact this incident has had.

**37**  Ms. Pritchard testified as to the reaction of two neighbours, in particular. A couple of weeks after the posts, one neighbour made a remark to her about the plaintiff videotaping children; she denied it, and he replied, "I thought I knew Doug, but I guess I didn't know the other side of him". Another neighbour, a parent of one of her husband's students, said to her a few months later that she had read the posts, and remarked, "You know, your husband could get fired".

**38**  Mr. Horton confirmed Mr. Pritchard's evidence of his withdrawal from the school programs, testifying that Mr. Pritchard has cancelled the rock band and jazz band, and reduced his commitment to the choir by 50%. Mr. Horton testified, not surprisingly, that allegations of impropriety towards students, even if unsubstantiated, can end a teacher's career. Principals would avoid hiring a teacher against whom such allegations had been made, even if unsubstantiated. He testified that if he did not know Mr. Pritchard, he would not hire him, based on the kind of allegations that were made against him.

**39**  Prior to trial, Ms. Van Nes made no apology to the plaintiff or his family. She deleted the offending posts from her Facebook page, but she has made no positive form of retraction or apology. She has done nothing to counter the effect of her posts having "gone viral". She insinuated in her cross-examination of Ms. Pritchard that she and her husband were unable to apologize because the Pritchards had asked them not to come onto their property; she gave no explanation as to why a letter could not have been sent.

**40**  Ms. Van Nes made some remarks at the conclusion of the trial. In respect of the nuisance claim she acknowledged that the dog was her responsibility; it ought to have been kept under better control, and she has now gotten rid of it. She said that the waterfalls had to be run continuously because the structure is a fish pond, but she said she would now do whatever needs to be done to respond to the plaintiff's concerns.

**41**  As to the defamatory comments, she acknowledged that "defamation is obviously awful", but she contended that she should not be held responsible for remarks made by others. She said that she was sorry that she used this way to "vent", but said that social media is "a large part of my life". She attempted to justify her belief that she was being watched by the plaintiff, but offered nothing more by way of explanation than her own suspicions or understanding. Her remarks to that effect were not testimony taken under oath and were not subject to being tested through cross-examination, and I give them no weight.

**42**  As with the private nuisance claim, given the entry of the default judgment I take the allegations in the Notice of Civil Claim with respect to the defamation claim to be unchallenged, and accept them as true.

**43**  Mr. Pritchard seeks aggravated general damages and punitive damages in respect of the defamatory Facebook posts.

**Discussion**

**Nuisance Claim**

***Liability for Nuisance***

**44**  I will note at the outset that in closing submissions counsel for the plaintiff acknowledged that the nuisance allegations are not intended as the real focus of this action.

**45**  The principles that underlie claims in nuisance were reviewed by the Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette*, [*2008 SCC 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DH-00000-00&context=), at para. 77:

At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.

[References omitted.]

**46**  The tests, then, are whether Ms. Van Nes' actions interfered with the use and enjoyment of Mr. Pritchard's land, and if so whether such interference was unreasonable.

**47**  I find the waterfall structure meets those tests. I do not have the benefit of any objective evidence such as noise level measurements. Nor do I have any evidence from any persons other than the plaintiff and his wife as to the noise level. However, I do not have any reason to conclude that the plaintiff was overly sensitive. On the whole, I accept Mr. Pritchard's evidence that the noise was a substantial interference causing him some distress, discomfort, and annoyance over the past four years. I find that the noise level caused by the waterfalls during the night was unreasonable, by objective standards. The severity of the nuisance, however, falls towards the lower end of the range giving rise to damages.

**48**  I also find that, over the period of roughly two years, as alleged, the numerous times that Ms. Van Nes' dog trespassed onto and defecated on the plaintiff's property, constituted a nuisance.

**49**  I characterize the misbehaviour of the defendant's sons, the late night noise from parties, and the issues surrounding parking to constitute unneighbourly acts that fall short of being nuisances. I have no doubt that these incidents aggravated the plaintiff and exacerbated his feelings of frustration over the waterfall and the dog, but alone or taken as a whole these unneighbourly acts do not warrant a finding of tortious liability sounding in damages.

***Damages for Nuisance***

**50**  The plaintiff relies on three cases as to quantification of damages for the nuisance claim: *Aschenbrenner* v. *Yahemech,* [*2010 BCSC 905*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22FF-00000-00&context=); *Boggs* v. *Harris,* [*2009 BCSC 789*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S052-00000-00&context=); and *Suzuki v. Munroe,* [*2009 BCSC 1403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B222-00000-00&context=).

**51**  In *Aschenbrenner*, the plaintiffs moved into a home in Victoria and shortly thereafter installed a hot tub. The humming of the hot tub disturbed their defendant neighbour. The plaintiffs went to great lengths to reduce the noise from the hot tub. They even went so far as purchasing a $700 new motor that ran quieter, and still the defendant was unsatisfied. The defendant engaged in sustained and numerous incidents of harassing and threatening the plaintiffs. Metzger J. found the defendant meant to annoy or irritate the plaintiffs by placing odorous compost bins next to the property line, subjecting the plaintiffs to compost smells almost on a daily basis. In one instance, the defendant placed fish offal in two compost bins on the hot summer day of the plaintiffs' daughter's graduation party on their back deck, and another time, the defendant made excessive noise moving rocks in the middle of the night. Metzger J. awarded $2,000 in general damages for the nuisance claim.

**52**  In *Boggs*, the plaintiffs moved into a condominium complex and attached to their unit was that of the defendants. Over the period of a little more than two years, the defendants deliberately caused excessive noise in their own unit to annoy the plaintiffs, such as pounding on the floor, on walls, moving and throwing chairs around, and playing loud music. There were at least 10 to 12 occasions of excessive noise. The plaintiffs, who had been in a same-sex relationship for about 30 years, claimed that the intentional nuisance directed at them was as a result of the their sexual orientation. The defendants video- and audio-taped the plaintiffs several times, and had several confrontations where the defendants made insulting and offensive remarks against them. Halfyard J. stated that the incidents viewed in isolation were not serious, but they formed part of a lengthy course of misconduct which constitutes nuisance, and awarded $7,500 for non-pecuniary damages.

**53**  *Suzuki* is more factually similar to the present matter. In that case, the parties were, as in this matter, neighbours in a residential suburban community in Coquitlam, B.C. The plaintiffs, husband and wife, claimed that the noise emanating from a central air conditioning unit 18 feet away from the plaintiffs' bedroom window created a nuisance. This went on for a period of approximately 3 years. The plaintiffs' sleep was also disturbed, and the negative impact on the plaintiff wife's health was especially pronounced as the nuisance was a cause of some of her psychiatric challenges. Medical evidence supported her claim.

**54**  The plaintiffs had evidence of professionally obtained noise level measurements, which found that the air conditioned produced 51 to 53 decibels. On the evidence, Verhoeven J. found that most people would consider an air conditioning unit operating in excess of 50 decibels only a few feet from their bedroom window as constituting a nuisance. Verhoeven J. ordered $2,000 as damages to the husband and $4,000 to the wife, whose distress and suffering was more severe. He acknowledged that the damage award would not eliminate the nuisance, but it was still justified in all the circumstances to provide some solace to the plaintiffs. Verhoeven J. also awarded a permanent injunction that did not allow the defendants to operate the air conditioner above a certain decibel limit during the nights. He stated that the damage awards would be significantly higher if he were not also granting an injunction.

**55**  I do not find the nuisance caused by the waterfall structure entirely similar to the disruption caused by a loud air conditioner near one's bedroom window. The waterfall structure was further away from Mr. Pritchard's bedroom and I would think that the distress and annoyance caused by a motorized sound is more so for ordinary people than that caused by a loud waterfall.

**56**  I find a fair award in all the circumstances in respect of that nuisance is $2,000. In respect of the issues surrounding the defendant's dog, I award a further $500, for a total damages award in nuisance of $2,500.

**57**  In addition to damages, Mr. Pritchard also seeks a permanent injunction against Ms. Van Nes to require that the waterfall in her backyard cease operating from 10 p.m. to 7 a.m. As an equitable remedy, the court has the discretion to grant the injunction, based on various factors as outlined in *Suzuki* at para. 110: A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140; *Boggs* at para.141; A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.

**58**  In the present case, I view an award of damages for prospective harm as an inadequate remedy. The plaintiff and his wife are entitled not to have their sleep disturbed. Damages would be poor compensation for the loss of sleep. They are also entitled to the peace of mind that would follow from having the waterfall noise - a constant reminder of the fractious relationship with their neighbour - abated.

**59**  I view the balance of convenience as favouring the plaintiffs. The burden imposed on them outweighs, significantly, the esthetic attraction enjoyed by the defendant.

**60**  I also note Ms. Van Nes' statement to the court that she will do whatever is required.

**61**  There will be a permanent injunction, enjoining the defendant and owners and occupiers of the property on which the defendant's residence is located from operating the waterfall structure between the hours of 10 p.m. and 7 a.m.

**Defamation Claim**

**62**  The Plaintiff pleads that the posts on Facebook, in their natural and ordinary meaning, and by innuendo, meant and were understood to mean, *inter alia*, the following:

1. that the Plaintiff was stalking and/or was obsessed with the Defendant's children;
2. that the Plaintiff videotaped children in the backyard at all times;
3. that the Plaintiff was a paedophile;
4. that the Plaintiff's character was not of good standing;
5. that the Plaintiff is dishonest; and
6. that the Plaintiff acted in a way that should cause him to lose his job or face disciplinary action at his place of employment.

**63**  There are three modes in which the defamation took place. There are Ms. Van Nes' own remarks, published by her to her own Facebook page; there is the republication of Ms. Van Nes' remarks, as they propagated through Facebook and, in one case, through email; and there are defamatory remarks made by third parties in reaction to Ms. Van Nes' post. The plaintiff submits the defendant is liable for all defamation that occurred in these three modes.

***Defendant's Liability for her own Facebook Posts***

**64**  The elements required to establish a claim in defamation were summarized in *Grant v. Torstar Corp.*, [*2009 SCC 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GX-00000-00&context=), at para. 28:

[28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism ... . (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se* ... . The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[Citations omitted.]

**65**  I find Mr. Pritchard has proven that Ms. Van Nes' initial Facebook posts and her subsequent replies to her "friends"' comments were defamatory, in that they tended to lower the plaintiff's reputation in the eyes of a reasonable person. The ordinary and natural meaning of Van Nes' comments unequivocally described Mr. Pritchard as a "nutter", a "creep", and an abnormal person.

**66**  Liability for defamation also arises in this case through the innuendo of the defendant's words. An innuendo is made where the defamatory meaning of words arises from inference or implication: *Hodgson v. Canadian Newspapers Co*., [*(1998), 39 OR (3d) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1G9-00000-00&context=) (Ont. Gen. Div.); rev'd in part on other grounds, [[*(2000), 49 OR (3d) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4WC-00000-00&context=); leave to appeal ref'd [*[2000] S.C.C.A. No. 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G42S-00000-00&context=). The innuendo must be one that a reasonable reader would draw from the words and it must not be one guided by any special knowledge, legal or otherwise: *Gatley on Libel and Slander*, 9th ed. (1998: Sweet & Maxwell), at 82, s.3.15.

**67**  Ms. Van Nes' initial Facebook posts suggest that Mr. Pritchard is obsessed with videotaping her and her family "under the guise" of keeping a record of her dog. She then mentions that her friends' four children "including young daughters" now reside with her. In this context she refers to his actions as borderline obsessive and abnormal. This implies that he now continuously has children under observation, coupling voyeurism with a prurient interest in young girls.

**68**  The next sentence of her initial post supports the innuendo that he is a paedophile; she states there is a "red flag" in that he works for the school district. This term implies that his behaviour is alarming, as if he poses a threat to students.

**69**  In the next sentence of the initial post, she reinforces the implied meaning of the foregoing by highlighting the "24/7" videotaping of her children. She then references what she purportedly understood to be his desire that she move the play centre out of the covenanted forest area - which would, it appears, have the effect of moving it closer to his property line - as if moving the children closer, so they could be observed, was his goal.

**70**  In Ms. Van Nes' first reply to her "friends"' comments, she says she would refuse to put her kids closer to "this nutters yard", again underscoring the importance of keeping children away. She says "ewe" at the thought of her oldest child attending music class with him - an expression of disgust and revulsion. What is implied by this expression is that the thought of this man, who she believed had some kind of inappropriate interest in children, being near or close to her child was disgusting and disturbing to her. Underlying that expression, "ewe", is her assumption that this is how her remark would be understood.

**71**  In her final reply comment, and after almost all the more inflammatory replies by her "friends" had been made, Ms. Van Nes makes a failed attempt of softening the impact of her defamatory remarks. She said, " ... Not saying he's 100% a dirty birdy, just a creep". This comment, I find, only served to reinforce the defamation through innuendo.

**72**  The finding of the defendant's remarks having defamatory meaning by innuendo is also supported by the explicitly defamatory nature of the comments made by her "friends". They clearly understood her meaning.

**73**  Ms. Van Nes clearly identified Mr. Pritchard as the subject of her comments. She identified him by his first name, his occupation, the school and the school district in which he works, and by his position as her next-door neighbour.

**74**  Without question, I find that the defendant's remarks, by their ordinary and natural meaning taken together, and by innuendo, were defamatory in meaning that Mr. Pritchard was a paedophile and was unfit to teach.

**75**  Ms. Van Nes' defamatory comments were published to at least the 37 individuals who replied to her post. They were potentially, depending on notification settings, communicated to all of the defendant's 2,059 "friends". They were also potentially communicated to "friends" of the 37 individuals who made replies, such as Ms. Regnier. And they were, given Ms. Van Nes' failure to use any privacy settings, viewable to the whole universe of Facebook users.

**76**  I find Ms. Van Nes liable in damages for her publication of her own defamatory remarks.

***Liability for Republication***

**77**  The plaintiff alleges having been injured as a result of the defamations and all repetitions and republications, and submits that Ms. Van Nes is liable for same.

**78**  The law of liability for republication of defamatory statements is as stated by Professor Brown in his text, The Law of Defamation in Canada, 2nd ed. (Scarborough: Carswell, 1994), at 348-350:

Republication occurs where the person to whom the words were originally published communicates them to someone else. The general rule is that a person is responsible only for his or her own defamatory publications, and not for their repetition by others. There is no liability for a republication by a third person that the defendant neither authorized nor intended to be made.

There is no liability upon the original publisher of the libel when the repetition is the voluntary act of a free agent, over whom the original publisher had no control and for whose acts he is not responsible ...

However, there are several exceptions to this rule. The defendant may intend or authorize another to publish a defamatory communication on his or her behalf. Secondly, a defendant may publish it to someone who is under some moral, legal or social duty to repeat the information to another person. Thirdly, a defendant may be liable if the repetition was the natural and probable result of his or her publication. These rules apply only where the information repeated is the same or substantially the same so that the sum and substance of the original charge remains. Once the requirements have been satisfied, the plaintiff is entitled to recover damages from the defendant both for the original publication and for the republication by the person to whom it was initially published.

[Emphasis added; citation omitted.]

**79**  There are two forms of republication in the present case: republication within Facebook, and republication through email, specifically Mr. Parks' email to the school principal Mr. Horton.

**80**  Mr. Pritchard provided some evidence to the court, based on his personal knowledge, as to the operation of Facebook. No expert evidence was tendered. In my view, social media platforms and applications, Facebook in particular, are so ubiquitous that the court is able to take judicial notice of some aspects of their nature and operation.

**81**  First, it is uncontroversial that the distribution of information - comments, photographs, videos, links to items of interest - amongst users is fundamental to the use of a social media platform such as Facebook.

**82**  Second, Facebook in particular facilitates such distribution through its structure or architecture. An individual user's posts to their own page are automatically shared with "friends" who are linked to the user's page. As "friends" react by commenting, the "friends"' comments may be spread automatically to "friends of friends". Such comments are solicited implicitly through the medium's tools that allow "Comment" on a post and "Reply" to a comment (not to mention soliciting endorsement through use of the "Like" button). Further distribution may take place through the "Share" function. This is intended only as a generic description; no detailed evidence was presented as to the specific features in operation on Facebook at the time of this incident. Nevertheless, it appears from the evidence that these basic features all played a role in the dissemination of Ms. Van Nes' defamatory remarks.

**83**  In my view the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow. This is particularly true in the case of the defendant, who had no privacy settings in place and who had more than 2,000 "friends". The defendant must be taken to have implicitly authorized the republication of her posts. There is evidence from which widespread dissemination of the defamation through republication may be inferred. There is actual evidence of the republication at least to Ms. Regnier, who learned of the posts through the comments posted by several of her own "friends". There is the indirect evidence through the comments made by neighbours who subsequently encountered Ms. Pritchard and remarked on the posts. And there is the possibility, at least, of republication having been made on Facebook by Mr. Parks; he stated in one of his comments that he had shared her post on his own Facebook page. Whether he did in fact do so has not been proven. If he did, such was implicitly authorized by Ms. Van Nes.

**84**  All of this republication through Facebook was the natural and probable result of the defendant having posted her defamatory remarks. Ms. Van Nes is liable for all of the republication through Facebook.

**85**  This brings us to the question of the defendant's liability for other forms of republication, specifically through email. Mr. Parks, after posting to Ms. Van Nes' timeline his encouragement to spread the news, stating "why don't we let the world know", then republished by sending to Mr. Horton the email message attaching Ms. Van Nes' photo of the mirror. Mr. Parks made editorial comments in that email, stating that the plaintiff was spying and referring to him as someone who would be understood by the public to be a potential paedophile; his editorialization merely summarized and made explicit the innuendo Ms. Van Nes had engaged in.

**86**  I make no finding as to whether Mr. Parks was justified in reporting the activity on Ms. Van Nes' Facebook page to Mr. Pritchard's school principal. That issue, of course, is not before me. The essential point, with respect to the liability of the defendant, is that through the email Mr. Parks was republishing the defendant's own attacks on Mr. Pritchard's character.

**87**  In my view, the implied authorization for republication that exists as a consequence of the nature of social media, and the structure of Facebook, is not limited to republication through the social media only. Ms. Van Nes ought to have known that her defamatory statements would spread, not only through Facebook. She is liable for republication through the email on that basis.

**88**  I further find that Mr. Parks' statement, in his comment on the defendant's Facebook page, "why don't we let the world know", coupled with his statement that he had shared her post on his own page, served as effective notice to Ms. Van Nes of Mr. Parks having an intention to republish. This basis for a finding of liability requires consideration of whether that statement actually came to the attention of Ms. Van Nes; or, if it did not, whether that knowledge is to be imputed to her.

**89**  I have no direct evidence as to whether the defendant actually viewed Mr. Parks' "let the world know" comment, either when he posted it to her page, when she next visited her page to post a reply, or at any other time prior to the email being sent to Mr Horton. However, she certainly had ample opportunity to do so. The printouts of the Facebook comments in evidence indicate that it was about one hour after Mr. Parks posted his comments that the defendant next posted her own reply comment, "I just find it creepy ... ". Given the social nature of Facebook, the defendant's own statement to the court as to its importance in her life, and the fact that, in the period of only a little more than a day after posting her initial comments, she made nine distinct replies of her own to comments made by others, before and after Mr. Parks' comments were posted, it is at least a fair assumption that Ms. Van Nes would have been actively scanning her Facebook page throughout this period to see what comments her "friends" had been making.

**90**  I find, in the circumstances, that the defendant had constructive knowledge of Mr. Parks' comments, soon after they were made. Her silence, in the face of Mr. Parks' statement, "why don't we let the world know", therefore effectively served as authorization for any and all republication by him, not limited to republication through Facebook. Any person in the position of Mr. Parks would have reasonably assumed such authorization to have been given. I find that the defendant's failure to take positive steps to warn Mr. Parks not to take measures on his own, following his admonition to "let the world know", leads to her being deemed to have been a publisher of Mr. Parks' email to Mr. Pritchard's principal, Mr. Horton.

***Defendant's Liability for Defamatory Third-Party Facebook Comments***

**91**  Liability for third-party defamatory comments on one's personal account, whether on Facebook or another internet-based platform, is still an emerging legal issue in Canadian law. Nevertheless, the law has evolved to the point where consistent principles may be identified.

**92**  *Crookes v. Newton*, [*2011 SCC 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XS-00000-00&context=), provides guidance as to what may constitute publication. The reasons of Deschamps J. (concurring in the result) are of particular assistance as to the issue of liability for third-party comments in that her analysis went further than that of the majority on this issue; the latter was centrally concerned only with liability of a webpage creator for hyperlinks to other internet pages containing defamatory material. At para. 55, Justice Deschamps reviewed the traditional test for publication:

[P]ublication has two components: (1) an act that makes the defamatory information available to a third party in a comprehensible form, and (2) the receipt of the information by a third party in such a way that it is understood.

**93**  At para. 56, she held that given new technological developments in communication, the first component of publication needs to be reconsidered. She concluded (as did all the judges of the Court) that only deliberate acts can lead to liability.

**94**  At para. 59 she stated:

[59] A more nuanced approach to revising the publication rule, and one that can be applied effectively to new media, would be for the Court to hold that in Canadian law, a reference to defamatory content can satisfy the requirements of the first component of publication if it makes the defamatory information *readily available* to a third party in a comprehensible form. In addition, the Court should make it clear that not every act, but only *deliberate* acts, can lead to liability for defamation.

[Emphasis in original.]

**95**  Justice Deschamps concurred in the result of the majority judgment, but stated:

While I agree that improvements can be made, I do not share the view of my colleague Abella J. that the solution is to exclude references, including hyperlinks, from the scope of the publication rule. In my view, the proper approach is (1) to explicitly recognize the requirement of a deliberate act as part of the Canadian common law publication rule, and (2) to continue developing the rule incrementally in order to circumscribe the manner in which a deliberate act must make defamatory information available if it is to result in a finding of publication.

**96**  Justice Deschamps reviewed the international caselaw at paras. 85 - 90, finding that it can be distilled down to the following rule:

The plaintiff must show that the act is deliberate. This requires showing that the defendant played more than a passive instrumental role in making the information available. (para. 91).

**97**  Justice Deschamps referred to an oft-cited case, *Byrne v. Deane*, [1937] 1 K.B. 818 (C.A.), where the defendant owners of a golf club were found liable for defamatory remarks that had left posted on their property, over which they had complete control. Justice Deschamps stated that *Byrne* and the cases following it ground the rule that publication be founded in a deliberate act:

[87] *Byrne* and its progeny are consistent with the requirement that any finding of publication be grounded in a deliberate act. If a defendant was made aware (or had reason to be aware) of defamatory information over which he or she had sufficient control but decided to do nothing about it, this nonfeasance might amount to a deliberate act of approval, adoption, promotion, or ratification of the defamatory information ... . The inference is not automatic, but will depend on an assessment of the totality of the circumstances ...

[Emphasis added; citation omitted.]

**98**  Given the jurisprudence cited by Deschamps J., it appears that a deliberate action can encompass failure to act to remove the defamatory material once actual knowledge or constructive knowledge has been made out.

**99**  Before *Crookes*, the British Columbia Court of Appeal was one of the first in Canada to address the issue of liability of online forum owners/operators for defamatory comments posted by third parties on their website, in *Carter v. B.C. Federation of Foster Parents Association,* [*2005 BCCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B147-00000-00&context=). The Federation operated an online forum in which a defamatory posting regarding the plaintiff had been made. After discovering the posting, the plaintiff urged the board of directors of the Federation to shut down the forum as it was being misused. Sometime later, the plaintiff discovered that the defamatory posting had not been removed, although it was within the Federation's power to do so.

**100**  The plaintiff's defamation action for the third party comment was dismissed on summary judgment because it was held to be time-barred on account of the "single publication rule" found in American authorities. The single publication rule states that the publication of defamatory matter gives rise to only one cause of caution, which accrues at the time of the original publication, and that the statute of limitations runs from that date. As it had been more than two years before the plaintiff in *Carter* amended her statement of claim to include the online defamatory comment, it was held that the limitation period had passed.

**101**  The Court reversed the summary judgment with respect to the matter of the third party defamatory comment on the forum over which the Federation had control, and remitted the matter back to trial. In doing so, Hall J.A. remarked as follows:

If defamatory comments are available in cyberspace to harm the reputation of an individual, it seems appropriate that the individual ought to have a remedy. In the instant case, the offending comment remained available on the internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way. (para. 20)

[Emphasis added.]

In determining that the Federation was a "publisher" of the defamatory information, the Court of Appeal stated that the analysis upon retrial would need to address the facts that the Federation had obtained actual knowledge of the defamatory posting, and that it had been within the Federation's control to remove the posting.

**102**  In *Weaver v. Corcoran*, [*2015 BCSC 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G5R-VSV1-DYMS-602H-00000-00&context=), Madam Justice Burke dealt squarely with the issue of liability for third-party defamatory comments in the reply section of the on-line edition of the *National Post* newspaper. The plaintiff was a professor at the University of Victoria and a well-known scientist in the climate change field. He claimed that four articles published by the newspaper defamed him, and he sued the *National Post*, its publisher, and the journalists who authored the articles.

**103**  The plaintiff Weaver also claimed that the defendants were liable for numerous reader postings made in response to each of the defaming articles. The defendants' position was that they were not the publishers of the reader comments because they had no control over the posts and were not involved in their making. They argued they played a passive instrumental role and took no deliberate action amounting to approval, adoption, promotion or ratification of the contents of the reader posts, citing *Home Equity Development Inc. v. Crow,* [*2004 BCSC 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3BT-00000-00&context=). Once the defendants had become aware of the defamatory reader postings and received the complaint from the plaintiff scientist, the postings were taken down within one or two days. The defendants argued it was unrealistic for them to screen the voluminous comments submitted by readers.

**104**  Justice Burke reviewed the case law and concluded that in order to find liability the plaintiff must show an active or deliberate act in making the defamatory information available to others (para. 275). Ultimately, Burke J. held that it would be unreasonable to expect the *National Post* to pre-vet every comment before it was posted. The *National Post* and its columnists were said to have a passive instrumental role (para. 284):

Until awareness occurs, whether by internal review or specific complaints that are brought to the attention of the *National Post* or its columnists, the *National Post* can be considered to be in a passive instrumental role in the dissemination of the reader postings. It has taken no deliberate action amounting to approval or adoption of the contents of the reader posts. Once the offensive comments were brought to the attention of the defendants, however, if immediate action is not taken to deal with these comments, the defendants would be considered publishers as at that date.

**105**  In passing, Burke J. acknowledged that in the case of a content provider such as the *National Post*, a more nuanced approach is necessary when reader comments are actively solicited. It is stated that many of the comments in issue attacked the character of the plaintiff in a vitriolic manner (para. 268). There appears to have been no allegation of the defendants' own defamatory content having instigated or incited the type of defamatory reader comments that were made.

**106**  In *Niemela v. Malamas*, [*2015 BCSC 1024*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB3-MY31-JX3N-B2C7-00000-00&context=), the plaintiff sought an interlocutory injunction compelling Google Inc. to block from its global search results 146 universal resource locators ("URLs") for websites containing defamatory comments about the plaintiff. This was in addition to a claim against Google for defamation. Madam Justice Fenlon had to determine whether the text accompanying the URLs listed in the Google search results, known as "snippets", made Google a publisher of the defamatory material. She found support for her analysis in *Metropolitan International Schools Ltd. v. Designtechnica Corp.*, [2009] EWHC 1765 (Q.B.), a similar case in which Google was not found as a publisher of "snippets" because it had not "authorised or caused the snippet to appear on the user's screen in any meaningful sense" (para. 51). The search results listed automatically, without "knowing involvement in the process of publication of the relevant words" (para. 49). In other words, Google had only a passive instrumental role, without any knowing mental element being engaged.

**107**  Before endorsing this "passive instrument test" for publication, Fenlon J., as she then was, noted that while the majority judgment of Abella J. in *Crookes* had stopped short of expressly adopting the test, it did approve of the approach taken in *Metropolitan*, which had applied it. Justice Fenlon then reviewed *Weaver*, where Burke J. discussed the passive instrumental role that the *National Post* was found to have had in that case. Ultimately, she concluded that Google was a passive instrument and not a publisher of the snippets. Justice Fenlon clarified that she was not asked in that case to consider whether Google could be a publisher of snippets and search results after notice of the defamatory content had been received.

**108**  In summary then, from the forgoing law it is apparent that *Carter*, *Weaver*, and *Niemela*, consistent with Deschamps J.'s reasons in *Crookes*, provide support for there being a test for establishing liability for third party defamatory material with three elements: 1) actual knowledge of the defamatory material posted by the third party, 2) a deliberate act that can include inaction in the face of actual knowledge, and 3) power and control over the defamatory content. After meeting these elements, it may be said that a defendant has adopted the third party defamatory material as their own.

**109**  In the circumstances of the present case, the foregoing analysis leads to the conclusion that Ms. Van Nes was responsible for the defamatory comments of her "friends". When the posts were printed off, on the afternoon of June 10th, her various replies were indicated as having been made 21 hours, 16 hours, 15 hours, 4 hours, and 3 hours previously. As I stated above, it is apparent, given the nine reply posts she made to her "friends"' comments over that time period, that Ms. Van Nes had her Facebook page under, if not continuous, then at least constant viewing. I did not have evidence on the ability of a Facebook user to delete individual posts made on a user's page; if the version of Facebook then in use did not provide users with that ability, then Ms. Van Nes had an obligation to delete her initial posts, and the comments, in their entirety, as soon as those "friends" began posting defamatory comments of their own. I find as a matter of fact that Ms. Van Nes acquired knowledge of the defamatory comments of her "friends", if not as they were being made, then at least very shortly thereafter. She had control of her Facebook page. She failed to act by way of deleting those comments, or deleting the posts as a whole, within a reasonable time - a "reasonable time", given the gravity of the defamatory remarks and the ease with which deletion could be accomplished, being immediately. She is liable to the plaintiff on that basis.

**110**  Furthermore, I would find that in the circumstances of this case there ought not to be a legal requirement for a defendant in the position of Ms. Van Nes having actual knowledge of the existence of defamatory comments by her "friends" as a precondition to liability. The circumstances were such that she ought to have anticipated such posts would be made. I come to this conclusion for two reasons: the nature or structure of a social medium platform, and the content of Ms. Van Nes' contribution to the posts.

**111**  A user of a Facebook page is not in the same position as the defendant Newton in *Crookes,* the defendant Federation in *Carter,* or the respondent Google Inc. in *Niemala*. Those parties were only passively providing a platform or links to defamatory material. In the present case the entity in the analogous position would be Facebook, Inc., the owner of the software that creates the pages and the servers on which the content is stored. The user hosting a page of a social medium such as Facebook, on the other hand, is providing a forum for engagement with a circle of individuals who may share some degree of mutual familiarity. As noted above, the social nature of the medium is such that posts about concerns personal to the user may reasonably be expected to be discussed by "friends".

**112**  What these factors entail is that once she initiated events through having made an inflammatory post concerning a matter of personal concern, Ms. Van Nes ought reasonably to have expected her "friends" to make sympathetic replies. The "friends"' comments were not unprovoked reactions; they were part of a conversation. And then, when they did comment, Ms. Van Nes - far from being the passive provider of an instrument for comment - continued as an active participant through making replies, prompting further comment. Those replies added fuel to the fire, compounding the chances of yet more defamatory comments being made.

**113**  In other words, I would find that the nature of the medium, and the content of Ms. Van Nes' initial posts, created a reasonable expectation of further defamatory statements being made. Even if it were the case that all she had meant to do was "vent", I would find that she had a positive obligation to actively monitor and control posted comments. Her failure to do so allowed what may have only started off as thoughtless "venting" to snowball, and to become perceived as a call to action - offers of participation in confrontations and interventions, and recommendations of active steps being taken to shame the plaintiff publically - with devastating consequences. This fact pattern, in my view, is distinguishable from situations involving purely passive providers. The defendant ought to share in responsibility for the defamatory comments posted by third parties, from the time those comments were made, regardless of whether or when she actually became aware of them.

**114**  I note that the liability of Facebook users for defamatory comments made by others purely on the basis that they ought to know of the potential for such comments being made was considered and rejected by the New Zealand Court of Appeal, in *Wishart v. Murray*, 2013 NZHC 540, rev'd in part 2014 NZCA 461. This was an appeal from an interlocutory order on an application to strike allegations in the respondent plaintiff's statement of claim. The appellant defendants had published allegedly defamatory statements on a Twitter account and on a Facebook page concerning a book written by the respondent plaintiff, and had repeated the statements during a radio interview. The defendants had partially succeeded on an interlocutory application to strike the pleadings, but much of the statement of claim remained intact and the defendants brought on an appeal of the application judge's refusal to strike those other portions of the claim.

**115**  One of the claims against the defendants was in respect of their liability for third-party comments posted to the Facebook page. The application judge held this allegation to have been properly brought. He stated:

[117] Those who host Facebook pages or similar are not passive instruments or mere conduits of content posted on their Facebook page. They will be regarded as publishers of postings made by anonymous users in two circumstances. The first is if they know of the defamatory statement and fail to remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. A request by the person affected is not necessary. The second is where they do not know of the defamatory posting but ought, in the circumstances, to know that postings are being made that are likely to be defamatory.

[Emphasis added.]

**116**  The Court of Appeal, however, expressed reservations as to finding liability on the basis of what a Facebook user ought to know. Two of their concerns had to do with perceived conflicts between that test and New Zealand legislation, including in particular the need to balance, under the New Zealand Bill of Rights, the right of freedom of expression against the interests of persons in protecting their reputation. The other concerns expressed by the Court had to do with issues in the law of defamation:

[137] The first concern is that, as Mr Rennie submitted, the ought to know test puts a Facebook page host who does not know of a defamatory comment on the page in a worse position than a host who actually does know. The latter will not be a publisher of the comment until a reasonable time for its removal has elapsed (and will not be a publisher at all if he or she removes it in that time). The former will be a publisher from the moment the comment is posted and unable to avoid that consequence by removing the comment from the Facebook page.

[138] The situation will be more complicated when a Facebook page host who ought to know of a defamatory comment on the page actually becomes aware of the comment. On the actual knowledge test, he or she can avoid being a publisher by removing the comment in a reasonable time. But removal of the comment in a reasonable time after becoming aware of it will not avail him or her if, before becoming aware of the comment, he or she ought to have known about it, because on the ought to know test he or she is a publisher as soon as the comment is posted. This seems to us to make the test very difficult to apply.

[139] The second concern is that the ought to know test makes the Facebook page host liable on a strict liability basis, solely on the basis of the existence of a defamatory comment. Once the comment exists, he or she cannot do anything to avoid being treated as its publisher.

[140] It can be argued that the ought to know test is not entirely a strict liability one, because it applies only where the circumstances are such that the host should reasonably anticipate the posting of a defamatory statement. That is akin to making the host liable for the defamatory comment because he or she has been negligent in not taking steps to prevent the defamatory comment being made. Imposing liability for damage to someone's reputation on the basis of ***negligence*** rather than an intentional act is contrary to the well-understood nature of the tort of defamation as an intentional tort.

...

[142] The fourth concern is that the ought to know test is uncertain in its application. Given the widespread use of Facebook, it is desirable that the law defines the boundaries with clarity and in a manner that Facebook page hosts can regulate their activities to avoid unanticipated risk.

[Citations omitted.]

**117**  In my respectful view, the concerns expressed by the New Zealand Court of Appeal are addressed through limiting the imposition of liability to situations where the user's original posts are inflammatory, explicitly or implicitly inviting defamatory comment by others, or where the user thereafter becomes an active participant in the subsequent comments and replies. Ms. Van Nes qualifies under either of those grounds. Their concerns with respect to blurring the lines between ***negligence*** and defamation are, with respect, unfounded; foreseeability is already well-recognized as a component of the tests for liability for republication. It does no harm to the integrity of defamation as a separate tort to extend the use of foreseeability by making it a test for liability for third-party comments.

**118**  The need to balance rights referred to by the New Zealand Court of Appeal is of course a valid concern in Canada as well. In *Niemala*, Fenlon J. noted:

... the tenor of *Crookes* and of recent jurisprudence in England is to narrow the test for who is a publisher of defamatory material to those who do deliberate acts. In Canada this shift originates in the Supreme Court of Canada's recognition post-*Charter* "that what is at stake in an action for defamation is not only an individual's interest in protecting his or her reputation, but also the public's interest in protecting freedom of expression": *Crookes*  at para. 31, citing *Hill v. Scientology*.

**119**  However, at the same time the minority opinion of Deschamps J. in *Crookes*, at least, endorsed findings of liability in situations where the user "had reason to be aware" of defamation (*Crookes*, at para. 97). In my view the potential in the use of internet-based social media platforms for reputations to be ruined in an instant, through publication of defamatory statements to a virtually limitless audience, ought to lead to the common law responding, incrementally, in the direction of extending protection against harm in appropriate cases. This is such a case.

***Damages for Defamation***

**120**  Defamation is a strict liability tort and damage is presumed: *Best v. Weatherall*, [*2010 BCCA 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62VR-00000-00&context=) at para. 45. Damages can be difficult to assess in defamation cases, but the court must strive to "achieve *restitutio in integrum*. Such an award should provide 'solatium, vindication and compensation ... '": *Best* at para. 46.

**121**  The factors to be considered in assessing defamation awards are summarized in *Leenen v. Canadian Broadcasting Corp.* [*(2000), 48 OR (3d) 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4VK-00000-00&context=), [*50 CCLT (2d) 213*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4VK-00000-00&context=), at para. 205; affirmed [*(2001), 54 O.R. (3d) 612*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1J6-00000-00&context=); leave to appeal ref'd [*[2001] S.C.C.A. No. 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-JXG3-X2BF-00000-00&context=).

[205] In attempting to arrive at the appropriate level of general damages in a defamation case, one must always be aware of not only the damage inflicted to a person's reputation but also the fact that once damaged a reputation is very difficult to restore. Always mindful of the fine balance between freedom of speech and the protection of reputation, once the scales have been tipped through defamation, a plaintiff is entitled to be compensated not only for the injury caused by the damage to his integrity within his broad community but also for the suffering occasioned by the defamation. A number of cases ... established factors which might be considered in assessing the appropriate level of compensation. While not all inclusive, some of these factors are as follows:

1. the seriousness of the defamatory statement;
2. the identity of the accuser;
3. the breadth of the distribution of the publication of the libel;
4. republication of the libel;
5. the failure to give the audience both sides of the picture and not presenting a balanced review;
6. the desire to increase one's professional reputation or to increase ratings of a particular program;
7. the conduct of the defendant and defendant's counsel through to the end of trial;
8. the absence or refusal of any retraction or apology;
9. the failure to establish a plea of justification.

[Citations omitted.]

**122**  The seriousness of Ms. Van Nes' defamatory Facebook post, her replies, and the comments of her "friends" cannot be overstated. An accusation of paedophilic behaviour must be the single most effective means of destroying a teacher's reputation and career, not to mention the devastating effect on their life and individual dignity. The identity of Mr. Pritchard is especially relevant in this case. Through his engagement in extra-curricular activities he occupies a position of trust as a music teacher for children. Through hard work and dedication to his students, he had earned the community's respect and admiration, as clearly established on the evidence. I find that he now faces the challenge of repairing the damage Ms. Van Nes has caused, if that is even possible at this point.

**123**  The vehicle through which Ms. Van Nes chose to publicize her defamatory accusations provided the court with further evidence of the damage to his reputation; that there were individual replies from 37 of Ms. Van Nes' Facebook "friends" within less than 24 hours clearly documents the quick degradation of Mr. Pritchard's estimation in the eyes of others.

**124**  To say the least, recovering from false allegations of impropriety against children will not be easy for Mr. Pritchard. It is to be hoped that these reasons for judgment will assist. But the taint of suspicion is not easily expunged, and the reality is that regaining the stellar reputation he once enjoyed will not be quick or easy. In *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=), the pervading nature of defamation and its long term impact was succinctly stated:

[166] ... A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation.

**125**  I have no difficulty in concluding that the defendant's conduct had a devastating impact on the plaintiff, which continues to this day and will continue into the future. That factor, in and of itself, merits a significant damages award.

**126**  The plaintiff asks that I go further and award an even higher amount of general damages by reasons of aggravation. I am asked to find that the defamatory material itself supports the conclusion that the defendant's conduct was motivated by actual malice aimed at ruining his professional and personal reputation.

**127**  An increase in the award for general damages on account of aggravation must be based on a finding that the defendant was motivated by actual malice, established through intrinsic or extrinsic evidence: as stated in *Hill:*

1. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff ... . The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff.

[Citations omitted.]

**128**  *Hill* described some factors that may be taken into account in assessing aggravation:

191 ... For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

**129**  There has been no examination of discovery of the defendant, and so I have no admissions from her as to what prompted to act in the manner she did, nor as to the basis for the statements she made in her posts. This leaves me with the task of trying to infer malice from the extrinsic or intrinsic features of this case.

**130**  Mr. Pritchard perceives the defendant's initial posts, and then the escalation that occurred as she encouraged comments with remarks like, "Oh Robert you make me laugh man", as an orchestrated campaign to malign his character and publically humiliate him. His perception is entirely understandable. But the impression I have of the defendant through her posts is of someone who was childish and shallow, and I do not credit her with that degree of forethought.

**131**  I do not find that the claim of malice has been made out. Taken in its entirety, the evidence of the defendant's actions - her self-centred, unneighbourly conduct; her failure to respond reasonably to the plaintiff's various complaints, particularly regarding her dog; and her thoughtless Facebook posts - point just as much to narcissism as to animosity. Her belief that the decorative mirror hung on the exterior of the plaintiff's house was some sort of surveillance device was simply ridiculous, speaking, to be blunt, more of stupidity than malice.

**132**  The defendant, as I see it, appears to have thoughtlessly taken to a social medium to give vent to her feelings, making reckless statements without any regard to the consequences. She certainly ought to have anticipated the potential impact of her remarks; whether she actually did so has not been proven.

**133**  The defendant's subsequent actions bear none of the indicia of malice discussed at para. 191 of *Hill*: she removed the posts relatively quickly, probably when the gravity of the situation became apparent to her through the police presence at the plaintiff's home; she did not seek to publicize the proceedings, giving rise to further dissemination of the defamation; she did not file a defence.

**134**  Aggravated damages are not in order, but given the seriousness of the allegations and the extent of the harm suffered, a significant award of general damages is. I award the plaintiff general damages for defamation of $50,000.

**135**  I further find this an appropriate case for an award of punitive damages, as a means of rebuking the plaintiff for her thoughtless, reckless behaviour. She acted without any consideration for the devastating nature of her remarks. With regard to the factors enunciated by the Supreme Court of Canada 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=), at para. 13, a punitive damages award must be proportionate to the defendant's blameworthiness, which in this case is high; the defendant's vulnerability, which is also high; the harm suffered by the plaintiff, which has been considerable; and the need to publically denounce the defendant and thus bring to the notice of the public the dangers of ill-considered remarks being made in social media and the serious consequences of such conduct.

**136**  I award the plaintiff additional punitive damages of $15,000.

**Costs**

**137**  Having made no finding of malice on the part of the defendant, I am unable to find this to be a case of reprehensible conduct deserving of rebuke through an award of special costs. The plaintiff will have his costs, assessed at Scale B.

**Conclusion**

**138**  Mr. Pritchard is awarded general damages of $2,500 for his nuisance claim. With respect to the defamation claim, he is awarded $50,000, and punitive damages of $15,000. He is also entitled to his costs.

**139**  There will also be a permanent injunction, enjoining the defendant and owners and occupiers of the property on which the defendant's residence is located from operating the waterfall structure between the hours of 10 p.m. and 7 a.m.

A. SAUNDERS J.

**End of Document**

[***Robson v. Chrysler Canada Ltd., [2001] B.C.J. No. 23***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2SX-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Neilson J.

Heard: October 30 and 31, 2000.

Judgment: January 5, 2001.

Vancouver Registry Nos. C992186 and C992809

**[2001] B.C.J. No. 23** | 2001 BCSC 40 | 84 B.C.L.R. (3d) 163 | 9 M.V.R. (4th) 226 | 101 A.C.W.S. (3d) 1107

Proceeding under the Class Action Proceedings Act, R.S.B.C. 1996, c. 50 Between Frank Robson and Karen Robson as representative plaintiffs, plaintiffs, and Chrysler Canada Ltd. and DaimlerChrysler Corp., defendants (Vancouver Registry No. C992186) And between Daryl Oshanek as representative plaintiff, plaintiff, and General Motors of Canada Limited, General Motors Corp., defendants (Vancouver Registry No. C992809)

(51 paras.)

**Case Summary**

**Trade regulation — Manufacturers — Deceptive trade practices — Practice — Pleadings — Striking out pleadings — Grounds, lack of jurisdiction.**

|  |
| --- |
| Application by the defendants DaimlerChrysler and General Motors for an order to set aside the writ of summons against them for lack of jurisdiction. The plaintiffs claimed that the paint finish on vehicles they purchased was defective. They sought a declaration that the defendants engaged in a deceptive trade practice contrary to the Trade Practice Act and damages. The applicants did not carry on business in Canada. They sold vehicles to their Canadian-owned subsidiaries. The subsidiaries sold the vehicles to dealers who resold them to consumers. The applicants did not promote their products or provide warranties on them.  HELD: Application allowed.  The action against DaimlerChrysler and General Motors was dismissed. The plaintiffs failed to establish a real and substantial connection between British Columbia and the cause of action advanced against the applicants. The cause of action had to occur within the province. These applicants were not suppliers. This term did not include a manufacturer. A manufacturer could be liable if it promoted its products. However, the applicants did not engage in these activities in Canada. Even if non-disclosure resulted in liability no deceptive act or practice was committed within the province. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 13(10), 14(6)(c).

Class Proceedings Act, *R.S.B.C. 1996, c. 50*.

Trade Practice Act, R.S.B.C. 1996, c. 457, ss. 1, 3(1), 3(1)(a), 3(3), 3(3)(q), 3(3)(r), 17, 17.1, 18, 18(1), 18(1)(a), 22, 22(1)(a).

**Counsel**

J.J. Camp, Q.C., and Sharon D. Matthews, for the plaintiffs, Karen Robson, Frank Robson and Daryl Oshanek. Allan P. Seckel, for the defendant, Chrysler Canada Ltd. J. Kenneth McEwan and Ludmilla B. Herbst, for the defendant, DaimlerChrysler Corp. David Harris and David A. Crerar, for the defendants, General Motors of Canada Limited, General Motors Corp.

|  |
| --- |
| **NEILSON J.** |

INTRODUCTION

**1**  These are parallel actions brought under the Class Proceedings Act, *R.S.B.C. 1996, c. 50*. The representative plaintiffs claim that the paint finish on vehicles they purchased was defective and delaminated. They seek a declaration that the defendants engaged in a deceptive trade practice, pursuant to s. 18 of the Trade Practice Act, [*R.S.B.C. 1996, c. 457*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-DY33-B0JT-00000-00&context=) (the "Act"), as well as damages pursuant to s. 22 of the Act.

**2**  The defendant DaimlerChrysler Corp. in the Robson action and the defendant General Motors Corp. in the Oshanek action (the "American defendants") have brought identical applications pursuant to Rule 13(10) and Rule 14(6)(c) of the Rules of Court to set aside service of the writ of summons on the basis that this court has no jurisdiction over them or the subject matter of the claim against them. Their argument focused on Rule 14(6)(c) and the question of whether the plaintiffs have established jurisdiction simpliciter. Chrysler Canada Ltd. and General Motors of Canada Limited (the "Canadian defendants") took no position on the application.

**3**  The parties agree that the onus rests with the plaintiffs to demonstrate a "good arguable case" against the American defendants in this jurisdiction. They are not required to prove their case to the standard required at trial: G.W.L. Properties Ltd. v. W.R. Grace & Co.- Conn. [*(1990), 50 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2DT-00000-00&context=) (C.A.).

**4**  The parties also agree that in order to establish jurisdiction, the plaintiffs must show that there is a "real and substantial connection" between British Columbia and either the American defendants, or the subject matter of the claim: Morguard Investments Ltd. v. De Savoye, [*[1990] 3 S.C.R. 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601H-00000-00&context=), [*76 D.L.R. (4th) 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601H-00000-00&context=) (S.C.C.); Furlan v. Shell Oil Co.(2000), [*77 B.C.L.R. (3d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2293-00000-00&context=) (C.A.) at para. 3. Here, there is no real and substantial connection between this jurisdiction and the American defendants. The issue is therefore whether there is such a connection between British Columbia and the claim put forward by the plaintiffs.

NATURE OF THE CLAIM

**5**  The plaintiffs' only claim is based on the statutory cause of action created by the Act. In Moran v. Pyle, [*[1975] 1 S.C.R. 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B09R-00000-00&context=) the Supreme Court of Canada set out the approach to be used in determining whether a court should assume jurisdiction. The Court considered whether a Saskatchewan court had jurisdiction over an action brought under the provincial Fatal Accidents Act based on negligent manufacture where the product had been manufactured in Ontario and caused death in Saskatchewan. Dickson J., as he then was, affirmed at p. 396 that a provincial legislature must be taken to legislate intra-territorially, and that the Fatal Accidents Act must therefore be construed as limited to wrongful acts committed in Saskatchewan. The first step in determining its application must therefore be identification of the site of the wrongful act. If the wrongful act occurred in Saskatchewan, the provincial legislation would apply, and the plaintiffs could maintain their action in that province. If the wrongful act did not occur in Saskatchewan, the plaintiffs would be unable to maintain their action under the provincial legislation, as to do so would be giving it extra-territorial application. He made it clear that the legislation cannot be used to determine the site of the wrong; it is the site which determines the application of the legislation.

**6**  At p. 405, Dickson J. commended an approach to jurisdiction by which the court first identifies the elements of the cause of action, and then determines which of these represent the essence of the claim. The place where these essential elements occurred will then be a paramount factor in determining the site of the wrongful act.

**7**  Applying that approach here, it is necessary to first analyze the statutory cause of action created by the Act, and identify its essential elements. The relevant provisions of the Act are the following:

Definitions

1. In this Act:

. . .

"consumer" means an individual, whether in British Columbia or not, other than a supplier, who participates in a consumer transaction and includes a guarantor or donee of that individual;

"consumer transaction" means any of the following:

1. a sale, lease, rental, assignment, award by chance or other disposition or supply of any kind of personal property or real property to an individual for purposes that
2. are primarily personal, family or household, ...

. . .

"supplier" means a person, whether in British Columbia or not, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier;

. . .

Deceptive acts or practices

1. For the purposes of this Act, a deceptive act or practice includes
2. an oral, written, visual, descriptive or other representation, including a failure to disclose, and
3. any conduct

having the capability, tendency or effect of deceiving or misleading a person.

. . .

Actions and proceedings

1. In an action brought by the director, or any other person whether or not that person has a special, or any, interest under this Act or the regulations, or is affected by a consumer transaction, the court may grant either or both of the following:
2. a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction is a deceptive or unconscionable act or practice;
3. an interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction.
4. In an action under subsection (1), any person, including the director, may sue on the person's own behalf and, at the person's option, on behalf of consumers generally, or a designated class of consumers.

. . .

Damages recoverable by consumer

1. If a consumer has entered a consumer transaction involving a deceptive or unconscionable act or practice by a supplier, a court may, in an action in respect of the transaction, do one or more of the following:
2. award the consumer damages in the amount of any loss or damage suffered by the consumer because of the deceptive or unconscionable act or practice, including punitive or exemplary damages;

**8**  It is evident from these provisions that the constituent elements necessary to obtain a declaration under s. 18(1)(a) of the Act are:

1. a consumer;
2. a supplier;
3. a consumer transaction; and
4. a deceptive or unconscionable act or practice by the supplier in respect of the consumer transaction.

**9**  In order to obtain damages under s. 22(1)(a) of the Act, the consumer must also establish that he or she suffered loss or damage because of the deceptive or unconscionable act or practice.

**10**  Having identified the elements of the cause of action under the Act, it is next necessary to determine which of these constitute the essence of the claim, and which must take place in British Columbia, in order to establish a real and substantial connection between the plaintiffs' claim and this province.

**11**  The definitions of "consumer" and "supplier" make it clear that neither of these parties must be in British Columbia. Similarly, the consumer transaction itself can take place in British Columbia or elsewhere: British Columbia (Director of Trade Practices) v. Ideal Credit Referral Services Ltd. [*(1997), 31 B.C.L.R. (3d) 37*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21WC-00000-00&context=) (C.A.).

**12**  The decisions in British Columbia (Director of Trade Practices) v. Ideal Credit Referral Services Ltd., supra, and Stubbe et al. v. P.F. Collier & Son Limited, [*[1977] 3 W.W.R. 493*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21R8-00000-00&context=) (B.C.S.C.) establish that the essence of the claim is the deceptive or unconscionable act or practice, and that this activity must occur in British Columbia to attract the application of the Act.

**13**  In Stubbe et al. v. P.F. Collier & Son Limited, supra, Aikins J. considered a claim that the Act was ultra vires the province as it dealt with interprovincial trade and commerce. In determining the pith and substance of the legislation he noted at pp. 537-538:

In pith and substance the matter to which the statute relates is deceptive or unconscionable acts or practices in consumer transactions within the province. I may properly put this a little differently: the Act relates to the regulation of "business ethics" in the province, in the field of defined consumer transactions.

The importance of the words "in the province", which I have now used several times, is illustrated by the following short passage from the judgment of Duff C.J.C. in Cowen v. A.G.B.C., [*[1941] S.C.R. 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FBV7-B546-00000-00&context=) at 323, [*[1941] 2 D.L.R. 687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FBV7-B546-00000-00&context=):

"The decisive consideration, in my opinion, is that the prohibitions are directed against acts done within the province. Prima facie the legislation is within the provincial legislative sphere."

**14**  In British Columbia (Director of Trade Practices) v. Ideal Credit Referral Services Ltd., supra, the Court of Appeal considered whether the offences and remedies provided by the Act were applicable to deceptive trade practices carried out within British Columbia on consumers who were outside the Province. In answering that question affirmatively Mr. Justice Lambert made the following observations at pp. 41-42:

The first inquiry is directed to a determination of the actions on which the legislative enactment, particularly the key offence and remedy sections, is focussed, for it is the focus that determines whether the legislation would be wrongly receiving extra-territorial scope if it were to be applied to those actions when they take place outside the Province.

. . .

The first inquiry is, in my opinion, resolved by reference to the key phrase which appears in various forms in s-s. 18(1), paras.(a) and (b), and in the offence section, s-s. 25(2). The phrase, as it appears in s-s. 25(2), is "... engages in or participates in a deceptive or unconscionable act or practice in respect of a consumer transaction....". The legislative prohibition is against engaging in or participating in a deceptive or unconscionable act or practice. The words "in respect of a consumer transaction" delineate the scope of the prohibition but do not describe the quality of the prohibited action. In Coode's terminology, they constitute a part of the legislative case and not a part of the legislative action. So I think that the key phrase operates to identify the pith and substance of the legislative prohibition as being a prohibition against the specific acts of engaging in or participating in deceptive or unconscionable acts or practices. It also identifies the general area in which the legislative prohibition is to operate as "in respect of a consumer transaction". With that guidance from the legislation itself, it is my opinion that the legislation is not being given extra-territorial application if it is applied in the Province to prohibit acts of engaging or participating in deceptive or unconscionable acts or practices in the Province, in relation to transactions defined by the Act as "consumer transactions", wherever they occur.

**15**  The damage forming the basis for a claim under s. 22 need not occur in British Columbia: British Columbia (Director of Trade Practices) v. Ideal Credit Referral Services Ltd., supra.

**16**  I conclude that in order to establish a real and substantial connection between the statutory cause of action under the Act and British Columbia, the plaintiffs must show a good and arguable case that the American defendants, as suppliers, engaged in a deceptive act or practice in British Columbia in respect of a consumer transaction.

THE FACTS

**17**  Ordinarily, the determination of jurisdiction simpliciter is an "intellectual exercise" based on the pleadings. However, in tenuous cases the court may also consider affidavit evidence: Furlan v. Shell Oil Co., supra, at para. 16. Here, representatives of each of the American defendants have filed affidavits and the parties are in agreement that I may consider these in addition to the facts alleged in the Statements of Claim.

The Statements of Claim

**18**  The relevant allegations in both Statements of Claim are identical for present purposes. Both American defendants are described as being incorporated in Delaware and having agents or offices in Michigan. Paragraphs 5 to 7 describe the respective roles of the American and Canadian defendants as follows:

1. The [Canadian defendant] is a manufacturer of [the] vehicles and the exclusive distributor of [the] vehicles in Canada.
2. The [American defendant] is a manufacturer and distributor of [the] vehicles.
3. The [American defendant] supplies [the] vehicles manufactured outside of Canada to [the Canadian defendant] for distribution within Canada.

**19**  The Statements of Claim go on to allege that between 1986 and 1997, both the American and Canadian defendants knowingly used a defective process to apply paint to vehicles purchased by the plaintiffs in B.C. The process did not permit the paint to properly adhere to the vehicles, and resulted in delamination and deterioration of the paint finish. The plaintiffs claim damages for depreciation and the cost of repainting.

**20**  With respect to the Act, the plaintiffs plead the following:

1. They were consumers;
2. The American and Canadian defendants were suppliers;
3. The purchase of the vehicles by the plaintiffs was a consumer transaction; and
4. The Canadian and American defendants engaged in a deceptive trade practice pursuant to s. 3 of the Act in failing to disclose the defective nature of the painting process to the plaintiffs.

As a result the plaintiffs seek damages pursuant to s. 22 of the Act and a declaration pursuant to s. 18 of the Act.

The Affidavit Evidence

**21**  The American defendant General Motors Corp. filed an affidavit from John Hazen, its Director of Finance, Vehicle Sales, Service and Marketing, North American Operations. Mr. Hazen states that this American defendant does not carry on business in Canada except to the extent it is responsible for the activities of its wholly owned subsidiary, General Motors of Canada Limited. He says it has no corporate presence, representative, or assets in British Columbia, and does not carry on business here.

**22**  Mr. Hazen also states that this American defendant manufactures motor vehicles in the United States. Some of these are sold to General Motors of Canada, and title in those vehicles passes to General Motors of Canada on delivery. Mr. Hazen says that General Motors of Canada is then responsible for distributing the vehicles throughout Canada, including to British Columbia. It resells the vehicles to independent dealers, who in turn sell the vehicles to consumers. General Motors of Canada is responsible for all advertising and promotion of these vehicles, provides the warranties to customers, and deals with customer complaints.

**23**  Mr. Hazen says this American defendant does not sell any of its vehicles directly to purchasers at the wholesale or retail level in British Columbia. It does not have contractual relations with dealers in British Columbia. Nor does it provide warranties on the vehicles sold in B.C. or deal with customer complaints. It does not advertise or promote the vehicles it manufactures in Canada or British Columbia. Nor does it solicit the supply or disposition of those vehicles, or offer the supply of those vehicles, in British Columbia. Mr. Hazen concludes with the following paragraph:

In summary, [this American defendant] does not engage in any sales, leases, rentals, or assignments of vehicles in British Columbia nor does it seek to enforce any such transactions in British Columbia. Its marketing activities in Canada are limited to the sale of vehicles to GM Canada.

**24**  Mr. Larry Ainslie, a member of the Office of Tax Affairs of DaimlerChrysler Corp., filed an affidavit on behalf of that American defendant. Mr. Ainslie states that it has no representatives in British Columbia and is not registered extra-provincially there. It manufactures vehicles in the United States, and does not sell these vehicles in British Columbia to dealers or consumers. It does sell the vehicles to Chrysler Canada Ltd., and that company has the exclusive right to sell them in Canada. Chrysler Canada Ltd. sells most of the vehicles to independent dealers, who in turn sell them to retail customers. Chrysler Canada Ltd. is responsible for providing warranties on the vehicles. This American defendant does not advertise the vehicles in Canada or elsewhere with the intention of reaching Canadian consumers.

**25**  The evidence of Mr. Ainslie and Mr. Hazen was not challenged by the plaintiffs.

ANALYSIS

**26**  The question for determination is whether there is a real and substantial connection between British Columbia and the cause of action alleged against the American defendants under the Trade Practice Act.

**27**  The American defendants concede that the plaintiffs are consumers under the Act and bought the vehicles in question in consumer transactions in British Columbia. They argue that the court should not assume jurisdiction over the claim against them because the plaintiffs have failed to establish a good and arguable case that these defendants owed a duty as suppliers in these consumer transactions, or engaged in a deceptive act in British Columbia in relation to them.

**28**  The American defendants say they simply manufactured the vehicles. They assert that they engaged in no relevant activity in British Columbia which would impose a duty on them as suppliers, or establish a breach of that duty in this province. They say they have no connection with British Columbia, and did not participate in the consumer transactions in question. Imposing obligations under the Act on them in such circumstances would constitute an extra-territorial and unconstitutional application of the Act.

**29**  In response, the plaintiffs deny they are urging an extra-territorial application of the Act, which they acknowledge would be ultra vires. Instead, they say they have met the burden of establishing a real and substantial connection between the cause of action alleged against the American defendants under the Act and British Columbia. They base their argument on an analogy with jurisdictional cases involving negligent manufacture and failure to warn.

**30**  In particular, the plaintiffs point to the circumstances of Moran v. Pyle, supra, in which the deceased was killed in Saskatchewan while removing a light bulb manufactured by the defendant in Ontario. As described earlier, his family brought an action in Saskatchewan under the Fatal Accidents Act of that province. The defendant did not carry on business in Saskatchewan and had no assets or property in Saskatchewan. It sold all of its products, including the light bulb, to distributors, and so had no direct dealings with the deceased. The Supreme Court of Canada held that Saskatchewan had jurisdiction over the defendant for the purpose of the action, stating at pp. 408-409:

Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the Distillers' case and again in the Cordova case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any county substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of ***negligence*** as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

**31**  The plaintiffs rely on other cases involving tortious causes of action as well, including Furlan v. Shell Oil Co., supra, Gariepy v. Shell Oil Co., [*[2000] O.J. No. 3804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-F873-B30K-00000-00&context=) (Ont. S.C.J.), G.W.L. Properties Ltd. v. W.R. Grace & Co.-Conn, supra, and Harrington v. Dow Corning Corp., [*2000 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*[2000] B.C.J. No. 2237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=).

**32**  The plaintiffs say the reasoning in these cases is directly applicable to the facts of this case. The American defendants manufactured defective vehicles and placed them into the stream of commerce for distribution in Canada, including British Columbia. As manufacturers and distributors, they owed a duty under the Act to disclose the defect in the vehicles to consumers in British Columbia, and failed to do so. As a result, those consumers suffered damage in British Columbia, and British Columbia is an appropriate jurisdiction to deal with their claims.

**33**  I cannot agree that these cases provide a conclusive answer to the jurisdictional issue which I must decide. I see no direct analogy between the tortious causes of action such as negligent manufacture and failure to warn, and the statutory cause of action advanced by the plaintiffs. As noted at the outset of these Reasons, an analysis of the constituent elements of the cause of action is essential to the determination of whether there is a real and substantial connection between that cause of action and this jurisdiction. It is clear from Moran v. Pyle, supra, and the other authorities cited by the plaintiffs which deal with claims in tort, that there was a finding that the essence or predominant element in these claims was the damage suffered. Thus the courts in the location where the damage occurred could assume jurisdiction over foreign defendants in these actions.

**34**  Damage or harm is not the essence of the cause of action created by the Act. The essence of this statutory cause of action is a deceptive or unconscionable act or practice performed in British Columbia by a supplier. While "loss or damage" is an element which must be established to permit recovery of damages under s. 22(1)(a), the cause of action is nevertheless complete under s. 18 without proof of loss or damage. Damages are only one remedy available to a consumer who is the victim of a deceptive or unconscionable act or practice.

**35**  The plaintiffs also rely on Alberta v. Thomas Equipment Ltd., [*[1979] 2 S.C.R. 529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JT99-200R-00000-00&context=), a case in which the court considered the application of buy-back provisions in The Farm Implement Act of Alberta to a New Brunswick supplier. The supplier argued these provisions were inapplicable as it did not operate in Alberta, and the proper law of the contract was that of New Brunswick. The Supreme Court of Canada nevertheless imposed the terms of the Alberta legislation on the New Brunswick supplier, and the plaintiffs here rely on this as authority that statutory duties under provincial legislation may be imposed on non-residents.

**36**  I am unable to conclude that this case assists the plaintiffs. It is clear from Mr. Justice Martland's comments at pp. 542-545 that liability was imposed on the New Brunswick supplier under the Alberta legislation because of its conduct in Alberta. At pp. 544-545 he stated:

In the present case, the liability of Thomas arose out of its conduct in Alberta. It had, in Alberta, rendered itself subject to the regulatory provisions of The Farm Implement Act. It had failed to comply with those regulations and the penalty imposed upon it was because of that failure. Thomas is not being penalized under the Act for its conduct in New Brunswick, but because of what it failed to do in Alberta.

These comments, to my mind, support the position of the American defendants that there must be conduct by them within the territorial ambit of provincial legislation in order to attract its application.

**37**  The analogies which the plaintiffs seek to draw from these cases therefore do not assist them. To defeat the application of the American defendants they must deal with the essence of the cause of action which they are advancing under the Act: they must show a good and arguable case that the American defendants, as suppliers to a consumer transaction, committed a deceptive act or practice in British Columbia.

**38**  The American defendants say the plaintiffs have failed to do this. First, these defendants say they do not fall within the definition of suppliers under the Act, and therefore owe no statutory duty in British Columbia to consumers. Second, these defendants say that even if they were suppliers under the Act, the plaintiffs have failed to show a good and arguable case that they committed a deceptive act in relation to a consumer transaction in British Columbia.

**39**  With respect to the question of whether the American defendants are suppliers, the plaintiffs argue that these defendants were the manufacturers of the vehicles in question, and that the definition of "supplier" is broad enough to cover the party that manufactures the subject of a consumer transaction. They say that the definition of "supplier" specifically removes the requirement of privity of contract, and that a manufacturer must be said to "otherwise participate in a consumer transaction" because, without the vehicles, there could be no consumer transaction.

**40**  I am unable to construe the definition of "supplier" broadly enough to include a party whose sole involvement is as manufacturer of the subject matter of a consumer transaction. Had that been the intent of the legislators, I would have expected it to be stated in clear language in the definition. Instead, the thrust of the definition covers those parties who actively participate in attracting consumers to engage in consumer transactions.

**41**  The Act read as a whole is focused on the goal of protecting consumers who enter contracts for personal, family, or household purposes. The legislation is not oriented toward the manufacturing process. This view is confirmed by Mr. Justice Aikins' comments in Stubbe et al. v. P.F. Collier & Son Limited, supra, at p. 538 where he states:

... the conduct sought to be regulated by the statute (business ethics in making contracts) clearly relates to making contracts.

**42**  Although the legislation is not directed at the manufacturing process, this does not mean that a manufacturer will never be subject to the Act. It is conceivable that a manufacturer may also engage in soliciting, offering, advertising, or promoting its products, thereby bringing itself within the definition of "supplier". However, that is not the case here. It is clear from the affidavit evidence that the Canadian defendants are the parties who conduct those activities with respect to the vehicles in question. The American defendants do none of these things, and in fact are twice removed from any direct involvement in the consumer transactions involving these vehicles: they sell the vehicles to their Canadian subsidiaries, who then sell them to dealers throughout Canada. It is the dealers who ultimately sell the vehicles to consumers. This division of activity is conceded in the plaintiffs' descriptions of the roles of the Canadian and American defendants in paragraphs 5 through 7 of the Statements of Claim. While the American defendants are described as manufacturers and distributors of the vehicles in paragraph 6, paragraphs 5 and 7 state that the Canadian defendants are the exclusive distributors of the vehicles in Canada. The Canadian defendants, although they do not have privity of contract with the consumers, may well be suppliers under the Act by virtue of their activities in advertising and promoting the vehicles. However, I can find no basis upon which the American defendants, as manufacturers only, could be said to fall within that definition.

**43**  In the event I have taken too narrow a view of the definition of "supplier" under the Act, I will go on to consider whether the plaintiffs have established that the American defendants participated in a deceptive act or practice in British Columbia as that phrase is defined in s. 3(1)(a) of the Act. The only deceptive act or practice alleged in the Statements of Claim is the failure of the American defendants to disclose the defective paint on the vehicles to the plaintiffs.

**44**  The American defendants argue that the Act cannot intend to make mere silence occurring outside of British Columbia a deceptive act or practice. What makes non-disclosure actionable is the context in which it occurs. The definition of "supplier" clearly anticipates positive statements by the supplier in attracting consumers to engage in consumer transactions. Section 3(1)(a) itself defines a failure to disclose in the context of active representations. They argue that a failure to disclose will constitute a deceptive act or practice only where there have been positive representations about the goods in question that give import to an accompanying silence regarding defects in the goods.

**45**  The American defendants say that further support for this view is evident in s. 3(3) of the Act which, "without limiting subsection 1", describes nineteen positive representations which may constitute a deceptive act or practice. Only two of these, ss. (q) and (r), refer to a failure to disclose, and both are in the context of omissions related to overt representations. None of the nineteen describes a failure to disclose in isolation.

**46**  Similarly, the American defendants say that the cases under the Act which deal with instances of non-disclosure all involve situations in which positive representations made by the suppliers as to the quality of their products gave context to their accompanying silence regarding defects in the goods: see for example Rushak v. Henneken [*(1991), 84 D.L.R. (4th) 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X30K-00000-00&context=) (B.C.C.A.) at pp. 92, 95 and 96; Stubbe et al. v. P.F. Collier and Son Limited, supra, at p. 522.

**47**  Even if non-disclosure alone could attract liability under the Act, the American defendants say their silence occurred outside British Columbia, and they therefore have not committed a deceptive act or practice within British Columbia as required to found jurisdiction. While they acknowledge that in cases of negligent and fraudulent misrepresentation the courts have found jurisdiction in the place where the representation is received, they say the same result does not obtain where silence is the basis of complaint. They cite the decision of the High Court of Australia in Voth v. Manildra Flour Mills Proprietary Limited and Another, [1990] 171 C.L.R. 538 as a judgment which elucidates the difficulty of pinpointing the place of an omission. There, an Australian company sued a Missouri accountant for professional ***negligence*** in failing to provide it with appropriate tax advice. At p. 567, the majority made the following observation:

It may sometimes be that the "cause of complaint" is the failure or refusal of the defendant to do some particular thing -- in other words, an omission. It makes no sense to speak of the place of an omission. However, it is possible to speak of the place of the act or acts of the defendant in the context of which the omission assumes significance and to identify that place as the place of the "cause of complaint".

The court went on to find at p. 569 that the omission on which the company relied for its cause of action took place in Missouri, and thus the tort, if there was one, was committed there:

... in a context in which the appellant was providing professional accountancy services on the basis that withholding tax was not payable, the failure to draw attention to the requirement that it be paid was, for all practical purposes, equivalent to a positive statement that it was not payable. When the case is approached on that basis it is clear that, in substance, the cause of complaint is the act of providing the professional accountancy services on an incorrect basis. The same is true if the matter is approached as an omission, for the omission takes its significance from that same act of providing those services. That act is in no way comparable to an act, such as that in Diamond and in The "Albaforth", which passes across space to be completed in some place different from the place where it was initiated. The act of providing accountancy services was an act complete in itself, or, if not complete in itself, one that was initiated and completed in the one place. That place was Missouri. The fundamental significance of that simple fact is not diminished merely because it may be possible, for the purpose of legal classification, to treat that act as equivalent to a statement that was received or acted upon in Australia.

**48**  The American defendants argue by analogy that all of their relevant activities took place outside British Columbia, and their silence with respect to the defective paint, by itself, cannot assume significance in British Columbia. They made no positive representations in British Columbia to consumers which would give that silence the necessary context to be actionable here.

**49**  Finally, the American defendants point out that the remedies provided by sections 17, 17.1, and 18 of the Act demonstrate the absurdity of finding that mere silence by a supplier could constitute a deceptive act or practice. Section 17 permits the director to accept a written undertaking from a supplier to refrain from engaging in the deceptive act or practice in question. Section 17.1 permits the director to order a supplier to comply with the Act. Section 18 permits the director or consumers to obtain an injunction restraining a supplier from engaging in the stipulated deceptive act or practice. The American defendants quite properly ask how any of these remedies could usefully apply to control or prohibit the business practices of a supplier whose only action has been non-disclosure through total silence.

**50**  I would not wish to make a broad statement that non-disclosure alone can never constitute a deceptive act or practice under the Act. However, I agree with the American defendants that in determining whether non-disclosure will support the cause of action created by the Act, it is critical to examine the context in which it occurs. I am persuaded by their arguments that the plaintiffs have failed to establish a good and arguable case that the silence of the American defendants in the circumstances here could constitute a deceptive act occurring in British Columbia.

**51**  I therefore find that the plaintiffs have failed to establish a real and substantial connection between British Columbia and the cause of action advanced against the American defendants under the Act. The applications of both American defendants pursuant to Rule 14(6)(c) are accordingly granted on the basis that this court has no jurisdiction. Subject to any submissions the parties may wish to make, these defendants will have their costs at Scale 3.

NEILSON J.

**End of Document**

[***Royal Bank of Canada v. Royal River Enterprise Ltd., 2010 CCLG para. 25-122***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-0C71-JJ6S-629H-00000-00&context=)

Canadian Commercial Law Guide

British Columbia Supreme Court

Before: Fenlon J.

Decision: April 12, 2010.

Docket No. S085304

***Canadian Commercial Law Guide*  > *Cases* > *2010s* > *2010***

**2010 CCLG para. 25-122** | [*[2010] B.C.J. No. 649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62RG-00000-00&context=) | [*2010 BCSC 488*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62RG-00000-00&context=)

Royal Bank of Canada v. Royal River Enterprise Ltd., Sran and Dhanda, and Athwal and Athwal

**Case Summary**

**Banking law — Accounts — Plaintiff bank applied for summary judgment against defendants for money owed in relation to a business account, line of credit, and Visa cards — Defendants submitted that the money was taken from the account by the third party and argued that he was responsible for repaying the bank — Action allowed — The third party's actions did not constitute a defence to the bank's claims — The bank was not negligent in allowing funds from the line of credit to be used to cover overdrafts in the business account — The bank was diligent in freezing the accounts once the third party's kiting of cheques was discovered — The bank was awarded $138,008.39 plus interest against defendants — Defendants were awarded $202,977.61 against the third party.**

|  |
| --- |
| **Facts:** The plaintiff Royal Bank of Canada ("RBC") applied for summary judgment against the defendants Royal River Enterprise Ltd. ("Royal River") and Randhir Singh Dhanda ("Dhanda"). RBC claimed that the defendants owed $138,008.39 plus interest in relation to a business account, line of credit, and Visa cards ("the accounts"). Royal River and Dhanda claimed recovery against the third party, Manvir Athwal ("Athwal"), based on his unauthorized removal of money from the accounts. They also claimed against Athwal's mother, Rashpal Athwal, based on a promise she made to RBC to repay the money taken by her son. Royal River and Dhanda also claimed that RBC was contributorily negligent in not identifying and putting a stop to the unauthorized use of the accounts by Athwal.  In July 2007, Royal River opened a business account with RBC. The following month, RBC granted Royal River a line of credit of $25,000, opened a Visa business account, and issued Visa cards to the company's principals, Manjit Singh Sran ("Sran") and Dhanda. Because Sran and Dhanda were often out of town on business, they decided to make Athwal the sole signing authority on the business account with RBC. Over the course of two months, Athwal made a series of deposits and withdrawals that put the business account into overdraft. The deposits were cheques drawn on another institution that were subsequently dishonoured due to insufficient funds. Before those cheques could be cleared, Athwal made a series of withdrawals on the business account, putting the account into overdraft when the cheques were returned. In short, Athwal kited cheques to cover the overdraft balances on the business account, giving it the appearance of a positive balance. When the cheques were dishonoured, putting the business account into overdraft, the line of credit was used to cover it. In addition, Athwal used the company credit cards to incur charges that were unrelated to the company's business according to Royal River and Dhanda.  HELD: The British Columbia Supreme Court allowed the application and awarded judgment to RBC in the amount of $138,008.  39 plus interest.  Royal River and Dhanda were awarded judgment against Athwal in the amount of $202,977.61, as he filed no evidence raising a triable issue and did not attend discovery or any of the hearing dates. The third-party claim for summary judgment against Rashpal Athwal was dismissed because there was a genuine issue for trial on her liability to pay the debt owed to RBC. Athwal's lack of authority for the transactions raised issues of indemnity between Royal River, Dhanda, and Athwal, but did not constitute a defence to RBC's claims. Athwal was an authorized signatory of Royal River. It was reasonable for RBC to have perceived him as acting within the scope of his employment and authority. Neither was RBC negligent, as the defendants contended, in failing to enforce the $25,000 overdraft limit, which applied to the line of credit, not the business account, and was never violated by more than $136.25. Furthermore, RBC was not negligent in failing to identify Athwal's activity more quickly. The kiting was difficult to detect. Any one of the transactions conducted by Athwal appeared legitimate and in the ordinary course of business until viewed collectively. RBC acted diligently in freezing the account within four business days of the first cheque being dishonoured. |

**Counsel**

S.L. Knowles for the plaintiff; N. Wignall for the defendants; no one appeared for the third parties.

**Reasons for Judgment**

|  |
| --- |
| **L. FENLON J.** |

**INTRODUCTION**

**1**  The plaintiff Royal Bank of Canada ("RBC") applies by way of summary trial under Rule 18A of the *Rules of Court* for judgment against the defendants Royal River Enterprises Ltd. ("Royal River") and Randhir Singh Dhanda. RBC claims the defendants owe $138,008.39 plus interest in relation to a business account, line of credit, and Visa cards (the "accounts"). RBC's claim against the defendant Manjit Singh Sran was stayed as a result of Mr. Sran's assignment into bankruptcy in March 2009.

**2**  The defendants' claim for recovery against the third party Manvir Athwal is based on his unauthorized removal of money from the accounts; their claim against Mr. Athwal's mother, Rashpal Athwal, is based on a promise she made to RBC to repay the money taken by her son. The defendants also claim that RBC was contributorily negligent in not identifying and putting a stop to the unauthorized use of the accounts by Mr. Athwal.

**BACKGROUND**

**3**  In late July 2007, the defendant Royal River opened a business account with RBC. The following month, RBC granted Royal River a line of credit of $25,000, opened a Visa business account and issued Visa cards to the company's principals, Mr. Sran and Mr. Dhanda. Because Mr. Sran and Mr. Dhanda were often out of town on business, they decided to make Mr. Athwal the sole signing authority on the business account with RBC. He had been working for the company for about one year at that point.

**4**  In September and October 2007, Mr. Athwal made a series of deposits and withdrawals that put the business account into overdraft. A number of the deposits made by Mr. Athwal were cheques written on a Royal River account at Vancouver City Savings Credit Union ("VanCity"). RBC accepted the cheques as a holder in due course and credited the business account. The cheques were dishonoured by VanCity and returned to RBC due to insufficient funds in the VanCity account. However, before the dishonoured cheques could be cleared, Mr. Athwal made a series of withdrawals on the business account. As a result, when the dishonoured cheques were returned unpaid, the business account was put into overdraft.

**5**  In a process called "kiting", Mr. Athwal repeatedly covered the overdraft balances with subsequent dishonoured cheques, giving the appearance that the business account was in a positive balance. The result of Mr. Athwal's kiting was that overdrawn balances were temporarily covered by cheques issued without sufficient funds. These cheques were subsequently returned unpaid resulting in further overdrafts on the business account.

**6**  Under the loan agreement, Royal River had agreed that its $25,000 line of credit could be used to cover overdrafts on the business account. Consequently, when the business account fell into overdraft as a result of the VanCity cheques being returned unpaid, loan credits from the line of credit were automatically used to cover the overdraft. These credits brought the business account back into its operating limits. By the time the kiting was detected and the account frozen, the line of credit stood at $24,500.

**7**  That debt was transferred from the line of credit to the business account and is accounted for in the outstanding amount owing on the business account. After that transfer, $500 remained outstanding on the line of credit as of May 2, 2008.

**8**  The outstanding amount due on the business account as of June 17, 2008 was $119,537.77. Since that date, interest and monthly fees have accrued and compounded under the terms of the loan agreement.

**9**  Mr. Athwal also made use of the Visa cards issued to Mr. Sran and Mr. Dhanda, who say that the charges were unrelated to the company's business. The balances due and owing under the Visa business account were transferred to a Visa loan account on April 29, 2008. The Visa loan account was opened by Royal River so that the money owing on the Visa cards could be paid off using a loan facility at a lower rate of interest. As of March 27, 2009, the outstanding amount on the Visa loan account was $9,635.77, comprised of principal in the amount of $8,188.25 and $1,447.52 in accrued interest at the rate of 19.5%. Interest continues to accrue at the rate of 19.5% per annum, or $4.36 per day under the terms of the loan agreement.

**10**  I will refer to the sums claimed by RBC under the business account, line of credit, and Visa accounts as the "Debt".

**ANALYSIS**

**1. The Plaintiff's Claim Against the Defendants Royal River and Dhanda**

**11**  The defendants agree with RBC's calculation of the Debt. They accept RBC's evidence regarding the frequency and amount of the deposits and withdrawals made by Mr. Athwal and do not dispute their obligations under the business agreement, the line of credit agreement, or the Visa card agreement, including the interest calculations. However, the defendants argue that they should not have to pay the Debt because:

1. Mr. Athwal acted outside of his authority when he withdrew funds from the business account for his own use and used the defendants' credit cards;
2. RBC was not authorized to exceed the overdraft limit of $25,000; and
3. RBC was contributorily negligent in not identifying and putting a stop to Mr. Athwal's unauthorized activity on the accounts.

I will address each of these arguments in turn.

1. **Athwal acted outside of his authority**

**12**  The defendants' primary defence appears to be that Mr. Athwal acted contrary to their authorization when he forged Mr. Sran's signature on cheques written on Royal River's VanCity account, deposited them in the RBC business account, and withdrew funds for his own use.

**13**  Although Mr. Athwal's lack of authority raises an issue of indemnity as between the defendants and Athwal himself, it does not constitute a defence to RBC's claims. That is so because Mr. Athwal was an authorized signatory of Royal River with authority to deposit cheques and withdraw funds on behalf of that company. As a third party acting in good faith, it was reasonable for RBC to have perceived Mr. Athwal as acting within the scope of his employment and authority based on Royal River's appointment of Athwal as sole signatory on the account.

**(b) RBC should not have exceeded the $25,000 limit on the line of credit**

**14**  The defendants say that RBC was negligent in failing to enforce the $25,000 overdraft limit. The defendants' view is that, at most, Royal River should be facing $25,000 in claims, rather than $150,000.

**15**  However, $25,000 is not the overdraft limit on the business account; rather, $25,000 is the maximum on Royal River's line of credit. The line of credit was used to cover debits to the business account under the loan agreement. Because of the kiting, whereby negative balances caused by returned cheques were being covered temporarily by other bad cheques, the outstanding balance on the line of credit never exceeded $25,136.25.

**16**  A review of the activity on the business account illustrates this point. The first time the business account was more than $25,000 overdrawn was October 17, 2007. The balance of negative $28,959.20 resulted from the return of multiple unpaid items. No further withdrawals were processed on that account that day until $45,100 was deposited into the business account creating a positive balance. The balance of the business account at the end of each day prior to October 22, 2007, was never less than the ostensible "overdraft limit" of $25,000. The pattern of withdrawals and deposits that created a positive balance was repeated on each of the relevant dates until October 22, 2007, when RBC detected the kiting and restrained the business account.

**17**  Therefore, even if the business account had an "overdraft limit", the suggestion that RBC "allowed" any overdraft limit to be exceeded is not correct. The negative balance in the business account was the result of the return of the dishonoured cheques to RBC; the overdraft was not a result of RBC's processing of withdrawals.

**18**  In summary on this point, I do not find that RBC was negligent in allowing the line of credit to be used to cover the overdrafts on the business account.

**(c) RBC was contributorily negligent in not identifying more quickly Athwal's unauthorized activity**

**19**  The defendants argue RBC is contributorily negligent because it failed to detect and put a stop to the unauthorized activity on the business account sooner than it did. The starting point in assessing the allegation of ***negligence*** against RBC is a determination of the scope of duty owed by RBC to its client.

**20**  In *Groves-Raffin Construction Ltd. et al v. Bank of Nova Scotia et al* *(1975), 64 D.L.R. (3d) 78*, *[1976] 2 W.W.R. 673* (B.C.C.A.) [*Groves-Raffin Construction Ltd.*], Bull J.A. at p. 83 (cited to D.L.R.) held that a banker's duty to his customer includes exercising "such care as a reasonable banker would consider requisite to ensure that what is suspicious or questionable is queried".

**21**  Robertson J.A. for the majority of the court in *Groves-Raffin Construction Ltd.* at 121 (cited to D.L.R.) adopted the articulation of the reasonable banker standard set out by Ungoed-Thomas J. in *Selangor United Rubber Estates, Ltd. v. Cradock et al (No. 3)*, [1968] 2 All E.R. 1073, [1968] 1 W.L.R. 1555:

To my mind, ... a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business.

**22**  In order to determine whether RBC met the standard of care owed to the defendants, it is necessary to review the activity on the business account that the defendants rely on in support of their claim.

**23**  First, the defendants say that the magnitude and frequency of the withdrawals alone should have alerted the bank that there was an unusual pattern of activity in the account. However, many of the withdrawals were for small amounts and all were made by the authorized signatory on the account. As Bull J.A. noted in *Groves-Raffin Construction Ltd.* at 83 (cited to D.L.R.):

[A] banker's duty to his customer involves ... the primary and axiomatic obligation to carry out its function as a banker to honour and pay its cheques when funds are on credit[.]

**24**  In *Titan West Warehouse Club Inc. v. National Bank of Canada*, [*[1996] 5 W.W.R. 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-F2F4-G0WB-00000-00&context=), [*142 Sask.R. 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-F2F4-G0WB-00000-00&context=) (Q.B.), the Saskatchewan Court of Queen's Bench considered whether a duty to inquire or monitor arose on the part of the bank in circumstances in which the funds on deposit at the bank were misused by the account's authorized signatory. Grotsky J. stated at para. 71 (cited to W.W.R.):

Both counsel, in their briefs of law, and during oral argument, submitted, and agreed, that before a duty to inquire, or monitor, arose, there would have to be unusual circumstances which would "red flag" the account or at the very least notify the defendant bank of unusual circumstances surrounding the account. ... The plaintiff must prove this fact on a balance of probabilities before the court will find that the defendant bank had a duty to inquire or closely monitor the account and prevent the movement of funds. No such circumstances existed in this case. There was, therefore, no duty on the defendant bank to either inquire, or to monitor, the account. It is at this point that the evidence of the experts is helpful. Messrs. Good and Craig both testified that there was nothing about the operation of the Titan account that caused them to "Red Flag" it. [The authorized signatory] had been in control of the account since its inception and no dissatisfaction or concern was ever expressed to it about the account until the commencement of this action.

**25**  The defendants say there were eight weeks of dishonoured cheques and withdrawals before the account was frozen, but that statement is incorrect. While it is true that Mr. Athwal was writing cheques on the account as early as September 13, 2007, the first opportunity the bank had to detect that there was a problem was the date on which the first cheque was returned unpaid on October 16, 2007. That is so because it takes time for a cheque drawn on another bank to be returned by that bank for insufficient funds. For example, Mr. Athwal wrote a cheque on the VanCity account for $9,457 and deposited it into the RBC account on October 9, 2007. That cheque was not returned by VanCity as unpayable until October 17, 2007. RBC detected the irregularities and restrained the business account on October 22, 2007, the fourth business day after the first dishonoured cheque was returned.

**26**  Bob Montgomery, the Corporate Investigations Services Officer with RBC, explained the challenge of detecting Mr. Athwal's kiting as follows:

Viewed separately, each of the individual Vancity cheque deposits and RBC cheques issued to "Cash" had the appearance of a legitimate business banking transaction on the Business Account. Similar transactions had previously been done on the Business Account, and are commonly done on other businesses' accounts, without any irregularity. As such, none of those transactions individually raised any "red flags" with the usage of the Business Account. These Athwal's [sic] transactions using the Business Account became suspicious only when viewed within the entire pattern of the Vancity cheques being repeatedly returned unpaid.

**27**  Further, Mr. Athwal's kiting was made more difficult to detect for a number of reasons. First, his cheque deposits consisted of both legitimate cheques and the subsequently dishonoured VanCity cheques. Second, the dishonoured cheques seemed to be written in the ordinary course of business, with what appeared to be legitimate notes written in their "re" sections such as "fuel". Third, under the arrangements in place, many of the shortfalls on the business account were covered by an automatic withdrawal from the line of credit which gave the impression that there was a positive balance on the business account and that the return of the few forged cheques was occurring in the ordinary course of business.

**28**  As noted, the account was first opened at the end of July. There was little activity in the account in August. In September, there were two cheques returned for insufficient funds ("NSF"), one on September 11 and another on September 27, 2007. Between October 16 and 22, the day the account was frozen, there were nine further NSF cheques over four business days. RBC says that a few NSF cheques are not a basis for freezing a business account.

**29**  The defendants led no expert evidence to support their argument that the pattern of NSF cheques in the account warranted the suspension of activity in the account before October 22, 2007.

**30**  Taking into account the pattern of withdrawals, the difficulty inherent in detecting kiting, and Mr. Athwal's status as the authorized signatory on the account, I am of the view that the bank acted diligently in freezing the account within four business days of the first VanCity cheque being returned NSF. It follows that the bank did not breach its duty of care to the defendants. I also find that the defendants are in breach of the agreements with RBC by having failed to pay the Debt.

**31**  I therefore award RBC damages in relation to the business account against the defendant Royal River in the amount of $127,872.62, together with contractual interest at the prime lending rate of the plaintiff in effect from time to time, plus 5% compounded monthly from March 27, 2009 to the date of these reasons for judgment.

**32**  I award RBC judgment against Royal River and Dhanda jointly and severally in relation to the line of credit in the amount of $500, together with interest at the prime lending rate of RBC in effect from time to time, plus 3% compounded monthly from March 27, 2009 to the date of these reasons for judgment.

**33**  I also award RBC judgment against Royal River and Dhanda jointly and severally, in relation to the Visa loan, in the amount of $9,635.77 together with interest in the amount of $4.36 per day from March 27, 2009 to the date of these reasons for judgment.

**34**  The damages therefore total $138,008.39 plus interest calculated in accordance with the applicable agreement, as set out above, to the date of judgment. Thereafter, court ordered interest will apply.

**2. The Defendants' Claim Against the Third Parties**

**35**  The defendants claim against the third parties $153,750 less $905.59 in banking fees, which are not attributable to Mr. Athwal's conduct. The defendants also claim an additional $49,227.61 for sums Mr. Athwal transferred by way of internet banking from the company's VanCity account to his own account.

**36**  The defendants apply for judgment and costs against the third parties under Rule 2(2)(d) and Rule 18 of the *Rules of Court*.

**37**  Rule 2(2)(d) provides:

1. Subject to subrules (3) and (4), where there has been a failure to comply with these rules, the court may

...

1. dismiss the proceeding or strike out the statement of defence and grant judgment[.]

**38**  The defendants argue that the third parties' failure to attend examinations for discovery on two occasions constitutes a failure to comply with the Rules of Court and warrants the striking out of their statements of defence and the granting of judgment against them under Rule 2(2)(d).

**39**  The third parties were served in the third week of April 2008 with notices of an appointment for examination for discovery, set for May 22, 2009. Rashpal Athwal, Mr. Athwal's mother, called counsel for the defendants to ask what was entailed in examinations for discovery. She asked the defendants' solicitor to call her son, Manvir Athwal, to discuss the situation with him. That was done and neither of the Athwals indicated that the date was a problem for them.

**40**  On May 20, 2009, Mr. Athwal spoke to defendants' counsel and asked to reschedule the discovery. That request was refused on the basis that the third parties had been given significant notice of the discovery date. Neither attended on May 22, 2009.

**41**  Counsel for the defendants called Mr. Athwal from the court reporter's office. He said that he was at a wedding in Squamish and agreed to reschedule the discovery for the following week. Counsel reset the discovery for May 29, 2009, and left a voicemail message for Mr. Athwal on May 25, 2009, advising him of the new date. Neither of the third parties attended on that date.

**42**  In *Muscroft et al v. Eurocopter S.A. et al*, [*2003 BCCA 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X2YG-00000-00&context=), [*12 B.C.L.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X2YG-00000-00&context=) at para. 4, Southin J.A. for the Court stated that striking out a statement of defence is "a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence." In my view, the third parties' failure to attend the examinations for discovery in these circumstances is insufficient to justify the exercise of my discretion under Rule 2(2)(d) to dismiss their statements of defence.

**43**  Next, I turn to the defendants' application for judgment against the third parties under Rule 18(1), which provides:

1. In an action in which an appearance has been entered, ... the plaintiff, on the ground that there is no defence to the whole or part of a claim, or no defence except as to amount, may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount.

**44**  The test under Rule 18(1) is whether there is a *bona fide* triable issue of fact or law: *K.E.S. Contracting Ltd. v. Hellyer*, [*2007 BCSC 1821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-221G-00000-00&context=) at para. 20, [2008] B.C.W.L.D. 4466. The onus of establishing that a *bona fide* triable issue does not exist rests upon the applicant. If I am left in doubt as to whether there is a triable issue, the application should be dismissed: *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd. et al.* [*(1984), 55 B.C.L.R. 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-FFTT-X05C-00000-00&context=), [*26 A.C.W.S. (2d) 246*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-FFTT-X05C-00000-00&context=) (C.A.).

**45**  In this case, the third parties did not file evidence to show that they have a defence which deserves to be tried. Although served with notice of this hearing as well as two earlier hearings which did not proceed, they did not attend any of the hearing dates.

**46**  The evidence before me on the application demonstrates that Mr. Athwal wrote cheques payable to "cash" totalling $153,750. In his statement of defence to the third party claim, Mr. Athwal admits that he wrote cheques from the VanCity Savings account by forging the signature of Mr. Sran. He acknowledges that he did not have signing authority and that he deposited the cheques to Royal River's RBC bank account. He also acknowledges going to the Royal Bank the day following a deposit to do a withdrawal. He admits in his pleadings that the amount of the overdraft he caused is approximately $100,000, but states that it was "not $155,000". There is no evidence to support Mr. Athwal's defence as to the amount of money improperly withdrawn from Royal River's business account. There is evidence that a payment of $50,000 was made to RBC by his mother, but that payment has already been deducted from the defendants' claim against the third parties. I am of the view that it is manifestly clear that there is no triable issue with respect to Royal River's claim that Mr. Athwal owes $153,750 in relation to the business account.

**47**  Turning to the internet transfers from the VanCity account to Mr. Athwal's personal account, the evidence demonstrates transfers of $49,227.61. Mr. Athwal denies these transfers in his statement of defence, but no material was filed in support of his position that he did not make the transfers. I am of the view that it is manifestly clear that there is no *bona fide* triable issue relating to the claim that Mr. Athwal transferred $49,227.61 without authorization from Royal River's business account with VanCity to his own account.

**48**  With respect to the defendants' claim that Mr. Athwal used their business Visa accounts without authorization, I am again left without any evidence from Mr. Athwal to support his defence that he did not use the credit cards in this way. In relation to this claim, however, I am not persuaded that a triable issue does not exist. The defendants did not present any evidence in support of this aspect of their claim other than a statement by Mr. Dhanda in his affidavit that misuse of the cards had occurred.

**49**  The material filed by the plaintiff shows a Visa statement for Mr. Dhanda as of November 5, 2007, with a balance of $3,798.44. The charges on that statement appear to be expenses related to the company's business. Similarly, the statement ending November 5, 2007 for Mr. Sran's Visa shows a charge relating to Ocean Trailer. There is no evidence to link those charges to Mr. Athwal's personal use. Therefore, on the material before me, there appears to be a *bona fide* triable issue as to whether Mr. Athwal is responsible for the sums charged on the Visa cards. Accordingly, I do not grant judgment to the defendants in relation to this part of their claim.

**50**  The defendants' claim against the third party Rashpal Athwal, Mr. Athwal's mother, is based on a meeting that occurred in the weeks after her son's unauthorized activities had been identified by RBC. Ms. Athwal agreed to pay the money taken by her son in order to avoid criminal charges being laid against him. The defendants say that she entered into a contract with them to pay the sums due and that she is now in breach of that contract.

**51**  As noted, Ms. Athwal did not appear at the hearing, nor did she file any materials in support of her statement of defence. She is self-represented. In her statement of defence, she acknowledged a conversation with the defendants at her home but denies that she promised to repay the entire amount due. Ms. Athwal says in her statement of defence that she told the defendants she would "try to pay back as much as she could." She admits she paid back $50,000, but denies she ever said that she would be able to pay the full amount.

**52**  Based on the materials before me, I cannot conclude that Ms. Athwal has no *bona fide* defence to the claim made by the defendants. On the face of the pleadings, the defendants' claim raises a triable issue as to whether a contract was entered into and, if so, whether it is enforceable. Although a third party should normally file an affidavit verifying its defence, the court has the discretion to refuse to grant summary judgment when the statement of defence raises a triable issue, but is not verified by affidavit: *Gary Park Properties Ltd. v. Jae Holdings Ltd. et al*. [*(1975), 15 B.C.L.R. 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3HJ-00000-00&context=), [*[1979] B.C.J. No. 2123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3HJ-00000-00&context=) (C.A.). In my view, this is an appropriate case in which to exercise my discretion to dismiss the defendants' claim for summary judgment under Rule 18 against the third party Rashpal Athwal.

**53**  In summary on this issue, Royal River is granted judgment against Manvir Athwal of $202,977.61.

**54**  RBC is entitled to its costs against the defendants at Scale B, but is at liberty to speak to the issue if it wishes to make further submissions in this regard.

**55**  The defendants are entitled to one set of costs against Mr. Athwal at Scale B. I make no order as to costs with respect to Rashpal Athwal.

L. FENLON J.

**End of Document**

[***Royal Bank of Canada v. United Used Auto & Truck Parts Ltd., [2006] B.C.J. No. 1778***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3CT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Rice J.

Heard: June 5 - 8, 2006.

Judgment: August 3, 2006.

Vancouver Registry Nos. H990076 and H990085

**[2006] B.C.J. No. 1778** | 2006 BCSC 1192 | 24 C.B.R. (5th) 102 | 151 A.C.W.S. (3d) 931 | 2006 CarswellBC 1943

Between Royal Bank of Canada, Petitioner, and United Used Auto & Truck Parts Ltd. and Others, Respondents (Registry No. H990076) And between Century Services Inc., Petitioner, and VECW Industries Ltd. and Others, Respondents (Registry No. H990085)

(88 paras.)

**Case Summary**

**Civil procedure — Estoppel — Estoppel by record (res judicata) — Issue estoppel — Res judicata as a bar to subsequent proceedings — The court dismissed an application to remove the trustee of the bankrupt so that an action could be pursued against the trustee for breach of fiduciary duty on behalf of the bankrupt's creditors — The proposed action was barred by the doctrine of issue estoppel, as the issues sought to be advanced arose from the same relationship and subject matter as were adjudicated in the prior proceedings, including a court approval of the sale of lands belonging to the bankrupt.**

**Insolvency law — Trustees — Discipline — Removal — The court dismissed an application to remove the trustee of the bankrupt so that an action could be pursued against the trustee for breach of fiduciary duty on behalf of the bankrupt's creditors — The proposed action was barred by the doctrine of issue estoppel, as the issues sought to be advanced arose from the same relationship and subject matter as were adjudicated in the prior proceedings, including a court approval of the sale of lands belonging to the bankrupt.**

**The court dismissed an application to remove the trustee of the bankrupt — The petitioning bank applied for an order removing and replacing PricewaterhouseCoopers, the trustee in bankruptcy of the respondent United, in order to provide United's creditors with a trustee having the capacity to sue the PWC for alleged breaches of fiduciary duty as trustee and court-appointed receiver of the estate assets — The petitioner alleged that PWC had failed in its duty to maintain and enhance the value of certain lands owned by United that had been subject to a court-approved sale, and to obtain a fair price on the sales — HELD: The proposed action was barred in its entirety by the doctrine of issue estoppel — Alternatively, the court would have dismissed it as an abuse of process and impermissible attack on the prior judgments regarding the approval of the sale of land — As there was no reason to re-open the claims, there was no need to remove the trustee at this time — The cause of action proposed in the draft statement of claim and the issues sought to be advanced arose from the same relationship and the same subject matter as was adjudicated in the prior proceedings — They were squarely before the court in the sale approval proceeding and in the two prior Mott actions — Some of the new evidence was discoverable with reasonable diligence prior to the sale approval, and certainly prior to the Mott actions, while the rest was not critical, as it did not bring to light any new issue or cause of action formerly unknown — Mott had simply changed the legal description of his claim to facilitate re-litigation of the same issues.**

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, [*R.S.C. 1985, c. B-3, s. 14.04*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9C1-FJDY-X0NP-00000-00&context=)

British Columbia Supreme Court Rules, Rules 19(24)

Companies' Creditors Arrangements Act, [*R.S.C. 1985, c. C-36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB11-F5KY-B48X-00000-00&context=)

**Counsel**

Counsel for Applicant, Mr. Mott: W.A. Pearce, QC

Counsel for PricewaterhouseCoopers Inc.: K. Jackson and D. Westgeest, Articled Student

|  |
| --- |
| **RICE J.** |

**INTRODUCTION**

**1**  This is an application for an order pursuant to s. 14.04 of the ***Bankruptcy and Insolvency Act***, [*R.S.C. 1985, c. B-3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB51-K054-G4Y8-00000-00&context=) (the "***BIA***"), removing PricewaterhouseCoopers ("PWC") as trustee in bankruptcy for United Used Auto & Truck Parts Ltd., Seiler Holdings Ltd., and VECW Industries Ltd., and United Used Auto Parts (Storage Div.) Ltd. (together "United"), and appointing George Abakhan, licensed trustee, in its place.

**2**  The applicant is Ian Mott, an officer, director, major shareholder, and creditor of one or more of the United companies. The sole purpose of the application is to provide creditors of United with a trustee that has the capacity to sue PWC for alleged breaches of fiduciary duty as trustee of the bankrupt estate and court-appointed receiver of the assets of the estate.

**3**  The application arises from the court-approved sales of certain lands owned by United in Surrey, B.C. (the "United Lands"). In particular, it concerns a sale in 2001 to the Pacific National Exhibition (the "PNE") of lots 3 to 6 and 8 to 20 of the United Lands (the "PNE Lands").

**4**  It is alleged that PWC, as United's trustee and receiver, failed in a fiduciary duty owed to United's creditors to maintain and enhance the value of the United Lands and to obtain a fair price on the sales. PWC denies these allegations and contends in any event that any legal action commenced now on those claims is *res judicata* and so barred either because the claims have been adjudicated in this Court before or because Mr. Mott should have but failed to raise them in earlier court proceedings.

**5**  The parties sought and obtained directions from Mr. Justice Tysoe on April 12, 2006. His Lordship directed that PWC was at liberty to raise the issue of *res judicata* on this application in advance of determining whether to replace PWC as United's trustee.

**BACKGROUND**

**6**  For many years, United operated a used auto parts business in Surrey, B.C. near the Patullo Bridge. It managed at the same time to assemble about 150 acres of land, some of which it used in its auto parts business, and some it kept vacant for redevelopment. This activity all took place under the direction of Mr. Mott.

**7**  As far back as 1994, United was under pressure of foreclosure of the United Lands from the Royal Bank. In May of that year, to forestall foreclosure, United entered into a forbearance agreement whereby the bank agreed to forbear from foreclosing until May of 1997. The agreement was extended a number of times through to 1998.

**8**  Beginning in about June 1997, the PNE and United had discussions on and off about the sale to PNE of the PNE Lands.

**9**  In March 1998, United entered into another forbearance agreement with another charge holder on the United Lands, R.A. Aziz. By that agreement, United was required to put the United Lands on the market for sale and undertake an aggressive sales and marketing program. United entered into a one-year listing agreement with Colliers.

**10**  Meanwhile, in about January 1998, United had made an informal proposal to the secured creditors whereby United would sell $25 million worth of the United Lands by September 1998. In that time, however, there were no sales.

**11**  In September 1998, three years of taxes were unpaid on the United Lands, and United obtained financing through another charge holder, Century Services. With that, United owed the Royal Bank about $6 million, Century Services about $5 million, Aziz about $6 million, and there were also other charges over the United Lands.

**12**  The Royal Bank and Century commenced foreclosure proceedings in January 1999. They obtained orders nisi on February, 4 1999.

**13**  United resisted applications for conduct of sale by the mortgagees in early 1999. It entered into another forbearance agreement with Aziz. The agreement included a repayment plan that required United to achieve various sales targets or a refinancing of the property by July 1999. United failed to meet the targets and sold none of the properties. In about July 1999, United consented to an order granting joint conduct of sale of the United Lands to the Royal Bank, Century, and Aziz.

**14**  On August 16, 1999, Century and the Royal Bank obtained an appraisal from Burgess, Austin, Cawler & Associates valuing the United Lands at $44.4 million based on industrial-salvage zoning. The appraisal was updated on September 23, 1999, valuing the lands at $23 million to $25 million if sold en bloc and $30.5 million if sold in individual lots. Century and the Royal Bank then agreed to list the United Lands for $32 million en bloc. Accordingly, on October 12, 1999, they entered into a listing agreement putting the asking prices at $49.6 million in total based on selling the lots individually and $32 million on an en bloc basis.

**15**  On November 8, 1999, United commenced proceedings under the ***Companies' Creditors Arrangements Act***, [*R.S.C. 1985, c. C-36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB11-F5KY-B48X-00000-00&context=) (the "***CCAA***"). Ernst & Young was appointed as a monitor and was granted conduct of sale of the United Lands.

**16**  On February 23, 2000, in the CCAA proceeding, the court approved a sale of the United Lands to Cape Developments, Oxford Properties, and GE Capital for $30 million. That sale was subject to two conditions: first, that Cape could rezone the property, and second, that Cape could be satisfied of the environmental condition of the property. Cape never cleared its conditions, and although an extension was negotiated, Cape failed to increase the deposit in accordance with the extension agreement. In the result, that transaction collapsed.

**17**  Meanwhile, on April 27, 2000, CB Richard Ellis provided a report for Mr. Mott valuing part of the United Lands, consisting of lots 22 through 32 (the "Group Five Lands"), at $28,400,000 based on highway-commercial zoning. A letter from Mr. Ellis to Mr. Mott on May 23, 2000, stated that the total United Lands excluding the Group Five Lands were worth $750,000 to $800,000 per acre.

**18**  In May 2000, Ernst & Young issued its ninth monitor's report. It was negative about United's conduct and ability to organize. The report stated that the prospects for restructuring appeared to be significantly poorer than when the Cape offer had been accepted earlier in the year.

**19**  The monitor remained of the view that United's operations could be financially viable in due course under competent management. However, the monitor accused Mr. Mott of improperly dealing with funds generated from the sale of its "P.M.S.I." inventory, which should have been held strictly in trust. The report stated:

It is common ground that the management of United lacks the skills to achieve the restructuring without significant professional assistance. However, even that professional assistance is without effect if management is not prepared to accept and execute professional advice it received in a prompt and efficient manner.

The report also alleged that United had filed a false affidavit and had breached a court order not to give further security.

**20**  In June 2000, Mr. Justice Tysoe granted the Royal Bank and Century conduct of sale of the United Lands, and they entered into a further listing agreement with Colliers to list the lands en bloc for $32 million as well as on an individual lot basis. The CCAA proceedings were terminated the next month. United was declared bankrupt, and PWC was appointed as the trustee in bankruptcy. United appealed, but the appeal was dismissed on August 8, 2000. PWC was later replaced as the trustee for United Used Auto Parts (Storage Div.) Ltd., but remained in that position for the rest of the United companies.

**21**  By this time, the administrative charges on the United Lands had risen to approximately $850,000. The interest costs on the mortgages were running at about $300,000 per month. In August 2000, Mr. Justice Tysoe approved the sale of lot 1 of the United Lands for $2.4 million, and on September 1, 2000, he appointed PWC as the receiver of the assets and undertaking of United with conduct of sale of all but lots 1, 7, and the Group Five Lands. Conduct of sale of lot 1 and the Group Five Lands remained with the Royal Bank and Century. Lot 7 was the subject of a separate foreclosure proceeding and was sold on November 27, 2000, to a numbered company owned by Advance Lumber for $2,525,000.

**22**  On February 6, 2001, PWC, acting as the receiver, filed applications under the Royal Bank and Century foreclosure actions for an order for sale of the PNE Lands and the right to purchase lot 2 for $12,572,600. The purchaser was a numbered company controlled by the PNE. PWC also applied for an order that lot 21 be sold to a numbered company related to Ralph's Auto Supply for $1,250,000.

**23**  Mr. Ritchie Clark appeared as counsel for Mr. Mott and for United itself on the sale applications. Although he brought no counter-application on behalf of United, Mr. Clark objected to the sale on several grounds, including alleged failures by PWC to adequately inform the other parties as to who were the purchaser's backers, to provide information on the negotiation history, to properly market the property, and to obtain a price at fair market value. Mr. Clark applied for an adjournment, which was refused, and Mr. Justice Shaw approved the sales on February 9, 2001. Later that month, Mr. Justice Tysoe granted PWC conduct of sale of the Group Five Lands.

**24**  On March 9, 2001, Mr. Mott sought leave to appeal the orders for sale granted by Mr. Justice Shaw. The application was dismissed.

**25**  The original sale of the PNE Lands to the PNE failed to close because the PNE wished to also acquire lot 7, which had been sold to Advance Lumber in a separate foreclosure proceeding. However, on May 11, 2001, PWC brought another application based on a renewed agreement with the PNE. It was for an order that the PNE Lands and the right to purchase lot 2 be sold to the PNE for $12,572,600 and that lots 27 to 32 (the "Replacement Lands"), which formed part of the Group Five Lands, be sold to a company related to Advance Lumber for $2,146,000. On May 15, 2001, after a hearing May 11 and 14, 2001, Mr. Justice Thackray approved these sales.

**26**  Mr. Mott and his son, Howard Mott, appeared at the hearing before Mr. Justice Thackray without counsel and made submissions opposing the sale. They requested an order directing a trial on the issue of constructive expropriation, but made no formal application to support the order. Mr. Justice Thackray dismissed their request, saying that such an application was not technically before him. Mr. Justice Thackray found further that the Motts had failed to establish a foundation for their allegations of conspiracy and fraud.

**27**  Mr. Mott sought leave to appeal Mr. Justice Thackray's ruling, but his application was dismissed on May 18, 2001. A further application by Mr. Mott to vary the Court of Appeal's order of May 18, 2001, and to stay Mr. Justice Thackray's orders approving the sales was similarly dismissed by the Court of Appeal on May 20, 2001.

**28**  After completion of the sale of the PNE Lands, the court made further orders granting Aziz conduct of sale of the remainder of the Group Five Lands, being lots 22 to 26. In about August 2002, the court made a vesting order in the foreclosure actions, approving the sale of lot 24 to Ralph's Auto Supply for $1,130,000. On October 3, 2003, Mr. Justice Tysoe granted a vesting order approving the sale of the remaining lots 22, 23, 25, and 26 to R & R Trading Co. Ltd. for $2,644,800.

**THE FIRST MOTT ACTION**

**29**  On May 31, 2000, Mr. Mott, on behalf of himself and Moe-Villa Investments Ltd., a fourth mortgagee of the United Lands, commenced B.C. Supreme Court Action No. S013035 (the "First Mott Action") against the PNE, PWC, and Advance Lumber. Concurrently, he filed certificates of pending litigation against 24 lots within the United Lands. His claim was for damages for breach of trust, deceit, and conspiracy. He alleged that the court-approved sales were not made in good faith for valuable consideration and that the defendant purchasers were not *bona fide* purchasers for value.

**30**  The endorsement on the writ provided:

Moe-Villa Investments Ltd. claim a mortgage over the lands ... and claim its security interest in the land which is being compromised by the tortuous [*sic*] and deceitful conduct of the Defendants in this action and in Supreme Court of B.C. action numbers H99076 and H99085. Ian Mott claims damages and title of the lands is being wrongfully [*sic*] transferred away by errors of the court and the parties to the action participated and wrongfully dealt in ways to deprive the Plaintiffs of their interest in the lands as set out in the attached schedules ... These lands are being taken without proper compensation to the Plaintiffs. Fair market value was not paid by the purchasers presently on title ... The Plaintiffs claim against the Defendants, and each of them, for damages [*sic*] and loss resulting from, breach of trust, deceit, and conspiring to transfer to the Defendant purchasers P.N.E. ..., 617548 B.C. LTD., ADVANCE LUMBER LTD. and 606703 B.C. LTD. the aforesaid interests in parcels of land unlawfully for less than fair market value, and contrary to the *Bankruptcy and Insolvency Act, R.S.C.* and the *Company Act, R.S.B.C.* The Defendants conspired to depress the market value of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and interests in the lands owned by the Plaintiffs for less than true market value. The said purchases of lands were not made in good faith for valuable consideration and the Defendant purchasers are not bona fide purchasers for value.

**31**  PWC applied to dismiss that action as an abuse of process, and the application was heard before Madam Justice Allan on August 23, 2001. Madam Justice Allan, upon reading the materials and hearing argument, ruled that all the issues in the new action had either been raised or should have been raised in the previous sale approval proceeding before Mr. Justice Thackray, who had dismissed the allegations of conspiracy as groundless.

**32**  Included in her findings of fact and law were the following:

[para. 8] ... Mr. Mott's son made extensive submissions on that application, alleging serious improprieties by the Receiver and the P.N.E. Specifically, Mr. Mott alleged a conspiracy between the Receiver and the P.N.E., to have the P.N.E. obtain land at price advantageous to the P.N.E., and disadvantageous to Mr. Mott.

[para. 22] ... In essence, the plaintiffs seek the return of the lands, and damages to compensate them for the Receiver selling those lands to the P.N.E. for less than fair market value, and deceitfully.

[para. 25] ... the plaintiffs filed additional affidavits asserting that Colliers did not permit prospective purchasers of the lands to make offers because Colliers was reserving certain parcels for purchase by the P.N.E.

[para. 26] ... The plaintiffs suggest that numerous matters were not before Mr. Justice Thackray, and that with respect to some issues, he was confused and did not understand them.

[para. 31] ... Mr. Mott seeks to pursue the claim that the defendants acted wrongfully and deprived the plaintiffs of their lands without proper compensation. He alleges the lands were "wrongfully transferred away by errors of the courts."

[para. 33] Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed.

[para. 34] These issues have all been raised in previous proceedings and litigated. There are no new parties to the litigation. There is no "fresh evidence" that was not or could not have been discovered in previous litigation. The proposed evidence of Mr. Seilor and Mr. Lutor who were apparently unsuccessful in making offers to purchase portions of the lands does not raise a new issue.

[para. 35] Mr. Justice Thackray devoted 18 paragraphs of his careful and lengthy reasons for judgment to the alleged conspiracy alleged by Mr. Mott, and dismissed it as groundless.

[para. 37] The PNE has been judicially determined to be a bona fide purchase for value. Allegations against Advance Lumber co-operating with PNE and Colliers, the realtor acting as agent for PWC, were canvassed before Thackray J. and have no merit.

[para. 38] I conclude that the plaintiff's application is an abuse of process and should be dismissed pursuant to Rule 19(24)(d).

[para. 45] ... So, pursuant to Rule 19(24), there will be two orders of special costs.

**THE SECOND MOTT ACTION**

**33**  On June 13, 2001, Mr. Mott commenced another action, B.C. Supreme Court Action No. S013957 (the "Second Mott Action"), against the existing and additional defendants. He filed certificates of pending litigation against the Group Five Lands. A similar application was made to strike the action under Rule 19(24) as an abuse of process. It was heard on September 26, 2002, before Mr. Justice Davies, who found that the endorsement in the Second Mott Action was "virtually identical" to the endorsement on the First Mott Action. Mr. Justice Davies held that because the Second Mott Action was "in all material respects identical to an action which has already been struck by this court as an abuse of process, it must be dismissed on the basis of *res judicata*."

**THE PROPOSED STATEMENT OF CLAIM**

**34**  In the proposed action underlying the application before me, the claims against PWC are detailed in a draft statement of claim submitted on behalf of Mr. Mott. As a pleading it is overloaded with redundancies, evidence, and conjecture, but it also manifests a number of allegations, which may be excerpted as follows:

**PROPOSED STATEMENT OF CLAIM**

|  |  |  |
| --- | --- | --- |
| **Statement** | **Allegation:** |  |
| **of Claim** |  |  |
| **Para. No.** |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 4 - 5 |  | PWC accepted appointment as Trustee and failed to disclose to the court and United's creditors its conflict in dealing with the PNE sale when PWC was also the auditor for PNE. PWC should never have accepted an appointment as Receiver because of the conflict that existed between the interests of the secured creditors and unsecured creditors. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 6 - 7, 18 |  | PWC failed to exercise its duty to take reasonable care, supervision and control of the debtor's property, specifically by failing to preserve the values of the property and enhance those values where it would have been prudent and feasible, and by failing to market the properties in a manner which would achieve the best possible price. PWC failed to appear at a public hearing in Surrey, July 31, 2000, to oppose a down zoning to remove salvage use from land zoned "Industrial Salvage" ("I.S."). PWC could have opposed the down zoning successfully on the basis that the down zoning constituted contravention of an agreement between the United and the City of Surrey in 1985. PWC knew or ought to have known that the proposed down zoning was part of a plan by Surrey to upgrade the use of the area where the United Lands were situate for commercial use, and it knew that commercially zoned lands were much more valuable than lands zoned for salvage or lands zoned for industrial use. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 8 - 9 |  | PWC failed to take reasonable steps to enhance the value of the subject lands before placing them on the market for sale by applying for a rezoning of the subject lands for commercial use or by not requesting Surrey counsel on July 31, 2000 to postpone the final passage of the down zoning to give it an opportunity to prepare rezoning applications. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 10, 18 |  | PWC locked the doors of the twelve business operations of United and proceeded to liquidate the assets without any prior notice to United, knowing that closing the businesses would put into jeopardy the non- conforming use of the United Lands and the premium value associated with that use, and knowing that United was revitalizing its business and the CCAA monitor's forecast income from operations would amount to approximately $866,000. PWC caused United to lose profits from the time of business closure to the present and in the future. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 11 |  | PWC listed the properties of United for sale without first taking advantage of the material change in Surrey's planning objectives to upgrade the area for commercial use and when it set an en bloc listing price of $32 million dollars which was an unconscionably low price having regard to the fair market value of the properties if sold as individual lots. |  |
| 12 |  | PWC failed to list the properties on MLS in a timely fashion and discouraged offers from potential purchasers who were interested in acquiring individual lots, with a view to accommodating the wishes of PWC's client, the PNE, which needed a large assembly of land to stay in place while it was in the process of deciding on its own site relocation. PWC failed to obtain a fair and reasonable return for the sale of the United Lands over reasonable period of time on a program that would give the properties as broad exposure as possible and encourage sales of individual lots but at the same time allowing consideration of en bloc offers that included premiums for the value of large blocks of land. |  |
| 13 |  | PWC failed to secure access as to the individual lots or to commence proceedings to enforce contractual rights claiming damages,, with the result that the lots bordering on the perimeter road were sold for substantially less than fair market value. |  |
| 17 |  | PWC sold the PNE Lands to the PNE for $12,572,600 based on a price of $185,000 per acre, which was substantially less than fair market value, knowing at the time that the PNE had secured the necessary commitment from the City of Surrey to rezone the subject lands for commercial purposes, and that if the lands were rezoned, their value would more than triple the price that was agreed upon. PWC further failed to take into account the following: |  |

1. the earlier expressions by the PNE of its willingness to pay full market value;
2. the scarcity of large blocks of land that would suit the needs of the PNE, and the fact that the PNE Lands were the PNE's first choice of all potential sites it had reviewed over a number of years;
3. the fact that the PNE was under a time constraint to acquire lands for a new site because of the expiry of an existing lease;
4. the fact that the Province of British Columbia, which owned the PNE, had the financial ability to pay not only full market value but a premium as well.

|  |  |  |  |
| --- | --- | --- | --- |
| 20 |  | PWC entered into a tri-partite agreement with PNE and Advance Lumber whereby PWC sold six lots (the "Replacement Lands") from the Group Five area to Advance Lumber, and Advance sold lot 7 of the United Lands to the PNE, and failed to advise the court of the following: |  |

1. its conflict of interest in dealing with the PNE, an important client of PWC;
2. information regarding the commitment that Surrey had made to rezone the lands to permit commercial use, including a casino;
3. the sale price of Lot 7, which would have provided the court with a good indicator of the value of the PNE Lands;
4. information about PWC's failure to take appropriate steps to preserve and enhance property values and to market the properties in a manner to achieve the best possible price;
5. information as to its complete failure to drive a hard bargain with the PNE.

|  |  |  |  |
| --- | --- | --- | --- |
| 21 |  | PWC also breached its fiduciary duty by: |  |

1. misinforming the court of the proper status for the zoning of the Replacement Lands and misinforming the court that salvage use on the subject lands would not likely be permitted by Surrey when PWC knew the opposite to be true;
2. discouraging the court from placing any value on an offer for one of the lots in the Replacement Lands which reflected a premium value based on the intended salvage use;
3. misinforming the court that United's inventory had been sold off;
4. misinforming the court that the sale price for the Replacement Lands was approximately $10,000 below market value when in fact a fair price for the Replacement Lands may well had been in excess of $2 million above the actual sale price;
5. misinforming the court that the Group Five Lands had been actively marketed for a long time before the agreement and purchase of sale to Advance was entered into.

|  |  |  |  |
| --- | --- | --- | --- |
| 22 |  | PWC failed to make the PNE accountable for the difference between the fair market value of the Replacement Lands and the actual sale price of the same. |  |
| 23 |  | PWC failed to obtain the best possible price for the remaining lots by setting a low benchmark in the sale of the Replacement Lands, in causing those lots bordered on the perimeter road to lack access, and failing to secure commercial zoning or to commence salvage operations to preserve the nonconforming salvage premium. |  |

**THE DOCTRINE OF *RES JUDICATA***

**35**  In British Columbia, applications to have actions dismissed on the basis of *res judicata* are brought under Rule 19(24), which enables the court to dismiss an action if it is "unnecessary, scandalous, frivolous, or vexatious", or is "otherwise an abuse of the process of the court."

**36**  The doctrine of *res judicata* and the related rules against abuse of process and collateral attack are designed to ensure that once a cause of action or the issues within it have been finally determined by the courts, they cannot be brought forward again. The goal is to bring litigation between two parties to a definitive end and to prevent one party from pursuing the other in the courts more than once over the same cause or the same issues: ***Fenerty v. The City of Halifax*** [*(1920), 53 N.S.R. 457*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-FC1F-M1BB-00000-00&context=), [*50 D.L.R. 435*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-FC1F-M1BB-00000-00&context=) (S.C.). Other policy reasons underlying the doctrine are to prohibit duplicative litigation and avoid potentially inconsistent results, undue costs, and inconclusive proceedings: ***Danyluk v. Ainsworth Technologies Inc.***, [*[2001] 2 S.C.R. 460*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48G-00000-00&context=), [*2001 SCC 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48G-00000-00&context=).

**37**  In ***Angle v. Minister of National Revenue***, [*[1975] 2 S.C.R. 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0CD-00000-00&context=), [*47 D.L.R. (3d) 544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0CD-00000-00&context=) at p. 555, Dickson J. explained the operation of the doctrine of *res judicata* and its two main branches: cause of action estoppel and issue estoppel. He wrote:

In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [ [*[1964] P. 181*](https://iclr.co.uk/pubrefLookup/redirectTo?ref=1964+P.+181) .], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537.], at p. 561:



I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

1. **Cause of Action Estoppel**

**38**  Cause of action estoppel applies to bar proceedings that allege the same cause of action between the same parties if that cause has already been determined by the courts. However, despite its name, it is not so strictly limited. Cause of action estoppel also applies to bar subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even though the second litigation may be based on a different legal description or conception of the cause: ***Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.*** [*(1980), 19 B.C.L.R. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F361-M02B-00000-00&context=) at pp. 64-65, [*109 D.L.R. (3d) 729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F361-M02B-00000-00&context=) (C.A.), cited with approval in ***Chapman v. Canada*** [*(2003) 21 B.C.L.R. (4th) 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TH-00000-00&context=), [*2003 BCCA 665*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TH-00000-00&context=) at para. 17.

**39**  This broader definition of cause of action estoppel recognizes that parties to an action have a duty to bring their whole case to the court's attention and not to reserve some aspect of the matter against the possibility of a decision in the opponent's favour as a means of preserving a way to come at the opponent again. As Wigram V.C. explained in ***Henderson v. Henderson*** (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319:

In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from ***negligence***, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties exercising reasonable diligence, might have brought forward at the time.

**40**  This description of the doctrine was quoted with approval by our Court of Appeal in ***Lehndorff Management****, supra,* where Carrothers J.A. gave the following further explanation of the doctrine's scope:

The maxim *res judicata* does not apply to distinct causes of action (*Hall v. Hall and Hall's Feed & Grain Ltd.* [*(1958), 15 D.L.R. (2d) 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93B1-F4GK-M3X0-00000-00&context=) (Alta. C.A.)), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties (*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd*. [*(1972), 27 D.L.R. (3d) 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-6275-00000-00&context=) (B.C.C.A.)). It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (*Winter v. Dewar*, [*41 B.C.R. 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F4GK-M0H6-00000-00&context=), [*[1929] 2 W.W.R. 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F4GK-M0H6-00000-00&context=), [*[1929] 4 D.L.R. 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F4GK-M0H6-00000-00&context=) (C.A.)).

**41**  Where a party seeks to pursue a second action against the same foe, the court must be satisfied that the new cause of action alleged is truly separate and distinct from the old, and not merely a new portrayal of the same subject matter, such as tort rather than contract. Litigants may not simply characterize the facts of the first action in a different way to avoid the application of *res judicata.*

**42**  PWC cites ***M.R.S. Trust Co. v. 374961 B.C. Ltd.*** [*(1997), 31 B.C.L.R. (3d) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S2NK-00000-00&context=), [*[1997] B.C.J. No. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S2NK-00000-00&context=) (S.C.), for its similarities to the case at bar. M.R.S. brought foreclosure proceedings on a mortgage in default against Giovanni Zen, a covenantor under the mortgage. Zen was represented at the hearing for an order nisi and conduct of sale of the property. The court ordered personal judgment against Zen at that time.

**43**  Zen subsequently commenced an action claiming breach of contract, breach of trust, and breach of a duty of care arising from M.R.S.'s conduct during the foreclosure proceedings. Zen claimed that following the hearing, he had ceased to be a party to the foreclosure proceedings and was unable to protect his interest in seeing that the highest price possible was obtained for the property. M.R.S., in turn, sought a declaration that Zen's action was estopped by the doctrine of *res judicata*.

**44**  The court held that Zen did not cease to be a party to the foreclosure proceedings. As a party with a vital interest at stake, he had standing to seek the court's assistance in obtaining the maximum sale price. Because the same parties were involved, the doctrine of *res judicata* could apply. The facts upon which Zen based his claims were all known before the order approving the sale was granted. Additionally, the issue that Zen sought to raise, that is, M.R.S.'s alleged failure to ensure the maximum possible price, was before the court at the earlier hearing. The court found that secondary issues relating to the sale price, such as waste, vandalism, and security issues, were relevant to the issues to be decided in the foreclosure and should have been raised at that time. The court stated at para. 37:

To Zen's contention that his claim is in tort and is therefore a distinct cause of action from the issues on the foreclosure the short answer is that the subject matter, the sale of the property, and the duties of M.R.S. (if such they were) were all matters within the competence and purview of the Court in the foreclosure. Recasting these issues in positive terms as a "duty" on the part of M.R.S. does not create a fundamentally different cause which could be separately litigated.

1. **Issue Estoppel**

**45**  The second branch of the doctrine of *res judicata* prevents litigants from attempting to re-litigate the same point or issue against the same party even though the overall cause of action now being pursued may be different. Where a material fact or issue in a proceeding has already been determined by a court of competent jurisdiction, that fact or issue may not be attacked or thrown into dispute in subsequent proceedings among the same parties: ***Danyluk****, supra,* at para. 54.

**46**  In ***Danyluk*** and ***Angle***, *supra*, and the Supreme Court of Canada adopted the three-part test for issue estoppel first framed by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935:

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel was final; and
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

**47**  Issue estoppel applies to any issue of fact, law, and mixed fact and law that is necessarily bound up with the determination of that issue in a prior proceeding: ***Danyluk***, *supra,* at para. 54. However, it acts to bar further proceedings on such issues only in circumstances where it is clear from the facts that the question has already been decided: ***R. v. Van Rassel***, [*[1990] 1 S.C.R. 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-653B-00000-00&context=), [*53 C.C.C. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-653B-00000-00&context=) at para. 32.

**ABUSE OF PROCESS**

**48**  As Madam Justice Allan did in the First Mott Action, the court may, in the alternative to applying the doctrine of *res judicata*, apply the doctrine of abuse of process, which was recently restated by the Supreme Court of Canada in ***Toronto (City) v. Canadian Union of Public Employees***, [*[2003] 3 S.C.R. 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=), [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=) at para. 35:

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [*[1994] 1 S.C.R. 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CS-00000-00&context=), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [*[1989] 1 S.C.R. 1659*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-650V-00000-00&context=), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [*[1990] 3 S.C.R. 979*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601D-00000-00&context=), at p. 1007:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

**49**  The doctrine of abuse of process is more flexible than *res judicata* and is typically invoked where the requirements of issue estoppel are not strictly met, yet it is apparent that the applicant is attempting to re-litigate a matter or to otherwise undermine the consistency and finality of judicial decision-making.

**COLLATERAL ATTACK**

**50**  Another closely related doctrine to that of *res judicata* or abuse of process is the rule against collateral attack on final judgments. In ***R v. Wilson***, [*[1983] 2 S.C.R. 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M29X-00000-00&context=), [*4 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M29X-00000-00&context=), the Supreme Court of Canada stated the rule as follows:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

**51**  In ***Roeder v. Lang Michener Lawrence & Shaw***, [*2005 BCSC 1784*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S30F-00000-00&context=), [*[2005] B.C.J. No. 2830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S30F-00000-00&context=) at para. 23, Rogers J. stated:

A proceeding is a collateral attack when it asserts facts inconsistent with a previous factual determination by a court that had jurisdiction to make it, or when the proceeding seeks relief that is inconsistent with a previous disposition by a similarly competent court. To be a collateral attack it is not necessary that the proceeding bluntly assert that the previous order should be set aside.

**52**  Thus, if the present proceedings are found to be a collateral attack on the orders of Justices Shaw, Tysoe, Thackray, Allan, or Davies, or on any of the orders of the Court of Appeal refusing Mr. Mott leave to appeal, the proposed action may be struck as an abuse of the court's process.

**DISCRETION FOR SPECIAL CIRCUMSTANCES**

**53**  The application of an estoppel to bar future litigation is not automatic, nor is it guaranteed. As Finch J.A. (as he then was) explained in ***British Columbia (Minister of Forests) v. Bugbusters Pest Management*** [*(1998), 50 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3XT-00000-00&context=), [*159 D.L.R. (4th) 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3XT-00000-00&context=) (C.A.) at para. 32:

It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of judicial discretion to achieve fairness according to the circumstances of each case.

**54**  The same principle applies to cause of action estoppel and the doctrines of *res judicata,* abuse of process, and collateral attack in general. A court must retain a residual discretion to refuse to apply any form of estoppel when do to so would be contrary to the requirements of justice. As the Supreme Court of Canada explained in ***Danyluk***, *supra,* at para. 33: "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."

**POSITION OF UNITED**

**55**  United argues that the breaches of fiduciary duty alleged against PWC have not been raised before now and so constitute a new cause or causes of action that must be brought before the court for resolution.

**56**  According to United, the only issue before Mr. Justice Thackray during the applications for approval of sales of the United Lands was whether or not a fair price had been secured in all of the circumstances. It says that the court was not asked to consider what duty of care the receiver had with respect to preserving the goodwill of the business and the property, nor was the court asked to consider the nature of the duty of the receiver to achieve the best possible price, a duty that United says was owed to all interested parties, including the bankrupt and the shareholders of the bankrupt. The court was not called upon to make a ruling whether the receiver had breached its fiduciary duty to preserve the property and to achieve the highest price for the property. Therefore, a person appearing at the applications for approval could not possibly succeed on a request for a trial so that such allegations could be judicially determined, and neither of the parties could have reasonably expected that that the outcome of the sale approval would bar a future action for breach of fiduciary duty. United relies on the comments of Finch J.A. (as he then was) in ***Bugbusters***, *supra*, to argue that a reasonable expectation of that kind is required before a party can be estopped from pursuing further action.

**57**  Referring to ***Bennett on Receiverships***, 2nd ed, (Toronto: Carswell, 1999) at p. 182-83 and p. 247, United says that the courts will generally follow the recommendation of a receiver and leave it to the receiver to assess offers to purchase a debtor's assets, accepting that the price put forward by the receiver is the best possible price obtainable. It is uncertain whether United means to imply that the court did not apply itself to the independent duty that it has to ensure a fair price during the sale approval proceedings. Certainly the implication seems to be that the court did not seriously consider the issues related to PWC's wrongful conduct, which Mr. Mott raised during the sale approval hearings.

**58**  United contends that due to the summary nature of the proceedings, which does not permit oral or documentary discoveries or interrogatories, Mr. Justice Thackray was not in a position to judge the sufficiency of the evidence relating to these allegations of wrongdoing. It is on this basis that United distinguishes the case of ***Toronto Dominion Bank v. Preston Springs Gardens Inc.***, [*[2006] O.J. No. 1834*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JJYN-B38M-00000-00&context=) (Ont. Sup. Ct. J.), in which *res judicata* was found to apply to claims of breach of duty and ***negligence*** against a receiver that had been the subject of detailed evidence and full argument in an earlier proceeding.

**59**  United argues that it never had the opportunity to bring forward its claims of breach of fiduciary duty. Even if Mr. Justice Thackray had directed a trial as Mr. Mott had requested, the issue of breach of fiduciary duty could not have been tried at that time as it had no relationship whatever to constructive expropriation, which was the basis advanced for the deceit and conspiracy claims.

**60**  Moreover, United says that although Mr. Justice Thackray was entitled to refuse to order a trial of the issue, the reasons that he provided with respect to allegations of conspiracy and fraud had no judicial weight because he had already determined that the issue was not properly before him. United says that Madam Justice Allan was therefore wrong in her view that Mr. Justice Thackray had considered all of the issues, that it was wrong for Mr. Justice Davies to concur, and that it would be wrong for this court to make a similar finding with respect to the allegations and issues in the proposed statement of claim.

**61**  United argues that both Madam Justice Allan and Mr. Justice Davies should have recognized that the evidence required to succeed in the claim of constructive expropriation would not be sufficient to support a claim of conspiracy, which necessitated a new action against PWC. United claims that this was confirmed by Mr. Justice Thackray when he expressed his view that the matter was not before him. According to United, a tort of conspiracy requires collusion and an agreement of the parties acting together to injure an individual. That is distinct from what is required to prove a constructive expropriation, on the grounds advanced before Mr. Justice Thackray, and it is different again from what is required to prove a breach of fiduciary duty, on the grounds alleged in this action.

**62**  United cites ***Re Caswan Environmental Services Inc.***, [*(2001), 287 A.R. 11*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X4KX-00000-00&context=), [*2001 ABQB 240*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X4KX-00000-00&context=) at p. 197, as support for its contention that the courts have recognized the impracticality, for the sake of justice, of forcing certain actions to be tried together:

The principle of avoiding litigation by installment [*sic*] must be tempered by practical considerations. The plaintiff's original application for declaratory relief would have bogged down the judicial process if it were coupled with an action for resultant damages. Common sense dictates that a determination as to the validity of the competing security interests should have been made before a damage claim was advanced. ... It is unlikely that any court would have granted leave to sue an interim receiver for damages until a declaration as to the entitlement of the goods was made. In practical terms there was no way in which a damage claim could have proceeded contemporaneously with the declaratory relief sought.

**63**  United also says that Madam Justice Allan should have realized that she could dispose of the First Mott Action on the basis of lack of jurisdiction, and had she done so, *res judicata* would not arise to bar the proposed claims. According to United, because it was bankrupt, the ***BIA*** dictates what proceedings could be brought to set aside a sale, and leave was required, but not obtained, to begin the First Mott Action. As the ***BIA*** provides a complete code on the subject, United says Madam Justice Allan could, and should, have concluded that there was no jurisdiction to hear the action. The same argument appears to be made against the decision of Mr. Justice Davies in the Second Mott Action.

**64**  On the question of mutuality of parties, United argues that the proposed action involves different parties in that Mr. Abakhan, as the new trustee for United, would bring the action against PWC itself for acts and omissions committed when acting as both receiver and trustee. United says that the previous actions involved PWC only as a representative of United. Moreover, on the application for a trial of the issue of constructive expropriation, Mr. Mott represented himself personally, and United was not represented at the hearings, thus according to United, the parties to the various proceedings are not the same and no estoppel may bar the proposed action.

**65**  Finally, United asserts that the proposed action is based on new evidence that could not have been discovered with reasonable diligence at or before the earlier proceedings. Alternatively, United argues that this new evidence constitutes a "special circumstance" sufficient to permit the court to refuse to apply an estoppel should grounds for one be made out. United describes the new evidence as follows:

1. information that prior to entering into the agreement of purchase and sale with the PNE, Surrey had made a commitment to the Province to re-zone the lands to permit commercial use of the PNE Lands including a casino;
2. information about the sale price of lot 7 from Advance Lumber to the PNE, which would have provided the court with a good indicator of value;
3. information showing the lack of any offers and counter-offers leading up to the agreement of purchase and sale with respect to the PNE which is evidence from which an inference can be drawn that PWC failed in its duty to aggressively seek the best possible price; and
4. evidence which demonstrates the ease with which PWC was able to commence a salvage parts operation on lot 24 to maintain salvage zoning for that lot and evience from which the court can infer the court was misled by PWC as to the non-salvage use of the Replacement Lands.

**POSITION OF PWC**

**66**  PWC says that the complaints in the proposed statement of claim are essentially the same as those that were raised in the sale approval proceedings and also in both the First and Second Mott Actions. The Mott Actions were not confined to allegations of conspiracy. They included claims of breach of trust and deceit. PWC prepared a list of passages from the affidavits and submissions filed in the sale approval application before Mr. Justice Thackray and in the First Mott Action before Madam Justice Allan, as well as quotations from the learned justices' judgments, which demonstrate that the issues now raised were all before the court in those earlier proceedings. These passages are as follows:

1. "the receiver ... is seemingly beholden to making a transaction with the P.N.E. to the detriment of the interest of the United Group creditors." (May 10, 2001, affidavit of Ian Mott, para. 49)
2. "the Trustee seems only to be interested in serving only the interests of the secured creditors, the Royal Bank and Century Services and includes Aziz in this group. (May 10, 2001, affidavit of Ian Mott, para. 56; May 14, 2001, submissions of H. Mott, page 26, lines 2-5)
3. "The Trustee's actions, taken individually and as a whole unreasonably favour the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favouring the interests of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors." (May 10, 2001, affidavit of Ian Mott, para. 61; May 14, 2001, submissions of H. Mott, page 27, lines 32-39)
4. "... United's interests and those of the secured and unsecured creditors who will not be paid by the sale to the P.N.E. are not being properly served by the trustee who ought to be acting in good faith and without any appearance of conflict. The fact is that the trustee PricewaterhouseCoopers (P.W.C.) is both a trustee of the United Group of Companies in bankruptcy as well as the appointed auditors of the P.N.E." (May 10, 2001, affidavit of Ian Mott, para. 64; May 14, 2001, submissions of H. Mott, page 28, lines 29-37)
5. "... we don't think the trustee is acting on behalf of the best interests of all the creditors. We feel he's acting only in the interest of the major secured creditors." (May 14, 2001, submissions of H. Mott, page 16, lines 19-23)
6. "... it's not clear to me that the trustee is representing the unsecured creditors at all." (May 14, 2001, submissions of H. Mott, page 49, lines 25-27)
7. "... the trustee and receiver, for any bankruptcy, never mind one as big as this, and as complex as this, should never be in conflict. They should be totally independent parties ..." (May 14, 2001, submissions of I. Mott, page 49, lines 36-40)
8. "the Motts questioned the propriety of the PricewaterhouseCoopers being both the receiver and the trustee." (May 15, 2001, reasons for judgment of Thackray J., para. 7)
9. "[Mr. Mott's] submission was grounded upon assertions of improprieties. The Court on several occasions informed Mr. Mott that to establish the improprieties, that went so far as to allege fraud, it was necessary for him to produce evidence." (May 15, 2001, reasons for judgment of Thackray J., para. 50)
10. "Mr. Mott then deposed as to the inappropriate actions' of the trustee and concluded that the trustee was intent on raising quick liquid cash to finance his receivership and sought the easy route of disposing of the inventory and chattels of the businesses for a value well below its actual market value.' He added:
11. The Trustee's actions, taken individually and as a whole unreasonably favour the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favouring the interest of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors.

I asked Mr. Mott if I was correct in reading this to mean that Mr. Mott was alleging fraud on the part of the trustee. He said that I was." (May 15, 2001, reasons for judgment of Thackray J., paras. 65 and 66)

1. "... in recommending this sale at what we now realize was a grossly inadequate sum, the Receiver had a duty to the Court to disclose its own conflict of interest. Unknown to Mr. Clark and his client and not disclosed to the Court was the fact that the Receiver was and remains this purchaser's auditors." (May 2001, Outline of I. Mott, page 6, par. 2(aa))
2. "The Plaintiffs claim against the Defendants, and each of them, for damages and loss resulting from breach of trust, deceit, and conspiring to transfer to the Defendant purchasers ... the aforesaid interests in parcels of land unlawfully for less than fair market value ... The Defendants conspired to depress the maket [*sic*] of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and intersts [*sic*] in the lands owned by the Plaintiffs for less than true market value." (Endorsement to Amended Writ of Summons dated August 15, 2001, in the First Mott Action)
3. "The relief which the Plaintiffs seek in the present action is the return of the subject lands to the United Group ... and for additional damages, including the loss of profits suffered by the Plaintiffs which resulted from wrongful interference with contractual arrangements, misrepresentations, deceit, breach of trust and other illegal actions on the part of the Defendants ..." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 6)
4. "... the PNE, Colliers International, the Receiver/Trustee (PricewaterhouseCoopers Inc.), the City of Surrey, the Province of B.C., Golders Associates, and others have worked in concert to frustrate and prevent fair value marketing of the subject lands by delaying the public listing of the individual lots until December 200, by discouraging prospective purchasers from making offers, and by refusing to process offers on the subject lands from prospective purchasers." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 14)
5. "[Mr. Mott is] claiming damages, once the land's returned, for the improper conduct. He's alleging for the first time breach of trust, deceit. The word "conspiring" or "conspiracy" has come up in his mind and from his mouth before without him even knowing the meaning of that. The - what he's saying is that, according to his affidavit evidence, is that the Royal Bank, Century Services, the receiver, Advance Lumber, the Aziz group and the PNE in particular, have worked together to transfer the lands to the PNE, and of course to Advance in this case, for amounts that clearly are not anywhere near the fair market value, and they've done so deceitfully, and that is dishonestly." (August 22, 2001, submissions of P. Formby, counsel for Mr. Mott, in the First Mott Action, page 51, lines 15-29)
6. "And that history, I'd like to be very clear, I don't think it's ever been properly presented before the court. And - and to do it properly, It would take a trial, and the simply cases with respect to what there - what happened thereafter with the - I would say the powerful players as opposed to those that didn't have any power with respect to the conduct of the receiver in an application, what will be alleged obviously, you know, is that there's grave misgivings with respect to the duty, the fiduciary duty of the receiver being breached, where there's an application I believe where the Royal Bank to have this particular receiver appointed, PricewaterhouseCoopers. And this is a court appointed receiver that should know of its particular duty with respect to all interested parties, not just to secured creditors." (August 22, 2001, submissions of P. Formby in the First Mott Action, page 66, lines 32-45)
7. "Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed." (August 23, 2001, reasons for judgment of Allan J., para. 33)
8. "[PWC] had a duty to pursue ... the contract that [the United Group] had with the City of Surrey." (September 26, 2002, submissions of I. Mott in the Second Mott Action, pages 32-33)

**67**  PWC submits that Mr. Mott should not be permitted to continue to litigate these same claims simply by recasting his grievance as a breach of fiduciary duty owed by PWC, or even by introducing some new fact. PWC argues that this amounts to litigating by instalment, and the court ought not to permit it or force PWC to bear the hardship resulting from having to defend further litigation: ***Melcor Developments Ltd. v. Edmonton (City)*** [*(1982), 37 A.R. 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92X1-FFFC-B2J2-00000-00&context=), [*136 D.L.R. (3d) 695*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92X1-FFFC-B2J2-00000-00&context=) (Q.B.)

**68**  In response to Mr. Mott's argument before Madam Justice Allan that some of the allegations were never "properly framed in any type of claim other than in opposition to the sale of the lands" and so no cause of action was ever advanced against PWC in the prior proceedings, PWC argues that any of the issues now raised are issues that either were raised or should have been raised in any event because they formed part of the same subject matter of the earlier litigation: See ***Henderson*** and ***Chapman,*** *supra.*

**69**  PWC contends that each of the allegations of misconduct on the part of PWC as trustee and receiver were raised in affidavits and argument during the sale approval proceeding and that these allegations were fundamental to Mr. Justice Thackray's decision in that he could not have approved the sale if he found that any of these allegations had merit. As the sale was approved, the issues must be deemed to have been finally determined: ***Toronto Dominion Bank***, *supra*, citing ***Bank of America Canada v. Willann Investments Ltd.*** [*(1993), 23 C.B.R. (3d) 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-JTNR-M2WW-00000-00&context=), [*[1993] O.J. No. 3039*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-JTNR-M2WW-00000-00&context=) (Gen. Div.).

**70**  On the issue of mutuality of the parties, PWC says, firstly, that mutuality is not lost by replacing PWC with Mr. Abakhan as the trustee in bankruptcy for United. Regardless of what individual or company is acting as trustee, the trustee was a party to the foreclosure actions and certainly had the opportunity to appear on the relevant hearings. Whether or not it chose to do so is, according to PWC, irrelevant; a party is bound by a decision in which they could have participated: ***Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*** [*(1988), 22 B.C.L.R. (2d) 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22C1-00000-00&context=), [*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=) at 438 (S.C.).

**71**  PWC also argues that there is no loss of privity because of the fact that Mr. Mott purported to appear on his own behalf as a creditor and shareholder of United in some of the proceedings and on behalf of United itself in others. PWC argued that according to the judgment of Mr. Justice Tysoe in ***Lang Michener LLP v. American Bullion Minerals Ltd.***, [*2006 BCSC 504*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1MS-00000-00&context=), [*[2006] B.C.J. No. 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1MS-00000-00&context=), there is a residual power in the directors of a company to oppose the enforcement of security on behalf of a company, and this is clearly what Mr. Mott was doing. In doing so, Mr. Mott raised any and all arguments that could have been made on behalf of the trustee and the estates of the bankrupt companies.

**72**  Accordingly, PWC argues that the parties to the proposed action are the same as were parties to the previous proceedings, and mutuality is not lost. PWC relies on Sopinka, Lederman, and Bryant, ***The Law of Evidence in Canada***, 2nd ed. (Toronto: Butterworths, 1999) at p.1088, where the learned editors note that: "it is impossible to be categorical about the degree of interest which will create privity." Mutuality will arise where 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 party."

**73**  As regards any special circumstances, PWC cautions that the courts have treated the discretion to refuse to apply *res judicata* as a very limited one, and "the fact that harsh results follow the application of the doctrine has not deterred its application by the courts": ***General Motors of Canada Ltd. v. Naken,*** [*[1983] 1 S.C.R. 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M273-00000-00&context=) at p. 101, [*144 D.L.R. (3d) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M273-00000-00&context=); ***Manolescu v. Manolescu***, [*(2003) 47 C.B.R. (4th) 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22J7-00000-00&context=), [*2003 BCSC 1094*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22J7-00000-00&context=) at para. 10.

**ANALYSIS**

**74**  For all the details provided in the proposed Statement of Claim as to the wrongdoing of PWC, I agree with the submission of PWC that, essentially, the claims sought to be advanced boil down to the following:

1. PWC as receiver failed to obtain the best possible price for the sale of the United Lands, which were worth more than the amount for which they were sold;
2. the PNE was the audit client of PWC, and, as a result of that relationship, PWC was in a conflict of interest and participated in a conspiracy with the PNE and the City of Surrey (among others) to sell the United Lands to the PNE at less than fair market value;
3. PWC failed to preserve the industrial-salvage zoning of some of the lots in the United Lands, resulting in a reduction of the value of those lots;
4. PWC failed to apply for rezoning of some of the United Lands to highway-commercial, such that the potential value of the United Lands was not realized; and
5. PWC failed to market the United Lands properly.

**75**  In my view, the cause of action proposed in the draft statement of claim, and the issues sought to be advanced, arise from the same relationship and the same subject matter as was adjudicated in the proceedings before Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. The facts and issues now raised were squarely before the court in the sale approval proceeding and in both Mott Actions.

**76**  Mr. Mott admits that he had the opportunity to be heard, and was heard, as an interested party during the sale approval applications before Mr. Justice Thackray. Mr. Mott argued strenuously that the sale ought not to be approved. In his submissions and affidavit evidence, he put before the court each of the allegations regarding PWC's conduct that are set out above as being the issues to be determined in the proposed action, including specifically the alleged conflict of interest, conspiracy to sell at less than fair market value, and each failure to perform those actions that would have resulted in obtaining the best possible price for the United Lands. I cannot accede to United's contention that it had no opportunity to make these claims.

**77**  As Madam Justice Allan noted, Mr. Justice Thackray issued lengthy and carefully considered reasons for his decision to approve the sale. Leave to appeal was sought and dismissed. These same arguments were again brought before Madam Justice Allan and then again before Mr. Justice Davies. Both found that the issues had been litigated and determined such that it would be an abuse of the court's process to review them once again. No appeal was taken of either of these decisions.

**78**  Mr. Mott now advances a few items of evidence that apparently did not come into his hands until after the two Mott Actions were concluded. I find that some of this evidence was discoverable with reasonable diligence prior to the sale approval proceedings and certainly prior to the Mott Actions. The rest I do not weigh as critical. Although it may not have been discoverable prior to the sale approval proceeding, it does not bring to light any new issue or cause of action formerly unknown or unpursued by Mr. Mott, nor is it likely that this evidence would have substantially altered the outcome of the previous proceedings.

**79**  While it is correct to say that breach of fiduciary duty, constructive expropriation, and conspiracy are each distinguishable as causes of action, the record shows that the evidence and argument offered to oppose the sale in the hearing before Mr. Justice Thackray included all of the allegations that Mr. Mott would now seek to prove in the case at bar. The same is true for both the Mott Actions, in which the claim alleged was not conspiracy alone but also breach of trust and deceit, which require much the same evidence as against PWC as the breaches of fiduciary duty now alleged. Any minor differences in the facts and issues raised in the proposed action belonged, in every case, to the subject matter of the earlier litigation. Mr. Mott has simply changed the legal description of his claim to facilitate re-litigation of the same issues.

**80**  I also accept PWC's argument that the requirements of issue estoppel are met for each issue now raised in the proposed statement of claim. There is sufficient connection to create privity. The appointment of a new trustee will not undermine the mutuality of parties required for the application of issue estoppel to the issues in the proposed action. The parties involved in all the previous proceedings include PWC, United, and Mr. Mott as either named parties or interested parties. The fact that Mr. Mott appeared variously in his capacity as shareholder, creditor, or director of United does not, in my view, seriously affect the mutuality requirement in this case. As Mr. Mott concedes that the previous decisions were final, and as I have found that the same issues were litigated, the proposed action is barred in its entirety by the doctrine of issue estoppel.

**81**  However, even if the requirements of issue estoppel were not strictly met, I would dismiss the proposed action as an abuse of process and impermissible collateral attack on the judgments of Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. Many of United's arguments are directed at challenging various aspects of Madam Justice Allan and Mr. Justice Davies' reasons for judgment. Yet Mr. Mott does not appear to have attempted an appeal of either decision. He has chosen instead to recast his claim yet again to avoid the outcome of those judgments.

**82**  Mr. Mott raises an interesting argument that the summary nature of an application for sale ought to be considered a "special circumstance" leading the court to refuse to apply an estoppel that would bar a trial of an action where the evidence may be much more thoroughly tested. The record shows, however, that this same argument was presented to Mr. Justice Thackray and Madam Justice Allan and was not accepted by either of them. The court, by its own account, carefully addressed the issues arising between these parties, even though the issues were brought forward in a summary proceeding.

**83**  As regards the argument that Madam Justice Allan should have disposed of the action on the basis of lack of jurisdiction, clearly that is an issue that should have been put before Madam Justice Allan with resort to the Court of Appeal if necessary. It is not an issue for this court to resolve in the case at bar.

**84**  Similarly, as to the statements in Mr. Justice Thackray's reasons for judgment with respect to the allegations of fraud and conspiracy and his refusal to direct a trial on the issue of constructive expropriation, Mr. Mott was entitled to seek leave to appeal that decision and did so. The Court of Appeal dismissed his leave application. Mr. Mott then applied further to stay the decision and vary the order of the Court of Appeal. Again, his application was dismissed. It is not for this court to sit in further judgment of the sufficiency and accuracy of those reasons or the orders they support.

**85**  Nothing advanced in the current proceeding or sought to be advanced in the proposed action alters the fact that all the material facts and issues underlying the breaches of duty now alleged were raised, considered, and rejected either explicitly or implicitly in the finding that the sales of the United Lands were made for fair market value through an appropriate process approved by the court.

**86**  Two judges of this court have declared that to adjudicate further on the matters brought before the court in the First and Second Mott Actions would be an abuse of process. Nothing arises in the present proceedings to change that view. I can find no special circumstances sufficient to militate against the application of the doctrines of *res judicata*, abuse of process, and collateral attack. Mr. Mott has had the opportunity to have his objections to the sale and his allegations of misconduct by PWC heard. This is a strong case for bringing finality to the litigation. To allow the trustee to commence the proposed action would be inconsistent with three previous orders of this court, and I can find no compelling reason for taking such a course.

**CONCLUSION**

**87**  Mr. Mott's overriding contention has been that the United Lands were sold at less than fair market value for wrongful reasons. The court rejected that contention expressly in the sale approval application before Mr. Justice Thackray. Two other judges have declined to permit that claim and its related issues to be re-litigated. In my view, the claims sought to be pursued are *res judicata* and an abuse of process.

**88**  The sole reason for the application to remove PWC as trustee was to provide United with a trustee that had the capacity to sue PWC so that these same issues could be re-opened. As there is no reason to re-open the claims, there is no reason to remove PWC as trustee at this time. The application is dismissed with costs as scale 3.

RICE J.

**End of Document**

[***R. v. Imperial Tobacco Canada Ltd., [2014] B.C.J. No. 2375***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G0DT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: July 15, 2014.

Judgment: September 23, 2014.

Docket: S010421

Registry: Vancouver

**[2014] B.C.J. No. 2375** | 2014 BCSC 1782

Between Her Majesty the Queen in Right of British Columbia, Plaintiff, and Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., JTI-MacDonald Corp., Canadian Tobacco Manufacturers' Council, B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. (formerly Philip Morris Incorporated), Philip Morris International Inc., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., Rothmans International Research Division and Ryesekks p.l.c., Defendants

(34 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pre-trial procedures — Preliminary determinations — Application by Province to hear and determine two issues as points of law dismissed — Province sued tobacco companies in 2001 to recover tobacco-related health care costs — Province sought preliminary determination of whether tobacco tax revenue was deductible from any recovery, and whether liability could be reduced due to governmental tobacco policy — Proposed questions were not defined with sufficient clarity in pleadings, could not be resolved in absence of evidence, and were not determinative of core issues — Lengthy appeals of previous pre-trial rulings suggested matter was best served by proceeding to trial — British Columbia Supreme Court Civil Rules, Rule 9-4 — Tobacco Damages and Health Care Costs Recovery Act, s. 2(1).**

**Government law — Crown — Actions by and against Crown — Practice and procedure — Application by Province to hear and determine two issues as points of law dismissed — Province sued tobacco companies in 2001 to recover tobacco-related health care costs — Province sought preliminary determination of whether tobacco tax revenue was deductible from any recovery, and whether liability could be reduced due to governmental tobacco policy — Proposed questions were not defined with sufficient clarity in pleadings, could not be resolved in absence of evidence, and were not determinative of core issues — Lengthy appeals of previous pre-trial rulings suggested matter was best served by proceeding to trial — British Columbia Supreme Court Civil Rules, Rule 9-4 — Tobacco Damages and Health Care Costs Recovery Act, s. 2(1).**

**Health law — Health insurance, government — Practice and procedure — Application by Province to hear and determine two issues as points of law dismissed — Province sued tobacco companies in 2001 to recover tobacco-related health care costs — Province sought preliminary determination of whether tobacco tax revenue was deductible from any recovery, and whether liability could be reduced due to governmental tobacco policy — Proposed questions were not defined with sufficient clarity in pleadings, could not be resolved in absence of evidence, and were not determinative of core issues — Lengthy appeals of previous pre-trial rulings suggested matter was best served by proceeding to trial — British Columbia Supreme Court Civil Rules, Rule 9-4 — Tobacco Damages and Health Care Costs Recovery Act, s. 2(1).**

|  |
| --- |
| Application by the Province of British Columbia to hear and determine two issues as points of law. In 2001, the Province enacted the Tobacco Damages and Health Care Costs Recovery Act, creating a cause of action against tobacco companies for tobacco-related health care costs. Litigation against the tobacco companies commenced the same year. Since then, preliminary applications regarding the constitutionality of the legislation and the validity of their party claims went to the Supreme Court of Canada. No discovery occurred and no date for trial was set. The Province now sought preliminary determination of the questions of whether any recovery under the Act could be reduced by tobacco tax revenue, and whether a tobacco company's liability could be reduced by any reason of federal or provincial tobacco policy. The defendants submitted that it was neither possible nor appropriate to determine the questions in isolation prior to trial, as any attempt to do so would cause further delay.  HELD: Application dismissed.  The proposed question regarding the off-set of tobacco tax revenue would not result in a substantial reduction in the evidence required at trial. The Province admitted that it received tobacco tax revenue and denied that such revenue was deductible from a claim, and also denied that the tax revenue exceeded the attendant health care costs. If the revenue was deductible, evidence was required to determine quantum. Tax revenue was also relevant in the context of other defences, such as the applicable standard of care. The proposed question related to tobacco policy, even if available as a defence, would still require evidence regarding the interactions between the government and the defendants, the nature and effect of government actions, the defendants' reliance, and the reasonableness of that reliance. The proposed questions on points of law were not defined with sufficient clarity in the pleadings, could not be resolved in the absence of evidence, and were not determinative of core issues. Given the prior lengthy appeals of pre-trial applications, the interests of timely resolution were best served by moving the matter toward trial. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, Rule 9-4

Tobacco Damages and Health Care Costs Recovery Act, [*SBC 2000, CHAPTER 30, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5XW1-RV51-DXPM-S1GJ-00000-00&context=), s. 1, s. 2(1), s. 3

**Counsel**

Counsel for Plaintiff: J.J. Camp, Q.C., J.A. Duvall, S.D. Matthews, Q.C., J.E. Virtue.

Counsel for Defendants: Philip Morris USA Inc., M.A. Feder; Ryesekks, R.B. Lindsay, Q.C.; Rothmans, Benson & Hedges Inc., M.D. Adlem; Rothmans International Research Division, M.D. Adlem; Rothmans Inc., M.D. Adlem; R.J. Reynolds Tobacco International Inc., J.J. Kay, Q.C. and R.J. McDonell; R.J. Reynolds Tobacco Company, J.J. Kay, Q.C. and R.J. McDonell; Philip Morris International Inc., M.A. Feder; Philip Morris Incorporated, M.A. Feder; JTI Macdonald Corp., J.J. Kay and R.J. McDonell; Imperial Tobacco Canada Limited, J.J.L. Hunter, Q.C., B.B. Olthuis, A. Coleman; Carreras Rothmans Limited, S.H. Sams; Canadian Tobacco Manufacturers' Council, K.L. Boonstra; British American Tobacco Limited, C.P. Dennis and D.L.R. Yaverbaum; BAT Industries p.l.c., S.H. Sams.

**Reasons for Judgment**

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

**I. INTRODUCTION**

**1**  As part of its long-running litigation against the manufacturers of tobacco products, the province of British Columbia asks the court to hear and determine two issues as points of law under R. 9-4 of the *Supreme Court Civil Rules,* *B.C. Reg. 168/2009*.

**2**  The *Tobacco Damages and Health Care Costs Recovery Act*, *S.B.C. 2000, c. 30* gives the government a cause of action against tobacco companies for tobacco-related health care costs. This action was commenced immediately upon the legislation coming into force in January 2001.

**3**  Since then, two preliminary applications have gone to the Court of Appeal and, from there, to the Supreme Court of Canada--one to determine the constitutional validity of the *Act* (*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 S.C.C. 49) and one to strike out third party claims against the government of Canada (*R. v. Imperial Tobacco Canada*, 2011 S.C.C. 42). Almost 14 years after the litigation began, there have still been no examinations for discovery nor has a trial date been set.

**4**  The government now asks the court to set a hearing for the determination of two questions:

1. Is the Government's recovery under the *Tobacco Damages and Health Care Costs Recovery Act* (the "*Act*") to be reduced by tobacco tax revenue?
2. Is a Defendant's liability under the *Act* to be reduced by reason of any federal or provincial tobacco policy?

**5**  The defendants say that is neither possible nor appropriate to decide those questions in isolation before trial and any attempt to do so will only cause further delay.

**6**  Rule 9-4 reads:

1. A point of law arising from the pleadings in an action may, by consent of the parties or by order of the court, be set down by requisition in Form 17 for hearing and disposed of at any time before the trial.
2. If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.

**7**  Where, as here, the parties do not agree to a proceeding on a point of law, R. 9-4 provides for a two-stage process. The party who wants to set the question for hearing must first obtain leave of the court. Only after leave is given does the matter proceed to a hearing on the merits (*Fink v. British Columbia (Public Guardian and Trustee)*, 2002 B.C.S.C. 438 at para. 9). These reasons relate only to the province's leave application.

**II. THE LEGISLATION**

**8**  The *Act* was enacted specifically to give the government a claim against the tobacco companies. This action is therefore not only the first of its kind in this jurisdiction; it will likely be the last. The cause of action is stated in s. 2(1) of the *Act*:

**2** (1) The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

"Health care benefits" are defined in s. 1 of the *Act* as:

**"health care benefits"** means

1. benefits as defined under the *Hospital Insurance Act*,
2. benefits as defined under the *Medicare Protection Act*,
3. payments made by the government under the *Continuing Care Act*, and
4. other expenditures, made directly or through one or more agents or other intermediate bodies, by the government for programs, services, benefits or similar matters associated with disease;

A "tobacco related wrong" is defined in s. 1 of the *Act* as:

**"tobacco related wrong"** means,

1. a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or
2. in an action under section 2 (1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in British Columbia who have been exposed or might become exposed to a tobacco product;

**9**  Under s. 3 of the *Act*, the government must prove that a defendant breached a common law, equitable or statutory duty that it owed to persons in British Columbia, that exposure to a tobacco product can cause or contribute to tobacco related disease and that the product was offered for sale in British Columbia. If the government proves those elements, there is a reverse onus under which a defendant must show that its breach of duty did not give rise to exposure to the tobacco product or that exposure did not give cause or contribute to tobacco related disease (*British Columbia v. Imperial Tobacco Canada Ltd*., 2005 S.C.C. 49 paras. 10 and 11).

**III. THE PLEADINGS**

**10**  The amended statement of claim, filed under the former rules of court, includes 14 pages alleging various breaches of duty by the defendants, but for present purposes these can be summarized as:

1. Failing to take reasonable measures to eliminate or minimize the risk of cigarette smoking;
2. Producing and marketing products that increased those risks;
3. Failing to warn of the risks;
4. Selling cigarettes to children and adolescents;
5. Marketing cigarettes when the defendants knew they were addictive and therefore unjustifiably hazardous;
6. Knowingly making false representations to consumers that denied, minimized or failed to disclose risks;
7. Engaging in deceptive acts or practices, contrary to the *Trade Practices Act,* S.B.C. 1974, c. 96 and making false representation contrary to the *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=).

**11**  Similar, but not identical statements of defence have been filed by 12 defendants. Some of the defences raised include:

1. The provincial and federal governments supervise, regulate and control the manufacture, sale and advertising of tobacco products and the defendants have complied with all standards, regulations and directions;
2. The defendants have co-operated with and been guided by governments and public health agencies in product development as well as advertising and promotion;
3. The government, with knowledge of the risks associated with tobacco, has continued to licence, regulate and tax what has, at all material times, been a legally marketed product;
4. The government, by its conduct, led the defendants to believe that marketing their products was not in breach of any provincial statute or regulation and was not actionable;
5. The government, knew of and voluntarily assumed any risk associated with tobacco when it incurred and continued to incur the cost of health care benefits provided to persons exposed to tobacco products;
6. The costs allegedly incurred were the result of the government's own acts and omissions (contributory ***negligence***);
7. The government was a participant in the alleged breaches of duty and cannot profit from its own wrongdoing;
8. The government has failed to mitigate its costs and failed to control or reduce those costs.

**12**  The issue of tax revenue from tobacco is raised in at least two contexts. The defendants say the government has suffered no loss because its revenue from taxes on tobacco products exceeds the alleged costs. A typical pleading is found in para. 204(e) of statement of defence of Imperial Tobacco Canada Ltd., which reads:

If the Plaintiff has incurred the cost of health care benefits as alleged or at all, which is denied, the Plaintiff has not and does not incur any costs in providing health care services to insured persons who have suffered tobacco related disease, as such costs are exceeded by the tax revenue and fees received from the regulation and sale of tobacco products in British Columbia, such that no cost of health care benefits is incurred by the Plaintiff.

**13**  At para. 207, Imperial says that any costs incurred by the government are the result of the government's own conduct. The list of particulars includes the government's "taxation policy and practices." Paragraph 208(d) then says:

1. The Plaintiff has benefited from the taxes imposed on and in relation to the sale of tobacco products in British Columbia, which amounts are in excess of the cost (if any) of health care benefits provided by the Plaintiff to insured persons in connection with tobacco-related disease or the risk of tobacco-related disease.

**IV. RULE 9-4**

**14**  The essential purpose of what is now R. 9-4 is to "determine, without deciding issues of fact raised by the pleadings, a question of law which goes to the root of the action" (B.C. Teachers' Fed. v. B.C. (A.G.) [*(1986), 7 B.C.L.R. (2d) 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FBN1-213Y-00000-00&context=) at para. 10 (C.A.), leave to appeal ref'd [*[1987] S.C.C.A. No. 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1S91-JGBH-B449-00000-00&context=) ). The applicable principles were set out in *Alcan Smelters & Chemicals Ltd. v. Can. Assoc. of Smelters & Allied Workers, Local 1* (1977), 3 B.C.L.R. 161 at 165 (S.C.).

1. The point of law to be decided must be raised and clearly defined in the pleadings...;
2. The rule is appropriate only to cases where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law...;
3. The facts relating to the point of law must not be in dispute and the point of law must be capable of being resolved without hearing evidence...;
4. Whether a point of law ought to be decided before the trial of the action is discretionary, and it must appear that the determination of the question will be decisive of the litigation or a substantial issue raised in it...;
5. In deciding whether the question is one which ought to be determined before trial the court will consider whether the effect of such a decision will immeasurably shorten the trial, or result in a substantial saving of costs.

**15**  The facts assumed in the question submitted should be set out in the language of the pleadings and, if it is not, the court must examine the pleadings to determine if they really state those underlying facts (*International Nesmont Industrial Corp. v. Coopers & Lybrand,* [*[1998] B.C.J. No. 2625*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M13V-00000-00&context=) at para. 14).

**16**  The court must be cautious about proceeding under R. 9-4 because there is a danger of decisions based on an insufficient or erroneous view of the facts (*Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd*., 2014 B.C.C.A. 227 at para 42).

**17**  In Ontario, it has been held that where the point of law involves construction of a statute, the court should not proceed under a rule similar to R. 9-4 if the statute is not "crystal clear" and the point is one of first impression (*SCP Properties Inc. v. Meaford (Municipality)*, [*[2008] O.J. No. 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF11-JGPY-X43P-00000-00&context=) at para. 37.).

**V. QUESTION ONE: TAX REVENUE**

**18**  The first question proposed by the province is whether its recovery under the *Act* is "reduced by tobacco tax revenue." The conclusion of law the province will seek, if the matter is heard on its merits, is that the *Act*, properly construed, does not permit the defendants to offset tax revenue against the health care costs incurred.

**19**  The *Act* does not explicitly address that question, but the province says that, in addition to the government's direct claim for the cost of health care benefits, the *Act* also refers to an individual claim for "damages." It argues that "health care costs" must mean something different than damages in tort and are not to be assessed in the same way. The province also relies on the fact that the *Act* defines "cost of health care benefits" as "total expenditure" and says the word "total" must be given its ordinary meaning.

**20**  However, the claim arises from a "tobacco related wrong," which is defined for the purposes of an action under s. 2(1) of the *Act* as a breach of any common law equitable or statutory duty. It is arguable that such language imports the normal measure of damages for such breaches of duty: the loss actually suffered by the plaintiff and an amount necessary to put the plaintiff in the position it would have been but for the breach.

**21**  This is a matter of first impression, involving a statute that may be interpreted only once. The legislature may well have intended to exclude some or all of the normal considerations applied to the assessment of damages, but in my view that is not "crystal clear" on the plain words of the statute. The meaning of the statute should not be determined in the absence of other evidence that may assist in determining the legislature's intention. That evidence may include, among other things, the legislative history of both the *Act* and the taxation statutes.

**22**  I also find that the proposed question does not clearly arise from the pleadings or from undisputed facts. The allegation in the statements of defence is that the tax revenue exceeds the tobacco related health care costs. If that was an undisputed fact, proceeding under R. 9-4 might offer the prospect of resolving the entire action because the deductibility of all tax revenue would leave no loss for the province to claim.

**23**  However, that is not an undisputed fact. In its replies, the province admits that it receives tobacco tax revenue and denies that such revenue is to be deducted from a claim under the *Act*, but it also denies that the tax revenue exceeds the cost. If the court decides that tax revenue is not to be deducted, the amount of such revenue would become irrelevant for the purpose of assessing the recoverable costs. However, if the court decides there is to be deduction, it will still have to hear evidence at trial to establish the amount of that revenue and the amount of health care costs from which it is properly deducted.

**24**  The question of tax revenue is also, on the pleadings, relevant to more than quantum. The defence pleadings also raise it in the context of other defences, including the applicable standard of care. It is one of the many ways in which the province is alleged to have acquiesced in, encouraged and benefitted from the alleged wrongful conduct. In that context, the fact the province received tax revenue and perhaps the amount may still be relevant and it is not clear to me that an answer to the first question in the province's favour would result in a substantial reduction in the amount of evidence necessary at trial.

**VI. QUESTION TWO: GOVERNMENT POLICY**

**25**  The second proposed question is whether the government's liability is reduced by "federal or provincial tobacco policy." The defendants do not explicitly use the words "tobacco policy" in their pleadings, but the province argues that it is essentially what the defendants rely on for their pleaded defences based on voluntary assumption of risk, contributory ***negligence***, mitigation and the plaintiff profiting from its own conduct.

**26**  The province says each of these affirmative defences is based on policy decisions by government and the answer to the proposed question simply involves application of the Supreme Court of Canada's most recent decision in this case,*R v. Imperial Tobacco*. That case involved the defendants' third party claims against the government of Canada and the issue was whether Canada owed a duty of care to the tobacco companies.

**27**  In order to determine whether a duty of care existed, the Court applied the well-known two part test arising from *Anns v. Merton London Borough Council,* [1978] A.C. 728:

1. Is there a relationship of sufficient proximity to give rise to a prima facie duty of care? and
2. If so, are there policy reasons why the duty of care should not be recognized?

**28**  The Court held that there was a prima facie duty of care, but the third party notices failed on the second branch of the test because the alleged representations and actions by Canada were "protected expressions of government policy" (at para 62). The Chief Justice said at paras. 87 and 90:

**87** Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

**90** I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.

**29**  The result of the Court's decision is that a government can rely on the "core policy" nature of its conduct as a defence to a claim brought against it. That is not what the province is now seeking to do. Government, as plaintiff, is seeking to invoke "core policy" to deprive the parties it is suing of defences that would otherwise be available at common law. It is the difference between a shield and a sword and it is not clear that the same considerations apply.

**30**  Further, the alleged policy matters relied upon by the defendants are not relevant only to the affirmative defences and are not raised exclusively as alleged breaches of duties owed by the province to the defendants. Read as a whole, the statements of defence allege that the defendants were not in breach of any duty because government actions, representations and policies define the standard of care with which they had to and did comply.

**31**  The province still has the burden of establishing the standard of care and proving breaches of it. Based on the defences as pleaded, it will be necessary to hear evidence about the interactions between the government and the defendants, the nature and effect of government actions, the defendants' reliance on them and the reasonableness of that reliance. Most of that evidence will still be necessary as going to the standard of care even if the affirmative defences are not available.

**VII. SUMMARY AND CONCLUSION**

**32**  Returning to the test set out in *Alcan* for hearing a matter under what is now R. 9-4, I find the proposed points of law are not defined with sufficient clarity in the pleadings, cannot be resolved in the absence of evidence, will not necessarily be decisive of issues going to the core of this action and will not necessarily shorten the trial or the pre-trial procedures.

**33**  On the last point, I note again that this action has already gone to the Supreme Court of Canada twice on preliminary applications. The first Supreme Court of Canada decision did not come until almost five years after the action began and the second came more than five years after the first. I have no doubt that any decision made now on a point of law will follow a similar appellate path. I agree with the defendants that, after almost 14 years, the interests of efficient and timely resolution will be best served if the parties simply get on with moving this matter toward a trial in which all legal and factual issues can be decided on their merits.

**34**  The application to set a hearing for determination of points of law is dismissed.

N.H. SMITH J.

**End of Document**

[***Sidhu v. Liang, [2009] B.C.J. No. 2475***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24RH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: January 19-23 and June 22, 2009.

Judgment: December 10, 2009.

Dockets: M064581, M085174

Registry: Vancouver

**[2009] B.C.J. No. 2475** | 2009 BCSC 1697 | 2009 CarswellBC 3373 | 183 A.C.W.S. (3d) 118

Between Hardip Singh Sidhu, Plaintiff, and Christopher Chi Shan Liang, Defendant SUBJECT TO RULE 66 And between Hardip Singh Sidhu, Plaintiff, and Lisa Noel Yee and Waysang Yee, Defendants, and Insurance Corporation of British Columbia, Third Party

(96 paras.)

**Case Summary**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Non-pecuniary loss — Affecting recreational activities — Action by plaintiff for damages for two motor vehicle accidents allowed in part — Defendants admitted liability; only quantum at issue — Medical evidence demonstrated plaintiff suffered soft tissue injuries in first accident that were aggravated by second and restricted social and recreational activities — Plaintiff awarded $36,000 non-pecuniary — Injuries caused restrictions so plaintiff had to do lower-paying jobs and was awarded $28,053 past wage loss — Most doctors expected full recovery, albeit slowly — Plaintiff awarded $5,000 loss of earnings yearly for five years, less five per cent for contingencies — $2,000 awarded for recommended therapy.**

|  |
| --- |
| Action by the plaintiff for damages for injuries suffered in two motor vehicles accidents. The defendants both admitted liability and only quantum of damages was at issue. The plaintiff was 31 years' old and worked as a longshoreman. Prior to the first accident he was healthy and active and worked six or seven shifts per week, earning $125,734 per year. The first accident occurred in 1994 when the first defendant suddenly rear-ended the plaintiff at a traffic light, totalling the plaintiff's vehicle. The plaintiff sought medical attention when he began to feel pain that day. The plaintiff missed some work and was unable to return to his regular position at work due to physical restrictions caused by his injuries. The plaintiff was recovering, but still felt some pain and stiffness in his neck and back when the second accident occurred in 2008. The second defendant backed into the plaintiff at a stop light. The accident was minor but the plaintiff's neck and back pain were aggravated for two weeks. The plaintiff was still working nearly every day of the week, but in lower-paid positions, and was unable to work out as frequently or help with housework as much as before.  HELD: Action allowed in part.  The plaintiff's wife and his general practitioner gave credible evidence that was given considerable weight. Overall, the medical evidence established that the plaintiff had suffered soft tissue injuries caused by the first motor vehicle accident and aggravated by the second. Despite the pain, the plaintiff continued working and there was no intervening event that could have caused the injuries. The injuries resulted in chronic, persistent pain that restricted the plaintiff's work, social life and recreational activities. He was awarded $36,000 non-pecuniary damages, 80 per cent of the quantum he sought. The majority of the expert witnesses predicted that the plaintiff would fully recover, in as little as two years. The plaintiff's injuries clearly restricted him to lower paying work and he was awarded $28,053 in past wage loss. The plaintiff sought $5,000 per year for 10 years for loss of future earnings. While the plaintiff was recovering slowly and may not be recovered in two years, it was not anticipated to take 10 years. The plaintiff was awarded $5,000 per year for five years for future loss of earnings, less five per cent for contingencies such as layoffs and strikes. Finally, the plaintiff's doctor strongly recommended pulse signal therapy for pain management. The recommendation was accepted and the plaintiff was awarded $2,000 for cost of future care. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *RSBC 1996, CHAPTER 76*,

Rules of Court, Rule 40(A), Rule 66

**Counsel**

Counsel for the Plaintiff: S. Johal.

Counsel for Defendant, Christopher Chi Shan Liang: C.L. Thiessen.

Counsel for the Defendants Lisa Noel Yee and Waysang Yee: L. Stevens.

**Reasons for Judgment**

|  |
| --- |
| **L.D. RUSSELL J.** |

**Introduction**

**1**  The two actions before this Court arose out of two separate motor vehicle accidents. The first action, pursuant to Rule 66, is for damages sustained in a motor vehicle accident that occurred on November 18, 2004 ("the first accident"). The second action, pursuant to Rule 68, is for damages sustained in a motor vehicle accident that occurred on August 14, 2008 ("the second accident").

**2**  Both defendants, defendant Liang with respect to the first accident and defendant Yee with respect to the second accident, have admitted liability. At issue is the quantum of damages. The plaintiff claims the accidents caused soft-tissue injuries to his neck and back as well as emotional difficulties. He is claiming damages for pain and suffering, as well as claims for past wage loss, loss of future earning capacity, and cost of future care.

**3**  The plaintiff has requested a global assessment of damages.

**Background**

**4**  The plaintiff is 31 years old and resides with his wife, parents and younger brother in their residence in Richmond, British Columbia.

**5**  At all times relevant to this action, the plaintiff was working as a longshoreman. The plaintiff has been in this line of employment since 1995 and at the time of the first accident had been a member of the International Longshore and Warehouse Union for approximately one year. The plaintiff worked the graveyard shift an average of six shifts per week, in the months leading up to the first accident.

**6**  Prior to the accident the plaintiff was healthy. He did not suffer from any chronic illness, disease or such. He had been involved in four other motor vehicle accidents in the past, one neck strain from lifting weights and two work accidents, one to his foot and one to his head, all of which resolved themselves over time and he had fully recovered from them at the time of the first accident. While the plaintiff has pre-existing experience with pain in his neck while backing up his equipment at work, this pre-existing condition had also resolved itself at the time of the first accident.

**7**  The plaintiff was an active, social family man prior to his accident. He attended the gym three to five times a week, played tennis, went bowling, played sports with his extended family and liked to attend movies and go on vacations with his wife. The plaintiff also did yard work and car maintenance around the house and assisted with the family construction business in his free time, cleaning up job sites, laying piping, insulating windows and building fences.

**8**  On the afternoon of November 18, 2004, the plaintiff was stopped at the intersection of No. 2 Road and Udy Road in Richmond when he was suddenly rear-ended by the defendant Liang. As a result of the impact, the plaintiff was jolted forward and was restrained by the chest strap of his seatbelt. He was then thrown backward in his seat and hit the back of his head against the head rest. He was stunned but conscious. As a result of the impact, the vehicle was written off as a total loss by the Insurance Corporation of British Columbia ("ICBC").

**9**  Within an hour to an hour and a half following the accident, the plaintiff started to feel pain in his left neck, left side, elbow, back and hip area. The plaintiff received treatment at Richmond General Hospital. The following day, he consulted his family physician, Dr. Gandham, who prescribed medication.

**10**  On January 4, 2005, the plaintiff attended at Lansdowne Physiotherapy, where he was treated by Peter Lamla, a physiotherapist. The plaintiff complained of periodic pain to the neck and lower back only. Mr. Lamla observed a decreased range of motion in the lower back and mild spasm in the neck. Mr. Lamla treated his paraspinal muscles. While Mr. Lamla noted that the plaintiff had good functional recovery from what was a mild strain, he defines "functional recovery" as an ability to walk without visible stress. In other words, functioning without acute stress does not necessarily mean in the absence of pain. The plaintiff attended seven or eight physiotherapy sessions up to January 26, 2005, before deciding not to go back as he felt it was not helping and he would improve on his own. The plaintiff was never discharged.

**11**  The plaintiff continued to follow up with Dr. Gandham from November 2004 to January 2005. At a visit on January 19, 2005, Dr. Gandham advised him to perform exercises and stretches. Following this appointment, the plaintiff ceased seeing Dr. Gandham and continued to work full-time from 2005 to 2007. The only treatment during this time was stretching and exercise. The plaintiff testified that he did not go back to his doctor during this period because his doctor had told him all he could do was stretches and exercise and that eventually the symptoms would resolve. However, his symptoms persisted. For the first three months following the accident, both his neck and back were painful and he experienced pain in his elbows and hips. While the elbow and hip pain waxed and waned over the years, the back pain persisted for the entire time although it did improve to a stiffness, rather than a pain.

**12**  By January 2007, the plaintiff felt improvement and so he reinstated his reach stacker rating, a position he held prior to the accident but which he had ceased to hold as it caused aggravation to his injuries. On February 6, 2007, after working full-time as a reach stacker for four weeks, his neck/upper back complaints flared up and he sought chiropractic treatment. Dr. Siu, a chiropractor, in a letter dated February 7, 2007, stated that the plaintiff's condition appeared to stem from his job, which requires him to have his neck and shoulder turned to the left. On February 7, 2007, the plaintiff followed up with Dr. Gandham, who advised him to stop working as a reach stacker and he subsequently removed the rating.

**13**  In 2008, prior to his second accident, the plaintiff started going to a massage therapist which, along with continuing to do his stretches and exercises, improved his symptoms.

**14**  On August 14, 2008, the plaintiff was involved in a second motor vehicle accident. He was stopped at the intersection of Highway 17 and Ladner Trunk Road when the defendant Yee reversed his jeep into the plaintiff's vehicle while it was in neutral. While this was a minor accident, the plaintiff's neck and upper back complaints were aggravated for a period of approximately two weeks. The plaintiff attended a walk-in clinic where he was prescribed pain medication.

**15**  Presently, the plaintiff's pain is improving but it is taking longer than he had anticipated it would to resolve. He is back to working seven days a week in gantry and labour positions. He occasionally works as a reach stacker, but it leaves him feeling stiff the next day. It also hurts when he has to take a heavy labour shift. He often comes home from work in pain, which affects his ability to fall asleep. The pain has also prevented him from lifting weights at the gym because it triggers the pain on the left side of the neck and as a result he has gained about 20 to 25 pounds. The plaintiff has, however, resumed doing some of his housework and construction work but more often in a supervisory capacity.

*Employment*

**16**  Rob Ford, the Secretary Treasurer for the International Longshore and Warehouse Union, Local 502, testified about the nature of the plaintiff's employment. There are generally three types of jobs that the plaintiff is qualified for: reach stacking, dock gantry and labourer. At the time of the accident the plaintiff was qualified as a reach stacker and labourer, but was about to commence training to qualify to do gantry work. He chose reach stacking because each shift provided additional remuneration of one hour of overtime, paid at time and a half, as an automatic entitlement, plus additional opportunities to work overtime. He chose to train for dock gantry qualification, because it would only require him to drive for half his shift but he would receive remuneration for the entire shift including an hour of overtime pay similar to that given to reach stackers. Furthermore, at the time there were a lot of positions open for workers who were trained to do dock gantry. While neither position would become available every day, being trained in both would increase the plaintiff's chances of regular employment in one or both areas without having to pick up labour jobs, which pay less and require longer hours.

**17**  Following the first accident, Dr. Gandham advised the plaintiff to take some time off work, however, the plaintiff felt pressure to work, due to financial responsibilities and therefore he worked through the pain, even though the nature of his work aggravated his neck pain. He did, however, initially, albeit briefly, slow down to working only three to four days per week.

**18**  Around the time of the first accident, the plaintiff was scheduled to start his training as a dock gantry. The plaintiff went ahead with this training, despite the accident, as he felt that he could not postpone the training because it costs the company a lot of money and therefore if he delayed he would miss his opportunity. During his training for dock gantry, the plaintiff was also taking a few reach stacking shifts in early December 2004. A reach stacker is a machine that picks up containers and moves them around the dock putting them on trucks or on the rail. This requires him to have his head turned often as he is backing up, which causes him the most pain. If one has a rating pin for this position, one must service those jobs when they become available. Because the plaintiff could no longer do reach stacking on a regular basis, the plaintiff brought in a doctor's note and his rating as a reach stacker was removed in early 2005. Following this, the plaintiff had to take more labour jobs when dock gantry positions were not available. Since then, opportunities for steady employment as a reach stacker have come up and have been filled by union members with less seniority than the plaintiff. Steady employees are paid more.

**19**  In 2006, the plaintiff still experienced pain but it fluctuated depending on what he was doing. The evidence from 2006 showed that the plaintiff was working six to seven days a week with overtime.

**20**  By 2007, his symptoms were improving so he tried to go back to reach stacking. The plaintiff did so for about three to four weeks and then his neck and upper back pain acted up again. Dr. Gandham advised him not to do reach stacking and so the plaintiff removed his reach stacking rating again in 2007. Workers with lower seniority to him have again been getting steady jobs as reach stackers.

**21**  The plaintiff is currently still unable to return to reach stacking on a sustained basis and only works the occasional shift, working primarily as a gantry or labourer. In the future, the plaintiff would like to return to reach stacking, so he can have a full-time schedule of dock gantry and reach stacking without having to take the lower paying positions, but to date, his injuries have prevented him from putting his reach stacking rating back up.

*The Medical Evidence*

**22**  All the medical experts agree that the plaintiff currently experiences soft tissue complaints with respect to his neck and back and all three agree there is no medical evidence of an intervening event. The divergence of opinion between the experts who testified is with respect to causation. Dr. Gandham and Dr. Hershler are both of the opinion that the plaintiff's current complaints of pain in the neck and back are due to the injuries he sustained in the first accident. Dr. Connell, the defence expert, is of the opinion that the ongoing complaints are not related to the first accident.

Dr. Gandham

**23**  Dr. Gandham is a general practitioner. The plaintiff has been a patient of Dr. Gandham since 1991. The plaintiff went to see Dr. Gandham the day following the accident on November 19, 2004, when he complained of bilateral elbow pain, neck pain and lower back pain. On November 24, 2004, the plaintiff continued to complain of pain in his neck and back. Dr. Gandham advised the plaintiff to wait a week before returning to work. Dr. Gandham testified in cross examination, that normally he would advise a patient to take four to six weeks off with this type of injury, but being aware of the plaintiff's work ethic and financial concerns, he assured him it was okay to return to work because there were no contraindications, but to do so only part-time and to gradually increase his hours or to do lighter work. In re-examination, Dr. Gandham clarified that he assumed full-time work to be five days a week for eight hours a day and that to get back to the level of working six to seven days a week would take at least three months with a re-assessment at that time.

**24**  The plaintiff saw Dr. Gandham regularly following the accident until January 19, 2005. At that appointment, Dr. Gandham told the plaintiff to continue exercising and stretching and doing lighter work and his symptoms would eventually improve over time. Following this advice, the plaintiff did not see any point in continuing to attend at Dr. Gandham's office with complaints, since there was nothing he could do about them.

**25**  In his March 14, 2005 form that he completed for ICBC, Dr. Gandham noted that the plaintiff initially experienced muscle spasms in the paracervical/paravertebral region, painful neck and lower back movements, but had full range of motion and was capable of performing activities of daily living including modified work. Dr. Gandham concluded that the plaintiff had partial disability of three weeks' duration.

**26**  Between 2005 and 2007, the plaintiff attended at Dr. Gandham's office twice on unrelated complaints, but did not attend again with respect to his back and neck complaints. Following an attempt to return to reach stacking on a more consistent basis in 2007, the plaintiff attended at Dr. Gandham's office on February 7, 2007 complaining that he was experiencing flare-ups of pain at work when driving the reach stacker, particularly when backing up and turning his neck. Dr. Gandham noted that he had a muscle spasm in the trapezius muscle group, painful movements in the neck and back, but still had a full range of motion in his neck and lower back. His notes also make reference to the "MVA" (motor vehicle accident). Dr. Gandham informed the plaintiff that this was musculoligamentous-related pain in those muscle groups. Dr. Gandham saw the plaintiff again the next day and advised him that it was okay to return to work so long as he avoided reach stacking or anything else that aggravated his neck and upper back. The plaintiff also mentioned at this appointment that he was having trouble sleeping because of the pain.

**27**  On April 18, 2008, the plaintiff attended at Dr. Gandham's office. While he complained of ongoing pain, there were no knots and his lower back was reportedly feeling normal.

**28**  Dr. Gandham provided a medical legal report dated June 27, 2008. Dr. Gandham diagnosed paracervical and paravertebral muscle spasms in the region of his lumbosacral spine and a knot in the trapezius. Dr. Gandham's opinion was that the complaints in 2007 were a result of the motor vehicle accident but were aggravated by work.

**29**  His medical legal report contained the plaintiff's medical history, which included that he had been in four prior motor vehicle accidents that caused acute cervical and, on some occasions, lumbar strain, similar to his present symptoms, all of which he was treated conservatively and all of which resolved over time. Dr. Gandham explained, that these incidents did not reflect chronic pain but acute pain resulting from incidental episodes of soft tissue injury. The report also noted a history of fainting attacks which all occurred within about two weeks and for which he was referred to a neurologist, who found no abnormalities. Finally, the report noted in January of 2004, he was treated for an uncomplicated cervical strain that resulted from lifting weights. Following January of 2004, he was not seen again with any neck or lower back symptoms until the first accident.

**30**  On examination following the first accident, in 2004, the report notes that he had paracervical and paravertebral muscle spasm in the region of his lumbosacral spine; no deformity; good range of motion in his neck and lower back, but painful movements; some local pain over the right elbow; but no other abnormalities. He was diagnosed with an MVA-related soft tissue injury to his right elbow and acute cervical strain and an acute lumbar strain. He was given neck and lower back care instructions and pain medication.

**31**  Following this the report lists that the plaintiff was seen in the office on November 20 and 24 and December 10 and 28, 2004, January 19, 2005, February 7 and 8, 2007 and April 16, 2008. During these visits he complained of ongoing neck and lower back pain until February 7, 2007, following which he only complained of neck pain. On examination during these visits, he was observed to have some muscle spasm over his left trapezius and upper back region, along with painful neck and lower back movements.

**32**  The report notes that he had seen a chiropractor and massage therapist and had been taking pain medication on occasion. It also states that Dr. Gandham had advised him to do muscle stretching and strengthening exercises at home, in addition to staying active and to continue working.

**33**  Dr. Gandham opined that he felt that the ongoing neck pain was musculoligamentous in nature secondary to the whiplash type of injury he sustained in the first accident. In his opinion, the plaintiff's prognosis was good. He stated that he did not believe that the plaintiff suffered any permanent damage, however, he noted that the plaintiff had not been able to do all his duties at work since the first accident and his symptoms were still likely to persist for the next two years.

**34**  Following the creation of the medical legal report, Dr. Gandham saw the plaintiff again on August 1, 2008, and noted muscle spasm in the trapezius and paracervical region, but that the plaintiff still had full range of motion in his neck. On August 14, 2008, the second accident occurred. The plaintiff attended at the office of Dr. Gandham following the second accident complaining of the same ongoing pain, but did not inform Dr. Gandham of the second accident.

**35**  At the time of trial, Dr. Gandham's prognosis was that the plaintiff would recover and that his problem was muscle-ligament related, which can go on for a very long time. He confirmed that his prognosis at the time of the original visit, that it would take a couple of years, but that his symptoms would clear with ongoing stretching and muscle strengthening, was still valid. He testified that it is typical of soft-tissue injuries, particularly to the cervical and lumbar region, to wax and wane during periods of recovery, depending on what the patient had done in a certain day, as certain types of movements can aggravate the injury.

Dr. Hershler

**36**  Dr. Hershler has specialized training in the treatment and management of chronic soft tissue and musculoskeletal and musculoligamentous injuries.

**37**  Dr. Hershler prepared two medical legal reports dated May 15, 2008 and June 23, 2008. In preparation for the first report, he reviewed the clinical records of Dr. Gandham up to 2007 and those of Richmond General Hospital, and in preparation for the second report he reviewed the results of a MRI and ultrasound reports.

**38**  The report, dated May 15, 2008, summarized the plaintiff's complaints as follows: he presented with a two and a half year history of pain, mainly in the neck and low back and, more specifically, on the left side of the neck; the pain is triggered by work activities, especially when he drives machinery; as soon as he rotates his head to the right, he experiences increased pain and "pulling" sensations on the left side of the neck; he continues to see a chiropractor intermittently for pain relief, but the relief is only temporary; and he also takes medication at times, but only uses plain Tylenol to avoid drowsiness.

**39**  On physical examination, Dr. Hershler noted a normal gait; normal spine with only a mild kyphosis; swelling in the left upper trapezius muscle and a large knot was observed on the top of the left shoulder; pain free and fluid movements of the lumbar spine with the exception of flexion which caused pulling pain; pain in the ligament structures on palpation; and a full range of motion. In contrast, the movements of the head and neck were extremely tight and there was a degree of splinting (unconscious holding of the head when moving); the plaintiff was unable to achieve a full range of motion in any direction because of involuntary muscle tightness or guarding to avoid pain; the plaintiff experienced pain with movements of the head to the right on the left side of the neck and across the top of the left shoulder; even light palpation of the left upper trapezius muscle elicited an immediate spasm and a large, tender muscle knot was palpable, which was not present on the right side; palpation of the cervical and thoracic spines was well tolerated; he had full shoulder movements and intact shoulder girdle strength; his handgrips were normal; neurological examination was normal and tone, deep tendon reflexes, coordination, strength and sensation were normal.

**40**  Dr. Hershler diagnosed a severe injury to the left upper trapezius muscle based on the palpable muscle knot; pain into the lower division of the left trapezius affecting the shoulder blade, and spasm with light palpation of the left trapezius which affects the movements of the head. Dr. Hershler concluded that it was his opinion that the injury was caused by the motor vehicle accident on November 18, 2004.

**41**  Dr. Hershler's prognosis for recovery was extremely guarded. The plaintiff had not been able to return to his full work capacity due to his inability to easily move his head and as a result has had to give up certain work options and even with this limitation, he continued to suffer increased pain as a result of his work. This pain has affected his ability to sleep resulting in frustration and anxiety. He also suffers from a milder injury that affects the ligament structures in the lumbar spine, which was caused by the same accident and becomes symptomatic depending on how long he sits in one position or how much bending he does. Given the history and the persistence of the physical finings, Dr. Hershler concluded his opinion that the plaintiff has a serious injury that has not resolved of its own accord and it is likely that he will have to deal with the symptoms on a permanent basis and it is imperative that he receive further treatment to attempt to reverse the damage. Dr. Hershler recommended intensive massage therapy of one to two treatments weekly for six months and if there was no change in his pain level, further investigation including ultrasound of the trapezius and a MRI of the cervical spine, would be warranted. He also suggested alternative treatment such as pulsed magnetic fields, once further investigations were concluded.

**42**  Because Dr. Hershler's first report suggested possible further investigation by way of MRI, an MRI was completed June 2, 2008, at the request of counsel for the plaintiff.

**43**  Dr. Hershler's second report, dated June 23, 2008, which was an addendum to the May 15 report was based on the results of the MRI report of the examination of the cervical spine as well as a review of an ultrasound report of the left shoulder and left trapezius muscle done on June 23, 2008. Dr. Hershler noted that the MRI revealed a number of small focal disc protrusions in the cervical spine with evidence of osteophytes and neural foraminal narrowing, but no significant neural compromise. The ultrasound of the trapezius muscle and left shoulder was normal.

**44**  Dr. Hershler explained that the ultrasound and MRI results did not significantly change his prior diagnosis that the major injury was to the left upper trapezius muscle. He opined that the disc protrusions probably pre-dated the accident but were likely rendered more symptomatic by the accident, and because they put the spine at greater risk of becoming painful due to trauma, they are probably prolonging the pain. The fact that the plaintiff experiences more pain on the left side is due largely to the soft tissue injury rather than due to the spine. These results also did not alter Dr. Hershler's guarded prognosis, but he did recommend that the plaintiff go ahead with Pulsed Signal Therapy or Pulsed Electromagnetic Field Therapy. It should be noted that Dr. Hershler does have a financial interest in this technology.

**45**  He diagnosed a severe injury to the muscle fibres of the left upper trapezius muscle as well as a mild injury affecting the ligament structures in the lumbar spine. On cross-examination, Dr. Hershler admitted that at first, he believed that the injury was only related to soft tissue, but following a request from counsel, he ordered the MRI which revealed the spinal problems which he saw as contributing to the prolongation of his pain.

**46**  Dr. Hershler also admitted on cross-examination, that with respect to soft tissue injuries, the assessment is based, to a large extent, on the history given by the patient and that he had not questioned the plaintiff about his prior motor vehicle accidents. Dr. Hershler did explain, however, that the gaps and inconsistencies in the plaintiff's symptoms are normal fluctuations and waxing and waning of pain.

Dr. Connell

**47**  Dr. Connell is a general practitioner with a specialty in occupational medicine and expertise in diagnosing musculoskeletal and musculoligamentous injuries sustained as a result of motor vehicle accidents.

**48**  On June 11, 2008, Dr. Connell assessed the plaintiff and reviewed his records. Absent from these records were the plaintiff's MRI results. Dr. Connell's opinion was that the plaintiff's most current soft tissue complaints were not related to or were not the same as the ones he sustained in the accident in 2004.

**49**  Following the assessment, Dr. Connell prepared a report dated June 12, 2008. The report noted that the plaintiff's most significant complaint was the pain in the left side of his neck and that this pain is exacerbated when operating the reach stacker. He reported that the plaintiff related that in the morning his neck was often stiff in the area of the left trapezius and that this pain increases and can radiate to the left side of his upper back and neck, his left shoulder and anterior left elbow if he is required to do heavy labour, or when he is lifting weights at the gym. He also complained of some trouble sleeping.

**50**  The report documented no significant abnormalities in his spine; his gait was normal and he could do a squat to three-quarters; range of motion was normal in most of his body and while range of motion was slow in his neck on examination, it moved fully and without hesitation during the interview. His left trapezius did appear more prominent and this prominence was more evident at certain times when he was asked to tighten his trapezius; palpation of the area did not reveal any mass and both light and firm touch did not lead to any spasm of the trapezius on either side; he was noted to be tender in the body of the left trapezius; he also complained of tenderness to his clavicle and left shoulder; range of motion of his shoulders was full, but was a little affected on the right side with internal rotation and there was some right shoulder pain with this manoeuvre; and finally, he noted that power in the plaintiff's upper and lower extremities was full.

**51**  In forming his impression, Dr. Connell noted that the plaintiff gave a history of continuous pain in his left trapezius, neck into his shoulder and at times elbow pain, dating back to the first accident. He also noted that his last appointment with Dr. Gandham with respect to this accident was in January of 2005 and that he did not see him in relation to these complaints again until February 7, 2007 after driving the stacker for three months. He also noted that his chiropractor, Dr. Siu, attributed his symptoms to his job and his physiotherapist, Peter Lamla, said he had good functional recovery, all of which contrasted with the plaintiff's report to Dr. Connell of no improvement from his treatment. Dr. Connell also made note of the plaintiff's employment records which showed that his work hours remained stable in 2004 and 2005 and, in fact, increased in 2006 and 2007. Dr. Connell also made specific reference to the prior accidents and his neck pain in 2002 that was related to driving at work.

**52**  Dr. Connell's opinion was that the plaintiff's most recent complaints were not related to the accident of November 18, 2004. The type of soft tissue injury he experienced after the first accident would not be expected to result in any permanent disability. Dr. Connell noted the complaints were soft tissue in nature and the only objective finding was of a somewhat prominent trapezius, but that there was no palpable mass and no significant palpable abnormality other than that. With respect to the pain the plaintiff experienced at work when repetitively having his neck turned to back up his vehicle, Dr. Connell's prognosis was optimistic that an appropriate activity program involving stretching and strengthening the muscles in and around the neck and upper back would minimize and quite possibly resolve the symptoms. Dr. Connell rejected the idea of passive treatments, arguing that this approach would only serve to reinforce the plaintiff's conviction that he had a significant injury and that active rehabilitation would be far more appropriate.

**53**  Under cross-examination, Dr. Connell conceded that his opinion with respect to causation was based in part on the opinions of Dr. Siu and Peter Lamla, neither of whom was qualified to provide expert opinion evidence in this matter. He also conceded that the plaintiff was suffering from a soft tissue injury and that there was no evidence of an intervening event like an additional accident or Workers' Compensation claim.

**Analysis**

*Admissibility of the Expert Evidence*

**54**  The plaintiff submits that this Court should reject the evidence of Dr. Connell, because his opinion was based on the opinions of unqualified experts whose opinions were not served pursuant to Rule 40(A); based on unfounded assumptions that Mr. Lamla discharged the plaintiff from treatment; he defines functional recovery as being fully functional with respect to work and non work-related activities with minimal or no ongoing symptoms but Mr. Lamla does say that a patient can have ongoing complaints of pain with functional recovery; and because he gave no weight to Dr. Gandham's notation of the "MVA" in the clinical entry in February 2007.

**55**  The defendant submits that the Court should reject the evidence of Dr. Hershler, because his evidence as a whole demonstrates that he is not impartial but rather that he is an advocate for the plaintiff, evidenced by his close association with the plaintiff bar and the fact that 80% of his income from private billings is for medical legal reports and to date all his court appearances have been on plaintiffs' behalf. Furthermore, the defendant submits that Dr. Hershler was an argumentative witness; he ordered tests at the request of counsel; he is clearly unaware of the duties owed by an expert witness to the court; and finally he placed inappropriate emphasis on the plaintiff's self-reports while downplaying the documentary evidence. In the alternative, the defendant proposes that no weight should be accorded to his opinions if they are admissible.

**56**  I am prepared to admit the reports of both Dr. Hershler and Dr. Connell and let the issues raised be treated as a question of weight. The trier of fact in each case must look to and weigh the evidence of the experts with great care. Dr. Hershler and Dr. Connell are no different. With respect to the submissions made about Dr. Hershler specifically, I can understand that he has sympathy for patients whom he believes suffer from chronic pain. However, I take his evidence in concert with that of the other experts and with the evidence of the plaintiff himself and decide what weight I will give it. Neither will I pronounce generally on the credibility of any witness for all time. I look to this expert's opinion in this case. As it happens, a prognosis that is "guarded" only means to me that I cannot take that expert's opinion as conclusive. It tells me that he does not wish to opine as to what the future holds with respect to this injury. It does not render his opinion inadmissible. It is all a matter of weight.

*Causation*

**57**  The plaintiff's position is that the medical evidence establishes that the first accident caused musculoligamentous injuries to the plaintiff's neck, back, hips, and elbows, resulting in chronic, persistent pain which continues to restrict his vocational, social and recreational activities. Furthermore, the plaintiff asserts that the second accident caused a minor aggravation of the musculoligamentous injury to the plaintiff's neck.

**58**  While the plaintiff acknowledges there is a gap of 25 months between medical visits, he submits there is significant continuity with respect to the clinical observations of the medical professionals involved. Dr. Gandham testified that the muscle spasms that he observed in February 2007 and August 2008 are in the same anatomical area as the spasm observed immediately after the first accident and that the neck pain is related to the pain that he experiences in the left trapezius, as both areas are interconnected. The plaintiff asserts that although he did not see a doctor from 2005 to 2007, his symptoms persisted and there was no intervening event.

**59**  The plaintiff asserts that there is considerable consensus among the medical professionals who provided expert evidence both for the plaintiff and the defendant that: the plaintiff did not have any history of ongoing or pre-existing complaints at the time of the first accident; the plaintiff sustained soft tissue injuries to the neck and back as a result of the first accident; the plaintiff currently experiences soft tissue complaints with respect to his neck and back; and there is no medical evidence of any intervening event.

**60**  Both defendants dispute causation of the injuries. The defendants accept that the plaintiff sustained a soft tissue injury, but assert that it was substantially resolved within a couple of months and that he only missed a few days of work as a result of it.

**61**  The defendants' position is that the plaintiff suffered nothing more than a mild soft tissue strain to his neck and lower back as a result of the November 18, 2004 motor vehicle accident, which had substantially resolved by the time of his last physiotherapy treatment on January 26, 2005, a period of just over two months. The defendants argue that, given the gap of 25 months between medical visits, the plaintiff's injuries arising out of the first accident resolved in early 2005 and the complaints in February 2007 arose from some other source. Despite seeing his doctor on a couple of occasions after January 19, 2005, the plaintiff never again mentioned any ongoing problems related to the accident. Then, in February 2007, he presented with a new complaint of pain in his left trapezius from working. He had never complained of pain in this area before following the first accident.

**62**  Furthermore, the defendants submit that any injuries sustained by the plaintiff as a result of his second motor vehicle accident on August 14, 2008, required only one visit to a medical clinic and were so minor as to not warrant any compensation.

**63**  The Supreme Court of Canada has clarified the principles surrounding the law of causation 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=) at paras. 18-28, [*[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=). The "but for" test remains the general test for causation, which requires the plaintiff to demonstrate, on a balance of probabilities, that the injury would not have occurred but for the ***negligence*** of the defendant. A substantial connection must exist between the acts of the defendant and the plaintiff's injuries.

**64**  While I did not find the plaintiff's evidence to be particularly useful or credible, I do give considerable weight to the evidence given by his wife and his general practitioner, Dr. Gandham. While there is evidence of a pre-existing condition which caused him to have pain before when he looked over his shoulder while backing up, that condition did resolve and it appears that although he has a vulnerability to this kind of injury, it was not symptomatic at the time of the accident.

**65**  I am prepared to conclude on the balance of probabilities of the evidence, that the current soft tissue injuries the plaintiff exhibits and the continuing pain that he has suffered are a result of the first accident which have continued to date, and have been aggravated by the second accident and therefore would not have occurred but for the defendants' ***negligence***. I believe the plaintiff has continued to experience this pain despite the gap in his treatment, and while work has aggravated it, there is no evidence of an intervening event that could be attributed as the cause.

**Damages**

*Non-Pecuniary Damages*

**66**  The plaintiff is making a claim for non-pecuniary damages to compensate for his pain, suffering, loss of enjoyment of life and loss of amenities.

**67**  The plaintiff's position, which I accept, is that the medical evidence establishes that the first accident caused musculoligamentous injuries to his neck, back, hips, and elbows, resulting in chronic, persistent pain which continues to restrict his vocational, social and recreational activities. Furthermore, the second accident caused a minor aggravation of the musculoligamentous injury to his neck.

**68**  As a result of the injuries he sustained, the plaintiff has experienced functional limitations due to ongoing symptoms in his neck and left upper back, as well as residual symptoms in the elbows, and mid to low back. These injuries interfere with his work ability as well as his ability to do chores and participate in his family construction project. His wife and father have had to take on the physical household chores. His wife testified that he became less physically active and has decreased his participation in family activities. The plaintiff's wife also testified that his pain has caused him to be moody and he also claims to have experienced emotional difficulties in the form of increased stress as a result of the accident. Because of his modified work ability, the jobs he can take require him to work longer hours for less money and therefore he is facing increasing financial pressures, has less free time and therefore has decreased his social activities, all of which he asserts leads to his stress.

**69**  Pursuant to *Rakhra v. Brandt*, [*2000 BCSC 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06B-00000-00&context=); *Lane v. Ford Credit Canada Leasing Ltd.*, [*2003 BCSC 701*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X32W-00000-00&context=); *Verhnjak v. Papa,* [*2005 BCSC 1129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B141-00000-00&context=); and *Corrado v. Mah*, [*2006 BCSC 1191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3CS-00000-00&context=), the plaintiff submits that based on the similar circumstances in this case, an award of $45,000 as a global assessment for both accidents would be an appropriate award for non-pecuniary damages.

**70**  The defendants dispute causation of the injuries, and therefore argue that the plaintiff should not be compensated for them by the defendants.

**71**  While I have concluded that, according to the medical evidence, the accidents were the cause of the injuries, these injuries are improving, albeit slowly. Dr. Gandham has estimated that the plaintiff will recover within two years and Dr. Heshler gives a similar guarded prognosis. Dr. Connell is also optimistic. Given that the plaintiff is young and healthy with a good prognosis for recovery, I am convinced that he will make a full recovery and thus assess his damages at 80% of the amount put forward by counsel, as I note the amount suggested is the upper range for these types of injuries.

*Past Wage Loss*

**72**  The plaintiff's claim for past wage loss is based on the plaintiff's time off from work as a longshoreman and the shift premiums that he lost as a result of his inability to return to work full-time as a reach stacker.

**73**  In a letter from the Waterfront Employers of B.C. dated October 20, 2006, it was noted that during the 12-month period immediately prior to the date of the accident, the plaintiff's earnings were $125,734.88. The letter also confirmed that the plaintiff last worked on November 18, 2004, the day of the accident, and resumed working on November 22, 2004.

**74**  Immediately after the first accident, the plaintiff was unable to work from November 19 to 21, 2004. Thereafter, he did not return to his pre-accident average of six shifts per week until January 22, 2005. Based on calculations made by assessing the plaintiff's pay stubs, the plaintiff submits that he sustained a wage loss of $8,184.59 for the period November 18, 2004 to January 22, 2005.

**75**  The claim for past wage loss subsequent to January 22, 2005 is based on the overtime hours that were lost as a result of the plaintiff's inability to work as a reach stacker on days when dock gantry work was unavailable. The plaintiff asserts his wage loss for this period amounts to $19,868.52.

**76**  Based on the foregoing, the plaintiff, submits that $28,053.11 is appropriate compensation for past wage loss, subject to any applicable statutory tax deductions.

**77**  The defendants assert that there was no loss of income. The March 14, 2005 medical report of Dr. Gandham specifically noted no total disability for the plaintiff and only a three week partial disability for modified or light duties during the time the plaintiff was doing his training course. The evidence establishes that the plaintiff missed two or three days of work and then returned to work as scheduled for his gantry training. By the week of December 6, 2004, the plaintiff had already returned to working as many as five days per week.

**78**  The defendants assert that there is no evidence to suggest the plaintiff did not return to his usual duties immediately following completion of his training course and instead there is evidence that through the years since the accident there are lengthy periods of time where the plaintiff was working six and seven days per week as either a dock gantry or reach stacker, including the time around when the plaintiff went to see Dr. Siu for the left trapezius pain and when Dr. Gandham had allegedly advised him to limit his work. Finally, the defendant points to the plaintiff's income tax statements, which illustrate that his income has actually increased since the first accident, as support for their position that the plaintiff did not experience any wage loss.

**79**  The defendants conclude that any claim for past income loss should be limited to the two or three days immediately following the initial accident.

**80**  I accept the plaintiff's submissions, notwithstanding the increase in his income. There is no doubt in my mind that the plaintiff is an extremely hard worker because of his financial responsibilities. The fact that he has not incurred substantial past wage loss, shows that he is prepared to work through the pain and accept any available work notwithstanding that it does not pay as well as reach stacking instead of experiencing the financial loss he would otherwise suffer. Despite the plaintiff's desire and willingness to work six to seven days a week, doing whatever work is available, he is limited to the types of jobs he is capable of performing as a result of his injuries, jobs which pay less than he could have been earning.

**81**  I therefore conclude that the plaintiff is entitled to an award for past wage loss of $28,053.11, subject to any applicable statutory deductions to be worked out by counsel.

*Loss of Future Earning Capacity*

**82**  The plaintiff submits that loss of earning capacity ought to be awarded because: he has been rendered less capable overall from earning income from all types of employment; he is less marketable or attractive as an employee to potential employers; he 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 he is less valuable to himself as a person capable of earning income in a competitive labour market. While the plaintiff continues to work on a full-time basis, he is no longer as strong a worker as he was prior to the accidents and he will not be able to sustain the same level of productivity into the future given his current symptoms. The plaintiff's intention was to work every shift as either a dock gantry or a reach stacker and his injuries have decreased his ability to do so. As such, the plaintiff submits that an award for diminution of earning capacity is appropriate in this case.

**83**  The plaintiff quotes Madam Justice Southin 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.) at 59:

Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability.

**84**  The plaintiff asserts that the Court should approach this head of damage on a globalized basis and assess it pursuant to the capital asset approach enunciated in *Pallos v. ICBC* [*(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=), [*[1995] 3 W.W.R. 728*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.), applying a variety of contingencies both positive and negative.

**85**  In addition to this and alternatively, the plaintiff has considered the impact of a reduction in the plaintiff's income on an annual basis and has estimated a loss of $5,000 per year, for the next ten years. Using the future loss of income multipliers set out in the report of PETA Consultants Ltd. the plaintiff explains that a loss of $5,000 per annum over 10 years translates into $44,060.

**86**  Given the plaintiff's age and the chronic nature of his condition, he asserts that an appropriate award would be $40,000.

**87**  The defendants submit that there is insufficient evidence to support a loss of capacity claim. By the plaintiff's own evidence he has worked more than full-time since shortly after the accident and even if the Court accepts that certain jobs increase the plaintiff's pain, he is still able to perform those tasks. There are no objective signs of physical injury that would limit the plaintiff's ability to work in any way. The defendants further submit that even if the left shoulder pain could potentially cause the plaintiff to lose time from work in the future, it is not the result of the accidents and any claim for loss of capacity should be rejected.

**88**  I have already made a finding that the plaintiff's injuries were caused by the accidents and that this injury has interfered with his ability to work as a reach stacker on a regular basis. The plaintiff's desire is to be able to someday return to reach stacking. A finding that his capacity to earn a living in his chosen profession is lessened is the equivalent of a finding of diminution of earning capacity as well as a lost opportunity: *Palmer*. Regardless of his ability to make money, the principle is not that the lost earnings themselves must be compensated, but loss of earning capacity as a capital asset that requires compensation: *Pallos*. That being said, I have also made the finding that the plaintiff's injuries will resolve and he will be able to return to reach stacking in the future. Dr. Gandham's prognosis is that the plaintiff will most likely require another two years for recovery. While this is supported somewhat by an optimistic prognosis from Dr. Connell, the prognosis of Dr. Hershler is more guarded.

**89**  Given that he has had a slower recovery than expected, I do not anticipate that he will recover as soon as Dr. Gandham expects, however I also do not believe that his injuries will affect his earning capacity for a full 10 years. That being said, I conclude that an appropriate award under this head would be an order that the defendant pay the plaintiff his loss of income per year over the next five years less a deduction for contingencies of 5% for layoffs or loss of time due to strikes.

**90**  I will leave it to counsel to calculate the present value of the impact of a reduction in the plaintiff's income on an annual basis.

*Cost of Future Care*

**91**  The plaintiff's claim for future care is for Pulsed Signal Therapy, recommended by Dr. Hershler, and for ongoing therapy and medication.

**92**  The estimated cost of Pulse Signal Therapy for the neck is $2,000. This award has been recognized by BC Courts: *Marchand v. Dunstan*, [*2000 BCSC 1887*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X3PH-00000-00&context=) and *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=), [*74 B.C.L.R. (4th) 280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21V7-00000-00&context=) and the plaintiff submits that this is a reasonable form of therapy to assist in the ongoing management of his symptoms.

**93**  While I note that the BC Courts have approved this form of treatment in the past, they have also rejected it in some cases: *Zaruk v. Simpson*, [*2003 BCSC 1748*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6115-00000-00&context=), [*22 B.C.L.R. (4th) 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6115-00000-00&context=); and *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=). I also know that in all these cases, Dr. Hershler, who has a direct financial interest in the proposed treatment, was the expert witness who recommended it. However, this is a plaintiff who has worked through his pain and may need some treatment to continue to do so. While this treatment is somewhat unconventional, it seems to me that the future care of a patient should be specific to his needs and he should have the opportunity to try the treatment. I will award $2,000 for Pulse Signal Therapy.

**94**  I do not award the cost of further massage therapy treatment. With reference to this type of injury, I take Dr. Connell's point that this kind of passive therapy will not be of assistance to the plaintiff and that an active exercise programme will be more likely to speed his improvement.

*Costs at Scale B*

**95**  The plaintiff will have his costs in accordance with the R. 66 Tariff. Should the parties want to address the issue of costs, they may contact the Registry.

**Conclusion**

**96**  In summary, the plaintiff is awarded:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | a) | Non-pecuniary damages | $36,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | b) | Past Wage Loss | $28,053.11 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | c) | Loss of Future Earning Capacity | $5,000 per year |  |
|  |  |  | for 5 years to be |  |
|  |  |  | reduced by 5% and |  |
|  |  |  | by a present |  |
|  |  |  | value calculation |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | d) | Cost of Future Care | $2,000.00 |  |

plus costs pursuant to R. 66 and interest under the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*.

L.D. RUSSELL J.

**End of Document**

[***Sienema v. British Columbia Insurance Co., [2002] B.C.J. No. 71***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61D8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Gill J.

Heard: September 4 - 7, 10 - 13, 17 - 21,

24 - 27 and October 2 - 3, 2001.

Judgment: January 17, 2002.

Vancouver Registry Nos. C980057, C980111, H970993

**[2002] B.C.J. No. 71** | 2002 BCSC 84 | 110 A.C.W.S. (3d) 915

Between Hendrik Sienema and Sofia Sienema, plaintiffs, and British Columbia Insurance Company, defendant (Vancouver Registry No. C980057) And between CIBC Mortgage Corporation, the Canadian Imperial Bank of Commerce, Hendrik Sienema and Sofia Sienema, plaintiffs, and British Columbia Insurance Company, defendant (Vancouver Registry No. C980111) And between CIBC Mortgage Corporation, Canadian Imperial Bank of Commerce, plaintiffs, and Sofie Sienema, Henry Sienema, South Bay Homes Ltd. and the British Columbia Insurance Company, defendants (Vancouver Registry No. H970993)

(147 paras.)

**Case Summary**

**Insurance — Fire insurance — The loss — Measure or replacement cost — Loss payable to mortgagee — Failure to name mortgagee in policy, effect of.**

|  |
| --- |
| Claim by the insured against the insurer for the value of a building and contents and for consequential and punitive damages. The insurer counterclaimed for the return of monies paid under policy, and alleged fraud against the insured. There was also a claim by the bank and mortgage corporation as legal or equitable assignees of insured. The bank and mortgage company claimed for breach of the insurance policy, compensation for the building, and punitive damages for alleged bad faith on the part of the insurer. The mortgage company claimed under the mortgage clause. There were also foreclosure proceedings by the mortgage company to rectify the mortgage in the face amount of $360,0000 and to substitute the mortgage corporation for the bank. The action arose out of a fire and subsequent damage to the house and contents owned by the insured. The insured provided a listing of articles lost or damaged in the fire and their cost in making a claim and supplying a proof of loss under their insurance policy. There were a number of discrepancies in the claims as to value of the items. The court found that misstatements had been made and considered whether the statements were fraudulently made or whether the insured made willfully false statements and thereby justified the denial of coverage. The insured also entered into a contract to rebuild the destroyed home and provided the insurer with a contract for proof of loss relating to the building. The contract had been altered by the insured to suggest work was being done which was not in fact part of the contracted cost. The mortgage corporation had instructed solicitors to prepare a mortgage in its favour and advanced funds on the belief that this had been done. In fact, the mortgage document showed the mortgagee as the bank. In the claim for rectification of the document, evidence was given as to the intent of the parties that the mortgagee would be the mortgage corporation  HELD: Insured's action dismissed; insurer's action allowed; bank and mortgage company's action allowed in part.  The statements of the insured in the proof of loss relating to the value of the listed articles were fraudulently made. The proof of loss and claim provided in the claim for loss relating to the building was fraudulently made. Evidence of inadvertence and honest belief as to the losses was rejected. The mortgage company was entitled to rectification to show it as the mortgagee in place of the bank. The mortgagors intended to grant security to the entity that was advancing the funds, the mortgage company, and all the documentation created by them supported this intent. The amount payable to the mortgage company was the actual cash value of $330,000. Proof of the claim, at which time interest could run, was the date of the filing of the foreclosure by the mortgagee. The mortgagee was not entitled to punitive damages; while the way the insurer dealt with the mortgagee in settling the amount of loss was regrettable, it did not warrant damages. A collateral mortgage securing a loan for share purchase by the mortgagor was valid. The claim by South Bay, which had contracted to rebuild the home, was entitled to a declaration that its lien against the property was valid. |

**Counsel**

G.K. Steele and D.R. Urquhart, for Hendrik (Henry) and Sophie Sienema. P.G. Altridge and J.E. Currie, for the British Columbia Insurance Company. D.R. Clark and J. Krupa, for CIBC and CIBC Mortgage Corporation. G. Miller, President of South Bay Homes Ltd., appeared in person.

|  |
| --- |
| **GILL J.** |

**1**   On January 10, 1997, the family home of Mr. and Mrs. Sienema was substantially destroyed by fire. Mrs. Sienema owned the home. Three mortgages were registered against title. The Sienemas were insured by the British Columbia Insurance Company ("BCIC"). In August, 1997, BCIC denied coverage on the basis that proofs of loss contained wilfully false statements. The CIBC Mortgage Corporation ("the mortgage corporation") was named as loss payee in the BCIC policy, which also contains a Standard Mortgage Clause.

**2**  Three actions were commenced. The Sienemas claim against BCIC for the building and contents. They also claim consequential and punitive damages. BCIC has counterclaimed for the return of monies paid under the policy. In addition to allegations in respect of statements in the proofs of loss, BCIC says that certain actions of the Sienemas were fraudulent.

**3**  The bank and the mortgage corporation also claim against BCIC for breach of the policy of insurance and seek compensation for the building. Both claim as legal or equitable assignees of the Sienemas and the mortgage corporation claims under the mortgage clause. Bad faith is also alleged against BCIC and punitive damages are sought.

**4**  Finally, the bank and the mortgage corporation have commenced foreclosure proceedings. The relief claimed includes rectification of a mortgage in the face amount of $360,000 to substitute the mortgage corporation for the bank. The claim for rectification must succeed if the claim of the mortgage corporation under the mortgage clause is to succeed. South Bay Homes Ltd. ("South Bay"), a defendant in the foreclosure proceedings, was rebuilding the home before the denial of coverage. It filed a lien for approximately $195,000. South Bay joins with BCIC in arguing against rectification and also asserts that the bank is not entitled to foreclose on its collateral mortgage.

THE CLAIMS OF THE SIENEMAS AGAINST BCIC

**5**  The central issue is whether BCIC has proven that the Sienemas made wilfully false statements or were fraudulent. I will deal first with the proof of loss dated March 3, 1997. It is alleged by BCIC that wilfully false statements were made about a number of items listed in the schedule of loss which is appended to the proof of loss.

**6**  The schedule is 198 pages in length and contains descriptions of items of property which were damaged beyond repair. For many items, place and date of purchase is described, as is the original cost. Replacement cost, depreciation and actual cash value are given for all items. With some exceptions, the descriptions of the items were prepared by an employee of On Side Restorations. The balance of the information was supplied by Mr. Sienema.

**7**  BCIC's adjuster instructed that costs should be exclusive of tax. Mr. Sienema testified that he followed those instructions. It was the evidence of Mr. Sienema and Mr. Latham, one of the independent adjusters retained by BCIC, that depreciation was discussed. Mr. Latham suggested that all items should be depreciated by 40%. Mr. Sienema testified that as he did not agree, Mr. Latham told him to indicate the figure that he felt was appropriate but also said that it was not likely that Mr. Sienema's figures would be accepted. Actual cash value is, of course, determined by reference to replacement cost and depreciation.

**8**  Mrs. Sienema testified that her only involvement with the schedule of loss was in respect of the replacement costs of the living room and family room upholstered furniture, the dining room suite and a table lamp. She had a number of meetings with Mr. Tylor at the Jordans store in Vancouver. She described the damaged items. He assisted in choosing comparable replacements and provided information as to replacement cost.

**9**  Although Mrs. Sienema had actually purchased some of the items which have assumed significance in these proceedings, Mr. Sienema prepared the schedule without consulting his wife about original costs. Nor did Mrs. Sienema read the schedule, although she swore it to be true.

**10**  It was not until August 29, 1997, that BCIC completed its investigation and advised the Sienemas of its position. A letter of that date states that the investigation undertaken by BCIC disclosed that wilfully false statements had been made in respect of the particulars of loss required to be provided under statutory condition 6. Such statements included descriptions of certain items and information as to original cost, when and where purchased, repair/replacement cost and actual cash value. Four items were specifically referred to in the August 29 letter. An additional four items were the subject of correspondence dated September 24, 1997.

**11**  Five items remain in dispute. They fall into two categories - furnishings allegedly purchased from J. Collins Furniture and two television sets.

**12**  Dealing with the first category, upholstered furnishings allegedly purchased from J. Collins were used by the Sienemas in their living and family rooms. The third item said to be purchased from the same store was a dining room suite.

**13**  It is agreed that the family room furniture was purchased at J. Collins. BCIC asserts that wilfully false statements were made about its retail price and acquisition cost. As to the other items, statements as to place of purchase as well as retail price and acquisition cost are said to be false.

**14**  I will begin by referring to the evidence of the Sienemas about these furnishings.

Living room furniture

**15**  Mr. Sienema testified that to the best of his recollection, these furnishings were purchased at J. Collins in 1990 or 1991. Twelve thousand dollars remained of a line of credit which had been taken out to renovate a home. The price paid was $12,800. The items are described as a sofa, loveseat and a wing back chair manufactured either by Henredon or Bernhardt. Because the furniture was rarely used, Mr. Sienema felt that depreciation should be 5%. Replacement cost was listed at $14.000.

**16**  J. Collins was not in business in 1997, so Mrs. Sienema went to Jordans to look at similar furniture. Mr. Tylor suggested a replacement cost of $14,000.

Dining room furniture

**17**  It was Mr. Sienema's evidence that this had been purchased at J. Collins. The schedule of loss states that the purchase price was $16,000, which is described as a 50% discount. Mr. Sienema said he believed the suite was made from black walnut because the salesman, Colin Ryan, told them so. The schedule of loss contains a notation indicating that this furniture was black walnut. After litigation was commenced, he spoke with Colin Ryan who suggested that the price range was probably $10 - $12,000. Mr. Sienema later located records of his holding company containing an entry which indicated that $10,000 was paid on April 17, 1986, re furniture. He now believes that $10,000 was the price paid.

**18**  Again, information as to replacement cost was obtained from Mr. Tylor. The amount set out in the schedule is $33,000. Because the furniture was in pristine condition, Mr. Sienema was of the view that depreciation should be calculated at 5%. The actual cash value is listed as $31,350.

**19**  Mrs. Sienema testified that she had first seen this furniture almost a year before it was purchased from J. Collins. It was priced in the range of $24,000, and was therefore too expensive. At the time of its purchase, J. Collins was having a sale. Her recollection is that the price paid was $10,000 to $12,000, but because of the accounting entry, believes it must have been $10,000. She, too, testified that she believed it was black walnut. However, when she was attempting to get replacement costs, she spoke to a salesperson at the Jordan's store in Coquitlam and learned that black walnut furniture would cost $50,000 to $60,000. She concluded that their furniture could not have been black walnut.

**20**  Mrs. Sienema agreed in cross-examination that in March, 1997, she knew they had not paid $16,000 and that the retail price was not $32,000. She stated that it was her recollection the furniture was 50% off, but could not explain the seeming contradiction flowing from her testimony that the retail price was $24,000, and the purchase price was $10,000, not $12,000. As she did not read the schedule of loss before she executed the proof of loss, she did not note the error.

Family room furniture (chesterfield, lounge chair and ottoman)

**21**  Mr. Sienema testified that this was purchased when J. Collins was in receivership. His wife had made an offer in the amount of $5,500, which was refused by the receiver with the proviso that if the furnishings did not sell, he would reconsider. Mr. Sienema recalled that the receiver telephoned at the end of the sale to say that he would accept $5,500. It was his recollection that the retail price was $14,000. Mr. Tylor also felt that would be the replacement cost.

**22**  In fact, the price paid was $3,508 plus tax. The invoice reflecting this amount was obtained some time after the preparation of the schedule of loss.

**23**  Mrs. Sienema testified that her first offer on this furniture, the regular price of which was $14,000, was rejected. Towards the end of the sale, she returned to the store and saw that the furniture had not been sold. An offer of $4,000, including tax, was accepted by a salesman. She agreed that had she reviewed the schedule of loss, she would have noted that the original cost was incorrectly stated.

**24**  A number of other witnesses gave evidence relevant to the issues raised by BCIC in respect of these items.

**25**  Mr. Jamieson, an accountant, was asked by BCIC to review the records of J. Collins. It was submitted that the relevant findings include the following:

1. A review of over 7,000 invoices in the period from 1990 to 1995 failed to disclose any issued to the Sienemas;
2. A review of all the customer cards in existence for that period failed to reveal a customer card for the Sienemas;
3. A quality control check found that of 60 substantial sales selected at random from the invoices for that period, 60 corresponding customer cards were located;
4. The computerized customer list did not include the Sienemas;
5. The invoices were kept in numerical sequence, and for the period from 1990 to 1992 there are only three missing invoices for the Burnaby store (where the goods were allegedly purchased), namely ones in the following periods:

June to July, 1990

May to August, 1991

November, 1992

1. There were no Sales Commission Records for any of the invoices that were missing;
2. A quality control check of cancelled invoices revealed that no cancelled invoices appeared on the invoice register, or sales commission reports, leading Mr. Jamieson to conclude that the three missing invoices were likely cancellations rather than genuine sales.

**26**  BCIC also relied upon the evidence of Colin and Dennis Ryan in support of its assertions that wilfully false statements were made in respect of place of purchase, retail price and acquisition cost.

**27**  Colin Ryan is 79 years of age and was a principal of J. Collins Furniture Gallery, which carried on business until late 1995. Until 1992, Mr. Ryan was active in the business.

**28**  Colin Ryan testified that inventory records dated March 31, 1985, confirm that a dining room suite, including eight chairs, of the type owned by the Sienemas was then in inventory. The total landed cost of the suite, which includes all duties, taxes and shipping costs, was $5,154. He testified that dining room furniture was usually priced at approximately twice its landed cost. It was therefore not possible that the retail price of this suite was $24,000.

**29**  The suite was manufactured by Thomasville and Mr. Ryan testified that it was part of the Parameter line. An agreed statement of facts filed in these proceedings confirms that Thomasville manufactured Parameter dining room furniture and one suite was shipped to J. Collins. Mr. Ryan testified that the sales tag stated what kind of wood an item was made from. The wood was cherry veneer. He stated that he would not have said this was black walnut, and the grain of black walnut is different from cherry.

**30**  Mr. Ryan was asked about a notation on the invoice for the sale of the family room furniture. He had made a note as follows:

Cost of goods

2775 factory

368 frt

$3,143

Gross profit $355.17

The selling price, exclusive of tax, was $3,508.77. He testified that he would have referred to inventory records destroyed in November, 2000, to obtain information as to cost. He would have expected the regular price of these items to be in the range of $6,500 in total.

**31**  As to furniture manufactured by Bernhardt or Henredon, Mr. Ryan testified that in approximately 1984, J. Collins became an exclusive dealer for Thomasville Furniture and remaining products manufactured by others were sold off. He did not believe that they would have had any discontinued product by 1990.

**32**  In cross-examination, Mr. Ryan was asked about statements made to Mr. Flavell, an investigator who was acting on behalf of the Sienemas. He denied that he had ever told anyone that the original price of the dining room suite was in excess of $20,000, although he recalled being interviewed by Mr. Flavell and signing a statement. He denied having told Mr. Flavell that there was a 90% chance that the Sienemas had purchased the dining room suite from them or that the price could have exceeded $20,000. Further, he denied having read the statement before signing it.

**33**  Mr. Flavell testified about taking of the statement. I accept that the statement he prepared for Mr. Ryan's signature included only information that had been provided to him by Mr. Ryan. I also accept that Mr. Flavell asked Mr. Ryan to review the statement before he signed it and that Mr. Ryan did, in fact, do so. Mr. Flavell recalled that some changes were discussed and a review of the document reveals that changes were made and initialled. I therefore accept that Mr. Ryan told Mr. Flavell the following:

At the time the dining room suite was sold in 1985/86 the 'Parameter' suite was a discontinued line. It would have been sold at a substantial discount. The original retail price would have been $20,000.00 or more. It was a large suite consisting of eight chairs, a large table and china cabinet. We probably would have offered it at a 50% discount or perhaps more. It is quite possible that the table sold for $10,000.00 or less just to move it from our showroom.

**34**  While I do not believe that Mr. Ryan was attempting to mislead, it seems clear that his memory is failing. The inconsistencies between his testimony and statements to Mr. Flavell necessarily call into question the reliability of some of his evidence. I also do not accept Mr. Ryan's evidence that he did not speak with Mr. Sienema about the dining room furniture and other matters in 1997, as Mr. Sienema testified. That conclusion is reinforced by the fact that Mr. Ryan told one of the individuals who was reviewing the documents of J. Collins in 1997 that he had received a telephone call from Mr. Sienema.

**35**  Dennis Ryan is the son of Colin Ryan. He worked at J. Collins from 1972 until the end of 1995 when the business was liquidated. He testified that dining room furnishings were normally priced at between 2.1 and 2.3 times their landed cost and therefore, on furnishings with a landed cost of $5,154, retail price would have approximated $11,000. He testified that he could not recall ever having any dining room suites which were priced in the range of $25,000.

**36**  His recollection was that they began to sell Thomasville products on an exclusive basis in 1987. It was possible, but not likely, that discontinued stock was still being sold in 1990.

**37**  As to upholstered sofas, chairs and loveseats, Dennis Ryan was asked in general terms about 1990 prices. His evidence was that the maximum price for a sofa was in the range of $2,800. For a loveseat, it was be $2,200 and for a wingback chair, $1,100. In his view, a customer would not have paid $12,000 for these items.

**38**  He was also asked about 1995 prices. He testified that the maximum retail price for a sofa, chair and ottoman would have been approximately $6,800. Custom orders may have been more.

**39**  Mr. Hawkins, who began with J. Collins as a salesman in 1985 and was with that company until it ceased to do business, gave evidence on behalf of the Sienemas. He testified that for approximately the first three years of his employment, J. Collins did not sell only Thomasville products. Approximately one year after J. Collins became an exclusive Thomasville dealer, he became manager of the Vancouver store.

**40**  It was his evidence that as a salesman, his income was 100% commission. The commission earned on any sale depended on the mark-up of the item sold. If it was sold for three times or more than its landed cost, salesmen would be paid at the rate of 15%. The lowest commission rate was 5% and it applied on items sold at a price below 2.3 times their landed cost. The commission structure was one reason why salesmen needed to know the landed cost of items. The second related to negotiations with customers. Salesmen were permitted to negotiate a discount of as much as 30% without approval.

**41**  As to the retail price which appeared on tags on the furnishings, Mr. Hawkins testified that the sticker price was a minimum of 3.2 times and a maximum of 4.6 times landed cost. On Thomasville case goods, including dining room tables, the mark-up was 3.2 times landed cost. He estimated the cost of this suite at $17,000, which happens to be 3.2 times its landed cost.

**42**  The evidence of Mr. Hawkins about the price of range of furnishings also differed from that of Dennis Ryan. He testified that the range for dining room suites was from a low of $5,000 to a high of between $25,000 to $30,000. He was referred to an invoice in respect of a sale that he made in July, 1992, which included a special order sofa which was sold for $4,500. He testified that there were "definitely" similarly priced items on the floor and the maximum retail cost was higher.

**43**  Mr. Hawkins confirmed that J. Collins had carried furnishings manufactured by Bernhardt and Henredon, although more so the former. He believed that discontinued stock was sold within six months to one year after the commencement of the exclusive agreement with Thomasville. Henredon was considered one of the very best lines in terms of quality.

**44**  It is difficult to reconcile the evidence of the Ryans and Mr. Hawkins as to mark-ups and the range of prices. Mr. Hawkins worked for the company for a decade and was paid on a commission basis. One would expect that he would be knowledgeable on such matters. The Ryans would obviously be knowledgeable. They were all independent witnesses.

**45**  Because of the way the trial proceeded, Colin and Dennis Ryan were not asked about how commission was calculated, nor did they comment on Mr. Hawkins' evidence. Counsel for BCIC suggested that Mr. Hawkins may have been confused about the difference between average cost and landed cost.

**46**  Landed cost was the total paid, being factory cost converted from US to Canadian dollars, plus brokerage, duty and tax. Average cost was the cost from the factory expressed in US dollars. Dennis Ryan testified that profit calculations in the records of J. Collins was calculated by subtracting average cost from net sale price. He agreed that this was not particularly sensible as calculations of profit margin should have been based on landed cost.

**47**  But again, this suggested confusion was not put to Mr. Hawkins and the records placed into evidence do not even permit this theory to be tested. Further, it seems unlikely that the Vancouver store manager would not understand the difference. It is nevertheless the case that the records in evidence to not show the kind of profit levels that would have been attained if the selling price was routinely as much as 3.2 to 4.6 times landed cost. For the reason, I conclude that they were not.

**48**  As to the evidence of price ranges of upholstered furnishings, Dennis Ryan's evidence about 1995 prices, does not seem to accord with his evidence that mark-ups were in the range of 2.3 times landed cost and the evidence of Colin Ryan about the landed cost of the family room furniture. If $3,143 is multiplied by 2.3, the result is $7,229, yet he testified that $6,800 was the maximum retail price. Further, the figures given by Mr. Ryan seem low for furnishings sold by what was described as a high end store. I therefore do not accept Dennis Ryan's evidence as to maximum prices.

**49**  I turn next to the conclusions to be drawn from this evidence. As to the family room furniture, the acquisition cost of the family room furniture was $3,500 plus tax, not $5,500 plus tax as set out in the schedule of loss. I accept that the landed cost was $3,143 as Colin Ryan testified. It is unlikely that the retail price was $14,000.

**50**  Mr. Jamieson's review of the records of J. Collins satisfies me that the living room furniture was not purchased there. I cannot draw any conclusions about retail or acquisition cost.

**51**  Referring finally to the dining room, the suite owned by the Sienemas was in stock at J. Collins at the time they said it was purchased and inventory records confirm a sale although no invoice could be located. I accept that the suite was purchased at J. Collins and that the price paid by the Sienemas was approximately $10,000. As to its regular price, it is unlikely that it was as much as $24,000. Even on the evidence of Mr. Hawkins, it was several thousand dollars less. The schedule of loss is therefore incorrect as to both original cost and regular retail price. Further, the dining room furniture was not black walnut, as stated. I accept Colin Ryan's evidence that the wood was cherry and that he would not have told a customer that it was black walnut.

**52**  I turn next to the two television sets. Mr. Sienema testified that all information on the schedule of loss regarding the colour projection system made by Panasonic is accurate. He testified that the original unit was purchased through Citiclaims for $5,600. He attempted to obtain a copy of an invoice but was unsuccessful.

**53**  Mr. Bedard, formerly a principal of Citiclaims, testified that although he could not recall selling a television to Mr. Sienema, Mr. Sienema did make purchases from them. The company went out of business in 1996 and he no longer has its records. He described those records as very sophisticated. He would have expected a record to exist if a television had been sold.

**54**  Patricia Buckley was a long time employee of Citiclaims and in 1994 became manager of its Vancouver office. When it ceased to do business, she worked with the receiver and assisted in cleaning up the receivables. In September, 1997, at the request of BCIC, she did a search of the records of Citiclaims using the model number of the television and the code for Mr. Sienema's name. Three documents were located, none of which was for the purchase of this item. It was her evidence that if Citiclaims ordered a product and it came to their warehouse, there would have been a record. She agreed that for some products, Citiclaims' suppliers might extend a discounted price to a customer of Citiclaims. In other words, the customer would not buy from Citiclaims, but from its supplier. Although she could not recall an instance where this had occurred in respect of a television but did not deny that it could have.

**55**  Citiclaims had provided a quotation dated November 20, 1992, to Ms. Moulton, who worked with Mr. Sienema, for three large screen TVs. The most expensive was $3,100. Ms. Moulton testified that she gave the quotation to Mr. Sienema. Mr. Willock, the estimator who provided the quotation, followed up with Ms. Moulton. She had no further knowledge of any purchase by Mr. Sienema from Citiclaims. The quotation of November 20, 1992, was one of the documents retrieved by Ms. Buckley.

**56**  Ms. Burdeny, an employee of Panasonic whose duties include providing product and pricing information testified that the suggested list price of model no. PTP4586SC, which was the model destroyed, was $3,899.95. As Citiclaims would have sold to the insurance industry at much lesser cost, I agree that this television could not have been purchased through Citiclaims for $5,600, nor is it reasonable to suggest that incidental costs such as set up fees or delivery could bring the cost up to that amount. The information in the schedule of loss is therefore incorrect.

**57**  The second television was an RCA model no. FKC2022T. In the schedule of loss, Sight and Sound, North Vancouver, is listed as the place of purchase. Mr. Sienema testified that he was incorrect. The television was purchased from Soundcraft TV Ltd. in North Vancouver. In the schedule, the original price is stated as $2,100. The invoice in respect of this television was subsequently located and is in the amount of $509.32. Mr. Sienema testified that the invoice does not reflect the fact that he had traded in a new television which had just been purchased but which his wife did not find satisfactory.

**58**  Mr. Wong is the owner of Soundcraft TV. He could not recall the regular price of the television in question at the time of its purchase , but he had located documents which suggested a price of approximately $1,100. In cross-examination, he agreed that it could have been in the range of $1,200 to $1,400. Counsel for Mr. Sienema acknowledged that $2,100 could not have been the cost.

**59**  In summary, misstatements were made as to each of the five items in dispute. The final question is whether BCIC has proven that wilfully false statements were made by either Mr. or Mrs. Sienema.

**60**  There is no disagreement of significance as to the applicable law. Statutory conditions 6 and 7 are included in the policy of insurance. Statutory condition 7 provides:

Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration.

Statutory condition 6 sets out the requirements after loss, including that the insured must do the following:

Deliver as soon as practical to the insurer a proof of loss verified by a statutory declaration:

1. 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.

**61**  By reason of the statutory conditions, materiality need not be established in respect of the information required from the insured. In respect of other matters, materiality must be proven. A statement is material if it is capable of affecting the mind of the insurer: Inland Kenworth Ltd. v. Commonwealth Insurance Co. [*(1990), 72 D.L.R. (4th) 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2F8-00000-00&context=) (B.C.C.A.)

**62**  In Peterson v. Bannon, [*[1993] B.C.J. No. 2357*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FG12-61P4-00000-00&context=) (B.C.C.A.), the meaning of wilfully false was considered. It was said that the onus is on the insurer to prove on a balance of probabilities that statements are false but as the allegations are serious, a careful scrutiny of the evidence is justified and cogent evidence will be required to support an allegation of dishonesty. As to the meaning of wilful, Finch J.A. (as he then was) speaking for the court, said:

46 A wilful act is one done intentionally, knowingly and purposely, without justifiable excuse. A wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A wilful act differs essentially from one done negligently: Gill v. Insurance Corporation of British Columbia, [*[1989] I.L.R. 1-2529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DY33-B4DC-00000-00&context=) (B.C.S.C.).

**63**  In Kruska v. Manufacturers Life Insurance Co., [*[1984] B.C.J. No. 2812*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2MP-00000-00&context=) (B.C.S.C.), affirmed [*[1985] B.C.J. No. 2143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61P0-00000-00&context=) (B.C.C.A.), Mr. Justice Finch considered s. 135 of the Insurance Act, R.S.B.C. 1979, c. 200 and the meaning of the word "fraud" as used in that section. He said this:

41 The accepted test of actual fraud in a civil case derives from Derry v. Peek (1889), 14 A.C. 337. There must be a false representation, made knowingly, without belief in its truth, or recklessly, without care whether it is true or false. Nothing less than this will suffice for the defendant to succeed in this case. Conduct without fraudulent intent which, before the statute, might have been characterized as fraud will no longer so qualify. The effect of the statute is that the insured is still bound by her duty of utmost good faith until the incontestability clause takes effect. After that time she will be held covered if her material misrepresentation or non-disclosures were made innocently, or negligently. The incontestability clause protects her from false representations of that kind. But it will not protect her if she has the fraudulent mind described in Derry v. Peek. Then the law will deprive her, or her beneficiaries, of the proceeds of the contract.

It is thus the absence of actual and honest belief which constitutes fraud.

**64**  BCIC argued that wilfully false statements as to when and where an item was purchased, although not matters which are referred to in statutory condition 6, can vitiate the right to recovery. Reliance was placed upon Dorosh v. Co-operators General Insurance Co., [*[1991] 6 W.W.R. 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JS5Y-B29N-00000-00&context=) (Sask. Q.B.) and Royal Insurance Canada v. Dimario, [*[1988] I.L.R. 1-2260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81K1-JBT7-X2NY-00000-00&context=) (Ont. S.C.). In Dorosh, the form provided by the insurer was similar to the form provided to the Sienemas in that it contained a column headed "Where and When Purchased". The Statutory conditions do not refer to such matters. Armstrong J. considered the argument of the insured that false particulars therefore cannot bring statutory condition 7 into operation. He rejected this argument, stating, at 545:

14 Statutory con. 7, it will be noted, refers to "false statement in a statutory declaration in relation to any of the above particulars." Are "Where and When Purchased" something "in relation to any of the above particulars"? The questions of "Where and When Purchased" are, in my view, both very relevant, material and reasonable to be asked by an insurer required to satisfy itself that there has indeed been the loss for which payment is claimed. They are, in my view, "in relation to" the items specifically referred to in stat. con. 6(1)(b)(i) and (d). Suppose, for example, an insured seeks cash rather than replacement for an article lost and is unable to produce a receipt showing the purchase of it. Surely relevant and material is the question of when it was bought in order to have some reference for determining depreciation. Where it is bought may likewise be relevant to determining when. Both are relevant to "whether" and are accordingly "in relation to" costs.

15 Nothing was cited and I have not found any authority dealing specifically with stat. Con. 7 and the expression "in relation to". This is so apparently notwithstanding that these statutory conditions are not unique to Saskatchewan. Ontario has exactly the same conditions as quoted above and, in fact, even numbered the same. It is in my view important to note that No. 7 of the statutory conditions does not simply refer to a wilfully false statement "of any of the above particulars" but instead uses the expression "in relation to any of the above particulars". This and the fact that the form of proof of loss is not prescribed leaves it to the insurer to ask for anything relevant and reasonable.

16 I find that by the operation of No. 7 of the statutory conditions the whole of the claim by Dorosh is vitiated.

Counsel for the Sienemas did not argue that these authorities should not be followed.

**65**  Turning to the arguments, the Sienemas acknowledged that there were mistakes in the schedule of loss, but Mr. Sienema testified that it was prepared to the best of his ability and recollection. The submission on their behalf was that errors were inadvertent. Mrs. Sienema's failure to read the proof of loss was careless but she did not purposely make false statements.

**66**  Counsel for BCIC agreed that it was not realistic to expect that anyone would have an exact recollection of prices paid for items years earlier. The process of completing a schedule of loss necessarily involves some estimating and an element of reconstruction. It was said, however, that the Sienemas consistently overvalued to a significant extent and that certain of their statements simply could not be anything but wilfully false.

**67**  In circumstances such as the present, whether a false statement is the result of inadvertence or carelessness as opposed to intentional or purposeful is a difficult question. Much of the argument of BCIC focussed on credibility.

**68**  Mr. Sienema testified that very soon after the fire, he was told by Mr. Latham that there would be an investigation into the fire. He was a high profile individual in the insurance industry as he had been fired from his employment because of alleged improprieties with a restoration contractor. Those allegations had adversely affected his reputation and were apparently widely known. Mr. Sienema also believed that Mr. Latham was of the view that he was under financial pressure. Mr. Sienema was thus aware that all aspects of the loss would be closely scrutinized, which might support an argument that he would not knowingly misstate.

**69**  Although Mr. Sienema denied that he was under financial pressure, he had lost his employment at the end of 1995, not long after construction of their home was completed. In 1996, he secured employment in Winnipeg. He earned $4,000 per month, less than half of what he had previously earned. Mrs. Sienema, who had not worked outside the home for many years, had to obtain part time employment, which was not lucrative. They had three children. They owed approximately $500,000 to the bank/mortgage corporation. Their monthly debts were $3,600 which would have been more than Mr. Sienema's net income. At the time of the fire, the Sienemas were clearly in financial difficulty and in my view, his denials are not credible.

**70**  Personnel from On Side Restorations were apparently satisfied that the descriptions of items on the schedule was accurate, including the model numbers of the television sets. Mr. Anton, an experienced adjuster, testified that BCIC gave instructions that depreciation on contents was to be 40% across the board, a view he did not share. He agreed that in such circumstances, information as to original cost was not significant. Certain misstatements therefore relate to matters which could have little relevance to any assessment of how much was payable. As model numbers for electronic equipment were available, information about the price paid, place or date of purchase was of little significance. Using the model numbers, the insurer would obtain its own quotes, as both Mr. Anton and Mr. Sienema were aware, and the balance of the information would not be relied upon to any great extent. That is not to say that the insurer must prove materiality. The relevance is in the determination of credibility.

**71**  It is of relevance that although the schedule of loss is very lengthy, it contains relatively few items which have an original cost or repair/replacement cost exceeding $500. Apart from the items in question, those to which a value of greater than $500 was ascribed include a piano, drapes, an area rug, a bed, encyclopaedia, a computer and certain personal items. BCIC is therefore correct that in terms of the most expensive items, a significant number were overvalued. In fact, the dining room furniture alone accounts for approximately one tenth of the total.

**72**  I also agree with the submission of BCIC that the financial significance of certain of these purchases is a consideration. For example, the dining room furniture was a significant expenditure, particularly in relation to Mr. Sienema's earnings, and the difference between $16,000 and $10,000 or a retail price of $32,000 versus $18,000 is also significant. An individual might be expected to have a recollection of significant purchases or at least, would not be so wrong.

**73**  The purchase of the family room furniture was made approximately 16 months before the proof of loss was sworn, yet the price was stated to be $5,500 plus tax, an overvaluation of more than 50%. I do not accept that there was a phone call from the receiver or that Mr. Sienema was told by his wife that $5,500 had been paid. As Mrs. Sienema actually made the purchase, one would expect her recollection to be more accurate than that of her husband.

**74**  In my view, there cannot be a question but that a television was not purchased from Citiclaims either for anywhere near $5,600 or at all. There is evidence about the competitiveness of retailers which would suggest that even an individual not in the insurance industry who was looking for the best price would have been able to purchase a unit at less than the suggested retail price of $3,800. Again, the overvaluation approximates 50%. While the purchase of the RCA television was many years before, the discrepancy was almost 100%.

**75**  Considering all of the evidence, I do not accept that the false statements were the result of ***negligence*** or inadvertence on the part of Mr. Sienema. I do not accept that he had an honest belief that all of the statements were true. I am therefore satisfied that BCIC has proven that wilfully false statements were made by Mr. Sienema.

**76**  Turning next to Mrs. Sienema, she did not read the schedule of loss. She signed the proof of loss before a notary public, Mr. Cammack. He testified that his invariable practice in these circumstances would have been to ask if she had both read and understood the document. He would not go on to ask if she declared it to be true if she had not read the document. He had no specific recollection of dealing with the Sienemas, or of the document which was presented.

**77**  At her examination for discovery, Mrs. Sienema was asked about whether as far as she was concerned, she was swearing that the contents of the document were true. She commenced her response as follows:

Well, I couldn't know because I didn't read it.

In essence, she acknowledged that she could not have had an actual and honest belief in the truth of a statement that she had never read. As was stated by Duff J. in Redican v. Nesbitt, [*[1924] 1 D.L.R. 536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G1H1-00000-00&context=) (S.C.C.), at 544:

If there is no belief, if the mind of the proponent has never been applied to the question and if he is in truth consciously ignorant upon the subject of his affirmation there is obviously a false statement, and if made with intent that it shall be acted upon in the way of business in a matter involving his own interests a fraudulent statement.

**78**  In Sleigh v. Stevenson, [1943] 4 D.L.R. (Ont. C.A.), the court considered the meaning of the word "knowingly" as used in the Ontario Insurance Act, R.S.O. 1937, c. 256, which provided that the claim of an applicant who "knowingly misrepresents" any fact shall be rendered invalid. The application for insurance had been filled out by the insurance agent and the plaintiff did not read the document before she signed it. The conclusion of Kellock, J.A. was as follows:

If Magee was the agent of the appellant in filling the application, as I think he was, the answers are her answers and she knew, as she admits, that they were not correct. Further, I do not think that a person making a proposal for insurance, can avoid the effect of the section when the proposal is untrue, by saying that while he signed, he was not aware of the contents of the application. I think "knowingly" in the statute is used in the sense that the applicant is in possession of information that what is in fact stated in the application is untrue or does not disclose the truth. The statute requires an application in writing to be signed by the applicant or his agent authorized in writing. That application must contain the matters specified in s. 185(4) including, what is relevant here, the name of the owner and the purchase-price to the owner. It is upon these prior requirements that s. 191 operates, and I think that in the circumstances of this case the appellant must take the responsibility under the statute for what the written application contains. I employ part of the language of Greer L.J., in Newsholme Bros. v. Road Transport & Gen'l Ins. Co., [1929] 2 K.B. 356 at p. 378: "When Mr. Newsholme signed ... the application form, by the act of signing he authenticated the statements contained in the form."

**79**  Sleigh has been followed in a number of subsequent cases, including decisions of this court. In Gill v. Insurance Corp. of British Columbia, [*[1989] B.C.J. No. 1417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B059-00000-00&context=), one of the issues was whether a wilfully false statement had been made. The plaintiff had signed a proof of loss declaring that the value of a missing vehicle was $59,000. The plaintiff testified that she had relied on the advice of her brother, Inderjit, as to value but on cross-examination said she had signed the proof of loss without reading it. Drost L.J.S.C. (as he then was) did not believe this testimony. He concluded:

Sleigh v. Stevenson, [*[1943] 4 D.L.R. 433*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC81-JSXV-G42T-00000-00&context=), a decision of the Ontario Court of Appeal, concerns a claim under the Insurance Act, R.S.O. 1937, c. 256, which, in s. 191, provided that where an applicant for a contract of insurance knowingly misrepresents or fails to disclose in the application any fact required to be stated therein, any claim by the insured shall be rendered invalid. At p. 441, Kellock J.A. said:

I do not think that a person making a proposal for insurance can avoid the effect of the section when the proposal is untrue, by saying that while he signed, he was not aware of the contents of the application. I think 'knowingly' in the statute is used in the sense that the applicant is in possession of information that what is in fact stated in the application is untrue or does not disclose the truth.

That reasoning applies equally well to a statement made with respect to a claim under a policy of insurance. Thus, the plaintiff by signing the proof of loss declaration authenticated the statement of value contained therein and must take responsibility for it.

However, before forfeiture will occur, it must be found that the false statement was made wilfully as well as knowingly. In Black's Law Dictionary, 5th Ed., at p. 1434 the following definition is given:

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

I find on all the evidence that when she signed the declaration of loss the plaintiff, as well as Inderjit, knew that the valuation of $59,000.00 was a significant exaggeration. I find that the false declaration of value was knowingly and wilfully made or adopted by the plaintiff and that her right to recover under the policy of insurance was thereby forfeited.

**80**  Counsel for Mrs. Sienema placed reliance on Kruska v. Manufacturers Life Insurance Co., supra, and particularly the conclusion was that the defendant had not established a fraudulent intent. However, the facts of the case must be borne in mind and it must also be recalled that Finch J. was speaking of the test derived from Derry v. Peek (1889) 14 App. Cas. 337 (H.L.). Kruska involved a policy application which had been completed, in part, by the insured's doctor. A later application was completed by her insurance agent. The insurer alleged failures to disclose medical information. As to the first application, Finch J. found there had been a misrepresentation and non-disclosure, but was not satisfied that the insured had done so knowingly or recklessly. It was just as likely that her reliance on her doctor lead her to innocently believe that all relevant medical history had been disclosed. As to the second application, the question was whether the insured qualified for a lower premium as a non-smoker. The meeting was described as casual and the insured was given the impression that smoking was the key issue, not her medical history. It was concluded that it would be speculation to infer a fraudulent state of mind.

**81**  Mrs. Sienema was aware of the nature of the information contained in the schedule of loss. She understood that it related to the value of the contents of the home. She assisted in obtaining replacement costs. Had she read the schedule and given any thought to its accuracy, she would in all likelihood have realized that information about the cost of dining room furniture was incorrect. On her evidence, she knew it was not black walnut before she spoke to Mr. Tylor. She had purchased the family room furniture and thus knew that her recollection may have been better than that of her husband. She certainly knew that $5,500 was not the purchase price.

**82**  The need to sign a proof of loss was conveyed to Mrs. Sienema by both Mr. Latham and her husband. She understood that it would have to be sworn before a notary public and went to Mr. Cammack's office solely for that purpose. She knew that she was swearing that the value given for the contents was true. In my view, she made wilfully false statements.

**83**  It was agreed that if there was a finding that wilfully false statements were made by Mr. and Mrs. Sienema, BCIC was entitled to judgment on its counterclaim in the sum of $248,738.79 plus interest.

**84**  Although not necessary to do so, I will address two further issues raised by BCIC relating to a contract entered into by the Sienemas with South Bay and an affidavit sworn by Mrs. Sienema on December 30, 1997.

THE BUILDING CONTRACT

**85**  On May 17, 1997, a contract was entered into between the plaintiffs and South Bay to rebuild the home which had been destroyed. It did not include a finished basement. The contract price was $295,675 plus GST of $20,697.25, for a total of $316,372.25. Not long after this contract was executed, South Bay was asked to provide a quotation for finishing the basement. The quotation was contained in a letter dated June 10, 1997, from Mr. Miller. Had it been accepted, the contract price would have increased to $338,395 plus GST.

**86**  Had the quotation been accepted, amendments to the May 17, 1997 contract would have been necessary. Accordingly, along with his letter of June 10, Mr. Miller forwarded a separate document containing necessary revisions to the clauses which appeared on the third page of the original contract. Using this document and a cut and paste method, Mr. Sienema created a new third page and inserted that new page into the May 17 agreement. Thus, a recipient of a photocopy of the altered document would have no way of knowing that it had been altered and would conclude that there was an agreement dated May 17, 1997 between the Sienemas and South Bay to construct a new home for the price of $338,395 plus GST. As the contract itself did not describe the scope of the work, a recipient would not be aware that South Bay was neither building a finished basement nor entitled to receive more than $316,372.25 on completion of its work.

**87**  On June 14, 1997, Mr. Sienema wrote to Mr. Anton, an independent adjuster retained by BCIC, stating that he and his wife had executed a contract to build a new home for the sum of $338,395 plus GST and that based on the contract, the building loss should be calculated as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Contract | $338,395.00 |  |
|  | GST | 23,687.65 |  |
|  | Decks | 2,373.60 |  |
|  | Window Coverings | 7,865.40 |  |
|  |  | $372,321.65 |  |

He enclosed the altered contract, not the original contract and Mr. Miller's quotation for the basement.

**88**  Mr. Sienema and Mr. Anton had agreed, based on the quotation from On Side Restorations Ltd., that the reasonable cost of repair was $360,396.58. Mr. Sienema was aware that policy of insurance provided that the amount payable was the amount spent on repair or replacement of the building, to a maximum of $360,396.58. The minimum payable was actual cash value. What is of significance is that to recover $360,396.58, that amount had to be spent. It would have been spent if South Bay's quotation for finishing the basement had been accepted, as the total cost would have been $362,082.65. The May 17 contract, however, was for substantially less.

**89**  Mr. Sienema acknowledged that he lied to BCIC. He testified, however, it had always been his intention to finish the basement. He suggested that South Bay was never so advised because the insurer's denial of coverage intervened.

**90**  There are difficulties with his explanation. Coverage was denied in mid-August, two months after construction commenced. Mrs. Sienema's evidence was that she and her husband had discussed whether the basement should be finished, but had not reached a conclusion. Mr. Miller's evidence was that he needed to know whether his quotation was accepted prior to commencing the plumbing and electrical work. He believed he told Mr. Sienema that he had to know "shortly". Mr. Miller explained that he could not have done the work for the price quoted if the decision to finish the basement was delayed.

**91**  Counsel for Mr. Sienema acknowledged that a false statement had been made, but argued it was not material. In Inland Kenworth v. Commonwealth, supra, materiality was discussed. It was stated, at 4:

It is sufficient...if the fraud or wilfully false statement is capable of affecting the mind of the insurer either in the management of the claim or in deciding to pay it. It is unnecessary to speculate about what the insurer would have done if the fraud had not occurred.

**92**  It was argued on behalf of Mr. Sienema that BCIC would not have paid out $360,396.58 simply on the basis of a statement from South Bay that the house had been completed in accordance with the May 17, 1997, contract. Further proof that this amount had been expended would have been required. However, the question is not whether a fraud based on the forged document would have succeeded. The issue is materiality. I agree with the submission of BCIC that the cost of repair/rebuilding was directly in issue and a false statement about the contract price bears directly upon the insured's entitlement under the policy. As such, it is material.

**93**  The evidence of Mr. Anton and Ms. Ribeiro is also of relevance. Mr. Anton testified that if he had been presented with a letter from Mr. Miller stating that the home had been completed in accordance with the May 17 contract, he might have recommended to BCIC that the full amount be paid. Ms. Ribeiro testified that had she been presented with such a letter from South Bay and a recommendation from Mr. Anton that the claim be paid, she might have requested that someone drive by the home to confirm that it was completed, but probably would not have done more. The materiality of the fraud is confirmed by their evidence.

**94**  I have not overlooked the argument of BCIC that Mrs. Sienema was complicit in this fraud. I unhesitatingly reject the submission that she created the forged contract at her husband's request. I do not agree that evidence given on her examination for discovery supports that argument. I accept her explanation that at her examination, she was presented with a contract that she had signed and did not realize she was looking at an altered version. She denied any involvement in the forgery and I accept her statement.

**95**  Had it been necessary to do so, I would have concluded that the presentation of the altered contract amounted to a fraud by Mr. Sienema.

THE DECEMBER, 1997, AFFIDAVIT OF MRS. SIENEMA

**96**  BCIC argued that an affidavit sworn December 30, 1997, by Mrs. Sienema contains a materially false statement. The affidavit is very brief. Mrs. Sienema deposed:

1. That I am the Respondent Owner of the lands and premises which are the subject matter of these proceedings.
2. That I have read the Affidavit of Brian C.R. Blake and acknowledge that it was always intended and agreed that the Mortgage No. BJ145079 was to be a Mortgage in favour of CIBC Mortgage Corporation and was to be a first Mortgage charge on the property.

The affidavit was sworn at the request of counsel for the mortgage corporation and was to be used in support of its claim for rectification.

**97**  I do not agree that the affidavit contains a false statement. Mrs. Sienema had no involvement in arranging this financing. She left such matters to her husband. The position of the Sienemas throughout the foreclosure proceedings has been consistent. They say the mortgage ought to be rectified. As argued on behalf of BCIC, the affidavit may violate Rule 51(10) which provides that an affidavit may state only what a deponent would be permitted to state in evidence at trial, except that statements made on information and belief are permitted so long as the source of the information and belief is given. However, the question is whether the affidavit contains a false statement. Even if Mrs. Sienema did not read Mr. Blake's affidavit or her affidavit, that cannot provide a basis to avoid the claim unless what she said was untrue.

**98**  BCIC described the agreement as being a triparteid agreement as between Mr. Blake, Mr. Sienema and Mrs. Sienema. While Mrs. Sienema was the owner of the lands and premises, her husband was acting on her behalf. To read her affidavit as stating that she personally made an agreement is, in my view, to distort the words used.

I therefore reject the submission that this affidavit contains a materially false statement.

THE CLAIMS OF THE BANK AND THE MORTGAGE CORPORATION

**99**  There are four issues raised in respect of the claims of the bank and the mortgage corporation, as follows:

1. Is the mortgage corporation entitled to rectification?
2. If so, is it entitled to a declaration that BCIC is liable to pay the amount found owing under mortgage no. BJ145079 to the date of judgment to the extent of policy limits after an accounting in the foreclosure action?
3. Is the mortgage corporation entitled to damages against BCIC for breach of an obligation of good faith?
4. Does the bank hold a valid mortgage?
5. RECTIFICATION

**100**  The mortgage corporation seeks rectification of a mortgage number BJ14509.

**101**  Although many authorities were referred to during argument, the applicable principles are well settled. In Bank of Montreal v. Vancouver Professional Soccer Ltd. [*(1987), 15 B.C.L.R. (2d) 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X0Y9-00000-00&context=) (B.C.C.A.), McLachlin, J.A. (as she then was) discussed the remedy of rectification. She stated, at 36-37:

Where the contracting parties have agreed on one set of terms and their agreement is later embodied in a document containing different terms, rectification may be available: Treitel, The Law of Contract, 4th ed. (1975), pp. 202-203. The remedy is concerned only with defects in the recording, not the making of the contract, a principle expressed succinctly in the maxim: "Courts of equity do not rectify contracts; they may and do rectify instruments": Mackenzie v. Coulson (1869), L.R. 8 Eq. 368 at 375.

Before rectification can be obtained, the applicant must establish:

1. that the written instrument does not reflect the true agreement of the parties;
2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument.

[See Joscelyne v. Nissen, [1970] 2 Q.B. 86 at 98-99, [1970] 2 W.L.R. 509, [1970] 1 All E.R. 1213 (C.A.); Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co., [1953] 2 Q.B. 450 at 451, [*[1953] 3 W.L.R. 497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JCJ5-23SM-00000-00&context=), [1953] 2 All E.R. 739 (C.A.).

The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make. While it may not be so high as the criminal onus of proof beyond a reasonable doubt (see Joscelyne v. Nissen, supra; Peter Pan Drive-In Ltd. v. Flambro Realty Ltd. [*(1978), 22 O.R. (2d) 291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23NN-00000-00&context=), [*93 D.L.R. (3d) 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23NN-00000-00&context=), affirmed *26 O.R. (2d) 746*, *106 D.L.R. (3d) 576* (C.A.)), terms such as "certainty" (Rose v. Pim, supra) and "convincing proof" (Joscelyn v. Nissen) are appropriate.

These statements have been referred to with approval in a number of subsequent authorities including I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd. [*(1994), 41 R.P.R. (2d) 312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63SV-00000-00&context=) (B.C.C.A.).

**102**  BCIC does not dispute that the mortgage corporation instructed solicitors to prepare a mortgage in its favour and advanced funds based on the belief that such a mortgage was in place. The argument of BCIC is that there is not convincing proof that all parties to the contract were in agreement as to its essential terms and therefore, rectification cannot be granted.

**103**  The argument of BCIC relies to some extent on the understanding of Mrs. Sienema, who was the mortgagor. (Mr. Sienema was a guarantor.) Mrs. Sienema testified that she was not aware of the existence of the mortgage corporation. Thus, it was argued that the mortgage as drawn was not in accord with her understanding of what was to occur. I do not agree that her lack of awareness of the existence of the mortgage corporation leads to the conclusion that the mortgage ought not to be rectified. What Mrs. Sienema understood was that financing had been arranged by her husband and her intention was to do whatever was necessary to obtain that financing. Mr. Sienema dealt with all business and financial matters on behalf of the family. Mrs. Sienema had no involvement in the negotiation of loans. In my view, it is clear that Mr. Sienema was acting on behalf of his wife, that he did so with her consent, and that she intended to be bound by the agreement he negotiated. It is therefore the evidence of Mr. Sienema and Mr. Blake, the loans officer with the bank who was assigned to deal with Mr. Sienema's account, that is of importance. The question is what agreement they made.

**104**  Mr. Blake testified that he had dealt with Mr. Sienema in respect to three loans. In early 1994, Mr. Sienema borrowed $150,000 to purchase shares in the company for which he then worked. This loan was secured by a collateral mortgage over the Sienema home. Later in 1994, he dealt with Mr. Sienema in respect of another $150,000 loan, again from the bank, which was to be used for interim construction financing. It was also secured by a second collateral mortgage over the Sienema home.

**105**  As to the mortgage in question, Mr. Blake had no specific recollection of his conversations with Mr. Sienema. He stated that it was his practice to advise customers of the advantages of conventional financing and explain that the mortgage would be with the mortgage corporation not the bank. He believed he followed his practice in this case. He made application to the mortgage corporation for the mortgage and in the application indicated that a portion of the funds was to be used to pay out the $150,000 construction loan. That one mortgage was replacing another was therefore certainly discussed with Mr. Sienema. I would add that as conventional financing was not offered by the bank, there is no question but that Mr. Blake did not say that the bank was to be the lender.

**106**  Mr. Sienema testified that in respect of the construction of the family home, he initially dealt with Mr. Blake after the lot had been purchased. He advised Mr. Blake that they required funds for construction. A loan of $150,000 was arranged and it was agreed that when construction was complete, the mortgage corporation would provide $360,000 which would be used, in part, to discharge the indebtedness of $150,000. A conventional residential mortgage was to be granted. It was Mr. Sienema's evidence that he advised his wife of what was to occur, but did not discuss the distinction between the bank and the mortgage corporation.

**107**  Documents prepared by Mr. Sienema are in accord with his evidence that he was aware that the lender was the mortgage corporation. The application for insurance dated August 5, 1996, referred to the mortgage corporation, which is why the policy of insurance issued by BCIC named the mortgage corporation. Mr. Sienema testified that after he lost his employment, he had difficulty meeting his financial commitments and sought to reduce mortgage payments. A letter dated November 8, 1996, to Mr. Blake states:

As discussed, please amend our mortgage with CIBC Mortgage Corporation to the lowest variable rate mortgage payments available effective as soon as possible.

The proofs of loss also refer to the mortgage corporation.

**108**  Although it is acknowledged that the solicitors who drafted the mortgage made an error, it is helpful to understand what occurred. The mortgage and other documents executed by the Sienemas were prepared by the law firm of Thompson McConnell. A letter dated December 6, 1994, provided instructions regarding the mortgage. This letter is on the letterhead of the mortgage corporation and included a request that the Sienemas sign an enclosed mortgage approval form, which also contained references to the mortgage corporation. That form was not, however, forwarded to the Sienemas.

**109**  Thompson McConnell opened a file in the name of the bank, not the mortgage corporation. Presumably, it was simply assumed that the bank was the client and no one looked at the instruction letter or enclosed documents. The error went undetected, although there was correspondence with the mortgage corporation and funds were requisitioned from the mortgage corporation. The mortgage which was drafted described the lender as the bank, although the standard conditions appended to the mortgage are those of the mortgage corporation and include the words "CIBC Mortgage Corporation". A consent and an acknowledgement of receipt also referred to the bank. I accept the evidence of Ms. Mooney that the contents of the documents were explained to the Sienemas when they were signed.

**110**  One of the submissions of BCIC is that Mr. Sienema would have questioned the identity of the lender when he signed these documents if he truly knew and believed that the lender was to be the mortgage corporation. I do not agree that it is "inherently incredible" that Mr. Sienema failed to raise a question. There was a lack of attention on the part of several individuals. The law firm retained by the mortgage corporation was remiss. When Mr. Blake received documents which showed the bank as mortgagee, he also failed to note that fact. Given that a legal assistant, a solicitor and a banker did not notice the error, it can hardly be incredible that Mr. Sienema did not question Ms. Mooney.

**111**  It was also argued on behalf of BCIC that until August, 1996, when the application to BCIC was completed, Mr. Sienema's conduct was inconsistent with his professed belief that the mortgage corporation was to be the lender. In support of that assertion, reliance is placed upon endorsements and renewal documents issued by previous insurers, some of which refer to the loss payee as the bank. One difficulty with this documentation is that the first endorsement which indicates that loss is payable to anyone other than the insured is an endorsement effective December 12, 1994, which makes the loss payable to the mortgage corporation. Another endorsement effective December 30, 1994, also states that any building loss is payable to the mortgage corporation. To that point, however, the mortgage corporation had not provided funds to the Sienemas. Presumably, an error was made. An endorsement effective February 20, 1995, named the bank as loss payee. The policy in place until August, 1996, continued to name the bank as loss payee, although the mortgage which is sought to be rectified was granted in May, 1995. There is no evidence, however, as to why or on whose application the endorsements were issued.

**112**  I conclude that the Sienemas intended to grant security to the entity which was advancing funds. Whether the lender was to be the bank or the mortgage corporation could not have been of significance to them and I doubt that either paid much attention to the identity of the lender. In my view, the question comes down to whether Mr. Blake stated that the mortgage corporation was to be the lender. I accept the evidence of Mr. Blake that it would have been his practice to do so. It also makes sense that he would have discussed with Mr. Sienema the difference between short term financing and long term conventional financing as it was intended that the collateral mortgage would be discharged from the proceeds of the conventional mortgage.

**113**  As to Mr. Sienema's evidence, because his application to BCIC for insurance specifies the mortgage corporation as the loss payee, there can be no question but that in August, 1996, he believed that the mortgage corporation was the lender. In fact, all of the documents created by Mr. Sienema identify the lender as the mortgage corporation. I do not accept the submission of counsel for BCIC that this speaks only to Mr. Sienema's understanding of the lender at the time the documents were created and not what he understood between November, 1994, when financing was discussed with Mr. Blake and in May, 1995, when the mortgage was executed. In my view, the documents are relevant.

**114**  Their relevance is apparent when one considers what would have occurred had the Sienemas argued against rectification. In such circumstances, Mr. Sienema undoubtedly would have been called upon to explain why the application made in August, 1996, the letter sent to Mr. Blake in November, 1996, and the proofs of loss filed in 1997 identified the mortgage corporation as the lender if that had not been his understanding during the relevant period of time. However, he was not asked these questions in these proceedings. In my view, his evidence that he always understood that the mortgage corporation was the lender is a credible explanation for why the documents refer to the mortgage corporation. I accept his evidence that the lender was discussed with Mr. Blake.

**115**  BCIC also argued that it is of some significance that Mr. Sienema was not certain that the bank and the mortgage corporation were different legal entities and did not know the precise name of the mortgage corporation. In my view, what is significant is not his lack of certainty on these other matters, but the fact that he believed there was a distinction between the bank and the mortgage corporation.

**116**  I am satisfied that there was discussion about agreement about the lender. The mortgage corporation has met the requirements for rectification and it is therefore entitled to an order amending the name of the mortgagee in mortgage no. BJ14509.

1. IS THE MORTGAGE CORPORATION'S RECOVERY UNDER THE STANDARD MORTGAGE CLAUSE LIMITED TO ACTUAL CASH VALUE?

**117**  Counsel for BCIC submitted that the mortgage corporation could recover only actual cash value, being $330,000.

**118**  The nature and extent of a mortgagee's interest is discussed in Couch on Insurance 3D (1998), Vol. 12, para. 178 53: The authors state:

The standard mortgage clause of a homeowners' policy insuring a mortgagee "as interest may appear" means that the insurer undertakes to pay the mortgagee to the extent of its lien or charge on the premises as it exists on the date of loss, including not only unpaid principal and interest but also payments of taxes and assessments by the mortgagee to protect its security, as well as the costs and disbursements of any foreclosure action.

**119**  The relevance of the date of the fire was confirmed in Market Furniture Ltd. v. Willann Enterprises Ltd. [*(1982) 34 B.C.L.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X2CN-00000-00&context=) (B.C.S.C.).

**120**  It was argued on behalf of the mortgage corporation that the standard mortgage clause contained in the policy of insurance does not limit the amount recoverable by the mortgage corporation. It does not contain the words "at the date of occurrence of the risk" or any other such words of limitation. The policy itself, however, contains provisions as to the amount payable. A standard mortgage clause creates an independent contract of insurance between the insurer and the mortgagee, but it does not exclude other policy provisions.

**121**  I agree with the submission of BCIC that the amount payable is $330,000.

**122**  The position of BCIC on the question of when interest begins to run was that it could not be earlier than October 6, 1998, when the foreclosure petition came on for summary trial. The mortgage corporation says that it began to run 60 days after the filing of the proof of loss. In the usual case, I would agree with counsel for the mortgage corporation. This case, however, is not usual. BCIC was at least entitled to additional information in respect of rectification. As there is no other basis on which to do so, I conclude that proof of the claim had been presented to BCIC on October 6, 1998.

1. IS THE MORTGAGE CORPORATION ENTITLED TO DAMAGES?

**123**  The position of the mortgage corporation is that the manner in which it was dealt with by BCIC demonstrated a pronounced lack of good faith and entitles it to damages.

**124**  After the claims of the Sienemas were rejected, BCIC advised the mortgage corporation that it was required to file a proof of loss. I do not propose to deal with arguments as to whether there was a legal requirement to do so. Counsel for BCIC acknowledges that it is at least arguable that its position was incorrect. In any event, it is not that advice which is the focus of the mortgage corporation's claim, and information had to be provided regardless of whether a form was used.

**125**  The claims of the Sienemas were not rejected until August, 1997. Mr. McLean, a solicitor who was retained to act on behalf of the mortgage corporation, was concerned about the lapse of time and quickly prepared and swore a proof of loss as agent for the mortgage corporation. The proof of loss sworn October 9, 1997, stated that the amount claimed was $370,000. As to replacement cost and cash value, Mr. McLean said "unknown at this time". The proof of loss had an attachment in which it was stated that as more information became available, a further proof would be provided, including details of the mortgage account. Mr. McLean also explained that a copy of the cover page of the policy of insurance had been requested from the insurer, but had not yet been received.

**126**  BCIC responded that this proof of loss was woefully inadequate, which was something that Mr. McLean had obviously recognized. On October 20, 1997, Mr. Altridge, as counsel for BCIC, wrote to counsel stating that the proof of loss was grossly deficient and referring to the failure to provide information with respect to replacement cost, actual cash value and the extent of the interest of the mortgage corporation in the property as of the date of loss. His letter concluded:

Clearly your client cannot possibly believe that it is entitled to the policy limits of $370,000.00 as claimed in the Proof of Loss. We remind you of your client's duty of good faith and fair dealing, and we repeat our caution that you should not treat a Proof of Loss as a negotiating ploy.

**127**  The tenor of this correspondence is surprising. BCIC understood that the mortgage corporation had had little involvement in the matter. It was critical of a failure to provide information as to replacement costs and actual cash value, yet three repair estimates had been prepared and provided to both the Sienemas and BCIC in January, 1997. These estimates had been reviewed and compared and it had been agreed by BCIC and Mr. Sienema that the estimate of On Side Restorations should be accepted for purposes of determining repair cost. To the knowledge of BCIC, the mortgage corporation could not have obtained any estimates in the fall of 1997 because the structure had been demolished and thus, it could not have provided additional information about replacement cost or actual cash value.

**128**  On November 7, 1997, Mr. McLean, again as agent for the mortgage corporation, swore a second proof of loss. An explanatory schedule was attached, together with copies of the estimates of On Side Restoration Services Ltd., Cromwell Restoration Ltd. and Edenvale Restoration Specialists, the building contract, Mr. Sienema's June 14, 1997, transmittal letter to Mr. Anton, the mortgage, the foreclosure petition and certain other letters to and from Mr. Anton. The schedule erroneously stated that Mr. Sienema and Mr. Anton had agreed that $373,156.10 was payable in respect of the building. The schedule set out the amount owing to the mortgage corporation on the date of the fire and listed further costs which had been incurred. The mortgage corporation acknowledged that the sum of $140,000 received from BCIC should be deducted from the amount otherwise payable under the claim.

**129**  On the issue of rectification, Mr. McLean stated than an error had been made in naming the bank. The mortgage was on the mortgage corporation's form of mortgage, including the standard mortgage terms, and had always been administered by the mortgage corporation. Mr. McLean asserted that rectification was being sought in the foreclosure action, which was apparent from the pleadings.

**130**  The response to this proof of loss was a request that Mr. McLean submit to an examination under oath and a suggestion to him that he consider obtaining legal advice from counsel experienced in insurance matters. Mr. McLean responded by letter dated December 12, 1997, stating that instructions were being sought in respect of Mr. Altridge's request. He asked for particulars of the areas of concern in respect of the proof of loss. The letter noted:

We are somewhat puzzled by your request because, from our perspective, we have provided the insurer with all of the information that we have and somewhat ironically, much of that information was information that we obtained either [sic] the insurer or from Mr. Sienema who had already forwarded that information to the insurer.

**131**  The response from Mr. Altridge to Mr. McLean included the following:

Finally with respect to the "areas of concern" regarding the subject Proof of Loss, our client is concerned that there may be fraud or wilfully false statements in the Proof of Loss in connection with the particulars required to be provided pursuant to Statutory Condition 6(1)(b). This relates, inter alia, to the amount of the claim, and the assertion that "CIBC Mortgage Corporation holds a Mortgage on the property."

**132**  To comment on Mr. Altridge's letter, I do not understand the statement that the mortgage corporation's assertion that it held a mortgage was fraud or a wilfully false statement, at least as the authorities define those words. Nor do I understand how the amount claimed could be described in that fashion. There may, for example, be disputes about the amount payable, but a disagreement about whether that amount is actual cash value, repair or replacement cost or the outstanding indebtedness cannot be categorized as a fraud or wilfully false statement.

**133**  It is not surprising that matters went downhill. BCIC was called upon to respond to the proof of loss within time limits. On January 7, 1998, BCIC advised that it was not prepared to honour the claim based on the information provided. The concern that there may be fraud or wilfully false statements and the proof of loss was repeated. BCIC stated its position that the claim must be based on actual cash value and the proof of loss contained no valuation of the claim on that basis. The areas of concern regarding "possible fraud or wilfully false statements" were said to include the following:

1. The amount of the loss claimed is $372,321.65 when the said sum:
2. is based on the cost of building a new structure which has not in fact been constructed;
3. includes the cost of repair or replacement of property which is not secured by the subject mortgage nor covered by the building portion of the Policy, namely "window coverings";
4. exceeds the cost of repairing the damage sustained by the subject building in the fire;
5. exceeds the amount owing on the subject mortgage;
6. exceeds the limits of liability under the Policy;
7. fails to account for the sum of $143,398.23 already advanced;
8. fails to account for the sum of $7,149.00 retained by the CIBC Mortgage Corporation.
9. The Proof of Loss represents that the "CIBC Mortgage Corporation holds a mortgage on the property" when:
10. the mortgage registered against the subject property is in the name of Canadian Imperial Bank of Commerce;
11. there is no evidence in support of the further representation that the naming of the said Bank "was in error" and in particular, there is no information, documentary or otherwise, identifying when and by whom the alleged error was made;
12. there is no indication that the deponent of the Statutory Declaration has any means of knowledge regarding such matters.

It may well be that our client's concerns about the possibility of fraud prove to be without substance. The issue, however, appears to turn on whether the deponent of the Proof of Loss, Mr. McLean, had an honest belief that a claim in excess of policy limits, etc. could be maintained and in that regard we have requested the opportunity to question Mr. McLean regarding these matters, but our request has effectively been refused.

**134**  Again, I frankly cannot understand why BCIC responded in that way. Speaking generally, a proof of loss is intended to provide to an insurer the information necessary to assess the claim. The mortgage corporation necessarily had to rely on information collected from others. On the other hand, BCIC possessed all the information necessary to calculate actual cash value and that information had been in its possession for almost one year.

**135**  It is surprising that an insurer would suggest that it is fraudulent, rather than simply erroneous, to include a sum for window coverings when calculating loss. If BCIC felt any such items should be deleted, it should simply have said so. Further, it was obvious from the statements in the schedule which were appended to the second proof that the mortgage corporation acknowledged receipt of $140,000.

**136**  As to the fact that the mortgage named the bank as mortgagee, it was surely clear to BCIC that in stating that the bank had been named in error, Mr. McLean was stating his conclusions as neither he nor his firm had been involved. Although BCIC was not given enough information to allow it to draw its own conclusions, it defies understanding to suggest that this could be indicative of a fraud in these unusual circumstances.

**137**  The approach taken by BCIC to the claim of the mortgage corporation can be illustrated by Ms. Ribeiro's evidence about the $140,000 advance. On the standard form proof of loss document, there is a blank space for the deponent to fill in the amount claimed. When Mr. McLean did so, he did not subtract $140,000. Rather, in his narrative, he stated that this amount was to be credited. Ms. Ribeiro nevertheless insisted that the mortgage corporation was claiming an amount it had already received, a position which I must regretfully describe as foolish. She further testified that an additional reason for rejecting the proof of loss was that it did not give sufficient information about the outstanding indebtedness. Although asked many times and in many ways, she could not say specifically what was lacking or conversely, what would have been sufficient. The reason for concern was therefore never delineated.

**138**  I agree with the submission of the mortgage corporation that the correspondence from BCIC was inflammatory and most issues could have been resolved by a simple telephone call or a polite letter. I agree that there was absolutely no basis to suggest that the mortgage corporation was trying to defraud BCIC. Nevertheless, assuming that it has an action for bad faith, I do not agree that it was a breach to require the mortgage corporation to engage in legal proceedings, which is the argument advanced.

**139**  By the end of 1997, BCIC had realized that Mr. Sienema had altered the contract with South Bay. It had reason to be concerned that the schedule of loss contained grossly inflated values. Necessarily, Mr. McLean's belief that the mortgage should be rectified depended, in part, upon the evidence of the Sienemas. BCIC was entitled to inquire about the basis of the claim for rectification and to consider whether the remedy was available as it was acknowledged by the mortgage corporation that its claim under the standard mortgage clause could not succeed unless rectification was ordered. While the way that BCIC dealt with the proofs of loss is regrettable, it is not my view than an entitlement to damages has been made out.

1. THE VALIDITY OF THE COLLATERAL MORTGAGE

**140**  South Bay argued that the collateral mortgage held by the bank does not secure any "indebtedness" as defined by the mortgage. Indebtedness includes demand promissory notes, personal loan promissory notes and any note taken in renewal or replacement.

**141**  South Bay's argument relates to the loan given to Mr. Sienema by the bank to finance the purchase of shares ("the share loan"). The share loan was secured by a promissory note. Additional security in the form of a mortgage was required and mortgage no. BH442360 was granted by Mrs. Sienema. On May 30, 1997, the bank debited the account of the Sienemas in the amount of $150,708.90 which was the amount outstanding on the share loan.

**142**  The debiting of the Sienemas' account occurred by reason of an error made by Mr. Atkinson, a bank employee. When Mr. Blake left the branch, Mr. Atkinson assumed responsibility for some of his files. Mr. Atkinson testified that he was not familiar with the flagging system for personal loans and therefore did not appreciate that he was required to review the share loan. Because of his inactivity, the Sienemas' account was debited. Because of the size of the debit, it came to his attention and it was then that he learned of the error. He attempted to reverse the entry but the bank's computer system rejected his attempts. His ultimate solution was to make application for a new loan. The Sienemas were unaware of the application.

**143**  On July 2, 1997, a promissory note was forwarded to the Sienemas for execution. South Bay argues that although the covering letter stated that consumer loan number 4184636188, being the share loan, was to be renewed, Mr. Atkinson knew that this loan could not be renewed and in fact, he subsequently applied for the new loan and approval was granted on July 23. It was argued that this new loan was in Mr. Sienema's name, that the bank has failed to prove that Mrs. Sienema is liable and that there is no indebtedness secured by the mortgage in question.

**144**  The response of the bank is that the payout was not authorized. The sole reason for the debit to the Sienemas' account was Mr. Atkinson's error. Mrs. Sienema, through her husband, agreed to provide a collateral mortgage for the share loan, the money was advanced and has not been repaid and there is a promissory note which evidences the debt.

**145**  I agree with the argument advanced on behalf of the bank. In substance, nothing changed. Mr. Atkinson did what he felt was necessary to correct his error, but that could not affect the original contract between the parties. If the argument of South Bay is that the bank altered the loan agreement without the consent of all parties, I cannot agree. In my view, the mortgage secures the outstanding indebtedness in respect of the share loan.

**146**  It is my understanding that having dealt with four issues raised in respect of the claims of the bank and mortgage corporation, counsel are agreed on the orders which follow, including the balance of the relief claimed in Action No. H970993. If issues arise as a result of the accounting, further submissions may be made. As to South Bay, it is agreed that it is entitled to a declaration that its lien is valid, although the amount has yet to be determined.

**147**  Also by agreement, costs were not addressed. If that issue cannot be resolved by the parties, submissions may be made orally or in writing.

GILL J.

**End of Document**

[***Stanway v. Wyeth Canada Inc., [2013] B.C.J. No. 411***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G21C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.M. Gropper J.

Heard: January 21 and 22, 2013.

Judgment: March 7, 2013.

Docket: S111075

Registry: Vancouver

**[2013] B.C.J. No. 411** | 2013 BCSC 369 | 44 B.C.L.R. (5th) 389 | 227 A.C.W.S. (3d) 360 | 2013 CarswellBC 563

Between Dianna Louise Stanway, Plaintiff, and Wyeth Canada Inc., Wyeth Pharmaceuticals, Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc. and Wyeth, Defendants

(44 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Discovery — Examination for discovery — Range of examination — Objections and compelling answers — Application by representative plaintiff for order requiring defendants to answer questions improperly refused at examination for discovery allowed in part — Plaintiff sued drug manufacturers of hormone replacement drugs allegedly causing breast cancer — Questions addressing the corporate connection between defendants and questions relating to employee code of conduct, sales information and size of defendants' promotional budget were irrelevant — Questions relating to benefits claimed by defendants, authenticity of documents, endometrial cancer and sales figures outside class period were relevant and appropriate questions.**

**Tort law — Suppliers of goods — Product liability — Manufacturers — Application by representative plaintiff for order requiring defendants to answer questions improperly refused at examination for discovery allowed in part — Plaintiff sued drug manufacturers of hormone replacement drugs allegedly causing breast cancer — Questions addressing the corporate connection between defendants and questions relating to employee code of conduct, sales information and size of defendants' promotional budget were irrelevant — Questions relating to benefits claimed by defendants, authenticity of documents, endometrial cancer and sales figures outside class period were relevant and appropriate questions.**

|  |
| --- |
| Application by the representative plaintiff for an order requiring the defendant to answer questions that were allegedly improperly refused at the examination for discovery. The defendants challenged the propriety and relevance of the questions posed. The plaintiff commenced a class proceeding regarding the ingestion of hormone replacement therapy drugs manufactured by the defendant that allegedly caused breast cancer.  HELD: Application allowed in part.  The scope of examination for discovery in the context of class proceedings must be defined broadly and not be limited by the common issues. Questions relating to benefits claimed by the defendants were appropriate. The common issue concerning the defendants' breach of duty to the plaintiff embraced this area of inquiry. Questions relating to endometrial cancer were material and relevant to the issue of whether the defendants breached their duty. The authenticity of documents was an appropriate area upon which to examine a witness at examination for discovery. Questions concerning sales figures after 2003 were relevant to the issue of the drop in breast cancer rates in Canada after the release of the Women's Health Initiative study. Although this question dealt with information outside of the defined class period, it was potentially material and relevant. While questions addressing the corporate connection between the defendants were appropriate, the degree of detail the plaintiff sought was beyond what could be found to be material and relevant. Questions relating to the employee code of conduct were irrelevant. Sales information and the size of the defendants' promotional budget were irrelevant. |

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 17*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-F2TK-2157-00000-00&context=)(1)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 7-2*(18)

**Counsel**

Counsel for the Plaintiff: D.A. Klein.

Counsel for the Defendants: W. McNamara.

**Reasons for Judgment on Examination for**

**Discovery Refusals**

|  |
| --- |
| **J.M. GROPPER J.** |

**Introduction**

**1**  The representative plaintiff in this class proceeding seeks an order pursuant to subrules 7-2(18) and (25) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009* [*Rules*] that a representative of the defendant Wyeth Canada Inc., Ms. Judith Halmos-Stark, answer questions that were allegedly improperly refused at the examination for discovery. This examination took place from November 19 to 21, 2012 and this application was filed shortly thereafter on November 27, 2012.

**2**  The defendants challenge the propriety and relevance of the questions posed. More specifically, they object to the plaintiff examining Ms. Halmos-Stark in the following categories:

1. marketing claims, particularly unproven benefits;
2. expert opinions;
3. endometrial cancer outbreak;
4. authenticity of documents;
5. sales information;
6. corporate structure and division of responsibility;
7. codes of employee conduct; and
8. sales information and promotional budget.

**3**  The principal issue for determination is the proper scope of examination for discovery in the context of class proceedings. I will then consider the eight categories of objections and conclude by outlining my disposition in respect of these objections, further detailed in Appendices A and B.

**Background**

**4**  This class proceeding regards the ingestion of hormone replacement therapy drugs manufactured by the defendants that allegedly caused breast cancer. It was certified in my reasons for judgment on August 4, 2011, indexed at [*2011 BCSC 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22T8-00000-00&context=). In my reasons, I defined the class as follows:

Women who were prescribed Premplus, or Premarin in combination with progestin, in Canada during the Class Period and ingested Premplus, or Premarin in combination with progestin and were thereafter diagnosed with breast cancer.

The "Class Period" runs from January 1, 1977 until December 1, 2003, inclusive.

**5**  Five common issues were certified, as excerpted in para. 7 of my reasons:

1. Is there a causal connection between the use of Premplus, or Premarin in combination with progestin, and breast cancer and if so, what is the nature and extent of the connection?
2. Did the Defendants, or any of them, owe a duty of care to class members?
3. Did the Defendants, or any of them, breach a duty of care to class members, and if so, when?
4. If the Defendants, or any of them, breached a duty of care owed to class members, were the Defendants, or any of them, guilty of conduct that justifies punishment?
5. If the answer to common issue 1(d) is "yes" and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against the Defendants, or any of them?

**6**  For class members who ingested Premplus or Premarin supplied in British Columbia, the common issues were defined as follows:

1. Did the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Premplus and Premarin for personal, family or household use by class members fall within the meaning of "consumer transactions" under the *Business Practices and Consumer Protection Act* ("BPCPA")?
2. With respect to the supply in British Columbia of Premplus and Premarin to class members for their personal, family or household use, are the Defendants, or any of them, "suppliers" as defined in the BPCPA?
3. Are the class members "consumers" as defined by the BPCPA?
4. Did the Defendants, or any of them, engage in conduct that constituted deceptive acts or practices contrary to the BPCPA as alleged in the Amended Statement of Claim?

**7**  The Court of Appeal upheld this certification ([*2012 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24CF-00000-00&context=)) and the matter is now proceeding to trial.

**Scope of Examination for Discovery**

**8**  Pursuant to subrule 7-2(18) of the *Rules*, the scope of examination for discovery is defined broadly:

**Scope of examination**

(18)Unless the court otherwise orders, a person being examined for discovery

1. must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and
2. is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

**9**  Mr. Justice Smith reviewed the evolution of the law with respect to the scope of examination for discovery in *More Marine Ltd. v. Shearwater Marine Ltd.*, [*2011 BCSC 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G32K-00000-00&context=):

[4] The new *Rules* came into effect on July 1, 2010, but the language in rule 7-2 (18) is identical to the former rule 27 (22). As Griffin J. said in *Kendall v. Sun Life Assurance Company of Canada*, [*2010 BCSC 1556*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B349-00000-00&context=) [*Kendall*] at para. 7 "the scope of examination for discovery has remained unchanged and is very broad." In *Cominco Ltd. v. Westinghouse Can Ltd.* [*(1979), 11 B.C.L.R. 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F2F4-G1FK-00000-00&context=) (C.A.) [*Cominco*], an early and leading case under the former rule, the Court of Appeal said at 151 that "rigid limitations rigidly applied can destroy the right to a proper examination for discovery." The court in *Cominco* also adopted the following statement from *Hopper v. Dunsmuir No. 2* (1903), 10 B.C.R. 23 (C.A.) at 29:

It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose, and it is needless to labour the proposition that in many cases much preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.

[5] In *Day v. Hume*, [*2009 BCSC 587*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M273-00000-00&context=) this court said at para. 20:

The principles emerging from the authorities are clear. An examination for discovery is in the nature of cross-examination and counsel for the party being examined should not interfere except where it is clearly necessary to resolve ambiguity in a question or to prevent injustice.

**10**  Smith J. observed one distinction between the *Rules* and the former rules of court in regard to discovery:

[6] While Rule 7-2 (18) is the same as its predecessor, the new *Rules* create a distinction that did not previously exist between oral examination for discovery and discovery of documents. The former rule 26 (1) required a party to list all documents "relating to every matter in question in the action." Although disclosure in those terms may still be ordered by the court under *Rule* 7-1 (14), the initial disclosure obligation is set out more narrowly in *Rule* 7-1(1) ... .

**11**  He concluded that this change was influenced by the recognition of the principle of proportionality in the *Rules* and in the common law:

[7] Under the former rules, the duty to disclose documents and the duty to answer questions on oral examination were therefore controlled by the same test for relevance. Under the new *Rules*, different tests apply, with the duty to answer questions on discovery being apparently broader than the duty to disclose documents.

[8] Although that may appear to be an anomaly, there are at least two good reasons for the difference. One reason is that if the court is to be persuaded that the broader document discovery made possible by rule 7-1(14) is appropriate in a particular case, some evidence of the existence and potential relevance of those additional documents will be required. The examination for discovery is the most likely source of such evidence.

[9] The second reason relates to the introduction of proportionality as a governing concept in the new *Rules*. *Rule* 1-3 (2) states:

1. Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
2. the amount involved in the proceeding,
3. the importance of the issues in dispute, and
4. the complexity of the proceeding.

...

[11] The new *Rules* recognize that application of a 19th century test to the vast quantity of paper and electronic documents produced and stored by 21st century technology had made document discovery an unduly onerous and costly task in many cases. Some reasonable limitations had become necessary and Rule 7-1 (1) is intended to provide them.

**12**  In support of this finding, he noted the imposition of time limitations on parties conducting their examination for discovery in the *Rules*. This procedural limit engenders proportionality by forcing parties to be effective with the time allotted to them:

[12] The new *Rules* also impose limitations on oral examination for discovery, but do so through a different mechanism. Rule 7-2 (2) now limits an examination for discovery to seven hours or to any longer period to which the person being examined consents. Although the test for relevance of a particular question or group of questions remains very broad, examining parties who ask too many questions about marginally relevant matters, who spend too much time pursuing unproductive trains of inquiry or who elicit too much evidence that will not be admissible at trial risk leaving themselves with insufficient time for obtaining more important evidence and admissions.

**13**  In sum, Smith J.'s reasons suggest that the scope of examination for discovery is not limitless. What may be considered relevant will be treated broadly but certain procedural limitations have been put in place in the *Rules* to direct that parties conduct their litigation in a manner that is proportional.

**The Scope of Examination for Discovery in the Context of Class Proceedings**

**14**  The *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* [*CPA*] provides that parties to a class proceeding have the same rights for discovery as found under the *Rules*, pursuant to s. 17(1).

**15**  The defence asserts the correct approach to the conduct of examination for discovery in a class proceeding is to limit the general broad scope principle by way of the certified class definition and common issues.

**16**  The scope of examination for discovery in class proceedings has not been specifically addressed in British Columbia.

**17**  This issue has been more fully reviewed in Ontario.

**18**  *Andersen v. St. Jude Medical, Inc.*, [*2010 ONSC 4708*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFH1-FBV7-B3S5-00000-00&context=) at para. 38 (*Andersen*) set out the rule for the scope of examination for discovery in the context of class proceedings:

In a civil proceeding, the relevance of the facts to the issues in the proceeding is usually determined with reference to the claims and defences raised in the pleadings. In the context of a class proceeding, relevance is also governed by the common issues that have been certified for trial, and not by any individual issues that remain. It is therefore the certification order as informed by the pleadings that define relevance for this phase of the trial: [citations omitted].

**19**  This rule was reiterated by Mr. Justice Perell in *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, [*2011 ONSC 4510*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFJ1-F4GK-M2KF-00000-00&context=) at para. 38 (*Axiom*), although he also noted there was case authority that suggested this approach of restricting the scope of the common issues and the associated discovery process is not absolute: para. 40.

**20**  Perell J. again had the opportunity to consider the scope of examination for discovery in the class proceeding *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [*2012 ONSC 6549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFS1-FFMK-M104-00000-00&context=) (*Quizno's*). He found that the parameters for questions led in examination for discovery are always governed by the fundamental evidentiary principles of materiality and relevance: para. 68.

**21**  I find the defendants' characterization of the rule in Ontario as limiting discovery to the common issues is not reflected in the cases to which I have referred. In *Andersen*, the court found that relevance was the circumscribing principle, relevance being governed by the common issues. In *Axiom*, Perell J. found that in class proceedings, the general rule is that examinations for discovery are restricted to the issues that have been certified, although he qualified that rule as not being absolute.

**22**  I do however note an important distinction between our *Rules* and the *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*, which provide for specific proportionality limitations upon the scope of discovery:

**CONSIDERATIONS**

***General***

**29.2.03** (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

1. the time required for the party or other person to answer the question or produce the document would be unreasonable;
2. the expense associated with answering the question or producing the document would be unjustified;
3. requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
4. requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
5. the information or the document is readily available to the party requesting it from another source.

**23**  These specific considerations are not addressed in our *Rules*. Rather, the rule for proportionality is to conduct the proceeding in a manner that is proportionate to (a) the amount involved in the proceeding, (b) the importance of the issues in dispute and (c) the complexity of the issues: subrule 1-3(2).

**24**  This class proceeding involves potentially a large sum of damages, important issues and complex factual and legal questions. These factors suggest that examination for discovery should not be limited in scope.

**25**  That said, I accept that the proportionality principle must be applied alongside the principles governing class proceedings. These principles are described in *Western Canadian Shopping Centres Inc. v. Dutton*, [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) at paras. 27 - 29 and were reiterated in *Hollick v. Toronto (City)*, [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) at para. 15 (*Hollick*). I cite from *Hollick* for those principles:

... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. ...

**26**  I find the scope of examination for discovery in the context of class proceedings shall also be defined broadly. It will not be limited by the common issues. Questions led in examination shall be subject to the evidentiary principles of materiality and relevance, the key determinant of relevance and materiality being the certified common issues.

**Categories**

**27**  Mindful of the principles reviewed above, I making the following findings with respect to the categories of objections to questions raised in the course of examination for discovery.

**1. Over-Promotion**

**28**  As noted in *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=), the ***negligence*** of a drug manufacturer may involve both minimizing the risks of a product and over-emphasizing its alleged benefits. At para. 25, Mr. Justice La Forest, writing for the majority, stated:

... A similar observation was made by Robins J.A. in *Buchan v. Ortho Pharmaceutical (Canada) Ltd*. [*(1986), 12 O.A.C. 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-FGY5-M307-00000-00&context=), which involved a suit by a woman against the Ortho pharmaceutical company after that woman had suffered a stroke from the use of Ortho's Novum oral contraceptives. In finding Ortho liable for failing to warn consumers about the risk of stroke inherent in the use of the contraceptives, Robins J.A. made the following observation, at p. 380:

As between drug manufacturer and consumer, the manufacturer is a distant commercial entity that, like manufacturers of other products, promotes its products directly or indirectly to gain consumer sales, sometimes, as in this case, accentuating value while under-emphasizing risks. Manufacturers hold an enormous informational advantage over consumers and, indeed, over most physicians. The information they provide often establishes the boundaries within which a physician determines the risks of a possible harm and the benefits to be gained by a patient's use of a drug.

**29**  I accept the principle that the ***negligence*** of a drug manufacturer can involve both the minimization of health risks and an over-emphasis of health benefits. I find that questions relating to benefits claimed by the defendants are appropriate. The common issue concerning the defendants' breach of duty to the plaintiff embraces this area of inquiry.

**2. Expert Opinion**

**30**  The plaintiff is entitled to ask questions of Ms. Halmos-Stark provided those questions address subject matter within her area of expertise.

**31**  A supporting authority for this proposition is *Westfair Properties (Pacific) Ltd. v. Aitken Wreglesworth Associates Architects Ltd.*, [*[1995] B.C.J. No. 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M200-00000-00&context=), 1995 CanLII 2204 (S.C.) at para. 7.

**3. Endometrial Cancer**

**32**  I consider the defendants' position that "anything not dealing with breast cancer is irrelevant" will unduly limit the scope of examination for discovery.

**33**  Instead, I find that questions relating to endometrial cancer are material and relevant to the issue of whether the defendants breached their duty.

**4. Authenticity of Documents**

**34**  This area is one the defendants have taken under advisement and are reviewing.

**35**  As a general comment, I consider the authenticity of documents is an appropriate area upon which to examine a witness at examination for discovery.

**5. Sales Information**

**36**  Questions concerning sales figures after 2003 are relevant to the issue of the drop in breast cancer rates in Canada after the release of the Women's Health Initiative study.

**37**  Although this question deals with information outside of the defined class period, it is potentially material and relevant. In reaching this conclusion, I note that these statistics were referred to in *Stanway v. Wyeth Canada Inc.*, [*2012 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24CF-00000-00&context=) at paras. 23 and 24 and regarded as particularly relevant:

A watershed event in the use of hormone therapy was the release in June 2002 of the results of the Women's Health Initiative Study (the "WHI study"). It found that 8,500 women who used estrogen plus progestin therapy had a small but statistically significant increased risk of breast cancer compared to 8,100 women who were given a placebo. Eight more incidents of breast cancers per 10,000 women per year were observed in the group taking hormone therapy.

The WHI study was terminated when researchers concluded it would be unethical to continue given the harm observed in the study. A public warning was issued in July 2002, after which the prescriptions for hormone therapy products fell from 12.7% of all 50-69 year-old Canadian women in 2002 to 4.9% of all 50-69 year-old Canadian women in 2004. The decreased use coincided with a 9.6% drop in Canadian breast cancer rates.

**38**  In view of these reasons, I find that all questions relating to this "watershed event" are both material and relevant.

**6. Corporate Structure and Division of Responsibility**

**39**  The defendants do not object to questions in this category involving basic corporate information, but they do object to questions which exceed that, such as questions seeking to determine which individual attended specific meetings or who authorized the capital to launch Premplus.

**40**  I agree with the defendants. This action lies solely against corporate entities. While questions addressing the corporate connection between the defendants are appropriate, the degree of detail the plaintiff seeks is beyond what could be found to be material and relevant.

**7. Codes of Employee Conduct**

**41**  The plaintiff argues that questions in this area are relevant to the standard of care the defendants set for themselves. The Ontario Superior Court of Justice found the employee code of conduct was potentially relevant to the standard of care or to punitive damages in *Andersen v. St. Jude Medical Inc.*, [*[2006] O.T.C. 795*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JFSV-G47V-00000-00&context=), [*33 C.P.C. (6th) 159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JFSV-G47V-00000-00&context=) at paras. 40 - 41. I fail to appreciate that logic. I find questions in this area are not material or relevant.

**8. Sales Information and Promotional Budget**

**42**  The plaintiff argues that sales information and the size of the defendants' promotional budget relate to duty of care. This information is sought to counter a potential argument by the defendants that they could not undertake their own Level 1 randomized study to test the safety of Premarin and Premplus because this study would cost too much.

**43**  In my view, this question goes beyond what is necessary to address the potential argument. It is appropriate to ask if that is one of the positions the defendants intend to take and if so, seek information about that particular position. The question as it is currently framed is too broad.

**Disposition**

**44**  The attached Appendices A and B address my disposition on the particular questions for examination in discovery that are in dispute.

J.M. GROPPER J.

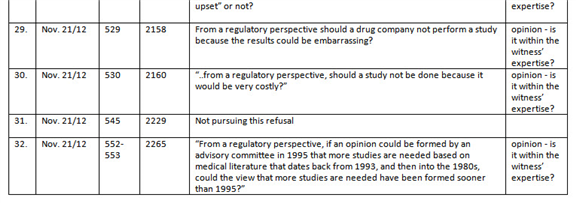
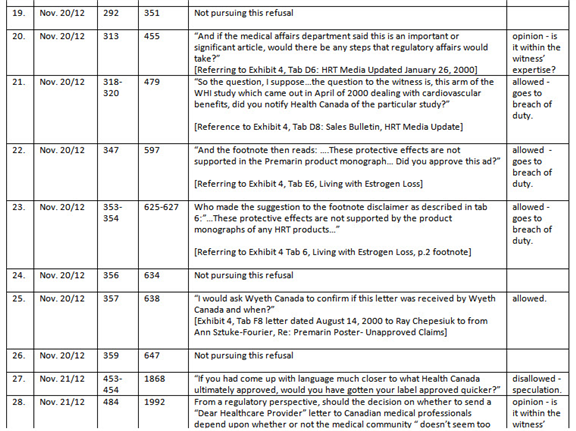
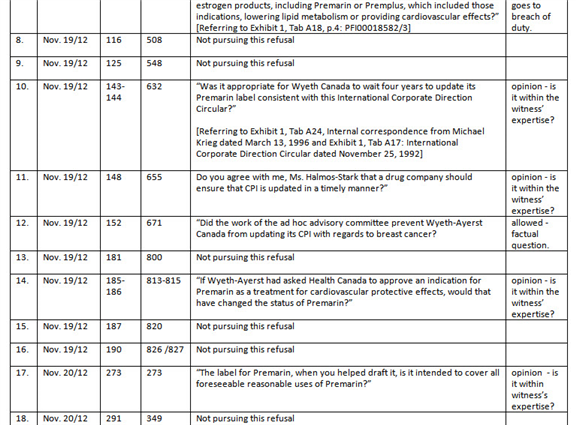
\* \* \* \* \*

**Appendix A: Refusals to Questions at**

**the Examination for Discovery of**

**Judith Halmos-Stark**

**November 19-21, 2012**

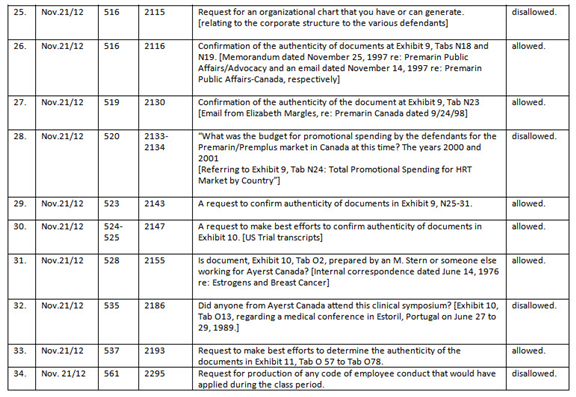
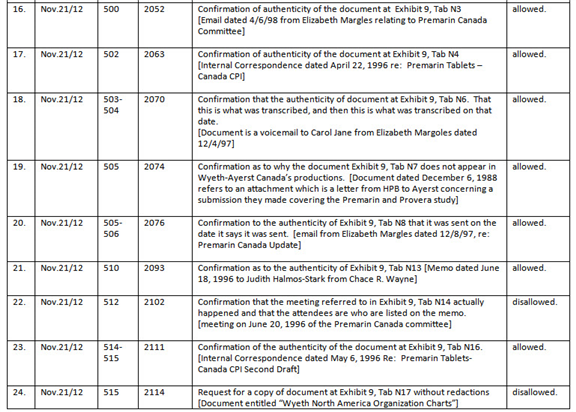
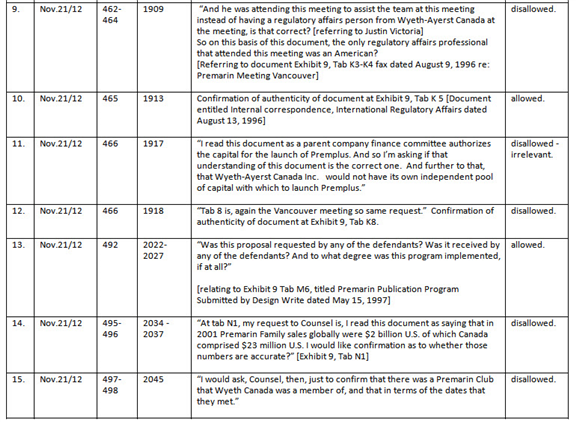
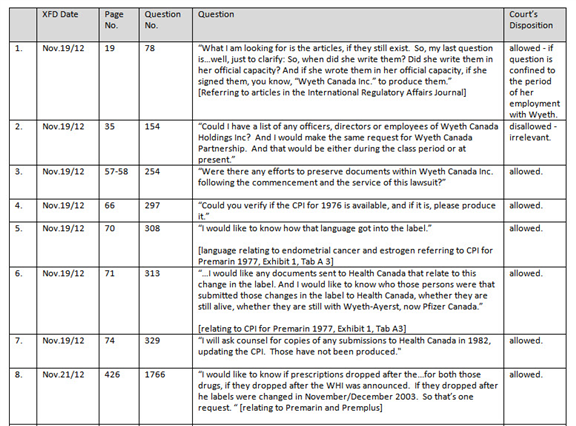


**Appendix B: Questions Taken Under**

**Advisement the at Examination for**

**Discovery of Judith Halmos-Stark**

**November 19-21, 2012**



**End of Document**

[***Stewart v. Canada (Attorney General), [2010] B.C.J. No. 2410***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4H3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.W. Walker J.

Heard: October 13, 2010.

Oral judgment: October 13, 2010.

Docket: S064560

Registry: Vancouver

**[2010] B.C.J. No. 2410** | 2010 BCSC 1711 | 2010 CarswellBC 3353 | 195 A.C.W.S. (3d) 76

Between Clay Ronald Stewart, Plaintiff, and Attorney General of Canada; Dr. Ian Postnikoff, Defendants

(90 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — Adding new cause of action — Adding subsequent facts — After expiry of limitation period — Application by plaintiff to amend Statement of Claim allowed in part — Plaintiff claimed he suffered harm by defendant's failure to clear his name and stay sex offence charges — Plaintiff's proposed amendments naming Correctional Service Canada as defendant and those with respect to claims made in current Statement of Claim allowed, other than superfluous and vague wording — Amendments raising new cause of action not permitted as limitations period had expired — Amendments with respect to plaintiff sending religious message and breach of Universal Declaration of Human Rights did not disclose cause of action and were not permitted.**

**Civil litigation — Limitation of actions — Expiry of limitation periods — Effect of — Application by plaintiff to amend Statement of Claim allowed in part — Plaintiff claimed he suffered harm by defendant's failure to clear his name and stay sex offence charges — Plaintiff's proposed amendments naming Correctional Service Canada as defendant and those with respect to claims made in current Statement of Claim allowed, other than superfluous and vague wording — Amendments raising new cause of action not permitted as limitations period had expired — Amendments with respect to plaintiff sending religious message and breach of Universal Declaration of Human Rights did not disclose cause of action and were not permitted.**

|  |
| --- |
| Application by the plaintiff to amend his Statement of Claim. The plaintiff claimed that he suffered harm, including an assault, as a result of the defendant's failure to clear his name and stay sex offence charges against him. The limitations period had expired and there was no question that the plaintiff had been aware of the limitations period and had legal representation at certain times. The plaintiff sought to name Correctional Service Canada as a defendant, add allegations about the delivery of a religious message, waiver of parole and breach of the Universal Declaration of Human Rights.  HELD: Application allowed in part.  The defendant consented to the proposed amendment to name Correctional Service Canada, and it was proper and allowed. The proposed amendments that added facts and particulars to the current allegations in the Statement of Claim were allowed, other than portions that were superfluous or vague. The plaintiff's proposed amendments that spoke about the delivery of a religious message and the breach of the Universal Declaration of Human rights did not disclose a known cause of action. Furthermore, the limitations period had expired with the defendant's knowledge, so new causes of action could not be pled. The proposed amendments about waiver of parole were not permitted on this basis. Allegations relating to the plaintiff's appeal before the Supreme Court of Canada were not relevant and not permitted. Depictions of religious symbols were not permitted. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Limitations Act, [*RSBC 1996, CHAPTER 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=),

Mental Health Act, *RSBC 1996, CHAPTER 288*,

Rules of Court, Rule 18A

**Counsel**

Appearing on his own behalf: C.R. Stewart.

Counsel for the Attorney General of Canada: E.L. Burnet, F. Paradis.

Counsel for Dr. Ian Postnikoff: K. Yee.

**Oral Reasons for Judgment**

|  |
| --- |
| **P.W. WALKER J. (orally)** |

**1**   Mr. Stewart brings this application to amend his statement of claim.

**2**  In the current statement of claim, amended pursuant to my order on May 6, 2009, Mr. Stewart pleads the following allegations against the Pacific Institution at paragraphs 27-31:

1. In stopping the mediation bulletin meant to clear my name of the allegations in Kent, unjustly deprived my rights to freedom of speech and caused those inmates at Kent to believe that I was guilty of the allegations levelled at me.
2. By refusing to remove the informations pertaining to the false allegations, which allude to my guilt in matters that are stayed (to be deemed by law not to exist), Pacific Institute broke the law knowingly, causing strife to life.
3. The use of the stayed charges and heavy citing of informations that were not substantiated, but hearsay, and the sharing of this information to the VPD was calculated to incite the VPD to act against me without warrant and this label and picture of me does not coincide with my real state of affairs at the time.
4. Failed to notify me of my rights under the Mental Health Act on 29-09-04.
5. Unjustly and unlawfully held me ten days past warrant expiry date.

**3**  In looking at those allegations and comparing them to the amendments that Mr. Stewart seeks to make, it occurs to me that there are a number of categories that his proposed amendments can be segregated into.

**4**  The first category of amendments concern his allegations that Correctional Service Canada ("CSC") authorities refused to expunge information from his record and files concerning certain alleged sexual assaults and the stay of the charges in relation to them. Mr. Stewart says that he suffered adverse consequences from that refusal by CSC. For example, he says that the information was transmitted to the Vancouver Police Department ("VPD") (and that this lead to the subsequent posting of a document on their website and delivery of a bulletin to the media indicating that Mr. Stewart was a sexual predator). He also claims that he has suffered other harm, including an assault. He says that he is fearful that he will suffer further harm as a result of the information circulated by CSC to the VPD.

**5**  The second category concerns allegations that the conduct of CSC authorities hindered Mr. Stewart's ability to successfully prosecute an appeal to the Supreme Court of Canada regarding a sentence given to him in a prior criminal proceeding.

**6**  The third category concerns the delivery of a message, which Mr. Stewart has described as a religious message, warning that a nuclear holocaust will take place in the future.

**7**  The fourth category is in respect of a violation of the *Charter of Rights and Freedoms* that Mr. Stewart says impacts upon his right to freedom of speech and also upon his freedom of expression of religious beliefs.

**8**  The fifth category concerns an assault that he suffered while in custody, and a general apprehension that he will suffer further assaults. Mr. Stewart alleges that the assault and his ongoing apprehension of harm were caused by the acts of CSC authorities.

**9**  Sixth, there are other causes of action pleaded by Mr. Stewart that I have grouped together in an omnibus "miscellaneous category". They include slander of title, deceit, inducing breach of contract, slander of goods, conspiracy, intimidation, and malicious prosecution.

**10**  The seventh and eighth categories concern an alleged breach of the *Universal Declaration of Human Rights* and false imprisonment that is said to arise from the allegation made in paragraph 31 of the current statement of claim (that refers to Mr. Stewart as having been unjustly and unlawfully held in custody ten days past the warrant expiry date).

**11**  It is clear that the allegations contained found in the second, third, fourth, fifth, sixth, and seventh categories should not be permitted because they are time barred, allege causes of action not known to law, or raise matters unrelated to the claims currently advanced (and are embarrassing or vexatious).

**12**  Mr. Stewart has been given a great deal of opportunity to file affidavit materials and application materials in an effort to demonstrate why the amendments should be permitted, notwithstanding the expiry of the limitation period. Mr. Stewart has not provided an excuse, let alone demonstrated a reasonable excuse, for failing to raise those allegations quite some time ago when he commenced his lawsuit. Mr. Stewart told me, during his oral submissions on this application, that he was well aware of the two-year limitation period before this lawsuit was commenced. Mr. Stewart now seeks to excuse his failure to make these claims within the limitation period for several reasons:

1. he was focused on the two-year limitation period in respect of other claims;
2. he was incarcerated;
3. he was ignorant of the law; and
4. since he lacked legal representation, he was late in realizing that he had a complaint that he could lodge against the Attorney General of Canada in respect of conduct of CSC authorities.

**13**  None of those excuses have any merit in the circumstances of this case. Even if there was a scintilla of merit to them, they are not reasonable. Mr. Stewart was well aware of the two-year limitation period in 2008 (including that period of time when he was in custody). He was aware of the provisions and limitation periods contained in the *Limitation Act*, R.S.B.C. 1966, c. 266. Mr. Stewart's decision to focus his attention on different claims was his choice.

**14**  Mr. Stewart has also had the benefit of legal representation in this case from time to time. He is presently receiving the benefit of a lawyer who represents him in his criminal proceedings. Further, Mr. Stewart has been urged to obtain legal advice by registry officials and this Court on a number of different occasions in the past (even before he commenced this lawsuit).

**15**  Mr. Stewart's allegations pertaining to impediment on his appeal to the Supreme Court of Canada should not be permitted in this action because the limitation period has expired.

**16**  Allegations concerning the delivery of a religious message are not known to law and ought not to be permitted. Even if there was some possible cause of action that could be raised, Mr. Stewart is well beyond the limitation period. The same applies to the proposed amendments concerning a breach of the *Universal Declaration of Human Rights*.

**17**  Allegations concerning an assault while in custody should not be permitted because the limitation period has expired.

**18**  The remaining allegations that fall within that sixth ('miscellaneous") category should not be permitted for any one or more of the following reasons:

1. they are inapplicable to the fact pattern in this case;
2. they are not supported by the evidence that Mr. Stewart has adduced on the application;
3. no material facts have been pleaded in support; and
4. they are beyond the limitation period.

**19**  I now turn to the proposed amendments that remain. In the course of my decision, I will refer to them by the paragraph numbers found in the amended statement of claim.

**20**  The first proposed amendment is general in nature. In paragraph 2, Mr. Stewart pleads that:

The Defendant, Attorney General of Canada, is the legal entity to name when bringing a civil suit against Corrections Service Canada (CSC) which is the federal agency responsible for federally incarcerated people in Canadian penitentiaries.

The amendment is allowed. It is also consented to by the Attorney General of Canada.

**21**  In paragraph 3, Mr. Stewart seeks to make allegations concerning his religious message. The paragraph begins with the following words:

I was born on November 7th, 1965, but recall waking in the presence of this body while in uteri. When I was three years old I had a vivid vision of a giant who glanced down at me and then I was the Spirit, above and behind myself, observing my three year old selflooking [sic] up at the giant ... I believe I will stop Armageddon from occurring.

That amendment, which falls into the fourth category, is not permitted.

**22**  The proposed amendments set out in paragraphs 4-6 contain allegations that Mr. Stewart says are the basis for his claim against the CSC for improperly refusing to remove from his file certain information about a sexual assault he allegedly committed and for which charges were laid (and then stayed). They fall into the first category of amendments, and state:

1. On August 6th, 1997, I had sex with a twelve year old girl who had led me to believe she was just turning seventeen. After we had had sex twice she told me she was actually just turning fifteen so I backed off alarmed but it came out when I divulged it to my wife a couple of months later. The young girl initially denied it but then told the R.C.M.P. I had sexually assaulted her, among other things, so I was charged with sexual assault on October 24th, 1997. The charges were stayed by the Crown on September 22nd, 1998, after the girl told the Crown, many times over, she wanted the charges stayed.
2. On April 10, 2001, I was sentenced to 3.5 years in the Provincial Court of British Columbia for Dangerous Driving and Police Assault after my lawyer divulged to the trial judge that I had these stayed sex charges (against my expressed concern). Since I am not guilty of sexual assault and my lawyer had inferred I was, I appealed this sentence along with the police assault conviction.
3. At the Regional Reception Assessment Center (RRAC) at Matsqui, the first stop for federal inmates, I saw an intake worker briefly who broached the subject of the stayed charges and told me I would not be permitted to enter Matsqui Institution as the stayed charges posed a danger risk for me. So I was sent to Mission Institution but when I received my inmate profile paperwork information from RRAC I was distressed to find over a page of information's [sic] relating the allegations of sexual assault and that my guilt had been presumed by the writer.

The amendments are allowed.

**23**  Paragraph 7 also relates to the allegations of sexual assault (which falls into the first category). While it could be suggested that a literal reading of the paragraph discloses a cause of action that relates to some form of intimidation, I do not read it that way in this case. I am permitting paragraph 7 to be included in the amended statement of claim so long as it is not taken as an allegation of a new cause of action and so long as it relates solely to Mr. Stewart's existing claim concerning the failure of CSCl authorities to remove the sexual assault allegations (including the stay of those charges) from his file.

**24**  Paragraph 8 deals with a waiver of parole. It has nothing to do with the allegations advanced in the current statement of claim or any of the other causes of action that Mr. Stewart seeks to advance. It reads:

1. My Institutional Parole Officer (IPO) convinced me to waive my parole for no reason, telling me that she could get it back within a week if I changed my mind. All I had to do is tell her. So a week later I told her I wanted it back and she told me she would take care of it then later told me she had. I then landed in the Mission Institution hole for punching a lifer in the nose and soon discovered CSC would not allow me back even though the inmate committee had mediated the situation. CSC told me I was getting shipped to Mountain Institution and I immediately told them this was unacceptable so they offered me Matsqui providing I sign a Placement Waiver form. I refused to sign the form so they sent me directly to maximum security at Kent Institution.

That pleading sits on its own. It is not allowed.

**25**  Paragraph 9 concerns Mr. Stewart's segregation while he was in custody at the Kent Institution. Paragraph 10 concerns an appeal of his conviction and sentence before the Supreme Court of Canada. The allegations have nothing to do with the categories of proposed amendments that I have permitted. The allegations in paragraph 10 concern Mr. Stewart's claim that his appeal to the Supreme Court of Canada was impaired. I have ruled that this claim falls outside the limitation period.

**26**  Paragraph 11 also concerns the delivery of Mr. Stewart's religious message. It falls in the fourth category. It does not advance a cause of action known to law. Some of the proposed words of this amendment deal with Mr. Stewart's appeal to the Supreme Court of Canada. That claim is time barred. As a result, the allegations in paragraph 11 are not allowed.

**27**  Paragraph 12 relates to what Mr. Stewart has described as the assault, which he says is to be distinguished from a battery. Mr. Stewart claims that as a result of the failure of CSC to remove information and documents from his files (which he says was an intentional decision on their part despite his objections), he is apprehensive and fears for his safety. Mr. Stewart fears that he will be killed by other inmates. Mr. Stewart has made these allegations in oral submissions since I was first appointed as the case management judge. In my view, this allegation is connected to and arises from Mr. Stewart's allegations set out in paragraphs 27-28 of his current statement of claim. The proposed amendment is a particular of the damage that Mr. Stewart claims to have suffered as a result of the alleged inappropriate conduct on the part of CSC authorities to remove information from his file. The particular relates to a claim that falls into the first category of proposed amendments. Whether the allegation is sufficient to found a claim for assault or is simply a particular of damage is something that I will permit to go to trial to be determined (although I make no comment on its merits).

**28**  Paragraph 13 relates to the alleged failure of CSC authorities to remove information from Mr. Stewart's file. It is permitted.

**29**  Paragraph 14 deals with a riot at the Kent Institution and the impairment of his appeal to the Supreme Court of Canada. They are not permitted.

**30**  Paragraph 15 also relates to Mr. Stewart's appeal to the Supreme Court of Canada. It is not to be permitted.

**31**  Paragraph 16 deals with various aspects. It states:

On September 29, 2004, I was certified unlawfully under the Mental Health Act and subsequently held ten days past my WED on October 9, 2004. There is evidence as early as September 4, 2004, that CSC was pushing to .... impose a certification under the MHA to hold me past WED or to impose an 810 order on me should this fail.

**32**  These amendments fall into the eighth category. They are allowed except for the words "*was pushing to revisit the stayed charges",* which are to be removed.

**33**  The proposed amendments in paragraphs 17-19 concern the failure of CSC authorities to remove information from Mr. Stewart's file. They are permitted.

**34**  There is a symbol at the bottom of the fourth page following paragraph 19. I am told that it appears to be some form of religious symbol. It is not permitted.

**35**  The proposed amendments in paragraph 20 concerns the sexual assault allegations and failure to remove information. It is permitted.

**36**  Paragraph 21 deals with the delivery of the religious message and is not allowed.

**37**  The allegations in paragraphs 22-24 concern Mr. Stewart's appeal to the Federal Court, his claim before the Federal Court, and his appeal to the Supreme Court of Canada. They have nothing to do with the issues raised in the current pleadings or the amendments that I have allowed. They are not permitted.

**38**  Paragraph 25 is not allowed since it concerns the delivery of Mr. Stewart's religious message.

**39**  Mr. Stewart advised me that he has voluntarily withdrawn the proposed amendment found at paragraph 26.

**40**  I will return to paragraph 27 after commenting on the amendments in paragraphs 28-50.

**41**  Nearly all of the amendments sought in paragraph 28 are permitted because they deal with the sexual assault allegations made against Mr. Stewart. The sentence that reads "*I frame it an invasion of privacy, defamation, an intentional infliction of mental suffering, assault, and a breach of Charter"* is not permitted. Those words are superfluous because those causes of action have been pleaded elsewhere.

**42**  The amendments sought in paragraph 29 are allowed, except for the last sentence which reads "*the fact they expanded it instead of removing it intimated me*". Those words are superfluous. It is a particular of the allegations already extant in paragraphs 27-31 of the existing statement of claim. The allegation is not to be construed as advancing a claim for malicious prosecution.

**43**  Paragraph 30 is allowed except --

**44**  CLAY STEWART: Sorry, My Lord. Just --

**45**  THE COURT: The last sentence of paragraph 29 is removed.

**46**  CLAY STEWART: All the words --

**47**  THE COURT: Yes.

**48**  CLAY STEWART: -- from *the fact* on?

**49**  THE COURT: Yes. The same with paragraph 30. It is allowed, but the sentence that starts with "*I frame this as defamation"* is removed.

**50**  Paragraph 31 is not allowed because it deals with waiver of Mr. Stewart's parole. It has nothing to do with the claims in the current statement of claim or the amendments that I have allowed.

**51**  The amendments sought in paragraphs 32-35 are not allowed because they have nothing to do with the allegations made out in the statement of claim. They concern other unrelated matters, such as the denial of Mr. Stewart's entry into certain correctional facilities and his security rating while in custody.

**52**  Paragraph 36 is permitted since it concerns the information that Mr. Stewart sought to remove from his file. However, the last sentence that begins with the words "*their response to each other acknowledging me but non response to me I frame as breach of duty"* is to be removed.

**53**  The amendments sought in paragraph 37 are not permitted since they concern the delivery of a religious message.

**54**  I will permit the amendments sought in paragraph 38. They read as follows: "*[a]nd CSC should have allowed the mediation 'Bulletin' I composed and dated April 30th, 2003, to go through to counter the label of sex offender*". Otherwise, the rest of the proposed amendments sought in paragraph 38 are not permitted.

**55**  The amendments sought in paragraph 39 are permitted, except the last sentence, which begins with the words "*I frame this as conspiracy, slander of title, and assault".* Those words are to be removed.

**56**  Paragraph 39 is permitted except the last sentence, which is to be removed.

**57**  Paragraph 40 is not allowed. It concerns Mr. Stewart's appeal to the Supreme Court of Canada.

**58**  Paragraph 41 has nothing to do with the causes of action raised by Mr. Stewart. It is not permitted.

**59**  Paragraphs 42 and 43 deal with Mr. Stewart's appeal to the Supreme Court of Canada. They are not permitted.

**60**  The allegations in paragraph 44 are vague and offer nothing by way of advancing Mr. Stewart's claim. It simply refers to a person named Tammy and the rest of the CSC beginning to "*make waves*" about different things. Those amendments are not allowed. They are too vague and add nothing to the claim.

**61**  CLAY STEWART: What if I provide particulars on that?

**62**  THE COURT: I am not permitting it. If you want to deliver particulars to Mr. Burnet, that is up to you and Mr. Burnet to deal with. However, I am not permitting the amendments sought in paragraph 44.

**63**  Paragraph 45 is permitted for the most part, except for some later portions. I direct the parties to the sentence found two-thirds of the way along in paragraph 45, which starts with these words:

CSC are joint tortfeasors to the public warnings wrongful issuance, and defamation ...".

The amendments sought up to that point are allowed. The rest of the sentence that reads "... *as well as the false imprisonment resulting from being arrested on the 810 order on October 28, 2004"* is not permitted because it raises a matter for which the limitation period has expired and because Mr. Stewart has offered no excuse as to why he should be permitted to make the claim in this lawsuit at this time. A portion of the next sentence is permitted. It reads "[*b]ut additionally this was an invasion of privacy of matters that were never tried, the October 6, 2004, letter was defamatory"*. However, the rest of the sentence that begins with "*an intentional infliction of mental suffering"*, is removed.

**64**  Paragraph 46 is permitted, except for the last sentence which is to be removed.

**65**  Amendments found in paragraph 47 that refer to "*this 810 order*" will not be permitted as any claims in relation to it are time barred.

**66**  Paragraph 48 concerns an assault that took place in February 2006 when Mr. Stewart was in custody. It should not be permitted. The limitation period has expired.

**67**  Paragraph 49 will be permitted insofar as it is a particular of the damage that Mr. Stewart claims to have suffered as a result of the dissemination of information concerning the sexual assault that Mr. Stewart says was caused by the wrongful acts or conduct of CSC authorities.

**68**  I also note that Mr. Stewart has made the concerning apprehension of harm in the past. His statement of claim pleads "causing strife to life". I make no comments regarding its merits.

**69**  Paragraph 50 concerns dissemination of the religious message. It is not permitted.

**70**  In terms of the prayer for relief, prayer (h) and (i) are not permitted. Nor are the postscript and the religious symbols found at the bottom of the document.

**71**  I will now return to paragraph 27, which is the beginning of Mr. Stewart's prayer for relief. Let me read to the parties what, in my view, should be permitted after removal of the offending portions:

WHEREFORE I, THE PLAINTIFF, contend the Attorney General of Canada is directly or vicariously liable for the following torts against me by CSC [the symbol is taken out]: invasion of privacy, defamation, assault and ***negligence***, are joint tortfeasors in the invalid certification and false imprisonment --

**72**  CLAY STEWART: Did you -- sorry, did you take *battery* out?

**73**  THE COURT: Yes.

-- are joint tortfeasors in the public warning which includes the false imprisonment. The *Canadian Charter of Rights* has been breached insofar as my rights to freedom of speech are concerned.

**74**  Mr. Stewart's claim for assault is limited to his allegation that as a result of the conduct (including omissions) of CSC, he continues to suffer from an apprehension of imminent harm. The amendment will be permitted so long as it is confined solely to that allegation.

**75**  I will not permit the words "*intentional infliction of mental suffering*" to remain in the prayer for relief. These are words that Mr. Stewart acknowledges should be removed.

**76**  The word "*battery"* is also removed from the prayer for relief. The words "*[t]respass to chattels*", "*breach of duty of care*" and "*breach of standard of care*" are removed. Also removed are the words "*resulting from the 810 order and that prosecution*", as well as "*and as far as" the above may apply to 'Side Trucer' the product I still wish to deliver, these business torts do apply: deceit inducing breach of contract, slander of goods, slander of title, conspiracy, intimidation, and malicious prosecution*". Also removed are the words "*and the Universal Declaration of Human Rights*".

**77**  To repeat, based on the amendments that I have permitted, the prayer for relief now read as follows:

WHEREFORE I, THE PLAINTIFF, contend the Attorney General of Canada is directly or vicariously liable for the following torts against me by CSC: invasion of privacy, defamation, assault and ***negligence***, are joint tortfeasors in the invalid certification and false imprisonment, are joint tortfeasors in the public warning which includes the false imprisonment. The *Canadian Charter of Rights and Freedoms* has been breached insofar as my rights to freedom of speech are concerned.

**78**  The Attorney General for Canada seeks costs on this application. Its position is that the parties have essentially returned to the point that they were at before the Attorney General brought its summary trial application. The Attorney General submits that once it continues in argument on that application, it will become clear nothing has changed as a result of the amendments that I have allowed. While I have sympathy for the Attorney General's position, I would prefer to withhold ruling on the issue of costs until after the Attorney General's summary trial application is argued. At that point, I will determine whether or not costs should be payable by Mr. Stewart in respect of this application and his application to have the registry seal affixed to his original statement of claim, whether the issue of costs should be put over to the conclusion of the trial, or whether the costs should be in the cause. I wish to defer a decision on costs until I have heard the remainder of your summary trial application, Mr. Burnet, which was interrupted some time ago when Mr. Stewart announced that he wanted to amend the pleadings.

**79**  MR. BURNET: With -- just so that I am clear, My Lord, you are saying that --

**80**  THE COURT: I am adjourning it over until the conclusion of your summary trial application.

**81**  MR. BURNET: On the seal matter?

**82**  THE COURT: Yes, on both matters.

**83**  MR. BURNET: And on the amended pleadings matter?

**84**  THE COURT: Yes.

**85**  MR. BURNET: Are adjourned until the conclusion of --

**86**  THE COURT: Right.

**87**  MR. BURNET: -- whatever Rule 18A has become.

**88**  THE COURT: Yes.

**89**  MR. BURNET: Thank you.

**90**  THE COURT: With respect to the other applications that Mr. Stewart argued yesterday, it is clear to me that they were wholly without merit. Accordingly, should be ordered payable in any event of the cause.

P.W. WALKER J.

**End of Document**

[***St. Michaels (Bletchley) Ltd. v. Schickedanz Properties B.C. Ltd., [2011] B.C.J. No. 2221***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22J4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

G. Barrow J.

Heard: January 27 and May 18, 2011.

Judgment: November 22, 2011.

Docket: 34842

Registry: Vernon

**[2011] B.C.J. No. 2221** | 2011 BCSC 1587

Between St. Michaels (Bletchley) Limited, Plaintiff, and Schickedanz Properties B.C. Ltd., Fernie Real Estate Company Ltd., Casey Chapman, Tammy Monsell, Michael Leslie and 637145 B.C. Ltd., operating as "The Wood", Defendants, and Michael Leslie and 637145 B.C. Ltd., operating as "The Wood", Third Parties

(35 paras.)

**Case Summary**

**Landlord and tenant law — Commercial tenancies — Termination by tenant — Abandonment — Action by purchaser for damages for breach of contract and breach of lease allowed and third party claim by vendor for indemnification from tenant dismissed — Plaintiff purchased commercial building and assumed leases — Sales agreement included clause that building would be in substantially same condition at possession date as when viewed, but shortly after possession, plumbing problem occurred — Tenant closed restaurant prior to end of lease — Purchaser incurred repair costs and lost rent — As plumbing ceased functioning properly prior to possession date, vendor liable for repairs — No evidence tenant caused plumbing problem — Tenant breached lease.**

**Real property law — Sale of land — Agreement of purchase and sale — Breach of — Express term — Damages — Action by purchaser for damages for breach of contract and breach of lease allowed and third party claim by vendor for indemnification from tenant dismissed — Plaintiff purchased commercial building and assumed leases — Sales agreement included clause that building would be in substantially same condition at possession date as when viewed, but shortly after possession, plumbing problem occurred — Tenant closed restaurant prior to end of lease — Purchaser incurred repair costs and lost rent — As plumbing ceased functioning properly prior to possession date, vendor liable for repairs — No evidence tenant caused plumbing problem — Tenant breached lease.**

|  |
| --- |
| Action by the purchaser for damages for breach of contract and breach of lease and third party claim by the vendor against the tenant for indemnification. In 2003, the plaintiff purchased a commercial building for $650,000 from the defendant Schickedanz Properties Ltd. The agreement of purchase and sale provided that all of the included items would be in substantially the same condition at the possession date as when viewed by the purchaser. The building had two stories, with a single tenant on each and, upon the closing of the sale, the plaintiff assumed the leases. The defendant Leslie, through the defendant numbered company, operated a restaurant on the upstairs floor. Around the time that the sale closed, a sewage problem was discovered in the building. Leslie was required to close the restaurant until the problem was rectified. The plaintiff arranged for workers to identify and fix the problem, which resulted in repair costs of $95,702, plus $6,560 for an agent to supervise repairs and $6,687 in abatement of rent. Leslie reopened his restaurant, but shortly thereafter the sewage problem returned and Leslie again closed the business and never re-opened it. At the time there were 10 months remaining on the lease. The plaintiff sought damages against Schickedanz Properties for breach of contract on the basis that the plumbing was not in the substantially same condition on the possession date. In addition, the plaintiff sought damages against Leslie and the numbered company for breach of the lease. Schickedanz sought indemnification from Leslie and the numbered company on the basis that they caused the plumbing problem by discarding grease down the drains.  HELD: Action allowed and third party claim dismissed.  The plumbing system was functioning properly when the plaintiff viewed the property and ceased functioning properly before the close of the transaction. Consequently, based on the terms of the contract, Schickedanz Properties was liable for the failure of the plumbing system. There was no evidence that Leslie or his company were responsible for the plumbing problems. As Leslie and his company breached his lease there were liable to pay rent for the unexpired term. They liable for nine months rent, but were entitled to an abatement of rent of one month. |

**Counsel**

Counsel for the Plaintiff: K.G. Burnham.

Counsel for the Defendants and Third Party Schickedanz Properties B.C. Ltd.: T.T. Brown.

Appearing for the Defendants and Third Parties Michael Leslie and 637145 B.C. Ltd.: M. Leslie.

**Reasons for Judgment**

|  |
| --- |
| **G. BARROW J.** |

**1**   The plaintiff, St. Michaels (Bletchley) Limited, seeks damages for breach of contract against the defendant, Schickedanz Properties B.C. Ltd., arising out of the purchase of a commercial building in Fernie, British Columbia. The plaintiff seeks damages against the defendant Michael Leslie and 637145 B.C. Ltd., a company he controlled, for breach of a lease which the plaintiff assumed on purchase of the building. The matter was heard on a summary trial basis. Although there are some factual issues, I am satisfied they can be justly resolved on the basis of the affidavit material.

**2**  John Holt, the principal of the plaintiff company, was vacationing in Fernie during the winter of 2003 when he saw a real estate listing for a building known as The Livery Building. Mr. Holt is in the business of buying and selling commercial real estate and thought this might be a prudent investment. He visited the building several times, and in particular on March 4, 2003. On April 1, 2003 he made an offer through his company St. Michaels. The purchase price was to be $650,000. The offer was accepted and the transaction eventually closed on July 4, 2003.

**3**  The Livery Building has two storeys with a single tenant on each. The bottom floor tenant in 2003 was Matt Brazeau who operated the Eldorado Lounge from the premises. The upstairs tenants were the defendants Michael Leslie and his numbered company. They operated a restaurant. Either just before or just after the transaction closed, Mr. Brazeau was preparing his business to open for the summer season, when he noticed a foul smell. He thought it might be sewage. He made inquiries and engaged various tradesmen to examine the plumbing. No one he engaged was able to fix the problem, and as a result he was not able to open for the summer. In the meantime Mr. Leslie became concerned about the safety of his restaurant operation. He contacted the Interior Health authority and they inspected the premises and "agreed" that the restaurant was to remain closed until the sewage problem was fixed. After Mr. Holt learned of the difficulties, he arranged for the necessary contractors to examine the building, identify the problem and fix it. Those repairs cost just over $95,000. They were completed in the fall of 2003.

**4**  Mr. Leslie re-opened his restaurant in December 2003. In January 2004 there was another problem with sewage. He closed his business again in early February as a result and never re-opened. At the time there were some 10 months remaining on his lease.

**The Issues**

**5**  The contract of purchase and sale contains two clauses of importance. Paragraph 8 provides:

1. VIEWED: The Property and all included items will be in substantially the same condition at Possession Date as when viewed by the Buyer on March 4, 2003.

Paragraph 16 provides that the property and all buildings on it were to be at the vendor's risk until 12:01 a.m. on the completion date after which the risk passed to the buyer. Eventually the parties agreed that completion and possession would be July 4, 2003.

**6**  The issues as between the plaintiff and Schickedanz Properties are as follows. The plaintiff argues that the plumbing was functioning properly on March 4, 2003 and that it was not functioning at all on July 4, 2003. As a result, the building was not in "substantially the same condition" on July 4 as it was on March 4 and as a result Schickedanz Properties was in breach of paragraph 8 and is responsible for the cost of repairs. Schickedanz Properties argues that the doctrine of caveat emptor applies and that the plumbing problem was a latent defect which was discoverable on a reasonable inspection by a qualified person. As a result, the plaintiff is responsible for the cost of repairs. In the alternative, Schickedanz Properties argues that the plumbing issue did not arise until after closing, and if that is so then the building was in substantially the same condition on closing as it had been when inspected.

**7**  The issue as between the plaintiff and Mr. Leslie and his numbered company is whether the plaintiff is entitled to recover for unpaid rent under its lease. Mr. Leslie argues the premises were not fit for the operation of his business in late January or early February and he was never notified that the problem had been remedied. In the result, he argues his obligation to pay rent ceased.

**8**  The defendant Schickedanz Properties' third party claim against Mr. Leslie is for indemnification for any damages it is responsible for in relation to the plaintiff's claim. The lease which Mr. Leslie and his company entered into with Schickedanz Properties provides in paragraph 10.04 that "[i]f the Building ... including ... pipes ... used for the purposes of the Building, or if the water pipes, drainage pipes ... get out of repair or become damaged ... through the ***negligence***, carelessness or misuse of the Tenant" then the tenant is responsible for the cost of repairs. Paragraph 11.04 obligates the tenant to indemnify the landlord from and against all claims "arising from ... the occupancy or use by [the] Tenant of the leased premises ...". Schickedanz Properties argues that the plumbing problem was the result of grease being discarded down the drains servicing the restaurant. If that is so then Mr. Leslie and his company are responsible for the repairs. Mr. Leslie argues that the evidence does not establish that grease that caused the problems, and thus he is not responsible for any repairs.

**Analysis**

1. **The Factual Issues**

**9**  I will deal first with three factual issues. The first involves the nature of a problem that occurred in late February or early March, and specifically whether it was an earlier instance of the problem that arose in July or whether it was something different. If the former, and assuming the July problem arose prior to completion, then, arguably, the building was not in a substantially different condition on closing than it was on inspection. The second factual issue is whether the problem that was detected in July arose before or after the sale closed. The third issue is whether the problem in July was caused by grease plugging the sewer lines or something else.

**10**  The Livery Building is 114 years old. According to Mr. Brazeau, the main floor is about is about 2,000 square feet. There is no basement but there is a crawl space. The crawl space is accessed by lifting up a bench-style seat in the lounge. This exposes an opening that is about two feet square and provides a limited ability to examine the crawl space. The crawl space is shallow, so shallow that it cannot accommodate a person absent significant physical contortions.

**11**  The nature of the sewage and related plumbing is described by Todd McGaw, an engineer with Keen Engineering Co. in his report of October 23, 2003. He examined all the fixtures that needed plumbing to dispose of waste water (sinks, toilets, dishwashers, urinals). They were all serviced by a 4 inch pipe which, in his opinion, is more than adequate to handle the effluent from the number of fixtures being serviced. The pipe which connects the building to the town's sewer system is 8 inches in diameter and made of clay. I gather that it runs just below the floor of the crawl space. There is an opening in the center of the crawl space floor described by Mr. McGaw as "an inactive sump style floor drain". It is in that area that the 4 inch interior sanitary piping intersects with the 8 inch clay pipe that takes effluent out to the municipal system. Although it is not entirely clear, I gather that the 4 inch pipe is vertical at the point where it intersects the horizontal clay pipe. When Mr. McGaw examined these pipes he found that the connection between them was "no longer intact". This junction is at or near the inactive sump-style drain. For some reason sewage escaped from the system at the junction of the two pipes and when it did it percolated up through the sump drain and flooded the crawl space. I am in some doubt as to precisely why or how the sewage escaped: whether it was due to the 8 inch pipe being plugged with grease and causing the system to back up or simply because the connection between the two pipes was "no longer intact". It seems, however, that the sewage escaped at the point where the two pipes intersected.

**12**  The event in the late winter of 2003 is described in the affidavits of both Mr. Brazeau and Roland Kraemer. Mr. Kraemer was Schickedanz Properties' project manager in the Kootenay area. He was responsible for dealing with issues involving the Livery Building. In the middle of March he received a telephone call from Mr. Brazeau who told him there was an odour emanating from under the floor of the lounge. Mr. Kraemer hired a plumber to look into the problem. There is no evidence from the plumber, rather only Mr. Kraemer's report of what the plumber told him. The plumber said he looked in the crawl space and saw "standing water with some sawdust floating on the surface and that the odour was that of stagnant water sitting in the crawl space of an old building". The plumber also told Mr. Kraemer that he "inspected the plumbing and piping for any leaks or venting problems but was unable to uncover any such problems". The plumber told Mr. Kraemer that given the absence of any leaks or other problems, the water was likely ground water that seeped in through the old foundation as a result of the unusually high spring runoff that year. He recommended simply having the water pumped out to eliminate the odour.

**13**  Mr. Brazeau deposed that he noticed the smell in late February. I am satisfied that it was closer to mid-March. Mr. Brazeau, in a statement he prepared much closer to the events, wrote that he noticed the smell in March and waited a few days before calling Mr. Kraemer. That accords with Mr. Kraemer's recollection as to when he received the call. Mr. Brazeau was in the building when the plumber that Mr. Kraemer hired inspected the problem. The plumber told Mr. Brazeau more or less what he later reported to Mr. Kraemer. As to Mr. Brazeau's own observations, he said that the standing water did not look like sewage and although it had a foul odour he did not describe it as a sewage smell. Whatever the cause of the problem in March, no one did anything about it; that is no one pumped out the water or took any other remedial steps. The water simply dissipated as did the smell. Both the lounge and the restaurant continued to operate without any problems until near the end of April when the ski season ended.

**14**  The lounge and the restaurant closed at the end of the ski season and both planned to reopen for the summer at the beginning of July, and specifically for the weekend that began on Friday, July 4, 2003. As Mr. Brazeau and Amy Hare, his manager, were preparing to reopen the lounge they noticed a smell which appeared to wax and wane according to their usage of the dishwasher and similar appliances. He made inquiries and learned that the building had been sold, and thus Mr. Kraemer was not prepared to assist. He contacted Mr. Holt and arranged for various tradesmen to come and examine the premises. Mr. Brazeau did not reopen his business as planned on the July 4th weekend. About a week later, a pump truck came to pump out the crawl space. According to Mr. Brazeau the water beneath the floor was standing at a depth of about 4 to 6 inches. He could see "running water coming from around the main exit sewer pipes of the building", which I infer was in the vicinity of the sump drain. None of the people Mr. Brazeau initially engaged were able to solve the problem. In mid-July a contractor cut a hole in the floor to better access the area. They were still unable to identify the problem, but a contractor suggested that Mr. Brazeau rent a fan and place it in the crawl space to dry the area. He did that and left the fan running for 5 days. Near the end of July Mr. Brazeau had another hole cut in the floor at the suggestion of another contractor. There was still about 3 inches of raw sewage in the crawl space. By this point it was apparent that there would be no quick fix.

**15**  Meanwhile, Mr. Leslie had reopened his restaurant for the summer season on June 20, 2003. When he first arrived in the premises he noted a minor smell, which he described as a "wet dog smell", a smell he associated with the smell of patrons' wet ski clothing. Over the next couple of weeks the smell grew worse and changed in character. He left for a vacation on July 8. When he returned 10 days later, Mr. Brazeau told him the smell was as a result of the sewer backing up into the crawl space. Mr. Leslie contacted the Interior Health Authority because he was concerned about whether he should be serving food in the circumstances. The initial advice he received was not particularly helpful. He then had his lawyer contact his insurance company and the health authority. That prompted an inspection as a result of which Mr. Leslie agreed to remain closed until the problem was solved and the premised inspected.

**16**  As a result of all of this Mr. Holt retained the services of Keen Engineering and. as noted, they reported on October 23. Based in part on their report, Mr. Holt had repairs done. They involved removing the floor of the lounge and the subfloor in the crawl space, replacing and sealing these components, removing and replacing damaged insulation, cleaning the duct work, replacing the necessary sewer lines, and reinstalling the main floor and the fixtures, including built-in fridges, bar sinks, taps and related items. All of this was done in October and November 2003. It came to some $95,702.50. There is no issue about whether these repairs were necessary or the cost of them; in fact no issues are raised about the damages claimed in general.

**17**  Returning to the factual issue, I am satisfied that what happened in the late winter of 2003 was significantly different than what happened in July. I reach this conclusion for several reasons. First, the problem in March resolved without any remedial steps being taken. The water simply dissipated on its own and while both businesses were operating in the midst of the ski season. Second, to Mr. Brazeau's eye, and to the plumber who reported to Schickedanz Properties' property manager, the water in the crawl space in March did not look like sewage, rather it appeared to simply be stagnant standing water. Third, while it had an unpleasant smell, it was not a smell that Mr. Brazeau or anyone else identified as sewage. Fourth, there was an unusually high and early runoff that spring, which could account for a volume of water accumulating in the crawl space of a 100-year-old building.

**18**  Given the foregoing I am satisfied that on March 4, 2003, the building had a functioning sewage system.

**19**  The next issue is whether the problem in July occurred before or after the transaction closed on July 4, 2003. The problem was first noticed by Mr. Brazeau and Ms. Hare. The defendant Schickedanz Properties argues that Mr. Brazeau's evidence is suspect because he told Mr. Johnston, the principal of Schickedanz Properties, that he was going to end up with a completely renovated bar which he was then going to sell for a profit as a result of the business interruption insurance claim he would be making.

**20**  Mr. Brazeau's memory for dates is not, by his own admission, particularly precise. Both he and Ms. Hare have deposed that they planned to reopen for the weekend that began on Friday, July 4, 2003. They expected that to be a busy weekend and wanted to be open for it. It was while they were stocking the business and cleaning it in preparation for that opening that they noticed the smell of sewage. Unlike other events, there was a specific reason tied to a specific date, which explains what might otherwise be characterized as a mere estimate. Finally, the timing coincides with Ms. Hare's return to Canada and her independent memory of the events. I am satisfied that the sewer malfunctioned prior to July 4, 2003.

**21**  The final factual issue relates to the cause of the problem in July. The plaintiff takes no position on this issue. It argues that all that matters from its perspective is whether the premises were in substantially the same condition on closing as on the day they were inspected. The defendant Schickedanz Properties argues that it was grease that caused the problem and that it was Mr. Leslie who was responsible for depositing the grease in the plumbing.

**22**  There is no direct evidence as to what plugged the sewer pipes in July or even if pipes were actually plugged. It is clear that if the problem was the result of a plugged pipe, then it was the 8 inch pipe that connected the building to the municipal system that was plugged. If the 4 inch pipe was plugged, the sewer would have backed up into the appliances or fixtures and that did not happen. The other possibility is that the sewage accumulated because the junction between the two pipes failed, causing the 4 inch pipe to discharge its contents into crawl space by way of the opening for the sump drain.

**23**  The only evidence that suggests that it was grease that plugged the pipe is in the report of Mr. McGaw. He wrote that:

The existing sanitary piping, we were informed, was plugged solid with what appeared to be grease. Rotorouter [sic] and the City of Fernie were able to clear the blockage.

**24**  There are Roto Rooter invoices for two attendances they made in January 2004. In the January 23, 2004 invoice the following reference is found:

... snaked the two cleanouts. Lots of grease in the backside cleanout to [indecipherable]. Tried 2 different bits to go past back of the building but could not.

In the January 26, 2004 invoice there is no mention of grease plugging the line. There was a problem with the line that day but, apparently, it was not related to grease.

**25**  I am unable to conclude that Schickedanz Properties has proven that Mr. Leslie or his company was responsible for whatever it was that caused the sewer to backup into the crawl space. I accept that Mr. Leslie's business was the only business that generated grease. I am unable to find that it was grease that caused the system to fail. The evidence on which I am invited to conclude there was a grease plug is hearsay in the case of the Roto Rooter invoices, and double hearsay in the case of the engineering report. Further, and leaving aside the hearsay issue, the Roto Rooter invoice of January 23, 2004 is suggestive of a blockage that could not be drilled through. On the face of it, that does not seem like grease.

1. **The Legal Issues**

**26**  I will deal first with the issues as between the plaintiff and Schickedanz Properties. As noted above, the defendant Schickedanz Properties argues that the doctrine of caveat emptor applies to this commercial real estate transaction. There are exceptions to the doctrine and one of the exceptions involves latent defects that render the premises dangerous (see generally *McCluskie v. Reynolds* [*(1998), 65 B.C.L.R. (3d) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2JM-00000-00&context=) at paragraph 53 (S.C.)). The distinction between latent and patent defects was explained by Ballance J. in *Cardwell v. Perthen*, [*2006 BCSC 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23PX-00000-00&context=), where at paragraph 122 she wrote:

The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person: ***44601 B.C. Ltd. v. Ashcroft (Village)***, [*[1998] B.C.J. No. 1964*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0DR-00000-00&context=) (S.C.) ...; ***Bernstein v. James Dobney & Associates***, [*[2003] B.C.J. No. 1495*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-228K-00000-00&context=), [*2003 BCSC 986*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-228K-00000-00&context=) ... In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example ***Eberts v. Aitchison*** [*(2000), 4 C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22HN-00000-00&context=), [*2000 BCSC 1103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22HN-00000-00&context=)).

**27**  Schickedanz Properties argues that, given the nature of this transaction involving as it did a 100-year-old commercial building, and given that the contract was subject to the buyer obtaining and approving a "professional inspection of the building", the defect, whatever its precise nature, would have been discovered had a reasonable inspection been carried out by the plaintiff. If that is so then the defect is properly characterized as patent, as opposed to latent.

**28**  The difficultly with this contention is that the doctrine of caveat emptor can be displaced by express terms in a contract. In ***Fraser-Reid v. Droumtsekas*** (1979), [*[1980] 1 S.C.R. 720*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1TG-00000-00&context=) at 723 Dickson J. wrote:

Although the common law doctrine of caveat emptor has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land ... [It] remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale ... [A] purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

(emphasis added)

**29**  The contract between the parties in this case provides in paragraph 8 that the premises were to be in substantially the same condition on completion as they were on inspection. Further, paragraph 16 stipulates that "[a]ll buildings on the Property ... will be, and remain at the risk of the Seller" until completion. Arguably either of these provisions is dispositive of the issue between these parties; taken together they clearly fix Schickedanz Properties with responsibility for the plumbing system failure that occurred before closing. This is so because the building's plumbing and sewage system was functioning on March 4, 2003 when the plaintiff viewed it. It was not functioning on July 4, 2003 when the transaction eventually completed. If the plumbing failed the day after closing, then the issue of whether it was a latent or patent defect would need to be resolved. Because the defect became manifest prior to closing, the terms of the contract allocating risk and warranting the condition of the premises between viewing and closing render Schickedanz Properties liable for the failure of the plumbing system. The cost of those repairs was $95,702.50. In addition, as a result of the sewage problem the plaintiff was required to abate the rent that would otherwise have been due from Mr. Leslie for the period from August 12, 2003 when the health authorities "agreed" to closing the building, to November 6, 2003 when the repairs were finished. The abated rent (inclusive of triple net charges) amounts to $6,687.93. Finally, the plaintiff spent $6,560 on an agent to supervise and organize the extensive repairs. The plaintiff is entitled to judgment against Schickedanz Properties for the total of those amounts.

**30**  The next issue is whether Mr. Leslie is liable to Schickedanz Properties under the indemnity provision of his lease. I digress here to note that the lease is between Schickedanz Properties' predecessor in title and "Michael Leslie operating as 637145 B.C. Ltd.". It is executed by both the numbered company and Mr. Leslie. Both are responsible under the lease. Mr. Leslie and his company are responsible to indemnify Schickedanz Properties only for claims "occasioned wholly or in part by any act or omission of [the] Tenant". Because I am not satisfied that it was grease deposited by Mr. Leslie's restaurant that caused the July 2003 failure, neither he nor his company are liable to indemnify Schickedanz Properties. The claim over against Mr. Leslie and his company by Schickedanz Properties is accordingly dismissed.

**31**  The final issue is whether Mr. Leslie and his company breached their lease with the plaintiff. The term of the lease expired November 22, 2004. Mr. Leslie departed the premises on February 7, 2004, although he left his equipment in the premises for some time thereafter.

**32**  Mr. Leslie has deposed that after he re-opened the restaurant on December 19, 2003 problems with the sewer system continued. During a week-long period commencing on January 24, 2004, trucks were at the building daily pumping sewage. Then on January 31, 2004 he was asked by the plaintiff to close for a day so that yet further repairs to the sewage disposal system could be affected. His patience was exhausted by that point and together with his "management team" he decided to remain open for a week to deplete his inventory and then close permanently. Mr. Leslie did not give the plaintiff notice he was leaving, he simply left.

**33**  Mr. Leslie argues that he was entitled to leave because the lease contains a provision (paragraph 17.01) which sets out the rights of the landlord and the tenant when the building is damaged. In general that provision affords the landlord the option of repairing if repairs can be done within a certain time. If the landlord invokes that option, and elects to do repairs, it is to give the tenant written notice. No notice as contemplated by that section was given to Mr. Leslie and thus he takes the position that he was relieved of his obligations under the lease. There are two problems with that analysis. First, the lease provides that if the tenant wishes to terminate the lease because the landlord has not given notice it intends to repair, the tenant must do that in writing. There is no evidence Mr. Leslie or anyone on his behalf did that. Second, Mr. Leslie went back into occupation in December 2003 after the repairs had been completed. By that point, it appears all parties were ready and willing to continue with their obligations under the lease. To conclude that the lack of notice relieves Mr. Leslie of his obligations, when he elected to return to the premises and operate for a further month and a half, is to ignore what the parties themselves considered to be their ongoing obligations. In the result, I am satisfied that Mr. Leslie is liable to pay rent for the unexpired term.

**34**  The amount of his obligation is somewhat less clear. I have sympathy for the situation that Mr. Leslie faced in late January 2004. He had already lost the opportunity to carry on his business for several months. In the belief that the problems had been fixed, he re-opened. Within 6 weeks he had to endure the daily presence of sewage pumping equipment in the immediate area of his restaurant for about a week. That did not end the matter. He was then forced to close for a day when yet more repairs had be carried out. He acted for himself in this proceeding, although he had the benefit of legal advice from time to time. I find that he is entitled to an abatement of rent for the month from January 23 to February 22, 2004. The plaintiff is entitled to damages in the amount of the rent for the remaining 9 months under the lease (including triple net expenses) less any credit that tenant is entitled to (section 3.03 of the lease provides that a damage deposit of $4,565.33 was paid by Mr. Leslie) and less any amount that the plaintiff received by way of rent for the premises during the 9 months in question. I do not know what those amounts are and thus cannot fix the damages precisely. It is my hope that the plaintiff and Mr. Leslie will be able to agree on those amounts. If they are unable to, they have liberty to apply.

**Conclusion**

**35**  In summary, the plaintiff is entitled to judgment against the defendant Schickedanz Properties in the sum of $108,950.43 plus pre-judgment interest. The plaintiff is entitled to judgment against the defendants Michael Leslie and 637145 B.C. Ltd. in an amount to be determined in accordance with the foregoing reasons. In the event the parties are unable to determine the amount, they have liberty to apply. Unless there are matters touching on the issue of costs about which I am unaware, the plaintiff is entitled to its cost at scale B.

G. BARROW J.

**End of Document**

[***Strata Plan LMS 2940 v. Quick as a Wink Courier Service Ltd., [2007] B.C.J. No. 1448***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21TN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Tysoe J.

Heard: June 1, 2007.

Judgment: June 29, 2007.

Vancouver Registry No. S036494

**[2007] B.C.J. No. 1448** | 2007 BCSC 948 | 159 A.C.W.S. (3d) 142 | 74 B.C.L.R. (4th) 307 | 2007 CarswellBC 1545

Between The Owners, Strata Plan LMS 2940, Plaintiff, and Squamish Whistler Express and Freight a division of Quick as a Wink Courier Service Ltd., Keefer Laundry Ltd., Gary Comeau, John Owner, John Owner Ltd., John Lessor, John Lessor Ltd., Defendants

(32 paras.)

**Case Summary**

**Corporations and associations law — Corporations — Actions — By corporation — Application by the plaintiff strata corporation for a declaration that its action was brought within the applicable limitation period allowed — Limitation period was two years — Action was commenced two years and one day after the incident that gave rise to the litigation occurred — Plaintiff had a statutory impediment that required it to have a 3/4 vote that authorized it to commence the action — Running of time in respect of the limitation period was postponed by one day because the plaintiff needed this time to obtain the vote — Action was therefore commenced on time — Limitation Act, R.S.B.C. 1996, c. 266, s. 6(4)(b) — Strata Property Act, S.B.C. 1998, c. 43, s. 173.1.**

**Limitation of actions — Extension, suspension and inapplicability of limitation periods — Disability — Legal disability — Application by the plaintiff strata corporation for a declaration that its action was brought within the applicable limitation period allowed — Limitation period was two years — Action was commenced two years and one day after the incident that gave rise to the litigation occurred — Plaintiff had a statutory impediment that required it to have a 3/4 vote that authorized it to commence the action — Running of time in respect of the limitation period was postponed by one day because the plaintiff needed this time to obtain the vote — Action was therefore commenced on time — Limitation Act, R.S.B.C. 1996, c. 266, s. 6(4)(b) — Strata Property Act, S.B.C. 1998, c. 43, s. 173.1.**

**Limitation of actions — Topics — Civil procedure — Actions, general — Corporations and associations law — Corporations — Meetings — Real property law — Condominium and strata property — Torts — *Negligence* — Application by the plaintiff strata corporation for a declaration that its action was brought within the applicable limitation period allowed — Limitation period was two years — Action was commenced two years and one day after the incident that gave rise to the litigation occurred — Plaintiff had a statutory impediment that required it to have a 3/4 vote that authorized it to commence the action — Running of time in respect of the limitation period was postponed by one day because the plaintiff needed this time to obtain the vote — Action was therefore commenced on time — Limitation Act, R.S.B.C. 1996, c. 266, s. 6(4)(b) — Strata Property Act, S.B.C. 1998, c. 43, s. 173.1.**

**Real property law — Condominiums — Condominium corporation — Meetings — Rights and obligations — Unit holders — Voting rights — Application by the plaintiff strata corporation for a declaration that its action was brought within the applicable limitation period allowed — Limitation period was two years — Action was commenced two years and one day after the incident that gave rise to the litigation occurred — Plaintiff had a statutory impediment that required it to have a 3/4 vote that authorized it to commence the action — Running of time in respect of the limitation period was postponed by one day because the plaintiff needed this time to obtain the vote — Action was therefore commenced on time — Limitation Act, R.S.B.C. 1996, c. 266, s. 6(4)(b) — Strata Property Act, S.B.C. 1998, c. 43, s. 173.1.**

|  |
| --- |
| Application by the owners of Strata Plan LMS 2940 for a declaration that their action against the defendants was brought within the applicable limitation period under the Limitation Act -- Strata corporation operated a hotel -- On December 1, 2001 a vehicle driven by the defendant Comeau struck a water pipe located in the parking garage of the hotel -- Consequent flooding caused extensive damage to the building and its contents -- After the flooding started Comeau came into the lobby of the hotel and said he had been driving the truck that struck the pipe -- He gave his employer's business card to the hotel's general manager -- General manager contacted the plaintiffs' insurance broker and was put in touch with an adjuster -- Adjuster commenced his investigation on December 2, 2001 -- He was under the mistaken impression that the limitation period for filing a claim that arose out of property damage was two years from the date that investigation and evidence supported an action -- Adjuster decided on December 2, 2003 to instruct counsel to file the writ to protect the claim and the action was commenced on the same date -- HELD: Application allowed -- Running of time in respect of the limitation period was postponed under s. 6(4) of the Act such that the running of time did not being until at least December 3, 2001 -- S. 6(4)(b) provided that time did not begin to run the person whose means of knowledge was in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action -- One of the relevant circumstances in considering when a strata corporation was able to bring an action was a statutory impediment that required it to first obtain a 3/4 vote that authorized a representative action -- Strata corporation was not able to bring an action until it had a reasonable time to obtain the requisite vote to authorize the action -- Reasonable period of time would be at least one day -- Even though s. 173.1 of the Strata Property Act provided that the failure of a strata corporation to obtain the vote did not invalidate an action that it commenced without it, it did not come into force until December 2, 2003 -- Court would not give it retroactive effect -- If it had given it such effect then the strata corporation would never have had a statutory impediment and the limitation period would have expired on December 1, 2003 -- Reason the court did not give it retroactive effect was that the provision was intended to save actions which were commenced by strata corporations and not to make such actions statute-barred -- An interpretation of s. 173.1 that give the defendants a limitations defence was unjust and was contrary to the intention of the Legislature -- Even if s. 173.1 applied retroactively it did not mean that the action would be statute-barred. |

**Statutes, Regulations and Rules Cited:**

Limitation Act, R.S.B.C. 1996, c. 266, s. 6(4)(b)

Strata Property Act, [*S.B.C. 1998, c. 43, s. 173.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B0SM-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: David A. Garner and Kevin J. McLaren.

Counsel for the Defendants, Squamish Whistler Express and Freight a division of Quick as a Wink Courier Service Ltd. and Gary Comeau: Richard B. Lindsay, Q.C. and Christine L. Stewart.

Counsel for the Defendant, Keefer Laundry Ltd.: Russell J. Bailey.

|  |
| --- |
| **TYSOE J.** |

Introduction

**1**  On December 1, 2001, a vehicle driven by the Defendant, Gary Comeau, struck a water pipe located in the parking garage of a building in Whistler, B.C., owned by the persons who are the members of the Plaintiff (the "Strata Corporation") and operated as the Delta Whistler Village Suites Hotel. The consequential flooding caused extensive damage to the building and its contents.

**2**  This action was commenced on December 2, 2003, two years and one day after the incident. The Plaintiff has now made an application for a declaration that the action was brought within the applicable limitation period 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=), and the Defendants have made two separate applications to have the action dismissed as being statute barred.

Background

**3**  After the flooding started, a man who identified himself as Gary Comeau came into the lobby of the hotel and said that he had been driving the truck which struck the water pipe. He gave a copy of what he said was his employer's business card to the hotel's general manager. It was the card of the general manager of Squamish Whistler Express and Freight, and it had an address and phone numbers. Mr. Comeau was then told that he could leave.

**4**  The hotel's general manager contacted the Plaintiff's insurance broker and was put in touch with an adjuster. The adjuster could not travel to Whistler on that day as a result of a snow storm and he attended at the property on the next day, December 2, 2001, which was a Sunday, to begin his investigation. On December 3, the adjuster met with the building inspector for the City of Whistler to inquire whether the heights and locations of the water pipes in the hotel's parking garage complied with the City's building code. He was told that they did comply, at which point he decided that a subrogated claim against the driver of the truck and other parties was a good possibility.

**5**  Approximately a week later, the adjuster met with a representative of the Insurance Corporation of British Columbia ("ICBC"), who said that he was investigating the collision of the truck with the water pipe at the hotel. The adjuster told the ICBC representative that his client would be looking to ICBC to recover its loss. The ICBC representative did not make any commitment to accept responsibility.

**6**  The adjuster then focused on the restoration of the property and quantification of the loss. He had a discussion with the ICBC representative on July 2, 2003 and advised that he was nearing the end of the adjustment in respect of the insurance claim and would like to discuss subrogation recovery from ICBC. The representative said that ICBC would likely be accepting responsibility and asked the adjuster to send him a package of information. The adjuster reached agreement with the hotel as to the final adjustment in the first week of November 2003 and then turned his attention to compiling a package to send to ICBC.

**7**  The adjuster was under the mistaken impression that the limitation period for filing a lawsuit for claims arising out of property damage was two years from the date that investigation and evidence supported an action. On December 2, 2003, the adjuster decided to instruct counsel to file a writ of summons to protect the claim. This action was commenced on the same day.

Legislation

**8**  Subsection 3(2) of the *Limitation Act* reads, in part, as follows:

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. ... for damages in respect of injury to person or property ...

The relevant portions of subsections (3), (4), (5) and (6) of section 6 of the *Limitation Act* read as follows:

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):

...

1. for damage to property ...
2. 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
3. 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
4. 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.
5. For the purpose of subsection (4),
6. "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,
7. "facts" include
8. the existence of a duty owed to the plaintiff by the defendant, and
9. that a breach of a duty caused injury, damage or loss to the plaintiff,
10. if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and
11. if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
12. 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.

**9**  Provisions of the *Strata Property Act*, *S.B.C. 1998, c. 43* are also relevant to this application. Section 171 provides that a strata corporation may sue as a representative of all owners about any matter affecting the strata corporation and s. 172 provides that a strata corporation may sue on behalf of one or more owners affecting their strata lots. In each case, the suit must first be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting. The present action was brought pursuant to s. 171.

**10**  Subsection 45(1) of the *Strata Property Act* provides that the strata corporation must give at least 2 weeks' written notice of an annual or special general meeting. Subsection 44(1) allows for the waiver of the holding of a special general meeting if all eligible voters waive the holding of the meeting and consent to the resolution in question, and s. 45(5) allows a vote to proceed despite lack of notice if all persons entitled to receive notice waive their right to notice.

**11**  Cohen J. considered ss. 171 and 172 in *Strata Plan LMS 888 v. Coquitlam (City)*, [*[2003] B.C.J. No. 1422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-2262-00000-00&context=), [*2003 BCSC 941*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-2262-00000-00&context=), supp. reasons, [*[2003] B.C.J. No. 1971*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20KR-00000-00&context=), [*2003 BCSC 1311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20KR-00000-00&context=). He held that (i) a strata corporation's right to commence a representative action does not exist outside ss. 171 and 172, (ii) a strata corporation must obtain a 3/4 vote before it commences a representative action and its right to commence such an action does not arise until the vote is obtained, and (iii) if a representative action is commenced before the vote is obtained, it is a nullity.

**12**  The B.C. Legislature reacted to Cohen J.'s decision. On December 1, 2003, *Miscellaneous Statutes Amendment Act (No. 3), 2003* received third reading. Among other things, it amended the *Strata Property Act* by adding s. 173.1, which provides that the failure of a strata corporation to obtain the authorization required under s. 171 or s. 172 does not affect the capacity of the strata corporation to commence a representative action and does not invalidate a suit that is otherwise undertaken in accordance with the *Act*. Subsections (2) and (3) state that subsection (1) applies to an action commenced before the section comes into force and that the section is retroactive to the extent necessary to give full force and effect to its provisions. Section 173.1 came into force by royal assent on December 2, 2003, which is coincidentally the same day this action was commenced.

Issues

**13**  The issues requiring determination on this application are as follows:

1. was this action commenced within the two year limitation period set out in s. 3(2) of the *Limitation Act*?
2. was the running of time in respect of the limitation period postponed under s. 6(4) of the *Limitation Act* such that the running of time did not begin until at least December 3, 2001?

**14**  Although the point was not argued by counsel for the Plaintiff, counsel for Keefer Laundry Ltd. addressed an *obiter dicta* comment in *Shah v. Governor and Co. of Adventurers of England Trading into Hudson's Bay Co. (c.o.b. Hudson's Bay Co.),* [*[2007] B.C.J. No. 504*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S47B-00000-00&context=), [*2007 BCSC 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S47B-00000-00&context=) that, as a result of s. 25(4) of the *Interpretation Act*, *R.S.B.C. 1996, c. 238* (which excludes the first and last days of a period in the calculation of the period), the expiry of two years after September 10, 2002 was September 11, 2004.

**15**  Relying on the decisions in *Walter v. Cote* [*(1989), 69 O.R. (2d) 661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B35F-00000-00&context=) (H.C.J.), affirmed [*(1991), 1 O.R. (3d) 558*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGCG-S2N6-00000-00&context=) (C.A.), *Sovereign v. Wawanesa Mutual Insurance Co.*, [*[1999] O.J. No. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD61-JWJ0-G267-00000-00&context=) (Gen. Div.) and *Chiasson v. Century Insurance Company of Canada* [*(1978), 21 N.B.R. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW51-JS0R-204H-00000-00&context=) (S.C. (App. Div.)), counsel for Keefer Laundry Ltd. submitted that even when the day of the event is excluded, a year is completed on the anniversary date of the event. Counsel for Mr. Comeau and Squamish Whistler Express and Freight submitted that s. 25(5), not s. 25(4), of the *Interpretation Act* is applicable to the calculation of limitation periods under the *Limitation Act*. As counsel for the Plaintiff did not address the issue, I do not propose to deal with it. I will proceed on the assumption, without deciding the point, that counsel for the Defendants are correct.

Discussion

**16**  Counsel for the Plaintiff primarily based his argument that the action was commenced within the limitation period on the decision in *Kitto (Guardian Ad Litem) v. Hanson* [*(1991), 58 B.C.L.R. (2d) 265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X2YJ-00000-00&context=) (C.A.). That case involved a claim under the *Family Compensation Act*, R.S.B.C. 1979, c. 120, in respect of a death which occurred on July 15, 1986. The action was commenced on October 28, 1988 by the mother of the deceased on behalf of herself and a person who may have been a child of the deceased.

**17**  Subsection 3(1) of the *Family Compensation Act* provided that an action could be brought for the benefit of the spouse, parent or child of the deceased and was to be brought by and in the name of the personal representative of the deceased. Subsection 3(3) stated that if there was no personal representative of the deceased or, if there was a personal representative but no action had been brought within 6 months after the date of death, the action may be brought by and in the names of persons for whose benefit the action could have been brought if it had been brought by the personal representative.

**18**  The B.C. Court of Appeal first held that, if there is a statutory impediment in the procedure for bringing an action on a substantively fully accrued statutory cause of action, the right to bring the action does not arise until the statutory impediment is removed. The Court observed that, in contrast to the predecessor legislation (which provided for the limitation period to run from "the cause of such actions"), s. 3(1) of the *Limitation Act* provides that the period for the bringing of an action runs from the "date on which the right to do so arose".

**19**  The Court next considered the ambiguity in the wording of s. 3 of the *Family Compensation Act* and concluded that the right of a beneficiary to bring an action under that *Act* did not arise until six months after the date of the death of the deceased. As a result, the Court held that the limitation period of two years began to run after the passage of those six months. In reaching this conclusion, the Court noted that there will be different limitation periods for executors, for administrators and for beneficiaries.

**20**  The B.C. Court of Appeal went on to consider the alternate argument that the running of time of the limitation period had been postponed under s. 6 of the *Limitation Act*. The Court concluded that, if the limitation period was two years from the date of death and if the right of a prospective beneficiary to bring an action did not arise until the six month period had elapsed following the death without a personal representative bringing an action, the prospective beneficiary would not "be able" to bring an action until the lapse of the six month period, with the result that there would be a postponement in the running of the limitation period for six months.

**21**  Although *Kitto* is obviously distinguishable on the facts, its reasoning is instructive and is applicable to the circumstances of this case. However, I prefer to base my decision on the alternate argument in *Kitto* that there has been a postponement in the running of time. My reluctance to apply the reasoning on the first ground in *Kitto* stems from the difference in the statutory impediment in the two cases and my opinion that the removal of the statutory impediment in this case is more properly viewed in the context of a postponement in the running of time.

**22**  The statutory impediment in *Kitto* was removed by the simple passage in time (together with inaction on the part of the personal representative in commencing an action). In contrast, the removal of the statutory impediment in the present case requires a resolution to be passed by the Strata Corporation. In my view, it could not have been intended by the Legislature in passing the *Limitation Act* that a person with a cause of action, but facing a statutory impediment requiring the person to take some step to remove it, could avoid the commencement of the running of time of the limitation period for an indefinite period of time by failing to take the step required to remove the statutory impediment. Consequently, it is my opinion that the reasoning on the first ground in *Kitto* should be restricted to the situation where the statutory impediment is removed by the passage of time (with or without some form of inaction during the period of time).

**23**  The reason why I consider the statutory impediment in this case to be more properly viewed in the context of a postponement in the running of time is because clause (b) of s. 6(4) of the *Limitation Act* states that time does not begin to run until "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"* (emphasis added). One of the relevant circumstances in considering when a strata corporation ought to be able to bring an action is a statutory impediment requiring it to first have a 3/4 vote authorizing the action.

**24**  A strata corporation ought not "be able" to bring an action until it has a reasonable time to obtain the requisite 3/4 vote authorizing the action. What is a reasonable period of time will depend on all of the circumstances, including the number of owners, their proximity and their past practice of waiving notice to meetings. In the present case, I need not determine what would constitute a reasonable period of time because there is no doubt that it would be at least one day.

**25**  As I am relying on the alternate reasoning in *Kitto*, I should address the comment of Lambert J.A. that he did not wish to rest his judgment on the alternate ground. His reason was that he considered the second condition he set out (i.e., "the right of a prospective beneficiary to bring an action did not arise until the six months period has elapsed following the death without a personal representative bringing an action") to be inconsistent with the first condition he set out (i.e., "if ... I am wrong and the limitation period runs for two years from the date of death"). The two conditions were considered inconsistent by Lambert J.A. because they would mean that the right of action on the part of a beneficiary arose on death but the beneficiary was not able to bring an action for the first six months. This expression of inconsistency was essentially a reiteration of Lambert J.A.'s reasoning on the first ground that the limitation period did not run for two years from the date of death because the beneficiary did not have the right to bring the action until six months later.

**26**  Counsel for Mr. Comeau and Squamish Whistler Express and Freight submitted that s. 173.1 should be given full retroactive effect, with the result that there never was a statutory impediment and the limitation period expired on December 1, 2003, one day before this action was commenced. In this regard, counsel relies on the following comments of the Attorney General when introducing the amendment:

This amendment will correct an error and restore the original intent of the legislation. The new section will clarify that the requirement for strata corporations to obtain owner approval before commencing a lawsuit is an internal procedural rule for the benefit of the owners and that failure to obtain this approval does not invalidate the lawsuit. (British Columbia, *Official Report of the Debates of the Legislative Assembly (Hansard)*, Vol. 19, No. 3 (27 November 2003) at 1615 (Geoff Plant).

I disagree with this submission for two reasons.

**27**  The first reason is that the intent of making s. 173.1 retroactive was to ensure that an action commenced prior to the enactment of s. 173.1 without an authorizing resolution would not be considered a nullity. The amendment was made for the benefit of strata corporations and should not be construed to their detriment. It was intended to save actions which had been commenced by strata corporations, not to make actions by strata corporations statute-barred.

**28**  Counsel for the Plaintiff relied on the following passage from P.A. Côté, *The Interpretation of Legislation in Canada*, 2d ed., (Cowansville: Les Editions Yvon Blais Inc., 1991) at 115, which was cited with approval in *Razutis v. Garrett*, [*[1999] B.C.J. No. 1505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4PP-00000-00&context=), [*1999 BCCA 410*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4PP-00000-00&context=) at para. 7:

The courts are often influenced by the consequences of different interpretations. They can determine whether the retroactive or prospective application of a statute will cause undue prejudice to individuals. There is a presumption that the legislator does not intend to be unjust. As a result, judges may refuse to apply statutes so as to produce "unjust", "unreasonable", "prejudicial", "severe", or simply "inconvenient" consequences.

I agree with counsel for the Plaintiff that an interpretation of s. 173.1 to provide the Defendants with a limitations defence would be an unjust result and contrary to the intention of the Legislature.

**29**  My second reason is that even if s. 173.1 is construed retroactively to the extent of removing the statutory impediment in the present case, it does not result in the conclusion that the action is statute-barred. Section 171 was not amended by s. 173.1 and there has at all times been the requirement that a strata corporation obtain an authorizing resolution before commencing a representative action. Even though an action commenced without an authorizing resolution will no longer be a nullity due to the enactment of s. 173.1, the *Strata Property Act* still requires the resolution to be passed before the strata corporation commences a representative action.

**30**  When deciding when a strata corporation ought to be able to bring an action for the purpose of s. 6(4) of the *Limitation Act*, a relevant consideration is whether the commencement of an action without obtaining an authorizing resolution would be a breach of a statute. In my view, a strata corporation ought not to be able to bring a representative action until the passage of a reasonable period of time to enable the strata corporation to obtain the authorizing resolution. In other words, even if s. 173.1 is interpreted to be as retroactive as counsel for Mr. Comeau and Squamish Whistler Express and Freight submitted, the postponement provisions of s. 6 of the *Limitation Act* would still have been operative in the circumstances, and the two year limitation period would not have expired prior to the commencement of this action.

**31**  As I have concluded that there was a postponement of the running of time with respect to the two year limitation period for at least one day on the basis of the reasoning of the alternate ground in *Kitto,* I need not address the argument made by counsel for the Plaintiff that there was a postponement of the running of time for other reasons.Conclusion

**32**  I dismiss the applications made by the Defendants, and I declare that this action has been brought within the limitation period under the *Limitation Act.* I grant costs of the Plaintiff's application to the Plaintiff in the cause.

TYSOE J.

**End of Document**

[***Strata Plan VR 10 v. EE Management Corp., [2015] B.C.J. No. 590***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60JH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D.J. Dardi J.

Heard: July 30 and 31, August 1, October

1 2014; written submissions,

November 6, 2014.

Judgment: March 27, 2015.

Docket: S142590

Registry: Vancouver

**[2015] B.C.J. No. 590** | 2015 BCSC 473

Between The Owners, Strata Plan VR 10, Plaintiff, and EE Management Corp. as representative of the Fractional Owners of Edgewater Estates, EE Management Corp., The Owners, Strata Plan VR5 and the Owners, Strata Plan VR126, Defendants

(153 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Real property — Trespass — Action by plaintiff for declaration it held equitable or statutory easement over portion of defendants' land on which its driveway encroached allowed in part — Counterclaim by defendants seeking damages for trespass allowed in part — Plaintiff had maintained driveway and adjacent hedgerow for 40 years — Parties discovered encroachment in 2014 — Title to encroachment was to vest in plaintiff — Notwithstanding vesting order, defendants entitled to $6,000 in damages for plaintiff's trespass prior to order.**

**Real property law — Interests in land — Easements — Creation — By statute — In equity — Action by plaintiff for declaration it held equitable or statutory easement over portion of defendants' land on which its driveway encroached allowed in part — Counterclaim by defendants seeking damages for trespass allowed in part — Plaintiff had maintained driveway and adjacent hedgerow for 40 years — Parties discovered encroachment in 2014 — Plaintiff had not established an equity — Balance of convenience favoured plaintiff — Title to encroachment was to vest in plaintiff — Issue of compensation for vesting was adjourned to permit parties to obtain evidence of value of taking — Property Law Act, s. 36.**

**Tort law — Trespass — To land — Continuing trespass — Action by plaintiff for declaration it held equitable or statutory easement over portion of defendants' land on which its driveway encroached allowed in part — Counterclaim by defendants seeking damages for trespass allowed in part — Plaintiff had maintained driveway and adjacent hedgerow for 40 years — Parties discovered encroachment in 2014 — Title to encroachment was to vest in plaintiff — Notwithstanding vesting order, defendants entitled to $6,000 in damages for plaintiff's trespass prior to order.**

|  |
| --- |
| Action by the plaintiff for a declaration it held an equitable or statutory easement over the portion of the defendants' land on which its driveway encroached. Counterclaim by the defendants seeking damages for trespass. The plaintiff was a strata corporation for a residential strata complex comprised of 13 buildings and 100 strata lots. The defendants owned the adjacent residential complex, which consisted of 131 townhouse and apartment units. The plaintiff had maintained the driveway and the Hedgerow immediately adjacent to it since the driveway was constructed in the 1970s. In 2014, the defendants blocked access to the driveway after the parties discovered that approximately 369 square feet of the driveway encroached on the defendants' lands. The plaintiff had obtained an interim injunction preventing the defendants from blocking the road. Approximately half the plaintiff's residents used the driveway on a regular basis, as did the residents of two other complexes. The defendant intended to convert the area into a garbage facility.  HELD: Action and counterclaim allowed in part.  The defendants had not intended to create any arrangement for the use of their land. The plaintiff had not established an equity. The Hedgerow effectively enclosed the driveway encroachment and clearly demarcated what the parties previously considered to be their property boundary. The Hedgerow constituted a fence and engaged s. 36(2) of the Property Law Act. The driveway was a fixed and lasting improvement. The negative effect on the defendants of not retaining the relatively small parcel of land that constituted the encroachment was significantly less than that which the plaintiff would suffer in losing access to the driveway. The balance of convenience favoured the plaintiff. Title to the encroachment was to vest in the plaintiff. The issue of compensation for the vesting was adjourned to permit the parties to obtain evidence of the value of the taking. Notwithstanding the vesting order, the defendants were entitled to $6,000 in damages for the plaintiff's trespass prior to the order. |

**Statutes, Regulations and Rules Cited:**

Interpretation Act, [*RSBC 1996, CHAPTER 238, s. 8*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JC0G-61K8-00000-00&context=)

Property Law Act, [*RSBC 1996, CHAPTER 377, s. 36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B1T4-00000-00&context=), s. 36(2), s. 36(2)(b)

Strata Titles Act,

**Counsel**

Counsel for the Plaintiff: J. Shields.

Counsel for the Defendants: G. Haddock.

**Reasons for Judgment**

|  |
| --- |
| **D.J. DARDI J.** |

**INTRODUCTION**

**1**  This lawsuit between the owners of two adjacent properties is anchored in an unfortunate dispute over a driveway (the "Driveway").

**2**  The Driveway has historically been used by the plaintiff. A small triangular portion of the Driveway encroaches onto the defendants' lands. The plaintiff claims an equitable easement over the portion of the lands on which the Driveway encroaches. In the alternative, the plaintiff seeks an order vesting title in the plaintiff, or in the further alternative, a statutory easement.

**3**  The defendants assert the plaintiff should not be entitled to any remedy. Further, by way of counterclaim, the defendants seek damages for trespass.

**4**  Before turning to the analysis, it is necessary to identify the parties, summarize the pertinent facts, and outline the issues to be determined by the Court.

**FACTS**

**5**  Commendably, the parties submitted an agreed statement of facts and filed a number of uncontroversial exhibits at trial.

**6**  Many of the essential facts are not in contention.

**The Parties**

**7**  The plaintiff, The Owners, Strata Plan VR 10, is a strata corporation in the District of North Vancouver, incorporated under the *Strata Titles Act* on May 19, 1970 ("VR 10"). The plaintiff's complex, "Lynnmour Village", is a residential strata complex, comprised of 13 buildings and 100 strata lots.

**8**  The VR 10 Lands are immediately adjacent to a residential complex known as the Edgewater Estates. The Edgewater Estates is comprised of 131 townhouse and apartment units, situated on the "Edgewater Lands".

**9**  The Edgewater Lands is a fractional interest property. Accordingly, residents of the Edgewater Estates purchase a fractional interest in the Edgewater Lands. Each fractional ownership interest is assigned to a particular residential unit of the Edgewater Estates. Each registered owner in the Edgewater Estates has an undivided interest in the Edgewater Lands.

**10**  The defendant, EE Management Corp. ("EE Management") is a corporate entity which manages the Edgewater Lands and serves as property manager for the Edgewater Estates. EE Management's shareholders are the owners of the fractionalized interests in the Edgewater Lands. EE Management's interest in the Edgewater Lands is limited to its right of reverter registered against most of the fractional interests. The right of reverter in relation to some of those fractional interests has been converted into a mortgage.

**11**  EE Management as representative of the Fractional Owners of Edgewater Estates is also a defendant to this action.

**12**  The Edgewater Lands are bound by Premier Street to the west, Lillooet Road to the south, and the VR 10 Lands to the north and east.

**13**  Premier Street is directly west of the VR 10 Lands. There is a small undeveloped and unused sliver of District of North Vancouver (the "District") land separating the VR 10 Lands from Premier Street.

**14**  A neighbouring strata corporation, The Owners, Strata Plan VR 5, comprises 78 strata lots ("VR 5"). Another neighbouring strata corporation, The Owners, Strata Plan VR 126, comprises 123 strata lots ("VR 126"). The VR 10 Lands are immediately to the north of the VR 5 Lands and immediately west of the VR 126 Lands. Throughout these reasons, the lands owned by these entities shall be referred to as the VR 5 Lands and the VR 126 Lands, respectively. VR 10, VR 5, and VR 126 are primarily situated on a bluff and the defendants' property is situated below the bluff.

**15**  For ease of reference, Appendix "A" is the strata plan registered as of April, 1969, which depicts the relative location of the lands at issue in this matter.

**16**  The Edgewater Lands were developed in or about 1968 or 1969, by W.K.P. Construction Co. Ltd., which changed its name to Malibu Management Ltd. on December 19, 1969. Edgewater Estates was originally developed as a rental property. However, at some point during the 1990's, legal title was fractionalized and ownership was effected in the manner described above.

**17**  W.K.P. Construction Ltd. owned the VR 10 Lands, together with Bramalea Trans-Canada Ltd. when the property was developed in 1969 and 1970. These two companies were part of a general partnership, Dunhill Developments, that was registered on May 16, 1969.

**18**  Edgewater Estates was built first, then VR 5, VR 10, and finally VR 126.

**19**  On the evidence, I cannot reliably make any findings as to the state of knowledge of the developers regarding the property lines on or around the Driveway when the Driveway was constructed in the 1970's. Nor am I able to make any determinations as to why the Driveway was constructed with the subject encroachment. The explanation for this state of affairs "is lost in the mists of time": *Dykes v. Nagel*, [*2011 BCSC 1549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22FX-00000-00&context=) at para. 49.

**Road Access**

**20**  There are two entrances to Lynnmour Village. One entrance is a private road, the "Old Lillooet Road Driveway", which branches off Old Lillooet Road. The other, the Driveway, branches off Premier Street.

**21**  The Old Lillooet Road Driveway is on the VR 5 Lands and the VR 126 Lands. It traverses 600 feet of those properties before it reaches the first building of the Lynnmour Village complex. There are seven speed bumps from the entrance of the Old Lillooet Road Driveway to the first building of the Lynnmour Village complex.

**22**  The Old Lillooet Road Driveway is governed by easements as between VR 10, VR 5, and VR 126, and/or the owners of the lands prior to each strata corporation's respective incorporation.

**The Driveway**

**23**  The Driveway, which anchors this dispute, provides access to Lynnmour Village from Premier Street. The first building in the Lynnmour Village complex is located 203 feet from the entrance to the Driveway.

**24**  Premier Street is a two-lane street with sidewalks and is maintained by the District.

**25**  All 100 units of Lynnmour Village have addresses on Premier Street.

**26**  Sanitary sewer pipes which run to the Lynnmour Village complex are located beneath the Driveway.

**27**  The maintenance and access to the Driveway and the Old Lillooet Road Driveway is supplemented by a Roadway Agreement entered into between VR 10, VR 5, and VR 126. The Roadway Agreement sets out approximate distances of portions of the shared roadways.

**28**  The plaintiff has historically maintained the Driveway and the landscaping immediately adjacent to the Driveway.

**29**  The south side of the Driveway is bordered by a row of 12 mature cedar trees (the "Hedgerow"). The Hedgerow grows alongside the Driveway continuously from the bottom of the Driveway on the land owned by the District of North Vancouver through the encroachment and onto the VR 10 Lands. The plaintiff maintains the Hedgerow. Later in these reasons I will return to the question of whether the cedar trees which comprise the Hedgerow were planted or are the result of natural growth.

**30**  Immediately south of the Hedgerow is a further cluster of trees and vegetation which is not maintained by either party. This vegetation is adjacent to a parking lot located in the Edgewater Lands.

**The Driveway Dispute**

**31**  In or around January 2014, the plaintiff made an inquiry with EE Management regarding tree maintenance along the eastern property line separating the Edgewater Lands and the VR 10 Lands.

**32**  At that time, the plaintiff also delivered three documents, including an aerial map showing boundaries (the "Documents") and land title office documents to EE Management.

**33**  The plaintiff also delivered a slope stability report prepared by Horizon Engineering Inc., which Mr. Bruce Higgins had received in January 2014. Mr. Higgins is a long-time resident of Lynnmour Village and a member of VR 10's strata council.

**34**  EE Management eventually retained a survey company to determine the property line between the Edgewater Lands and the VR 10 Lands. On or about February 27, 2014, the surveyor, Mr. Heath, provided EE Management with his findings. His report indicated that approximately 369 square feet of the asphalt Driveway was encroaching on the Edgewater Lands (the "Driveway Encroachment").

**35**  The Driveway Encroachment is triangular, and is located near the north-west corner of the Edgewater Lands. For ease of reference, Appendix "B" is an excerpt of Mr. Heath's report, depicting the Driveway Encroachment.

**36**  The defendants assert that the plaintiff, through its representative, Mr. Higgins, knew or ought to have known that the Driveway Encroachment was not the plaintiff's property.

**37**  I found Mr. Higgins to be a forthright and responsive witness. In cross-examination, Mr. Higgins candidly acknowledged that he had the Documents in his possession for some time prior to early 2014. However, it is important to note that none of the Documents are surveys, and the two sketches which were prepared in relation to water main replacement are not drawn to scale. The third document, which appears to have been available on Geoweb at the District's public website, is also not a survey. It is an aerial photograph showing the various complexes. There is no evidence as to who marked it up, or for what reason. I accept Mr. Higgins' evidence that when he reviewed the Documents he did not make any observations about the property lines on the Driveway as he had focussed his attention on issues associated with the balcony sizes.

**38**  In the end, I find that, prior to early 2014, Mr. Higgins honestly believed that there was no trespass and that there were no issues with the property lines on the Driveway. Moreover, on the totality of the evidence, I am not persuaded that he should have reasonably been alerted to any such issues. There were no red flags or any matters which reasonably would have precipitated him examining any of the Documents for the purpose of ascertaining the property lines on the Driveway.

**39**  In short, I find on balance that neither the plaintiff nor the defendants knew of the Driveway Encroachment trespass until early 2014. This conclusion accords with the probabilities of the case.

**40**  On February 27, 2014, EE Management erected temporary wooden signs on each side of the Driveway which read "Private Property No Trespassing". The installed signs were located on the Edgewater Lands and District Land.

**41**  The plaintiff responded to EE Management's inquiries about the Driveway Encroachment through counsel. In a letter dated March 3, 2014, counsel for VR 10 advised EE Management that while VR 10 intended to address any legitimate concerns regarding boundary issues, it would seek injunctive relief if the Driveway was blocked or residents of Lynnmour Village were harassed.

**42**  The Board of EE Management resolved to close the Driveway, effective March 17, 2014.

**43**  On March 17, 2014, EE Management blocked access to the Driveway. This was effected by the installation of two steel posts, one of which was at the point of the triangular Driveway Encroachment. The latter post was installed by cutting through the asphalt. A chain was strung across the Driveway between the two posts, blocking access by any vehicle. EE Management also placed a number of construction cones at the entrance to the Driveway, on the VR 10 Lands.

**44**  Accordingly, EE Management prepared letters dated March 17, 2014, providing notice of the closure of the Driveway, effective as of that date. Copies of those letters were delivered by hand to VR 10's property manager, the BC Ambulance Service, the District, the Royal Canadian Mounted Police, and the North Vancouver City Fire Department.

**45**  The Fire Department acknowledged receipt of the notice of closure of the Driveway.

**46**  The evidence establishes that the emergency response route is discretionary for the individual captains of the fire trucks.

**47**  On March 21, 2014, a North Vancouver City Fire Department fire engine with its emergency lights activated attempted to turn into the Driveway from Premier Street. After a period of not more than 45 seconds, the vehicle encountered the chain and was forced to turn back and approach the VR 126 property from an alternative entrance.

**48**  On March 26, 2014, a resident of Lynnmour Village called for emergency medical assistance. At that time, a fire truck, ambulance, and two police vehicles attempted to use the Driveway to reach Lynnmour Village. The Fire Department first responders were prepared to cut the chain to permit access by the emergency vehicles, however, EE Management's maintenance personnel attended and unlocked the chain.

**The Potential for Relocation of the Driveway**

**49**  Representatives of the plaintiff have pursued the possibility of relocating the Driveway with representatives of the District since it would require municipal approval to relocate the Driveway.

**50**  The District has rejected two proposals and has indicated a third preliminary option may be feasible. The application for a third option would require a detailed design by a professional engineer and an environmental survey since the proposed relocation would impact District trees. In any case, the District has made it clear that it will not entertain any proposals to relocate the Driveway until this action is concluded.

**HISTORY OF PROCEEDINGS**

**51**  In proceedings commenced on April 3, 2014, the plaintiff sought a declaration of an equitable easement of the defendants' property, interim, interlocutory, or permanent injunctive relief, barring the defendants from obstructing the Driveway and from harassing owners or residents of Lynnmour Village, and finally damages. The Notice of Civil Claim named The Owners, Strata Plan LMP 15179 and EE Management Corp. as defendants.

**52**  The plaintiff applied for an interim injunction permitting their use of the Driveway until the resolution of this matter at trial. In reasons indexed at [*2014 BCSC 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2RC-00000-00&context=), Holmes J. granted interim injunctive relief which was to extend until the earlier of trial of the matter or the end of July 2014. The effect of her order was to bar EE Management from obstructing the Driveway. However, Holmes J. permitted the steel post marking the top of the Driveway Encroachment to remain in place.

**53**  EE Management filed a Response to Civil Claim and Counterclaim on April 29, 2014. EE Management noted that the relief sought by the plaintiff was not enforceable against it because it was not the owner of the Edgewater Lands. Further, EE Management disputed the existence of an easement and alleged the plaintiff was trespassing on the Edgewater Lands. In its Counterclaim, EE Management sought a declaration that the plaintiff was trespassing on the Edgewater Lands, an order that it relinquish control of the Driveway and that it remove all impediments to the lands, and damages.

**54**  Pursuant to the order of Master Baker dated May 27, 2014, EE Management Corp., as representative of the Fractional Owners of Edgewater Estates, was substituted in place of the previous named defendant, The Owners Strata Plan LMP 15179 and the style of cause of this proceeding was amended accordingly. In the result, EE Management stands as a defendant in its own right and in a representative capacity on behalf of the owners of the Edgewater Lands.

**55**  The matter proceeded to trial on July 30, 2014. The parties invited me to take a view of the properties. On the second day of trial, I did so with counsel and representatives of each party present. My tour included driving through the Lynnmour Village complex by way of the Old Lillooet Road Driveway and walking along the portion of the Driveway in dispute. With the knowledge and consent of counsel, after the trial had concluded, I attended for a second site visit to view the Driveway. I did not have any interactions with any of the parties during the second site visit.

**56**  At trial, I raised a concern regarding the potential interests of the neighbouring stratas in this proceeding and whether they should be added as parties.

**57**  On October 1, 2014, the plaintiff applied for leave to name the two additional neighbouring strata corporations as defendants. I ordered on October 1, 2014, that The Owners, Strata Plan VR 5 and The Owners, Strata Plan VR 126 be added as defendants.

**58**  On October 20, 2014, the defendant, VR 5 filed a Response to Civil Claim in which it consented to the relief sought by the plaintiff in the Amended Notice of Civil Claim. In its response, VR 5 stated that residents and visitors of VR 5's complex used the Driveway and that it wished to continue to do so.

**59**  On October 29, 2014, the defendant, VR 126, filed a Response to Civil Claim, in which it consented to the relief sought by the plaintiff in the Amended Notice of Civil Claim. In its response, VR 126 also stated that residents and visitors of VR 126's complex used the Driveway and that it wished to continue to do so.

**60**  On November 6, 2014, counsel for the plaintiff, with the consent of defence counsel, submitted correspondence advising the court that in light of the positions taken by VR 5 and VR 126, the parties were of the view that a further hearing was not necessary.

**ISSUES**

**61**  It is common ground that the Driveway encroaches, in part, upon the Edgewater Lands. It is the question of the plaintiff's entitlement to any remedy for this state of affairs that lies at the heart of this dispute.

**62**  The plaintiff seeks a declaration of an equitable easement over the Driveway Encroachment. In the alternative, the plaintiff seeks relief under the provisions of s. 36 of the *Property Law Act*, *R.S.B.C. 1996, c. 377* (the "*PLA*"). Under this provision, the plaintiff seeks an order vesting title to the lands constituting the Driveway Encroachment for compensation. The plaintiff suggests that $10,000 is a fair sum. In the further alternative, the plaintiff seeks a statutory easement, under the *PLA*, in perpetuity.

**63**  The defendants dispute that the plaintiff is entitled to any relief. Further, the defendants counterclaim in trespass and seek monetary damages for insurance and taxes paid in respect of the Driveway Encroachment.

**64**  I will analyze the issues as follows:

1. Is the plaintiff entitled to a declaration of an equitable easement over the Driveway Encroachment?
2. Is the plaintiff entitled to relief under s. 36 of the *Property Law Act* and, if so, should the court vest title in the land encroached upon or should the court grant a statutory easement?
3. If yes, what compensation should the plaintiff make to the defendants?
4. Does the Driveway Encroachment constitute a trespass?
5. If yes, what damages should the defendants recover in relation to that trespass?

**ANALYSIS**

**65**  I turn to the arguments advanced by the parties and the legal principles that animate the issues in this matter.

**Equitable Easement**

***Position of the Parties***

**66**  The plaintiff seeks a declaration of an equitable easement over the Driveway Encroachment.

**67**  The defendants oppose any order which would recognize an equitable easement.

***Legal Framework***

**68**  There is no dispute on the legal principles that govern equitable easements in this province.

**69**  The analytical framework governing the recognition of an equitable easement is rooted in the principles of proprietary estoppel: *Dykes*, at para. 59. These principles inform the court's assessment of whether it should recognize an equitable easement.

**70**  The authorities establish that a claim for proprietary estoppel is founded on an equitable right arising from the conduct of the parties. The courts will give effect to proprietary estoppel in circumstances where the conduct of the parties is predicated on certain assumptions about their respective rights, such that it would be unjust or unfair to allow a party to resile from that assumption. In *Dykes*, Harris J. (as he then was) noted that "where there has been an implied promise by conduct and acquiescence, coupled with detriment, it may be inequitable to allow a party to assert rights inconsistent with that implied promise": *Dykes*, at para. 59.

**71**  In *Erickson v. Jones*, [*2008 BCCA 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S38S-00000-00&context=), the Court of Appeal summarized the principles of proprietary estoppel. The Court of Appeal described the starting point of the analysis as follows:

[53] A starting point is *Willmott v. Barber* (1880), 15 Ch. D. 96 (C.A.), wherein Fry J. formulated his oft-quoted statement of the five "probanda" that need be demonstrated by a person seeking to raise a proprietary estoppel: (1) that the plaintiff (the person seeking to raise the estoppel) must have made a mistake as to his legal rights; (2) that he have expended some money or done some other act to his detriment on the faith of his mistaken belief; (3) that the defendant (the person sought to be estopped) must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; (4) that the defendant know of the plaintiff's mistaken belief of his rights; and (5) that the defendant have encouraged the plaintiff in his expenditure of money or other acts, either directly or by abstaining from asserting his legal right.

**72**  The weight of the recent authorities in British Columbia endorse a broad, flexible, and less literal judicial approach to proprietary estoppel which moves beyond the strict evaluation of the "probanda" as articulated above. In *Tretheway-Edge Dyking District v. Coniagas Ranches Ltd.*, [*2003 BCCA 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2C4-00000-00&context=), Madam Justice Newbury, in concurring reasons, described the development of the modern approach, as follows:

[64] At the outset, I note that the five elements or "probanda" famously cited by Fry J. in *Willmott v. Barber* (1880) 15 Ch. D. 96, including in particular the making of a "mistake" by a party as to his or her legal rights, have now been overtaken by a broader and less literal approach to proprietary estoppel. *Halsbury's* (4th ed., vol. 16) explains this approach as follows:

The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories. [para. 1072; emphasis added.]

**73**  The foregoing characterization of the broader approach was cited with approval by Mr. Justice Chiasson in *Erickson* at para. 56 and in several subsequent decisions of the Court of Appeal, including the recent decision of *Sabey v. Rommel*, [*2014 BCCA 360*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G0F0-00000-00&context=). In *Sabey*, the Court clarified the essential formulation of the test for proprietary estoppel as follows:

[30] Although the test for proprietary estoppel has been framed in many different ways in the case law, it always bears the same essential qualities. In my view, it can be summarized as follows:

1. Is an equity established? An equity will be established where:
2. There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and
3. The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.
4. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.

***Discussion***

**74**  With these guiding principles in mind, I turn to consider the facts of this case.

**75**  The starting point for this analysis is whether or not an "equity' is established.

**76**  The plaintiff urges the court to conclude that the conduct of the parties has been such that a claim in equity is made out. Its primary contention is that the court ought to "ensure that justice be done" by maintaining the status quo which has been in place for the last 40 years. In advancing this argument, the plaintiff acknowledges that neither party has knowledge of how the Driveway came to be in its present location. However the plaintiff submits that the defendants have conducted themselves as though the plaintiff had a right of access to the Driveway Encroachment, upon which it relied to its detriment and, as such, the defendants are estopped from excluding the plaintiff from accessing that land.

**77**  The primary contention of the defendants is that the claim for an equitable easement must fail because the evidence does not support any claim in equity. The defendants assert that the claim must fail on the first arm of the test because the defendants cannot be properly said to have "encouraged" a right to the use of land they were unaware was even theirs to command. The defendants say that EE Management never turned its mind to the possibility it owned the Driveway Encroachment until early 2014 and accordingly made no representations or indications as to the existence of a right on the part of the plaintiff to access same. In the circumstances, it cannot be said that the plaintiff believed "there [was] a right encouraged or created by the words of the defendants to the detriment of the plaintiff".

**78**  It is common ground that EE Management first learned of its ownership of the Driveway Encroachment upon completion of the survey in early 2014.

**79**  The plaintiff argues that the lack of knowledge is not necessarily a bar to the recognition of an equitable easement. Counsel points to several decisions in which the parties were mutually mistaken as to the quality and scope of the rights asserted by the claiming party but the defendants were nevertheless estopped from asserting their full legal rights.

**80**  The plaintiff relies on *Sherbinin v. Jackson*, [*2011 BCSC 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2TF-00000-00&context=), in which Fitzpatrick J. recognized an equitable easement in circumstances where the parties were unaware of defects in an existing easement registered against certain lands. The plaintiff applied for an order cancelling the easement. In that case, the registered easement pertained to a roadway which had fallen into disuse, and a second, commonly used roadway had been constructed. The parties were the owners of three adjacent lots, which the roadway crossed, permitting access by the landlocked owners of the second and third lots. The arrangement had been in place for decades and when the plaintiff owners of the first lot acquired their property, they knew that access was being exercised: *Sherbinin,* at para. 58. The plaintiffs had continued to permit that access over the course of many years and had at times assisted their defendant neighbours in exercising that access. Fitzpatrick J. found that all parties operated on the basis that the neighbouring owners would have a right of access over the first lot. She concluded that in the circumstances it would be "unconscionable and unjust" to deny the neighbouring parties a right of access to the road.

**81**  Similarly, in *Dykes*, Mr. Justice Harris granted an equitable easement in circumstances where all the parties assumed there was access to their properties by way of an easement. The easement in question gave one party access to a road which traversed the property of another. However, the roadway at times strayed outside of the bounds of the easement as registered, a fact of which neither party was aware until a survey was conducted in anticipation of renovations. The adjacent landowners had assisted in the maintenance of the subject road and had improved their property acting to their detriment on the strength of their right of access: *Dykes*, at para. 62.

**82**  The plaintiff submits that the circumstances in *Sherbinin* and *Dykes* are analogous to the dispute between the parties in this matter. I do not agree. I adopt Holmes J.'s observations that "[t]he equitable easements in those cases gave legal force to arrangements that the parties or their predecessors had intended to create and under which the parties had lived for years, and it was only when one party sought to nullify that arrangement by relying on a recently emerged defect in the legal instrument believed to reflect it that the principles of proprietary estoppel came into play": *The Owners, Strata Plan VR 10,* at para. 13.

**83**  I have earlier concluded that the evidence supports a finding that both parties were mistaken as to the true ownership of the Driveway Encroachment until early 2014. It cannot be said that the defendants had intended to create any arrangement for the use of their land. Upon learning of the true ownership, the defendants acted expediently to assert control over the Driveway Encroachment. In both *Sherbinin* and *Dykes* all parties believed there were rights of access and they had conducted themselves accordingly. The parties in this matter had no such arrangement as to the use of the Driveway Encroachment. In the result, the analysis in *Sherbinin* and *Dykes* is distinguishable.

**84**  In all the circumstances, I conclude that an "equity", as that term is understood in the pertinent authorities, has not been established. In view of my findings, it is unnecessary to consider the other constituent elements of the test for proprietary estoppel.

**85**  In the result, the claim seeking a declaration of an equitable easement is dismissed.

**The Property Law Act**

**86**  I turn to the plaintiff's claim to relief under the purview of the *PLA*.

***Position of the Parties***

**87**  The plaintiff seeks relief pursuant to the statutory framework of s. 36 of the *PLA*. In broad terms, this section permits a court to declare a statutory easement, or vest title to the lands which have been encroached upon, in circumstances where a fence improperly encloses adjoining lands.

**88**  The plaintiff submits that the Hedgerow constitutes a "fence" for the purposes of s. 36. The plaintiff argues that it is in the interests of fairness to preserve the status quo as between the parties, and that accordingly, title to the Driveway Encroachment should be vested in the plaintiff pursuant to s. 36(2)(b) of the *PLA*. In the alternative, the plaintiff seeks a statutory easement pursuant to s. 36(2)(b) of the *PLA*.

**89**  The defendants vigorously oppose the relief sought by the plaintiff. The defendants assert that the Hedgerow does not constitute a "fence" within the meaning contemplated by the statute. Further, they argue that even if the Hedgerow can be properly regarded as a "fence", the relief sought by the plaintiff is not justified on the jurisprudence.

***Legal Framework***

**90**  The relevant section of the *PLA*, s. 36, reads as follows:

**Encroachment on adjoining land**

36 (1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.

1. If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
2. declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
3. vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
4. order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

**91**  Section 36 confers statutory authority upon the court to resolve encroachment disputes on equitable grounds: *Taylor v. Hoskin*, [*2006 BCCA 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1VC-00000-00&context=) at para. 2. The granting of a remedy pursuant to s. 36 is discretionary and the determination whether to grant or refuse relief turns on the facts and equities of each individual case: *Gainer v. Widsten*, [*2006 BCCA 580*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M2W6-00000-00&context=) at para. 8.

**92**  On considering an application under s. 36, the court must first be satisfied that the requisite criteria mandated by statute are met. That is to say, the characterization of the nature of the encroachment is regarded as a threshold question. The applicant must establish there is an encroachment onto neighbouring land in the form of a building or that there is something having the equivalent effect of a fence which delineates the property: *Epp v. Gartside*, [*2011 BCSC 1687*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22S7-00000-00&context=) at para. 22.

**93**  A "fence" is not defined in the *PLA*. In accordance with s. 8 of the *Interpretation Act*, R.S.B.C., 1996 c. 238, the *PLA* is to be construed as "remedial" and is to be given a "fair, large, and liberal construction and interpretation as best ensures the attainment of its objects": *Oyelese v. Sorensen*, [*2013 BCSC 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0NM-00000-00&context=) at para. 20.

**94**  Numerous cases in this province have considered what constitutes a fence for the purposes of triggering the application of s. 36. The judicial approach to the definition of a building or fence under the *PLA* can be fairly described as "elastic". In *Oyelese*, at paras. 21-24, Madam Justice Fitzpatrick canvassed a number of decisions addressing the question of what constitutes a fence. Those decisions demonstrate that the following structures have been found to constitute a fence:

1. A fence which had partially fallen down: *Svenson v. Hokhold*, [*[1993] B.C.J. No. 859*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M398-00000-00&context=) (C.A.);
2. A demarcation comprised in various parts of a hedge, trees, and a fence which was no longer standing: *Vineberg v. Rerick*, [*[1995] B.C.J. No. 2506*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G22V-00000-00&context=) (S.C.);
3. A retaining wall: *Barrow v. Landry*, [*[1998] B.C.J. No. 1601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2GR-00000-00&context=) (S.C.);
4. An "aggregation of large stones, meant to separate two properties that effectively annexe[d] a part of one property to another": *Langley v. Yang*, [*2012 BCSC 1520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2BC-00000-00&context=), at para. 19.

**95**  In *Barrow*, Clancy J. provides guidance regarding the proper interpretation of s. 36(2) as follows:

21 To take the narrow view suggested by Mr. Landry would not be of assistance in attaining the objects of the Act. I see no reason to limit the definition of "fence" as that word is used in the Act to some upright, above ground, structure that encloses an area of property. I conclude that a structure of any kind, provided it serves the purpose of either enclosing property or separating contiguous estates is a fence within the meaning of the Act. I find as well that it is unnecessary, as contended by Mr. Landry, that the fence be constructed for the specific purpose of dividing the property into two distinct portions. It seems to me to be sufficient if the structure serves that purpose.

**96**  Once the threshold under s. 36(2) is established, the court will proceed with the application and apply a balance of convenience test. In *Vineberg*, Mr. Justice Leggatt provided what is regarded as the leading articulation of the factors which animate the test, at para. 20:

1. The comprehension of the property lines: Were the parties cognizant of the correct boundary line before the encroachment became an issue? There are three degrees of knowledge: honest belief, ***negligence*** or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
2. The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? What is its effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.
3. The size of the encroachment: How does the encroachment affect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

**97**  The continued relevance of the principles outlined in *Vineberg* was affirmed by the Court of Appeal in *Taylor* at para. 50, and by this court in *Oyelese* at para. 30 and *Langley* at para. 15. However, it is important to appreciate that the considerations outlined by Leggatt J., as he then was, are a guide to assist the court in the exercise of the equitable discretion under the statute, and are "not tests to be rigorously applied in every case": *Gueldner v. Nichele*, [*2013 BCSC 2354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S4DH-00000-00&context=) at para. 18. The authorities mandate that the court should assess the factors having regard to the overarching consideration of s. 36 to resolve boundary disputes in an equitable fashion: *Taylor* at para. 51.

**98**  In *Oyelese*, Fitzpatrick J. noted that the authorities caution that the court's discretion under s. 36(2) "should be 'lightly exercised' and that the moving party must show that the balance of convenience is 'decidedly in its favour'": *Oyelese* at para. 29.

***Discussion***

1. ***Is Section 36 Engaged?***

**99**  The central question is this: can the Hedgerow properly be regarded as a "fence" for the purposes of the *PLA*? It is common ground that neither the Driveway nor the Hedgerow satisfies the definition of a "building" for the purposes of the *PLA*.

**100**  The plaintiff urges the court to conclude that the Hedgerow constitutes a fence as that term has been interpreted by the relevant authorities. The plaintiff contends that the Hedgerow was planted along what was presumed to be the property line enclosing the Driveway.

**101**  The defendants counter with the submission that the vegetation that borders the Driveway is natural growth which cannot be regarded as a fence. They urge this court to conclude that the "irregular and natural placement of the vegetation is in marked contrast to a rock wall ... and does not constitute a construction that, that even by the most elastic of interpretations, can be classified as a fence". The defendants argue that this conclusion would be consistent with the reasoning in *Epp*.

**102**  Mr. Higgins was residing in a rental unit at the Edgewater Estates in the 1970's when the VR 10 complex and the Driveway were constructed. Mr. Higgins moved into Lynnmour Village in 1975 and has resided there continuously to date. Since 1975, with the exception of 2005/2006, he always has been member of VR 10's strata council.

**103**  According to Mr. Higgins, whose testimony I accept, the Driveway has never moved. He described the Hedgerow as 12 cedar trees spaced between three and four feet apart that follow the curvature of the Driveway. He persuasively related to the court that the Hedgerow has been there for as long as he could remember and that he had observed the Hedgerow mature and grow taller over the last 40 some years. Mr. Higgins did not directly observe the planting of the Hedgerow. However, he testified he had always understood that the Hedgerow had been planted by the developer, or its contractor, to delineate the boundary lines between Edgewater Lands and the VR 10 Lands, along the curvature of the Driveway. The uncontroverted evidence is that VR 10's personnel have always maintained the Hedgerow.

**104**  Mr. Higgins described the Hedgerow as very dense. He explained that in February or March 2014, the defendants had created an opening in the Hedgerow when they erected barriers on the Driveway. However, prior to the subject dispute, there had been no access through the Hedgerow. Ms. Alexandra Lyde-Stad, who has resided in Lynnmour Village since September 1999, also testified that she had always understood the Hedgerow delineated the property line between the parties and she always perceived the Hedgerow as too thick and dense to pass through.

**105**  Mr. Higgins' testimony was also corroborated by Mr. Eric Miura. Mr. Miura is a general contractor and has been involved as the maintenance contractor for VR 10 in some capacity since 1992. In relating his observations about the Hedgerow, he described a dozen cedar trees of the same species, Excelsa, planted three to four feet apart in a row bordering the Driveway in a curved line. According to Mr. Miura the trees have matured over the years. He always perceived the Hedgerow as delineating the property lines between the parties. He described the Hedgerow as solid and impassible until recently, when the defendants created an opening in the Hedgerow when they excavated to create a barrier on the Driveway.

**106**  Ms. McBoyle, who is the president of the board of directors of Edgewater Estates, maintained that the cedar trees which border the Driveway are similar to those found throughout the defendants' property. However she acknowledged in cross-examination that the Hedgerow had been there since 1972 when she moved into the complex. At the time, Hedgerow was much smaller and she has observed the cedar trees grow over the years. She too assumed that the Hedgerow formed the boundary between the two properties.

**107**  On the evidence I prefer, I find it is more likely than not that the 12 trees of the same species planted in a linear fashion along a circular driveway were deliberately planted. It can reasonably and properly be inferred that the planting of the Hedgerow was intended to delineate the property lines between the parties. This conclusion accords with the preponderance of probabilities an informed person would find reasonable in the circumstances. My conclusions in this matter are bolstered by my own observations of the Hedgerow.

**108**  Given my findings, the analysis in *Epp* is inapplicable. I am not persuaded that there is any merit to the defendants' characterization of the Hedgerow as "natural growth" that cannot be classified as a fence. In any case, s. 36 does not mandate a specific erection of a "fence", only that it "encloses adjoining land". The Hedgerow serves the purpose of effectively enclosing the Driveway Encroachment and clearly demarcates what the parties previously considered to be their property boundary.

**109**  To the extent the defendants assert that the Hedgerow does not enclose adjoining lands because the area is accessible from the Edgewater Lands along the District frontage, this imposes too strict an interpretation of s. 36, which is intended to provide equitable relief. I note that this court has repeatedly held that a fence need not entirely enclose adjoining land if it delineates a putative property line: *Barrow* at para. 17; *Rideout v. Fliss,* [*[1998] B.C.J. No. 714*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29C-00000-00&context=), [*1998 CanLII 2922*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29C-00000-00&context=); and *Vineberg v. Rerick* at para. 17.

**110**  Applying a fair, large, and liberal interpretation, I conclude that the Hedgerow constitutes a fence. In the end, I find that there is a fence improperly located so as to enclose the adjoining land, and that s. 36(2) of the *PLA* is therefore engaged.

1. ***Balance of Convenience***

**111**  I will address all three factors cited in *Vineberg* in turn.

1. Knowledge of the Parties

**112**  The defendants emphasize they had no knowledge of the Driveway Encroachment until early 2014.

**113**  As I mentioned earlier, the preponderance of the evidence supports a finding that the plaintiff had no knowledge of the Driveway Encroachment. The plaintiff held an honest belief that the Hedgerow formed the boundary line. Moreover, I have found that there were no circumstances which should have reasonably prompted Mr. Higgins to investigate the property lines on the Driveway prior to early 2014.

**114**  In the final analysis both parties operated for a great many years on mistaken assumptions regarding their respective property lines. In all the circumstances, I cannot ascribe any fault to either party.

**115**  In any event, even if the plaintiff was to be faulted in this regard the respective knowledge of the parties is only one factor to consider. It is not determinative of the issue: *Oyelese* at para. 50.

1. Nature of the Encroachment

**116**  The paved Driveway Encroachment has existed for some 40 years. It is a clearly a fixed and lasting improvement.

**117**  Mr. Justice Melnick, in *obiter*, commented on the driveway which was the subject of the dispute in *Epp* at para. 28:

[28] The nature of the improvement is a driveway that has existed for about 60 years. It is paved. It will be expensive to replace it wholly on the Epps' land. Apart from the cost of doing so, it may be physically difficult and enquiries of the government for an encroachment onto the road right-of-way have not yet been undertaken. No one knows what the response from the government may be. Balanced against this is the vague plans the Gartsides have for perhaps developing their property someday in a manner such that the driveway may prove to be in the way either of the construction or the view from what is constructed. This factor favours the Epps.

**118**  Although in *Epp* Mr. Justice Melnick ultimately concluded that s. 36 was not engaged, I find his analysis instructive in this case.

**119**  It can reasonably be inferred that the cost of relocating the Driveway would be significant. According to Mr. Miura related the plaintiff had received a very preliminary estimate at $200,000. I do not find the defendants' submission regarding the lack of evidence on the cost of removing the Driveway Encroachment persuasive. I note that in *Vineberg* the analytical framework considers the effort and costs of moving an improvement.

**120**  There are other significant challenges in moving the Driveway. Crucially, whether or not the Driveway can in fact be relocated is dependent on approval by the District. The municipality has rejected two proposed relocation options and while a third option may be feasible, the District has indicated it will not entertain any further proposals until these proceedings have been concluded.

**121**  The defendants contend that they plan to develop the Driveway Encroachment by relocating their garbage and recycling area to that location. The defendants intend to create new parking spaces, approximately six, for residents of the Edgewater Estates in the area presently occupied by their garbage facilities. The defendants maintain they are unaware of any impediments to this planned redevelopment. There was no evidence adduced of the cost of the defendants' development proposal.

**122**  Although this is closely balanced, I find this factor favours the plaintiff.

1. Size and Effect of the Encroachment

**123**  The plaintiff forcefully asserts that the loss of the Driveway Encroachment would have a substantial negative impact on the residents of Lynnmour Village. It would render the Driveway unusable. Counsel points out that the residents of the Lynnmour Village have used the Driveway for 40 some years and have invested time and expense into its upkeep. The plaintiff argues that Driveway is the most convenient point of ingress and egress for residents, the majority of visitors, and first responders alike.

**124**  The defendants counter with the submission that the effect on the plaintiff of the loss of the Driveway would be negligible. Their primary contention is that the Driveway is nothing more than a convenience for the residents of Lynnmour Village. They argue that the corresponding loss would be significant to them, as they would lose the opportunity to move the existing garbage away from the Edgewater Estates complex, thereby precluding them from increasing the number of parking stalls.

**125**  In *Oyelese*, Madam Justice Fitzpatrick helpfully canvassed the jurisprudence, where the court considered the relative effect of the loss of the subject land to the rightful landowner.

[77] In *Svenson*, the trial judge ordered a transfer of the property after finding that the strip of land had no "functional use" to the party who owned that strip of land: para. 13. In *Vineberg*, the court granted an easement after finding that the party losing their rights to the land was not being forced to give up an "inordinate" amount of their total property and that they still had room in which to undertake an expansion of their home: paras. 25-27. In *Barrow*, the court granted an easement after finding that Mrs. Barrow's retaining wall did not adversely affect the use or value of Mr. Landry's land: paras. 28-29. In *Langley*, the court also reluctantly granted relief to the encroaching party, the Yangs, but only after finding that the area in dispute was not accessible or usable by the Langleys for any practical purpose: paras. 13, 27. In *Taylor*, the trial judge ordered a transfer of the property after finding that Mrs. Taylor's use of the land did not inconvenience the Hoskins or preclude them from doing certain other works on their land: para. 27.

[78] All of these cases demonstrate circumstances where the effect on the "losing" owner was considerably less than what will be suffered by the Oyeleses in this case if they are forced to give up the encroachment area.

**126**  My findings on this point may be summarized as follows:

1. While there is alternative access to the VR 10 Lands via the Old Lillooet Road Driveway, the evidence supports a finding that approximately one-half of the residents of Lynnmour Village, regularly use the Driveway. The Driveway is the shortest and most convenient route to the northern buildings of Lynnmour Village complex.

Both Mr. Higgins and Ms. Lyde-Stad view the alternate access via the Old Lillooet Road Driveway as inferior, in part, because of the congestion associated with the alternate access.

1. Additionally, the evidence supports a finding that visitors, service vehicles, and first responders regularly access Lynnmour Village through the Driveway, as all units in Lynnmour Village bear Premier Street addresses.
2. For over 40 years, the plaintiff has expended funds to maintain the Driveway and the adjacent Hedgerow.
3. In their response filed with the court, VR 5 and VR 126 both assert that their residents and visitors use the Driveway and that they wish to continue to do so. They also admit the allegations of fact in the plaintiff's Further Amended Notice of Civil Claim regarding the closure of the Driveway having raised safety concerns, as well as significant inconvenience.
4. In March 2014, first responders twice attempted to access the Driveway, which was barred by a chain. These two incidents underscore the plaintiff's concerns regarding the safety of its residents and the neighbouring residential complexes. Mr. Ben Wilson, who is the Captain of Fire Prevention for the District's Fire and Rescue Services acknowledged in his testimony that the Fire Department would want to preserve access through the Driveway -- as an entry point for emergency vehicles -- and that he would not want that emergency access blocked by garbage or recycling bins.
5. If access from Premier Street through the Driveway was eliminated it follows that all residents would be required to use the Old Lillooet Road Driveway access. This would result in an increase in the congestion of what is already a busy and often congested roadway.
6. The size of the Driveway Encroachment is 369 square feet. According to the defendants' submissions the Edgewater Lands are approximately 321,335.02 square feet. Thus the Driveway Encroachment constitutes approximately 0.11% of the overall Edgewater Lands.

**127**  The preponderance of the evidence supports a finding that there would be a significant negative impact on the plaintiff if the Driveway was to be closed. Balanced against these considerations is the loss of the defendants' proposed use for the area of the Driveway Encroachment as a garbage facility. This, in turn, would potentially facilitate the installation of six parking stalls in the area where the garbage facilities are currently located. The evidence falls short of establishing that this is a feasible proposal which would be approved by the District.

**128**  The authorities have regarded the relative effect of the loss of the encroaching area to the original owner as an important factor: *Oyelese* at para. 76. After careful consideration, I have concluded that the negative effect on the defendants of not retaining the relatively small parcel land that constitutes the encroachment would be significantly less than that which the plaintiff would suffer in losing access to the Driveway. This factor favours the plaintiff.

**129**  In summary, having considered the factors outlined in *Vineberg*, I conclude that the balance of convenience weighs in favour of the plaintiff. In all the circumstances, I find that the just resolution and appropriate remedy in this case is a vesting order upon payment to the defendants of fair compensation. I considered whether it would be sufficient to grant an easement but, in my view, an easement would not sufficiently address the equities in this case and the need for finality in this unfortunate dispute.

**130**  Accordingly, I conclude that title to the 369 square foot parcel, the Driveway Encroachment, shall vest in the plaintiff.

**131**  The Court of Appeal in *Gainer* at para. 14 affirmed that the court has the discretion to vest in the encroaching party land which exceeds the actual encroachment. The plain fact is that the plaintiff has maintained the Hedgerow for many years and the Hedgerow served as the boundary between the neighbouring landowners. In this case the vesting order shall include an additional narrow strip of land: the enclosed area of the Hedgerow which extends to the southern border of the Hedgerow closest to the parking lot of the Edgewater Estates. To be clear, the land to be vested is not to include the vegetation beyond the edge of the Hedgerow. I have crafted this to be a practical order which is intended to deter any future disputes between these neighbouring landowners.

**132**  There was no survey data or other reliable evidence of the pertinent measurements. If the parties are unable to agree on the area of land to be vested, they have leave to apply.

**133**  In view of my conclusions, it is not necessary to consider the issue of a statutory easement under s. 36.

***Compensation***

**134**  Given my conclusions that title to the Driveway Encroachment and the additional strip of land described above should vest in the plaintiff, the defendants are entitled to compensation as mandated by the *PLA*.

**135**  The plaintiff asserts that in the absence of the defendants adducing any appraisal evidence of the Edgewater Lands, the court should assess a nominal value. Counsel submits somewhat arbitrarily that payment of $10,000 would be the appropriate and equitable compensation for the vesting of the Driveway Encroachment in the plaintiff.

**136**  I am not persuaded that it is appropriate to exercise the court's discretion to award compensation in an evidentiary vacuum.

**137**  In their Amended Response to Civil Claim, the defendants take the position that if the court makes a vesting order under s. 36(2) of the *PLA*, the matter of compensation for the vesting should be adjourned in order to permit the parties to obtain evidence of the value of the taking. I agree.

**138**  The Driveway Encroachment, along with the portion of the Hedgerow which encloses the said encroachment will vest in and be transferred to the plaintiff pursuant to s. 36 of the *PLA* upon payment of compensation that the parties agree to or the court otherwise assesses. I note that the *Act* requires that compensation be that which the court determines. If the parties agree, they should submit a proposed consent order, along with supporting material, for consideration by the court. If the parties are unable to agree on the amount of compensation, I remain seized of this matter to the extent that it will be necessary for me to assess compensation.

**139**  The injunction enjoining the defendants from interfering with the Driveway will continue on the terms I ordered at trial, until such time as the subject land has been transferred or until further order of this court.

**140**  The plaintiff shall be responsible for the survey and legal work costs required to accomplish the transfer of title to the Driveway Encroachment.

**THE COUNTERCLAIM**

**Position of the Parties**

**141**  It is common ground that the Driveway Encroachment is a trespass on the Edgewater Lands.

**142**  The defendants seek damages in the amount of $6,878.67 for the trespass. This sum reflects the defendants' calculation of insurance premiums and property taxes paid in respect of the Driveway Encroachment and the adjacent portion of the Edgewater Lands since 2000 and 1999 respectively.

**143**  The plaintiff submits that the defendants have given their implied consent to the trespass, which would constitute a full defence to the trespass, and that accordingly the defendants' counterclaim should fail. In the alternative, the plaintiff submits that damages should be fixed at $2,000.

**Discussion**

**144**  The tort of trespass occurs when a party enters the land of another without authority. It is actionable without proof of damage and consent is a complete defence: *Phillips v. Keefe*, [*2010 BCSC 2005*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BW-00000-00&context=) at para. 75, varied on other grounds [*2012 BCCA 123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6298-00000-00&context=).

**145**  The evidence establishes that the defendants were not aware of the existence of the Driveway Encroachment until early 2014. Given the absence of knowledge on their parts, I cannot conclude that they gave the plaintiff consent, implied or otherwise, which would negate their claim in trespass.

**146**  I conclude that notwithstanding the vesting order I have made, the defendants are entitled to damages for the plaintiff's trespass prior to the order.

**147**  The plaintiff disputes the defendants' calculation of damages arguing that it is predicated on a larger area than just the Driveway Encroachment, as it includes adjacent landscaping separating the Driveway from the Edgewater Estates parking area. Further, it argues that such calculations ignore applicable limitations periods. The plaintiff says the claim for damages in trespass should be restricted to two years, reflecting the limitation period. I find merit in the plaintiff's submissions.

**148**  In *Taylor v. Hoskin*, [*2003 BCSC 1843*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60VV-00000-00&context=), varied on other grounds,2006 BCCA 39, Madam Justice Baker considered the appropriate award for trespass to an area of encroachment which she determined should vest in the plaintiff in that matter. She commented as follows on the issue of limitation periods and the recovery of damages:

[134] In *Hawkes v. Silver Campsites Ltd*. [ [*91 B.C.L.R. (2d) 126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F5T5-M29R-00000-00&context=)], the Court of Appeal made an order vesting in the defendant, land belonging to the plaintiff. However, the court held that notwithstanding the vesting order, the plaintiff was entitled to damages for the defendant's trespass prior to the vesting order. They also determined that the cause of action for trespass was subject to a two year limitation period.

[135] Applying the reasoning in that case to the case at bar, the Hoskins are entitled to general damages suffered as a result of Mrs. Taylor's trespass and encroachment on their land from and after July 16, 1999, since they filed their counterclaim on July 16, 2001. They have not pleaded a claim for aggravated, punitive or exemplary damages.

**149**  The defendants' counterclaim in this matter was filed on April 29, 2014. Accordingly, applying the reasoning of Baker J., the defendants are entitled to damages for the trespass from and after April 29, 2012.

**150**  The defendants have never used the area of the Driveway Encroachment. They were unaware of its true ownership for over 40 years. The evidence as to how the Driveway Encroachment came to exist is unclear but, on the evidentiary record before me, no fault could fairly be ascribed to either party. The plaintiff's conduct since discovery of the Driveway Encroachment has been reasonable. The defendants did not advance any evidence of a diminution of the value of their property attributable to the trespass.

**151**  These factors support an award of nominal damages. Taking all factors into consideration, I award the defendants the sum of $6,000 to compensate them for the ongoing trespass to the date the transfer of land is effected.

**COSTS**

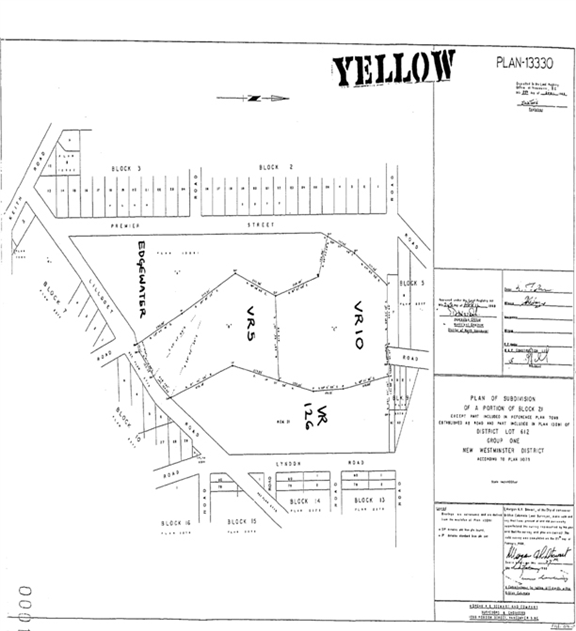
**152**  The defendants cannot be criticized for asserting their legal rights. In all the circumstances, it would not be just to impose a costs award upon them for opposing the plaintiff's claim. On the other hand, the plaintiff should not be required to pay the costs of the defendants when it has been successful in its action. In the result, each party will bear their own costs.

**153**  Finally, I wish to thank counsel for their efficient presentation of this case and for comporting themselves with professionalism throughout this unfortunate dispute.

D.J. DARDI J.

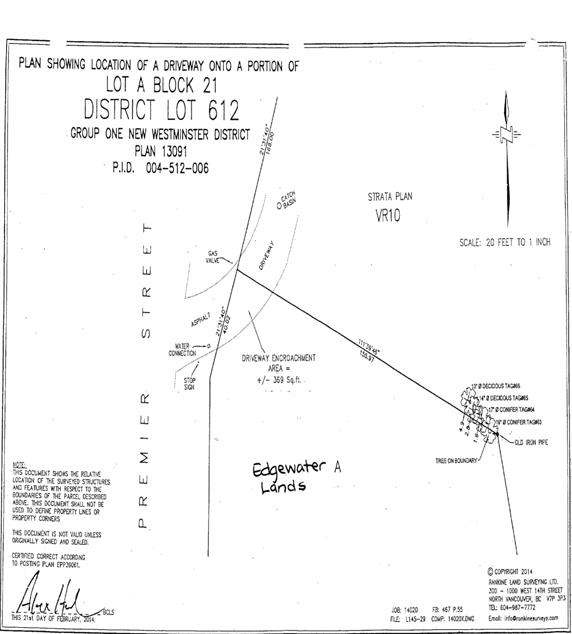
\* \* \* \* \*

**Appendix "A"**



\* \* \* \* \*

**Appendix "B"**



**End of Document**

[***Wakelam v. Johnson & Johnson, [2011] B.C.J. No. 2477***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B19V-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

J.C. Grauer J.

Heard: April 26-29 and May 2-4, 2011; written submissions,

December 7 and 12, 2011.

Judgment: December 22, 2011.

Docket: S078806

Registry: Vancouver

**[2011] B.C.J. No. 2477** | 2011 BCSC 1765 | 27 B.C.L.R. (5th) 336 | 212 A.C.W.S. (3d) 18 | [2012] 7 W.W.R. 354 | 2011 CarswellBC 3670

Between Lana Wakelam, Plaintiff, and Johnson & Johnson, Johnson & Johnson Inc., McNeil Consumer Healthcare Canada, Novartis Consumer Health Canada Inc./Novartis Santé Familiale Canada Inc., Wyeth Consumer Healthcare/Wyeth Soins De Santé Inc., Pfizer Canada Inc., Trillium Health Care Products Inc., Vita Health Products Inc., and Procter & Gamble Inc., Defendants, and The Attorney General of British Columbia Pursuant to the Constitutional Questions Act

(169 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Certification — Application by Wakelam for an order certifying a class proceeding, allowed in part — Wakelam's claim was against manufacturers and/or suppliers of cough and cold syrup that had been represented as safe and effective for children six and under — Such medicines were not, in fact, effective and were no longer marketed in Canada for children under six — Wakelam claimed defendants were guilty of misrepresentation and non-disclosure — Court agreed plaintiff had satisfied requirements for certification; however, claim for damages for unlawful interference with economic relations struck as was common issue relating to distribution of damages among class members — Business Practices and Consumer Protection Act — Class Proceedings Act — Competition Act.**

**Commercial law — Deceptive marketing — Misrepresentation to public — Efficacy — Application by Wakelam for an order certifying a class proceeding, allowed in part — Wakelam's claim was against manufacturers and/or suppliers of cough and cold syrup that had been represented as safe and effective for children six and under — Such medicines were not, in fact, effective and were no longer marketed in Canada for children under six — Wakelam claimed defendants were guilty of misrepresentation and non-disclosure — Court agreed plaintiff had satisfied requirements for certification; however, claim for damages for unlawful interference with economic relations struck as was common issue relating to distribution of damages among class members — Business Practices and Consumer Protection Act — Class Proceedings Act — Competition Act.**

|  |
| --- |
| Application by Wakelam for an order to certify a class proceeding. Wakelam's claim was against the manufacturers and/ or suppliers of varieties of cough and cold syrup that had represented those medicines as safe and effective for children under the age of six. Wakelam had purchased such products and given them to her son during his childhood to relieve cough and cold symptoms. She had come to understand, however, that such cough and cold medicines were ineffective for that age group. In fact, such products were no longer marketed in Canada for that age group. Buying the medicines, she argued, was a waste of money and offered no benefit to balance the risks of taking the medication; in fact, it exposed her son to a real and unnecessary risk of harm. Wakelam claimed the defendants were guilty of misrepresentation and nondisclosure. Wakelam's statement of claim alleged four causes of action: (1) breach of the Business Practices and Consumer Protection Act (BPCPA), (2) breach of the Competition Act, (3) interference with economic relations, and (4) unjust enrichment/waiver of tort/ constructive trust. The defendants opposed certification on all possible grounds, including constitutional. The core of their argument was that their representations that the medicines were safe and effective for use in children under six could not be considered to have been deceptive given that Health Canada had determined in 1988 that they were effective for such use.  HELD: Application allowed in part.  The Court found that the plaintiff's claims under the BPCPA and the Competition Act, as well as for unjust enrichment/waiver of tort/constructive trust, were not bound to fail. In relation to the BPCPA claim in particular, the Court rejected the defendants' argument that the BPCPA was inoperable due to the paramountcy of the federal Food and Drugs Act and Health Canada regulations. While jurisdiction overlapped, dual compliance was possible. However, the plaintiff's claim for interference with economic relations was struck, as the essential elements of the tort were missing. Merely causing economic loss by unlawful means was insufficient to support such a claim. With respect to the requirement for common issues, the Court rejected the defendants' argument that many of the plaintiff's issues were individual issues and not common issues. It was appropriate to certify all the issue as common issues at this point. If they became unmanageable during the course of litigation, steps could be taken at that point to deal with them. However, the Court did recognize that the issue of distribution of damages was an administrative issue not a common issue. The Court found that a class proceeding was the preferable procedure, especially in light of the volume of expert evidence that would inevitably be needed. Finally, the Court was satisfied the plaintiff was an appropriate representative plaintiff. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, [*SBC 2004, CHAPTER 2, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B23W-00000-00&context=), s. 4(1), s. 4(3)(b)(vi), s. 171(1), s. 172, s. 172(1)(a), s. 172(1)(b), s. 172(3)(a), s. 172(3)(c)

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=), s. 4(1), s. 4(1)(a), s. 4(1)(b), s. 4(1)(c), s. 4(1)(d), s. 4(1)(e), s. 4(2), s. 4(2)(a), s. 4(2)(d), s. 4(2)(e), s. 29, s. 30

Competition Act, [*R.S.C. 1985, c. C-34, s. 36*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B791-JW09-M0XN-00000-00&context=)(1), s. 52(1), s. 52(1.1)

Constitutional Questions Act, *RSBC 1996, CHAPTER 68*,

Food and Drugs Act, [*R.S.C. 1985, c. F-27, s. 30*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5XBT-KMV1-F900-G19V-00000-00&context=)(1), s. 31

Food and Drugs Regulations, *C.R.C, c. 870*,

Trade Practice Act, RSBC 1996, CHAPTER 457, s. 3(1)

**Counsel**

Counsel for the Plaintiff: Reidar Mogerman, David Jones, Mark Underhill, John Green.

Counsel for the Defendants Johnson & Johnson, Johnson & Johnson Inc., McNeil Consumer Healthcare Canada and Pfizer Canada Inc.: David Neave, Violet Allard.

Counsel for the Defendant Novartis Consumer Health Canada Inc./Novartis Santé Familiale Canada Inc.: David Kent.

Counsel for the Defendant Wyeth Consumer Healthcare/Wyeth Soins de Santé Inc.: William McNamara.

Counsel for the Defendant Procter & Gamble: Diana Dorey.

Counsel for the Defendant Trillium Healthcare Products Inc.: Tristram Mallett.

Counsel for the Defendant Vita Health Products Inc.: Jill Yates.

Counsel for the Attorney General of British Columbia: Jonathan Penner.

Counsel for the Attorney General of Canada: Kenneth Manning.

**Reasons for Judgment**

|  |
| --- |
| **J.C. GRAUER J.** |

**INTRODUCTION**

**1**  Lana Wakelam has a son who was born on August 12, 2004. During his childhood, she purchased cough and cold syrup on occasion and gave it to him to relieve cough and cold symptoms. The defendants are all manufacturers and/or suppliers of varieties of cough and cold syrup, including the sort purchased by Ms. Wakelam. All of it was packaged with instructions that included recommended doses for children between 2 and 6. This, says Ms. Wakelam, constituted a representation that these medicines were safe and effective for children in that age group.

**2**  Ms. Wakelam now understands that these cough and cold medicines were ineffective for children between the ages of 2 and 6. They are no longer marketed in Canada for that age group. Buying it, she says, was a waste of money. Moreover, she alleges, as it offered no benefit to balance the risks of taking the medication, it exposed her son to a real and unnecessary risk of harm. Consequently, she asserts, the defendants are all guilty of misrepresentation and nondisclosure.

**3**  In these circumstances, Ms. Wakelam applies for an order certifying this case as a class proceeding. She seeks to bring the action on her own behalf and on behalf of all residents of British Columbia who purchased "Children's Cough Medicine" (as defined) for use by children under the age of 6, that was supplied, offered for sale, advertised or promoted by the defendants between December 24, 1997, and the date of the certification order.

**4**  The plaintiff commends this case as ideal for certification. The defendants pronounce it a travesty. They note that no one has been injured or harmed. They point out that they are closely regulated by Health Canada and did nothing that was not specifically authorized by their federal regulators. They oppose certification on all possible grounds, including constitutional, and issued Notice of Constitutional Question pursuant to the *Constitutional Question Act*, *R.S.B.C. 1996, c. 68*.

**5**  First, I will describe the claim that the plaintiff presents. Next, I will review the regulatory background that is front and centre to the defence. I will then turn to consider whether the claim meets the requirements for certification set out in section 4(1) of the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50*.

**THE CLAIM**

**1. The Medicines**

**6**  I have already described the proposed class. At the heart of this proposed class action is a group of medicines, described as "Children's Cough Medicine", defined as meaning:

... cough medicine supplied, offered, manufactured, produced, advertised, marketed, sold or promoted by the Defendants for use by children under the age of six years old between December 24, 1997, to present containing one or more of the following groups of drugs:

1. Antihistamines such as brompheniramine maleate, chlorpheniramine maleate, dexbrompheniramine maleate, clemastine hydrogen fumerate, diphenhydramine hydrochloride, diphenylpyraline hydrochloride, doxylamine succinate, pheniramine maleate, phenyltoloxamine citrate, promethazine hydrochloride, pyrilamine maleate, and triprolidine hydrochloride;
2. Antitussives such as dextromethorphan, dextromethorphan hydrobromide, and diphenhydramine hydrochloride;
3. Expectorants such as guiafenesin; and/or
4. Decongestants such as ephedrine hydrochloride/sulphate, phenylephrine hydrochloride/sulphate, and pseudoephedrine hydrochloride/sulphate.

**7**  This covers most of the cough and cold medicines well known to consumers under trade names such as Tylenol, Benylin, Motrin, Sudafed, Buckley's, Jack & Jill, Triaminic, Robitussin, Advil, Vicks and Dimetapp, as well as house brands in major chain stores. These products did not, of course, each contain all of the drugs listed, but rather contained varying combinations of two or more of them. Any particular product need contain only one particular listed drug to qualify as "Children's Cough Medicine".

**8**  Except where it is useful to use the defined term, I will refer to these products as the "medicines".

**2. Causes of Action**

**9**  The amended statement of claim describes four causes of action which the plaintiff alleges entitle the class to claim relief from the defendants: breach of the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* (*BPCPA*); breach of the *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=); interference with economic relations; and unjust enrichment/waiver of tort/constructive trust.

**10**  It is worth noting that the plaintiff does *not* allege: physical injury; ***negligence*** (existence and breach of a duty of care); failure to warn; or breach of any regulatory duty vis-à-vis Health Canada.

**a. *Breach of the* BPCPA**

**11**  This cause of action is the principal focus of the claim. It is alleged that each purchase of Children's Cough Medicine was a "consumer transaction" as defined by the *BPCPA*. Allegations that are key not only to this cause of action but also to the others are then pleaded in paragraph 21:

1. The Defendants engaged in numerous deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the Children's Cough Medicine. In particular:
2. in every consumer transaction in which the Class purchased children's cough medicine, the Defendants represented that Children's Cough Medicine provides effective relief from cough symptoms when in fact the Children's Cough Medicine was not effective in children under the age of six;
3. the Defendants failed to disclose the material fact that Children's Cough Medicine is not effective for children under the age of six; and
4. the Defendants failed to disclose the material fact that Children's Cough Medicine can be dangerous when it is used by children under the age of six.

**12**  It is then alleged that these representations and omissions have the capability, tendency or effect of deceiving or misleading the class, and therefore constitute deceptive acts or practices under section 4 of the *BPCPA*, from which the defendants have gained. As a result, with reference to the *BPCPA*, the plaintiff and class members seek:

1. a declaration pursuant to section 172(1)(a) that those representations and omissions are deceptive acts or practices;
2. an interim and permanent injunction pursuant to section 172(1)(b) restraining the defendants from engaging are attempting to engage in such deceptive acts or practices;
3. an order pursuant to section 172(3)(c) requiring the defendants to advertise to the public the particulars of any judgment, declaration, order or injunction against them; and
4. an order pursuant to section 172(3)(a) that the defendants refund all sums that the class paid to purchase the Children's Cough Medicine, or disgorge all revenue which they made on account of Children's Cough Medicine purchased by the class.

**13**  The plaintiff goes on to plead that it is unnecessary for her or any class member to prove that the defendants' deceptive acts or practices caused them to purchase the Children's Cough Medicine to make a claim for relief under section 172 of the *BPCPA.* In the alternative, it is alleged that they did suffer damages because of these acts or practices, and damages are sought.

**b. *Breach of the* Competition Act**

**14**  The plaintiff claims that in making the representations and omissions particularized in paragraph 21, the defendants breached section 52 of the *Competition Act* and therefore committed an unlawful act because the representations and omissions were made for the purpose of promoting their business interests, were made to the public and were false and misleading in a material respect. As a result, it is alleged that the class suffered damages.

**15**  The Class claims those damages as well as their costs of investigation pursuant to section 36 of the *Competition Act*.

**c. *Interference with Economic Relations***

**16**  Here, the same representations and omissions particularized in paragraph 21 are alleged to constitute unlawful acts undertaken by the defendants with the intent to injure the class, making the defendants liable for the tort of unlawful interference with economic interests. The class allegedly suffered damages as a result.

**d. *Unjust Enrichment / Waiver of Tort / Constructive Trust***

**17**  This somewhat controversial cause of action is introduced as follows:

1. In the alternative, the Plaintiff waives the tort and pleads that she and the other members of the Class are entitled to recover under restitutionary principles.

**18**  Those restitutionary principles are then pleaded in the forms of unjust enrichment and constructive trust, concluding with a plea that equity and good conscience require the defendants to hold in trust for the plaintiff and the other members of the Class all of the "illegal revenue" they obtained from the sale of the Children's Cough Medicine purchased by the plaintiff and the other members of the Class.

**3. Damages**

**19**  The plaintiff alleges that the restitution and damages sought can be calculated on an aggregate basis for the Class as provided by the *BPCPA* and by sections 29 and 30 of the *Class Proceedings Act*. This is intended to avoid any need to assess class members' damages individually.

**20**  Finally, the plaintiff pleads that the defendants' conduct was "high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in intentional disregard of the rights and safety of the class and their children". On this basis, punitive damages are claimed.

**THE REGULATORY BACKGROUND**

**21**  The medicines have been supplied to consumers in both Canada and the United States. They were sold over-the-counter, rather than by prescription.

**22**  In the United States, their regulation is overseen by the Food and Drug Administration (USFDA), a federal department. In Canada, their regulation is also a federal responsibility, administered by Health Canada in accordance with the *Food and Drugs Regulations*, *C.R.C., c. 870*. Those Regulations are made under section 30(1) of 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=), which authorizes the making of regulations respecting the labelling and packaging, and the offering, exposing and advertising for sale of drugs, the specifications of packages of drugs, and the use of any substance as an ingredient in any drug,

... to prevent the purchaser or consumer thereof from being deceived or misled in respect of the design, construction, performance, intended use, quantity, character, value, composition, merit or safety thereof, or to prevent injury to the health of the purchaser or consumer. ...

**23**  Typically, Health Canada makes decisions regarding Canadian standards based on USFDA precedent and its own extensive review of available data for the medicines in question.

**24**  Before selling any drug in Canada, its proprietor must first apply for and obtain a drug identification number (DIN) from Health Canada as required by the Regulations. Health Canada issued guidelines applicable to all DIN applications for the medicines. These guidelines were in effect from early 1995 until 2009. The issuance of a DIN indicates that the product has passed a regulatory review of its formulation, labelling and instructions for use. All the medicines complied with this process and received DINs.

**25**  Once labelling has been approved, the proprietor must advise Health Canada of any proposed changes to it, and a further DIN submission may be required.

**26**  In the late 1980s, Health and Welfare Canada (as it was then called) convened an expert advisory committee to make recommendations to its Health Protection Branch regarding, among other things, the safety, efficacy and labelling of over-the-counter cough and cold medicines. This committee issued a series of three reports dealing with the different ingredients in such medicines, breaking them down into: cold medication ingredients such as antihistamines and nasal decongestants; cough medication ingredients such as antitussives and expectorants; and combinations of ingredients.

**27**  In its first report, the committee concluded that the cold medication ingredients, including the antihistamines and decongestants that are relevant here, were generally safe and effective. It made some label and dosing recommendations for children, including medical supervision when antihistamines were given to children under 6. This recommendation followed that of an American panel that reported to the USFDA in 1976 and was based on safety concerns.

**28**  In its second report, the committee came to a similar conclusion concerning the antitussives and expectorants included in the medicines: they were considered to be generally safe and effective.

**29**  In coming to these conclusions, the committee recognized that the question of the safety and efficacy of these ingredients was not without controversy.

**30**  In its third report, the committee approved various combinations of these ingredients, including those used in the medicines, and made recommendations for dosing children aged 2 through 12.

**31**  After receiving these reports, the Health Protection Branch sought comments and input from others, including the manufacturers of the medicines in question. It then issued an Information Letter on November 22, 1990, setting out its regulatory proposals. The discussion concerning antihistamines, for instance, proceeded as follows:

1. ANTIHISTAMINES (1, page 4)

1.1 GENERAL COMMENTS (1.1, page 4)

1.1.1 Efficacy For Relief Of Allergic Symptoms (1.1.1, page 4)

The Committee did not make any recommendations on the usefulness of antihistamines in treating allergies. Four respondents requested that claims for both the relief of cold and allergy symptoms continue to be allowed for antihistamines where appropriate. The Health Protection Branch agrees with this request. ...

1.1.2 Children's Doses (1.1.5, page 5)

The Committee agreed with the recommendation of the [American panel] that medical supervision is recommended when children under 6 years of age are given antihistamines. This recommendation was based on general safety considerations. Individuals vary widely in the degree to which adverse effects, particularly drowsiness, occur when given antihistamines. Respiration may be depressed and this effect can be serious in infections involving the airway. As it is difficult to assess adverse effects in children, use without medical supervision was not recommended.

Four respondents objected to the Committee's recommendation concerning restriction of antihistamines availability for children under age 6 years. The availability of a number of nonprescription products in Canada for this age group without any apparent adverse consequences was pointed out, as was the increased burden to physicians and the health care system if this recommendation were adopted.

As the Committee's recommendation was based on general safety considerations and not on specific data, and because of the existence of marketed products in Canada without apparent ill effects, the Health Protection Branch proposes the following:

*The safety and efficacy of antihistamines in children under age 6 years, and of nonprescription cough and cold products in general in children, needs further study. It is, therefore, proposed that a committee of paediatric experts be formed to study this issue. Issues relating to safety, efficacy, labelling, availability, and dosage, including the concept of standard paediatric dosing units and dosing by narrower age groups, should be considered by this committee. In the interim, marketing of existing products will be permitted. If a manufacturer applies for a Drug Identification Number (DIN) for an antihistamine-containing product promoted for use by children under age 6 years, and if the formulation or dosage regimen differs from that currently on the market, then data to support the safe and effective use of the product in children under age 6 will be required. Furthermore, products which are not presently registered as Proprietary Medicines will not be accepted in this category until the committee has studied the issue.*

**32**  In the result, the defendants were authorized to continue marketing the medicines as before, which marketing included in their labelling recommended doses for children between the ages of 2 and 6.

**33**  On October 11, 2007, Health Canada issued a Public Advisory recommending that nonprescription cough and cold products, including the medicines, not be administered to children under 2 years of age unless instructed to do so by a healthcare practitioner. This was based on the reporting to the USFDA of life-threatening adverse events, including unintentional overdoses, associated with the use of those products in children under 2. On the same date, members of the Nonprescription Drug Manufacturers Association of Canada announced the voluntary withdrawal of oral cough and cold medicines intended for use in children under the age of 2 years.

**34**  In March of 2008, Health Canada convened another expert advisory committee to advise it on the safety of and appropriate labelling for nonprescription paediatric cough and cold medications sold in Canada.

**35**  Then on December 18, 2008, Health Canada released a decision requiring manufacturers to re-label nonprescription cough and cold medicines that have dosing information for children to indicate that they should not be used in children under 6. This requirement was to be completed by Fall 2009, "in time for the next cough and cold season". In the meantime, Health Canada advised parents and caregivers not to use such medicines in children under 6. This decision, described as an expansion of the recommendations of October 11, 2007, was the result of:

... a Health Canada review of these medicines, including the input of a Scientific Advisory Panel convened in March 2008. Health Canada has concluded that while cough and cold medicines have a long history of use in children, there is limited evidence supporting the effectiveness of these products in children. In addition, reports of misuse, overdose and rare side-effects have raised concerns about the use of these medicines in children under 6. The rare but serious potential side-effects include convulsions, increased heart rate, decreased level of consciousness, abnormal heart rhythms and hallucinations.

**36**  By Notice to market authorization holders (which would include the defendants) issued on the same date, Health Canada communicated its decision that, by Fall 2009,

... the labelling of marketed orally administered paediatric nonprescription cough and cold products belonging to the therapeutic categories listed above are to include a statement to the effect of: "Do not use in children under 6 years of age." In addition, these products are also to have: (1) Enhanced labelling; (2) Child resistant packaging; and (3) The inclusion of dosing devices for all liquid formulations.

In the meantime, market authorization holders were strongly encouraged to effect any necessary labelling changes as soon as possible.

**37**  Health Canada released its Final Guidance Document: *Nonprescription Oral Paediatric Cough and Cold Labelling Standard* on February 6, 2009

**38**  There is no allegation that any of the defendants failed to comply with any of Health Canada's directives, regulations, standards or requirements. Any such failure would have put the offending party afoul of the provisions of section 31 of the *Food and Drugs Act*, which make a breach of the Act or Regulations an offence punishable by fine or imprisonment or both.

**39**  At the core of the defendants' position is the notion that their admitted representation before 2009 that the medicines were safe and effective for use in children under 6 cannot fairly be considered to have been deceptive given that Health Canada had determined in 1988 that they *were* safe and effective for such use, and so informed the public, the industry, and the medical and pharmacy professions. Even now, they note, these medicines may be administered to children under 6 on the advice of a physician. I observe, however, that while the Health Canada regime is no doubt intended to protect consumers from misrepresentation and deception, whether it is also intended to insulate manufacturers of drugs from civil liability to consumers is a different question.

**40**  With this background in mind, I turn to consider whether this proposed class proceeding meets the requirements for certification.

**CERTIFICATION REQUIREMENTS**

**41**  The requirements are set out in section 4 of the *Class Proceedings Act*:

**4.** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of 2 or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff who
6. would fairly and adequately represent the interests of the class,
7. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
8. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
9. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
10. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
11. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
12. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
13. whether other means of resolving the claims are less practical or less efficient;
14. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Section 4(1) is mandatory. If the case meets the requirements set out in subparagraphs (a) through (e), then it *must* be certified as a class proceeding. I will consider them in turn after a brief review of some legal principles.

**DISCUSSION**

**42**  No two cases are exactly the same. Nevertheless, it is fundamental that like cases should be decided alike, and each side proffered a particular precedent as a template for this decision. The plaintiff relies on *Knight v. Imperial Tobacco Canada Ltd.*, [*2005 BCSC 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S159-00000-00&context=), [*43 B.C.L.R. (4th) 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S159-00000-00&context=); appeal allowed in part, [*2006 BCCA 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B25N-00000-00&context=), [*54 B.C.L.R. (4th) 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B25N-00000-00&context=). The defendants nominate *Singer v. Schering-Plough Canada Inc.*, [*2010 ONSC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JSC5-M1XG-00000-00&context=), [*87 C.P.C. (6th) 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JSC5-M1XG-00000-00&context=). Not surprisingly, the former was certified as a class action, but the latter was not. Both involved alleged misrepresentations concerning products sold to consumers. In *Knight*, the product was cigarettes marketed as "light" or "mild". In *Singer*, the product was sunscreen. The issue of the effect of federal regulation, however, did not arise in the *Knight* case. It did in *Singer*.

**43**  In *Knight,* the Court of Appeal for British Columbia reminds us at paragraph 20 that class proceedings legislation ought to be construed generously, and that while it is necessary that a statement of claim disclose a cause of action, the certification stage is not a test of the merits of the action. The focus is on the form of the action and the key question is whether the suit or portions of it are appropriate for the trial of common issues. If so, then class actions serve judicial economy by avoiding unnecessary duplication in a multiplicity of actions, improve access to justice, and serve to modify wrongful behaviour. If not, then as noted in *Singer* at paragraph 205, the class format is unmanageable and inefficient.

**44**  As I review the requirements for certification, it is important to bear in mind that the burden is on the plaintiff to show some basis in fact for each of them, other than the first requirement, that the pleadings disclose a cause of action. In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [*2009 BCCA 503*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2B7-00000-00&context=), [*98 B.C.L.R. (4th) 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2B7-00000-00&context=) ("*Infineon*"), the Court of Appeal noted that in conformity with a liberal and purposive approach to certification, this evidentiary burden is not an onerous one, requiring only a "minimum evidentiary basis". As the Court of Appeal for Ontario stated in *Cloud v. Canada (Attorney General)* [*(2004), 73 O.R. (3d) 401*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2WK-00000-00&context=), [*247 D.L.R. (4th) 667*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2WK-00000-00&context=) at para. 50 (leave to appeal to SCC refused, [*[2005] S.C.C.A. No. 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F1P7-B3WX-00000-00&context=), [2005] 1 S.C.R. vi):

... [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

**1. Do the pleadings disclose a cause of action?**

**45**  In considering this first requirement, no evidence is admissible. The court must assume that the facts pleaded in the statement of claim can be proved. The test is whether, on that basis, it is plain and obvious that the plaintiff's claim cannot succeed. With this test in mind, I will consider each of the causes of action pleaded.

**a. *Breach of the* BPCPA**

**46**  The defendants submit, first, that as a matter of law, the plaintiff's claims based on a breach of the *BPCPA* cannot succeed for jurisdictional reasons. All parties accept that the *BPCPA* is valid provincial legislation. As legislation enacted for the protection of consumers, it is within the province's legislative civil rights power, just as the *Food and Drugs Act*, aimed at protecting public health and safety, is a valid exercise of the federal legislative criminal law power. The defendants argue, however, that the *BPCPA* is inapplicable to them in this context due to the constitutional doctrine of interjurisdictional immunity, is inoperable due to the constitutional doctrine of paramountcy, and is unenforceable due to the regulated conduct doctrine.

**47**  Both the plaintiff and the Attorney General of British Columbia submitted that it was premature to determine the constitutional questions, on the ground that a proper evidentiary basis would be required, and at this stage there is no proper factual record. They maintained that these should properly be decided as common issues after certification. I ruled that the defendants could argue these defences at this stage as issues of law, but would not be at liberty to adduce evidence in their support.

**48**  The main thrust of the defendants' argument is that Health Canada is provided with the sole authority in this country to regulate packaging and labelling and to prosecute consumer deception involving drugs such as the medicines. The declaratory and injunctive relief sought by the plaintiff would require the court to usurp the function of Health Canada in directing the defendants as to how they may label, market and advertise their products, and how they ought to have done so. Thus, assert the defendants, to allow the *BPCPA* to have the effect sought would result in a quick descent from the expert national regulation of medicines by Health Canada into a morass of episodic, inconsistent and *ad hoc* local regulation by individual judges by whom the different consumer claims are scrutinized. This would, they argue, supersede and frustrate the federal regulatory scheme by which the defendants had governed their actions. Moreover, it would put them in a position where compliance with federal regulatory requirements exposes them to liability under provincial legislation. These are results, they say, that the constitutional principles of interjurisdictional immunity and paramountcy are intended to avoid.

**49**  I am unable to accept either that the relief sought by the plaintiff would have so profound an effect in fact, or that constitutional principles are so engaged in law.

**50**  I accept that the subject matter of this claim has a double aspect. By this I mean that the subject matter of protecting consumers from misrepresentation and deceit engages both federal and provincial heads of power: see, for instance, *Standard Sausage Co. v. Lee*, [*[1934] 1 W.W.R. 81*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JW09-M05F-00000-00&context=) (B.C.C.A.), and Peter W. Hogg: *Constitutional Law of Canada,* 5th ed. supplemented, vol. 1, looseleaf (Carswell: Toronto, 2007) at 21-28.

**51**  In this way, the jurisdictions do overlap. Each is constitutionally endowed with the power to prevent the deceptive marketing of pharmaceuticals: the federal government pursuant to its criminal law power; the provincial government as a matter of property and civil rights. Although they overlap, these powers are not co-extensive. The provincial power is limited to the marketing aspect, and does not include other aspects of the wider federal power such as approving new drugs.

**52**  The courts have recognized that such overlaps are "the 'inevitable' indicia of cooperative federalism" and are not inherently problematic: *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)*, [*2011 BCCA 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2X6-00000-00&context=) at para. 86; *Canadian Western Bank v. Alberta*, [*2007 SCC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B190-00000-00&context=), [*[2007] 2 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B190-00000-00&context=); *Chatterjee v. Ontario (Attorney General)*, [*2009 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1FC-00000-00&context=), [*[2009] 1 S.C.R. 620*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1FC-00000-00&context=) at para. 32.

**53**  In these circumstances, the preferred constitutional analysis is that of paramountcy rather than interjurisdictional immunity. Not only is it "much better suited to contemporary Canadian federalism" (*Canadian Western Bank* at para. 69), but it is also analytically more appropriate: *Jim Pattison Enterprises* at para. 123 *et seq*. This is because both jurisdictions have validly enacted applicable legislation, and the issue is the manner in which their power is to be exercised in this case, not whether the defendants, as federal undertakings, ought to be immune from provincial regulation. See, for instance, *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [*2010 SCC 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1JB-00000-00&context=), [*[2010] 2 S.C.R. 536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1JB-00000-00&context=) at para. 62 ("*Pilots Association*").

**54**  The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [*2005 SCC 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B13F-00000-00&context=), [*[2005] 1 S.C.R. 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B13F-00000-00&context=) at para. 11.

**55**  The test was enunciated in the *Pilots Association* case in this way:

[64] Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, [*[1982] 2 S.C.R. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M259-00000-00&context=), at p. 191, *per* Dickson J. In *Bank of Montreal v. Hall*, [*[1990] 1 S.C.R. 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6538-00000-00&context=), at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Society of British Columbia v. Mangat*, [*2001 SCC 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M496-00000-00&context=), [*[2001] 3 S.C.R. 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M496-00000-00&context=), at para. 72; *Lafarge Canada*, [*[2007] 2 S.C.R. 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B191-00000-00&context=), at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans*, at para. 14.

**56**  We are here concerned with both forms of conflict. As to the first, the defendants argue that the manner in which the plaintiff seeks to enforce the provincial legislation threatens to render them liable in circumstances where they have complied as they must with federal regulations designed to protect those same consumers. This raises the sort of operational conflict between federal and provincial laws to which the Supreme Court of Canada referred. As to the second, the defendants assert that although both legislative regimes are aimed at protecting consumers, it is the wider purpose of the federal legislation of effecting and maintaining a uniform national food and drug regime that will be frustrated by the *ad hoc* approach of courts adjudicating claims under the provincial legislation.

**57**  These arguments, however, do not succeed as a matter of law. As the Court of Appeal stated in the *Jim Pattison Enterprises* case:

[137] ...The trend of co-existing of federal and provincial legislation on "double aspect" matters was acknowledged in [*Multiple Access Ltd. v. McCutcheon,* [*[1982] 2 S.C.R. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M259-00000-00&context=)] where Mr. Justice Dickson, for the majority, stated at 190-191:

With Mr. Justice Henry I would say that duplication is, to borrow Professor Lederman's phrase, "the ultimate in harmony". The resulting "untidiness" or "diseconomy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to [...] provincial autonomy" (Hogg, at p. 110). Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.

[Emphasis added by the Court of Appeal]

**58**  Here, while there may be duplication, the necessary actual conflict does not arise. There is no basis for concluding either that dual compliance is impossible, or that a federal purpose is frustrated.

**59**  The federal legislation and regulations did not compel the defendants to market the medicines as safe and effective for children between 2 and 6. It permitted them to do so, notwithstanding that there was acknowledged controversy over the issue and Health Canada recognized that further study was required. If the plaintiff is able to demonstrate factually that, over the period in question, the defendants engaged in deceptive practices as far as consumers were concerned, then I see nothing in the federal regulatory scheme that appears intended to insulate the defendants from answering to consumers for that conduct.

**60**  In all of the circumstances, the defendants' answer may well prove to be that the plaintiff's claim must fail *as a matter of fact* for the same reasons that led Health Canada in 1990 to authorize them to continue marketing the medicines. Compliance is not, however, an answer *in law* to anything other than a criminal charge under the *Food and Drugs Act*. Conduct that avoids exposure to criminal prosecution has never guaranteed freedom from civil liability; nor can it be said that compliance with the federal regulations necessarily constituted defiance of the provincial legislation.

**61**  Similarly, what federal purpose is frustrated if the defendants are found to have misrepresented the safety and effectiveness of their products although they followed all of Health Canada's requirements? It will not expose Canadians to drugs that have not been reviewed and approved by Health Canada, nor will it remove approved drugs from the market. It does not threaten to dismantle a national, unified regulatory scheme. That will remain; the federal power is left untrammelled. It simply adds an additional layer of protection for the consumer by telling the marketers and manufacturers of drugs that compliance with all that Health Canada requires may not be enough, though difficulties of proof may abound.

**62**  By way of example, after Health Canada's Public Advisory of October 11, 2007, the members of the Nonprescription Drug Manufacturers Association of Canada announced the withdrawal of oral cough and cold medicines intended for use in children under the age of 2 years. That withdrawal was not mandated by Health Canada, but was voluntary. Presumably, those same members could have voluntarily withdrawn oral cough medicines intended for use in children between 2 and 6; they were not required to continue marketing their products as before, but they were permitted to do so, and they did (compare *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [*2001 SCC 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48B-00000-00&context=), [*[2001] 2 S.C.R. 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48B-00000-00&context=) ("*Spraytech*"), and *Rothmans, Benson & Hedges*.

**63**  In these circumstances, it seems to me that as a matter of law, it is open to the plaintiff to allege, and to attempt to establish in fact, that in continuing to market the medicines as authorized by Health Canada up to 2009, instead of withdrawing them earlier on the basis of the information available to them, the defendants engaged in misrepresentation and nondisclosure concerning the medicines' safety and effectiveness. It may be a steep climb for the plaintiff, but it is an ascent that, in law, she is entitled to attempt.

**64**  I conclude that, as a matter of law, the doctrine of paramountcy is not engaged and there is no constitutional basis for concluding that the plaintiff's claim under the *BPCPA* is bound to fail. The same logic, in my view, applies to the regulated conduct doctrine, though I will deal with that argument more fully in relation to the claim under the *Competition Act*, where it was principally advanced. Although the issue appears to have been argued differently, the existence of a comprehensive regulatory regime was also rejected as dispositive of claims under the *BPCPA* in *Stanway v. Wyeth Canada Inc.*, [*2011 BCSC 1057*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22T8-00000-00&context=) at para. 73.

**65**  I therefore turn to consider whether the *BPCPA* claim is bound to fail for other reasons.

**66**  In this regard, the defendants submit that the deceptive acts or practices alleged in paragraph 21 of the amended statement of claim are not actionable as pleaded, and that the remedies sought are not available in law.

**67**  With respect to paragraph 21, the defendants note that the first particularized act is a representation that the medicines were effective when they were not. The second and third are failures to disclose: that they were ineffective; and that they could be dangerous.

**68**  A failure to disclose, the defendants assert, is not capable of constituting a "deceptive act or practice" within the meaning of that phrase as defined in section 4 of the *BPCPA* - unless it constitutes a failure "to state a material fact, if the effect is misleading" as set out in section 4(3)(b)(vi). This, the defendants argue, imposes a different standard from the objective test that is contained in the language of section 4(1): "[representation or conduct] that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor", and requires that the effect *is* misleading; otherwise the nondisclosure is not actionable. The flaw here, the defendants say, is that the plaintiff has failed to plead that the alleged non-disclosures were misleading.

**69**  Moreover, the defendants submit, this is not a mere defect in pleading that can be cured by amendment. Rather, they say, it is fundamental to the structure of the case given the plaintiff's pleading in paragraph 28 that it is unnecessary to prove that the defendants' deceptive acts or practices caused any member of the class to purchase the medicines in order to make out a claim for relief under section 172 of the *BPCPA*. Thus, they assert, the plaintiff has built her case on a reliance-free foundation, necessitated by the reality that reliance is an issue that is individual, rather than common to the class.

**70**  In support of this argument, the defendants rely on references in the authorities to the significance of the change in the legislation. The *Trade Practice Act*, [*R.S.B.C. 1996, c. 457*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-DY33-B0JT-00000-00&context=), provided as follows in relation to deceptive acts or practices:

**3.** (1) For the purposes of this Act, a deceptive act or practice includes

1. an oral, written, visual, descriptive or other representation, *including a failure to disclose*; and
2. any conduct

having the capability, tendency or effect of deceiving or misleading a person.

[Emphasis added]

**71**  The words "including a failure to disclose" were omitted from the *BPCPA*, which provides:

**4.** (1) In this Division:

"**deceptive act or practice**" means, in relation to a consumer transaction,

1. an oral, written, visual, descriptive or other representation by a supplier, or
2. any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor. ...

**72**  Both provisions are followed by examples of representations and conduct that constitute deceptive acts or practices, "without limiting subsection (1)". In the *BPCPA*, as noted, one of these examples refers to "a representation" that "uses exaggeration, innuendo or ambiguity about the material fact or that fails to state a material fact, if the effect is misleading": subparagraph 4(3)(b)(vi).

**73**  In the *Knight* case in this Court, Satanove J. (now Kloegman J.) considered an argument by the defence that the new legislation had eliminated any right to sue for allegedly failing to disclose material facts, and held that such rights that had accrued under the *Trade Practice Act* were substantial, and remained available notwithstanding the new provision. Her Ladyship went on to note:

[49] As discussed under [the] heading of cause of action, I have found that it may not be necessary for the plaintiff to show individual reliance on the conduct of the defendant to establish certain breaches of the [*Trade Practice Act*] or *BPCPA*. *With the exception of a failure to disclose contrary to the BPCPA, the defendant's conduct does not have to actually mislead consumers to be actionable*.

[Emphasis added]

This indicates, submit the defendants, that a failure to disclose under the *BPCPA* must in fact mislead each claimant.

**74**  Similarly, in *Blackman v. FedEx Trade Networks Transport & Brokerage (Canada), Inc.*, [*2009 BCSC 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3MK-00000-00&context=) (which, significantly, was not brought under the *Class Proceedings Act*), Garson J., then of this Court, relied on Satanove J.'s judgment in *Knight* in coming to this conclusion:

[67] I agree with the defendants' contention that the removal of the "failure to disclose" portion of the definition of deceptive practice does foreclose the plaintiff from seeking redress under the *BPCPA* for a complaint that he was deceived by a failure to disclose. ...

**75**  When the Court of Appeal entertained the *Knight* case, it had this to say:

[26] ... As I observed, *supra*, it seems to me that the question of whether or not it can be established by the plaintiff that there have been deceptive acts or practices committed by the defendant in marketing cigarettes is central to the claims advanced on behalf of the plaintiff. Given the broad definition of deceptive acts or practices which includes acts or practices capable of deception, the question of deception or no deception is something that can, in my opinion, be litigated without reference to the circumstances of the plaintiff for individual class members. The situation with respect to this issue is somewhat analogous to that in [*Rumley v. British Columbia*, [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), [*[2001] 3 S.C.R. 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=)], where there was an allegation of systemic ***negligence*** made against a defendant. ... Here, too, the question is one of a systemic course of conduct engaged in by the appellant, not limited by intention or effect to any one potential consumer.

**76**  Relying on that decision, Dardi J. took a different approach in *Koubi v. Mazda Canada Inc.*, [*2010 BCSC 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6322-00000-00&context=), in response to the defendants' argument that the plaintiff would have to show individual reliance on a failure to disclose a material fact:

[124] In my view, the critical component is proving that Mazda Canada committed a deceptive act or practice. The focus of this inquiry is on Mazda Canada's knowledge of the alleged defect and its conduct, and on whether the alleged conduct had the "capability, tendency, or effect of deceiving or misleading a consumer" and not whether a particular plaintiff was deceived or not. ...

**77**  As I see it, the comments of Satanove J. concerning the effect of the new legislation's omission of the words "including a failure to disclose" on what must be demonstrated to satisfy subparagraph 4(3)(b)(vi) are *obiter* given her conclusion that the *Trade Practice Act* continued to govern the plaintiff's rights in that case. With the greatest respect to Satanove J., I prefer the approach taken by Dardi J. in *Koubi* and the Court of Appeal in *Knight*.

**78**  It seems to me that the deletion of the words "including a failure to disclose" from the portion of the *BPCPA* definition relating to representations does not affect the exceedingly wide inclusion as a "deceptive act or practice" of "any conduct ... that has the capability, tendency or effect of deceiving or misleading a consumer ...", which width is not to be limited by any of the ensuing examples. Specifically, it ought not to be interpreted as excluding from such conduct a failure to disclose if that failure satisfies the rest of the definition. It is therefore sufficient, in my view, for the plaintiff to have pleaded that the representations and omissions particularized in paragraph 21 of the amended statement of claim "have the capability, tendency or effect of deceiving or misleading the Class" (amended statement of claim, paragraph 22).

**79**  In this regard, I consider it noteworthy that the requirement in subparagraph 4(3)(b)(vi) that "the effect is misleading", arguably a higher onus then the concluding words of subsection (1), is not specific to a failure to state a material fact (nondisclosure). Rather, it applies to the whole subparagraph, which refers to "a representation ... that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading". One can, of course, be guilty of significant nondisclosure without making any representations at all.

**80**  Moreover, when I look at subparagraph 4(3)(b)(vi), I am unable to agree that "if the effect is misleading" means "if a consumer is in fact misled". Rather, it seems to me to accomplish precisely the same end as the requirement in subsection 1 that the representation or conduct in question "has the capability, tendency or effect of deceiving or misleading a consumer ...", which is to set an objective standard. Given that the legislation is intended to prohibit suppliers from committing or engaging in deceptive acts or practices in consumer transactions, and empowers the court, among other things, to declare that an act or practice "about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act" (s. 172(1)(a)), it seems evident to me that the test is intended to remain objective. What is or would be the effect of the conduct, including a failure to disclose a material fact, that has occurred or is about to occur? If the effect is or would be misleading, the supplier must answer for it. If "effect" is intended to mean the subjective impression of a specific consumer, then the inclusion of the word in subsection (1) would be quite unnecessary.

**81**  I must confess parenthetically that I find it difficult to conceive of a failure to disclose a material fact that would *not* have a misleading effect. One would have thought that if the nondisclosure had no such effect, then the undisclosed fact could not have been material.

**82**  Still speaking parenthetically, I must further admit to finding this argument rather artificial. The defendants concede that they represented the medicines to be safe and effective, from which it follows that they made no disclosure that they were unsafe and ineffective. These are two sides to the same coin. The real issue, then, is whether this was a deceptive practice, or otherwise unlawful, and that is clearly raised in the pleadings. The resolution of that issue will not depend on questions of disclosure or nondisclosure, representation or misrepresentation.

**83**  I conclude that the plaintiff's claim under the *BPCPA* is not bound to fail by reason of the failure to plead that the plaintiff was in fact misled by the defendants' alleged failure to disclose that the medicines were ineffective and unsafe.

**84**  I turn next to consider the defendants' argument concerning the remedies that the plaintiff seeks: damages pursuant to subsection 171(1) of the *BPCPA*, and a restoration order pursuant to paragraph 172(3)(a). The defendants submit that the plaintiff's failure to plead a causal link between the alleged contravention of the *BPCPA*, and the remedies claimed, is fatal to the entirety of the claim under the *BPCPA*, including the first particularized 'deceptive act or practice'.

**85**  There is no doubt that subsection 171(1) refers to "damage or loss due to a contravention of this Act", while paragraph 172(3)(a) refers to the restoration of "any money ... that may have been acquired because of a contravention of this Act". Both provisions accordingly require a causal relationship between the alleged contravention of the *BPCPA* and the damage claimed by the consumer, or the money acquired by the supplier.

**86**  What the plaintiff has pleaded is this:

1. The Plaintiff, and the other members of the Class, seek an order pursuant to section 172(3)(a) that the Defendants refund all sums that the Class paid to purchase the Children's Cough Medicine, or that the Defendants disgorge all revenue which it made on account of Children's Cough Medicine purchased by the Class. ...
2. It is unnecessary for the Plaintiff or any member of the Class to prove that the Defendants' deceptive acts or practices caused such persons to purchase the Children's Cough Medicine to make a claim for relief under section 172 of the *BPCPA*.
3. In the alternative, the Plaintiff and the other members of the Class suffered damages because of the Defendants' acts or practices and seek damages pursuant to section 171 of the *BPCPA*.

**87**  In the *Singer* case, the court noted, and the defendants here emphasized, the difference between the question of whether actual reliance is necessary to establish a breach of the statute (here a deceptive act or practice; it is not), and the question of whether reliance on a misrepresentation is necessary to establish the required causal link between breach and loss.

**88**  In that case, in the context of the *Competition Act*, Strathy J. said this:

[108] Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of section 52(1). The separate cause of action, created by section 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment.

[Emphasis original]

**89**  That reasoning does not, however, apply to the *BPCPA*. As Satanove J. noted in *Knight*:

[32] As mentioned earlier, the main difference between the *BPCPA* and the *TPA* is in the definition of deceptive act or practice. The *BPCPA* definition states, among other things, that a representation by a supplier that fails to state a material fact is a deceptive act or practice if the effect is misleading. Although this revised definition suggests a higher onus of proof with respect to misrepresentation by silence or omission as opposed to misrepresentation by express statement, it does not materially alter the causation requirement in section 172(3). A restoration order under this section will still be contingent on the supplier's in breach [*sic*] of the statute that resulted in the supplier's acquisition of benefits from the consumer.

[33] None of the cases cited to me specifically considered what needs to be proved in order to obtain a restoration remedy under section 18(4) of the *TPA* or section 172(3) of the *BPCPA*. However, I am of [sic] satisfied on a plain reading of the statutes that the necessary proof of causation under these sections does not mandate proof of reliance on the deceptive act or practice by the individual consumer.

...

[34] Section 22(1)(a) of the *TPA* and section 171(1) of the *BPCPA* clearly require the consumer to prove loss or damage suffered by the consumer (as an individual) in reliance upon the alleged deceptive act or practice. ...

[35] The plaintiff submits that he can satisfy the onus of proof in ... section 171 of the *BPCPA* without the need for individual evidence, by tendering economic and statistical evidence showing that the entire market place was distorted by the defendant's deceptive practice, and that all class members paid too much for a product which did not truthfully exist. In other words, the plaintiff expects to show that all purchasers of the defendant's light cigarettes paid an amount which exceeded the product's true market value (i.e. what purchasers would have paid had they known the truth).

[36] I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the *TPA*, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under section 22(1)(a) and section 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

**90**  The Court of Appeal found no fault with this reasoning. I conclude that the plaintiff's pleading in paragraphs 27 through 29 of the amended statement of claim is sufficient in terms of the causal links required between the alleged contravention of the *BPCPA* and the remedies sought.

**91**  It follows that the pleadings do disclose a cause of action for breach of the *BPCPA*. I will proceed to consider the other claims pleaded so that if I find that any do not disclose a cause of action, we may dispense with them at this stage.

**b. *Breach of the* Competition Act**

**92**  As noted, the plaintiff alleges that in making the representations and omissions particularized in paragraph 21 of the amended statement of claim, the defendants committed an unlawful act by breaching section 52 of the *Competition Act*, and that the class suffered damages as a result of this unlawful breach. The damages are sought pursuant to section 36 of the Act.

**93**  Section 52 of the *Competition Act* falls under *Part VI: Offences in Relation to Competition*, and reads in part:

*False or misleading representations*

**52.** (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interests, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

*Proof of certain matters not required*

1. For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(*a*) any person was deceived or misled;

(*b*) any member of the public to whom the representation was made was within Canada; or

(*c*) the representation was made in a place to which the public had access.

**94**  Section 36 provides:

*Recovery of damages*

**36.** (1) Any person who has suffered loss or damage as a result of

(*a*) conduct that is contrary to any provision of Part VI, or

(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

**95**  The defendants submit that this claim is bound to fail for two reasons: the failure of the plaintiff to plead causation in relation to the loss claimed under section 36; and the application of the regulated conduct doctrine.

**96**  We have already seen how Strathy J. of the Ontario Superior Court of Justice approached the *Competition Act* causation issue in the *Singer* case. His Honour considered that it was not enough for the plaintiff simply to plead the conclusory statement that the class suffered damages "as a result of" the unlawful breach, although that is the language used in section 36. Thus, it is argued, although section 52 requires no reliance to establish the offence, reliance must be pleaded to establish the right to collect damages.

**97**  That argument is undoubtedly consistent with the approach of at least some judges in Ontario: in addition to *Singer*, see, for instance, *Magill v. Expedia Canada Corp.*, [*2010 ONSC 5247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFC1-FG12-618C-00000-00&context=) at paras. 99-107 (pleading struck out with leave to amend). No case has been cited to me where that approach has been adopted, at least expressly, in British Columbia. In *Holmes v. United Furniture Warehouse LP*, [*2009 BCSC 1805*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24YD-00000-00&context=), Madam Justice Fisher said only this:

[35] A claim for damages under section 36 of the *Competition Act* is a possible cause of action. However the plaintiffs have not pleaded this clearly and concisely. ...

[36] The particulars of this claim must be set out clearly. A reference to [false and misleading representations] "as particularized above" in a pleading of this kind is insufficient. *In addition, the pleading should include an allegation that the plaintiffs have suffered loss or damage as a result of this particular conduct, in order to properly bring this claim within section 36.*

[Emphasis added]

**98**  I am unable to see any logical distinction between the defendants' argument of insufficient pleading of causation in relation to section 36 of the *Competition Act*, and that same argument in relation to the *BPCPA*. Both, in my view, are met by the reasoning of Satanove J. in paragraphs 32 through 36 of *Knight,* as quoted above, upheld in the Court of Appeal; see also *Steele v. Toyota Canada Inc.*, [*2011 BCCA 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1BJ-00000-00&context=), and *Infineon*. In the circumstances, given the whole of the pleadings, I am not prepared to hold that the plaintiff's pleading in relation to section 36 of the *Competition Act* is fatal.

**99**  I therefore turn to consider the defence of the regulated conduct doctrine. The defendants argue that the conduct alleged to be in breach of the *Competition Act* is expressly authorized and regulated by valid legislation (the *Food and Drugs Act*, and the *Food and Drugs Regulations*), thereby providing the defendants with an unanswerable defence to this part of the claim. The doctrine provides that conduct that is *required or authorized* by provincial legislation is exempted from the reviewable conduct or criminal of provisions federal legislation such as the *Competition Act*: see, for instance, D. Jeffrey Brown ed., *Competition Act & Commentary*, *2009* (Markham, LexisNexis Canada Inc., 2008) at pp. 2-3, and *A.G. Canada v. Law Society of B.C.*, [*[1982] 2 S.C.R. 307*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M25F-00000-00&context=).

**100**  Whether it applies equally where the authorizing legislation is also federal, as the defendants assert, is not free from doubt. But even if it does, it is clear that where the statutes can be interpreted so as not to interfere with each other, that interpretation is to be preferred: *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=), [*[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=) at para. 76.

**101**  In this case, the conduct alleged to be in breach of the *Competition Act* is the same conduct alleged to constitute deceptive acts or practices under the *BPCPA*: one misrepresentation and two incidents of nondisclosure relating to the safety and efficacy of the medicines. The *Food and Drugs Act* does not authorize misrepresentation or nondisclosure, but is intended to prevent it. As I noted above, the scheme it created permitted but did not compel the defendants to market the medicines as safe and effective for children between 2 and 6. They could have complied with their obligations under the regulatory scheme without so marketing the medicines. If, as a matter of fact, the plaintiff can demonstrate that such marketing did indeed give rise to the misrepresentation and nondisclosures alleged, then I am unable to conclude, as a matter of interpretation, that the scheme under the *Food and Drugs Act* was intended to exempt the defendants from the provisions of the *Competition Act*. The circumstances of this case are wholly distinguishable, in my respectful view, from those considered by the Federal Court in *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* [*(1992), 60 F.T.R. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M431-F900-G07J-00000-00&context=), [*45 C.P.R. (3d) 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M431-F900-G07J-00000-00&context=).

**102**  I conclude that it is not plain and obvious that the plaintiff's claim under the *Competition Act* must fail, and that the pleadings adequately disclose a cause of action in this regard.

**c. *Interference with Economic Relations***

**103**  The defendants submit that this claim, as pleaded, cannot succeed, because essential elements of the tort are missing.

**104**  The tort of unlawful interference consists of deliberately interfering with the trade, business or economic interests of another by unlawful means: *Poirier v. Community Futures Development Corp.,* [*2005 BCCA 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0FW-00000-00&context=); *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1.

**105**  Of relevance here, the "economic relations" in question must consist of trade or business relations between the plaintiff and a third party, with which the defendant deliberately interferes by unlawful means. Merely causing economic loss by unlawful means is not enough: *Alleslev-Krofchak v. Valcom Ltd.*, [*2010 ONCA 557*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFC1-JX8W-M0SK-00000-00&context=), [*322 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFC1-JX8W-M0SK-00000-00&context=). No allegation of such relations is discernible in the amended statement of claim, nor is it one that could sensibly be made in the circumstances.

**106**  The plaintiff argues that this tort is evolving, and to the extent that a novel argument may be made at trial, the question of whether it can succeed should be determined on the basis of a full factual record. That position would have merit if the issue here concerned such questions as whether the conduct alleged could properly be described as unlawful. But that is not the issue. We are here concerned with a fundamental element of the tort that is nowhere to be found in the amended statement of claim, and could not be supported by any of the material facts alleged.

**107**  In the circumstances, I conclude that this claim is bound to fail and that paragraphs 32 and 33 of the amended statement of claim should accordingly be struck.

**d. *Unjust Enrichment / Waiver of Tort / Constructive Trust***

**108**  The defendants' submissions in relation to this pleading are premised largely on the success of their arguments that the plaintiff's claims under the *BPCPA*, the *Competition Act* and the tort of intentional interference with economic relations were bound to fail. As the defendants have succeeded on striking out just one of those three claims, that premise disappears.

**109**  With respect to unjust enrichment, the defendants advance two further arguments. Both relate to the constituent elements: enrichment of the defendant with corresponding deprivation of the plaintiff; and the absence of a juristic reason for the enrichment.

**110**  The defendants submit, first, that there is a juristic reason for the alleged enrichment: Health Canada's authorization of the continued marketing of the medicines for children between 2 and 6. Here, however, the defendants again assume as established what in fact is in issue. They submit that it is not a misrepresentation to tell the public what the regulator permits you to tell the public. But this ignores the fact that the suppliers are not puppets dancing on the regulator's strings. To tell the public what the regulator permits but does not compel the defendants to say may or may not be a misrepresentation. That will depend on the facts. The process that led the regulator to act as it did may also shield the defendants. But it is not inevitable that it will do so. The issue remains to be litigated. Accordingly, whether there is a juristic reason for the alleged enrichment remains to be seen. It cannot be determined on the pleadings.

**111**  The defendants' second argument focuses on the elements of enrichment and corresponding deprivation. The plaintiff pleads that the defendants have been enriched by the receipt of revenue from the sale of the medicines purchased by the plaintiff and other members of the class, and that the plaintiff and other members of the class have suffered a corresponding deprivation in the amount of the purchase price.

**112**  In attacking this plea, the defendants rely on the decision of the Ontario Court of Appeal in *Boulanger v. Johnson & Johnson Corp.* [*(2003), 174 O.A.C. 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JGHR-M001-00000-00&context=), a proposed class action on behalf of users of the prescription drug Prepulsid, manufactured by the defendant. One of the claims pleaded was that the plaintiff was entitled to reimbursement for the full purchase price paid for the product. On that issue, Goudge J.A., for the court, said this:

[20] Third, the appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery.

**113**  The present case is different. Although the plaintiff cites the purchase price of the medicines as the amount by which the plaintiff and other members of the class were deprived, she does not claim reimbursement of that purchase price, but rather seeks recovery of the amount by which the defendants were unjustly enriched through their receipt of revenue.

**114**  Notwithstanding this distinction, on which he did not comment, Strathy J. applied *Boulanger* in the *Singer* case in concluding that the claim before him based on unjust enrichment did not disclose a cause of action because the plaintiff purchased the products in question from a retailer and not directly from the defendants.

**115**  I do not see the issue as quite so cut and dried. In my view, it is not in line with authority in this province, including *ICBC v. Lo*, [*2006 BCCA 584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61J1-00000-00&context=), [*278 D.L.R. (4th) 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61J1-00000-00&context=), *Innovex Foods 2001 Inc. v. Harnett Rovers et al.*, [*2004 BCSC 928*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X04X-00000-00&context=), and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [*2006 BCSC 1047*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G34B-00000-00&context=), [*57 B.C.L.R. (4th) 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G34B-00000-00&context=). I am therefore not prepared, at the certification stage, to pronounce it plain and obvious that the plaintiff's claim for unjust enrichment as pleaded must fail because the members of the class will presumably prove to have purchased the medicines from a retailer rather than from the defendants.

**116**  Given my conclusion that the pleadings disclose a cause of action in relation to the claim for unjust enrichment, it seems to me to follow that an arguable claim also exists for a constructive trust. The two go together, and will depend on the evidence. I therefore do not need to consider whether the claim for a constructive trust can survive independently of a claim for unjust enrichment in the circumstances of this case.

**117**  With respect to the waiver of tort claim, the defendants concede that it is properly pleaded so long as the allegations of wrongdoing have survived the defendants' submissions concerning the other causes of action. For the most part, they have.

**e. *Limitation Periods***

**118**  Finally, the defendants argue that it is plain and obvious that any surviving causes of action are mostly limited to a shorter time than the proposed class period. Accordingly, they submit, such causes of action should only be certified as to those shorter periods.

**119**  I am unable to agree. There is no pleading of any limitation defence as yet, the onus of establishing which is on the defendants. Whether any such defence succeeds will ultimately be fact specific, depending upon such matters as discoverability. In these circumstances it cannot be said to be plain and obvious at this stage. If this action is certified, the appropriate class period will be the longest one possible (10 years), subject to the class being amended should the evidence establish that different periods apply; see, for instance, *Chace v. Crane Canada Inc.* [*(1997), 44 B.C.L.R. (3d) 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2D6-00000-00&context=) (C.A.) at para. 19.

**f. *Conclusion***

**120**  The requirement of paragraph 4(1)(a) of the *Class Proceedings Act* that the pleadings disclose a cause of action has been met.

**2. Is there an identifiable class of two or more persons?**

**121**  As discussed, with respect to this and all further requirements of subsection 4(1) of the *Class Proceedings Act*, the burden is on the plaintiff to show a minimum evidentiary basis for the requirement. The court will, of course, consider all of the evidence placed before it in determining whether this burden has been satisfied.

**122**  The defendants submit that the plaintiff has failed to provide any evidentiary basis to support the existence of other individuals who share her complaint and who are desirous of having their complaint litigated through the mechanism of a class proceeding. They argue that a bald assertion that a class exists is insufficient: *Lau v. Bayview Landmark Inc.* [*(1999), 40 C.P.C. (4th) 301*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD81-F1H1-24YW-00000-00&context=) (Ont. Sup. Ct. J.) at para. 23. Rather, there must be evidence of a real and subsisting group of persons who are desirous of having their common complaint determined through the class action process: *Bellaire v. Independent Order of Foresters* [*(2004), 5 C.P.C. (6th) 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-FC6N-X50D-00000-00&context=) (Ont. Sup. Ct. J.) at para. 33.

**123**  I am satisfied that, for the purposes of certification, the proposed class (all residents of British Columbia who purchased the medicines during the proposed class period) is adequately defined in accordance with the principles discussed in cases such as *Hollick v. Toronto (City)*, [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), *Bywater v. Toronto Transit Commission* [*(1998), 27 C.P.C. (4th) 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD51-F1H1-24BV-00000-00&context=) (Ont. Ct. J. Gen. Div.), *Steele* and *Knight*.

**124**  At the hearing of this application, however, there was no evidence of the existence of more than one individual member of that class who shares the plaintiff's desire to have the pleaded complaint determined through this mechanism of a class action or at all. It was therefore necessary to consider the extent to which such evidence is required in the circumstances of this case.

**125**  In *Chartrand v. General Motors Corp.*, [*2008 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0NX-00000-00&context=), [*75 C.P.C. (6th) 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0NX-00000-00&context=), Martinson J. considered a certification application in relation to a claim arising out of an allegedly defective and dangerous spring clip used in parking brakes on certain vehicles with automatic transmissions manufactured by the defendant. Her Ladyship had this to say:

[53] It is not enough to point to a group of people in British Columbia who are owners of specific vehicles with automatic transmissions. There must be some evidence that two or more people have a complaint that GM manufactured a dangerously defective product that caused them a loss and/or that GM was unjustly enriched at their expense.

[54] There is no evidence of such complaints. NHTSA was satisfied with the recall of only the manuals. Transport Canada has no concerns and has received no complaints. The three complaints to transport Canada relating to parking brakes on GM vehicles had nothing to do with vehicles in the proposed class. ... There is no evidence of complaints or concerns by consumer groups. There is, therefore, not an identifiable class as there is not a group of two or more people with complaints.

[55] I have not overlooked the fact that members, or some members, of the proposed group may not know about the spring clip issue; Ms. Chartrand did not know about it. However, there is no evidentiary basis for concluding that they would have reason to complain that it was dangerously defective or that GM was unjustly enriched, even if they did not know about it.

...

[60] If the group of automatic vehicle owners found in the proposed class can, by reason of ownership alone, be viewed as an identifiable class ..., there must still be some rational relationship between that class and the proposed common issues. This is implicit in the identifiable class requirement: *Hollick* at para. 20. The requirement is not an onerous one. The representative plaintiff does not have to show that everyone in the class shares the same interest in the resolution of the asserted common issues. The class, however, must not be unnecessarily broad: *Hollick* at para. 21.

[61] This requirement has been viewed as an air of reality test, testing the reality of the linkage between the plaintiff's claim and the proposed class: *Samos Investments Inc. v. Pattison*, [*2001 BCSC 1790*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-619P-00000-00&context=), 22 B.C.L.R. (3d) 46, [*2003 BCCA 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G044-00000-00&context=), [*10 B.C.L.R. (4th) 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G044-00000-00&context=); *Nelson v. Hoops L.P., a Limited Partnership*, [*2003 BCSC 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G05C-00000-00&context=), [*2004 BCCA 174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B24V-00000-00&context=).

**126**  Other cases relied upon by the plaintiff, such as *Hoy v. Medtronic, Inc.*, [*2001 BCSC 1343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6143-00000-00&context=), aff'd [*2003 BCCA 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3GV-00000-00&context=), [*14 B.C.L.R. (4th) 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3GV-00000-00&context=), *Lambert v. Guidant Corp.* [*(2009), 72 C.P.C. (6th) 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S456-00000-00&context=) (Ont. Sup. Ct. J.), and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [*2010 BCSC 922*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22FS-00000-00&context=), rev'd [*2011 BCCA 187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1VY-00000-00&context=), did not assist in this analysis. In all of those cases, at least two individual members of the proposed class were clearly identified.

**127**  The question therefore became whether it was sufficient, as the plaintiff argued was suggested by Martinson J. in *Chartrand*, for the evidence to establish that a class of people exists who would have the same reason to complain as the plaintiff, even if no second individual can be identified.

**128**  We must bear in mind, of course, the premise of the claim as pleaded: that contrary to the defendants' admitted representation, the medicines were neither safe nor effective for children between 2 and 6, and the defendants therefore engaged in deceptive acts or practices.

**129**  The evidence before me at the hearing established that the defendants' medicines were widely marketed and sold to persons in British Columbia for, among other things, the use of children between 2 and 6. The evidence further established there were adverse events reported by at least some of the defendants to Health Canada over the period 2002-2008, and also that there were numerous calls to the British Columbia Drug and Poison Information Centre concerning the pediatric use of the medicines. Typically, however, these calls did not involved adverse reactions. Rather, they concerned unintentional overdoses, and incidents of child self-medication in the absence of parental supervision.

**130**  Notwithstanding that the evidentiary burden on the plaintiff is light, I was unable to conclude that I could draw sufficient inferences from this evidence to satisfy the requirement that the plaintiff demonstrate that there is at least one more identifiable class member who shares her complaint. Logically, on the premise of the action, it appeared that anyone who purchased the medicines for the stated purpose would be in the same position as the plaintiff. What did not necessarily follow is that any such persons would have any interest in pursuing the matter. This is not, after all, a case involving physical or psychological harm, and the individual losses, on the premise of the claim, are not significant. Accordingly, in the absence of evidence of other interested parties, I was unable to find that the requirement of section 4(1)(b) of the *Class Proceedings Act* has been met.

**131**  Counsel for the plaintiff advised that he had an unfiled affidavit that identifies other interested parties, and points to the following passage from *Lambert*:

[100] ... In the present case, however, ... plaintiffs' counsel informed me that they have been in contact with a number of other putative class members who expressed an interest in the proceeding. If the defendants are not willing to accept that assurance, I would give leave to the plaintiffs to deliver an affidavit of one of their counsel for the [*sic*] purpose.

**132**  It is not immediately apparent why that affidavit was not filed in support of the certification application, although the focus of the defendants' opposition was clearly elsewhere. After considering this issue, I decided that it was appropriate to grant leave to file the affidavit, and to give the defendants an opportunity to comment on its adequacy, before coming to a conclusion as to whether this requirement has been met. In my view, there was a sufficient air of reality to the linkage between the plaintiff's claim and the proposed class that the application for certification ought not to founder on this rock alone if the appropriate evidence were readily at hand.

**133**  In response to my invitation, plaintiff's counsel filed an affidavit sworn May 4, 2011, identifying several individuals who purchased Children's Cough Medicine over the period in question, and who have indicated that they are 'interested in and support the class proceeding'.

**134**  The defendants argue that this is not enough. They submit that there remains no evidence of two or more persons who complain, were deceived, suffered harm or found the medicine ineffective. Moreover, they assert, the proffered evidence is insufficiently specific to establish that the products purchased consisted of Children's Cough Medicine as defined.

**135**  The difficulty with these submissions is twofold: first, it is well established as noted above that the evidentiary burden on the plaintiff is not an onerous one, and requires only a "minimum evidentiary basis" (*Infineon*); second, the deficiency I had found was a lack of evidence that others were interested in pursuing the matter, not that others had, on the premise of the claim, found themselves in the same position as the plaintiff vis-à-vis the alleged misrepresentations.

**136**  In my view, the evidence filed by the plaintiff is sufficient to correct the deficiency that concerned me. It follows that the plaintiff has met the requirement of paragraph 4(1)(b) of the *Class Proceedings Act*

**3. Do the claims of the class members raise common issues?**

**137**  There is no doubt that this requirement is satisfied. The claims of the class members do indeed raise common issues, as the defendants concede. The real question is which of the issues that the plaintiff proposes for certification as common issues ought to be so certified. Those proposed common issues are set out in Schedule "A" to these reasons.

**138**  The Supreme Court of Canada explained the nature of the enquiry into whether the claims of the potential class members raise common issues in *Hollick*:

[18] ...[T]he underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" [*Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) at para. 39 ("*Dutton*")]. Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

**139**  With respect to the *BPCPA* claim, the defendants concede that the issues set out in subparagraphs (a) through (d) and (f) through (h) are indeed common issues. The same is not true, they assert, with the issues set out in subparagraph (e), which is whether the defendants engaged in deceptive acts or practices in the solicitation, offer, advertisement and promotion of the medicines. They note that this is the critical issue in the *BPCPA* claim and maintain that it is an individual issue because of the need for the individual members of the class to prove that he or she was in fact misled by any failure to disclose a material fact. For the reasons discussed above in paragraphs 68 through 83, I am unable to accept that submission. I consider that issue (e) is also a common one as explained in *Hollick*.

**140**  The defendants then point to issue (i) which is whether, if the defendants are found to have engaged in deceptive acts or practices contrary to the *BPCPA*, a monetary award should be made in favour of the class, and in what amount. This issue, they assert, requires an individual inquiry because to the extent the medicines worked for any particular individual, then that buyer got what he or she bargained for and suffered no loss. They rely on evidence indicating that children vary widely in their response to drugs such as those contained in the medicines, from which it follows that at least some class members probably suffered no economic harm. Accordingly, they assert, any claim for damages under subsection 171(1) of the *BPCPA*, or for restoration under section 172, must be individual, as causation is required and the evidence simply does not support an aggregation approach pursuant to section 29 of the *Class Proceedings Act*.

**141**  The defendants take a similar approach to the plaintiff's proposed common issues in the *Competition Act* claim. They concede that issues (a) and (b) are common, but contend that the meat of the claim is in issue (c), which they say is not common. That issue is whether the class suffered damages as a result of the defendants' alleged unlawful breach of section 52 of the Act.

**142**  Turning to the unjust enrichment, waiver of tort and constructive trust claims, the defendants maintain that all of the issues proposed by the plaintiff are individual.

**143**  The defendants assert that however one approaches it, these issues will require an individual assessment for each member of the class, and that the plaintiff has failed to adduce evidence that supports a class-wide basis for assessing damages whether on the loss side (the class) or the gain side (the defendants). In particular, say the defendants, there is no evidence that the aggregated approach proposed by the plaintiff is plausible in the circumstances of this case.

**144**  These arguments were rejected by the Court of Appeal in *Infineon*, largely because the trial of the issues on common evidence had at least the potential to decide liability and damages without resort to individualized inquiries. They were also rejected by Dardi J. in *Koubi v. Mazda Canada Inc.*, [*2011 BCSC 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2S9-00000-00&context=).

**145**  Here, too, it seems to me that the defendants are getting ahead of themselves. The extent to which individual inquiries will be necessary in relation to these claims, and the availability of an aggregated damages approach, remain to be determined. They should be "worked out in the laboratory of the trial court" (*Knight*, CA, at para. 40). The plaintiff has provided expert evidence to support the contention that there are class-wide methods available to determine these issues. The plaintiff does not have to establish that these methods must succeed. Much will depend on the nature of the findings to be made on the evidence, expert and otherwise, in relation to what I consider (as I have previously stated) to be the primary issue in this case: whether the defendants engaged in deceptive acts or practices/unlawful activity as particularized in paragraph 21 of the amended statement of claim.

**146**  The defendants argue that *Infineon* is distinguishable because of the nature of the expert evidence put forward in that case. Naturally the evidence there was different from the evidence here, but I fail to see any valid distinction. The cases are sufficiently alike, and at para. 66 the Court of Appeal warned against embarking upon too exacting a scrutiny of the expert opinion evidence adduced at a certification hearing. The defendants' argument here depends upon such scrutiny, and upon assumptions being proven correct, issues of admissibility being determined in their favour, and opinions (opposed or otherwise) being accepted or rejected, none of which can or should be accomplished at this stage.

**147**  In my view, it follows that it is appropriate to certify these issues as common issues at this time. If, in the further course of this litigation, it becomes clear that they cannot be managed as common issues, then appropriate steps can be taken to deal with them otherwise. For the present, I am satisfied that the plaintiff should be permitted to attempt to establish the appropriate remedies on a class-wide basis. These remedies should include the issue of entitlement to prejudgment interest, which must depend upon any findings as to damages.

**148**  The claim for punitive damages, of course, is concerned not with compensating the class for any loss, whether individual or class-wide, but rather with punishing the defendants for their allegedly egregious conduct. That, too, is an appropriate common issue.

**149**  I accept the submission of the defendants that the issue of distribution of damages and/or trust funds is an administrative issue and ought not to be included as a common issue.

**4. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?**

**150**  The inquiry here is directed at two questions: first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and second, whether the class proceeding would be preferable to other procedures: *Hollick* at paras. 28-31; *Rumley* at para. 35.

**151**  In British Columbia, the *Class Proceedings Act* provides express guidance as to how a court should approach the preferability question by listing five non-exhaustive factors to be considered in section 4(2). In this case, the defendants rely on subparagraphs 4(2)(a), (d) and (e). These raise the questions of whether: common issues of fact or law predominate over questions affecting only individual members; other means of resolving the claims are less practical or less efficient; and the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**152**  The defendants also rely upon on the general principles of assessing preferability: whether a class proceeding will promote access to justice, judicial economy and behaviour modification.

**153**  Access to justice has been described as a more important goal than judicial economy: *Endean v. Canadian Red Cross Society* [*(1997), 36 B.C.L.R. (3d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=), [*148 D.L.R. (4th) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=) (S.C.), at para. 54. In this case, there is no doubt that the expense of litigation would deny access to any person pursuing an individual claim of this sort. In weighing that, however, one must take into account that no one has suffered injury, that any individual out-of-pocket losses are minimal, and that there are other regulatory means for the pursuit of consumer dissatisfaction.

**154**  Contextually, the defendants argue that individual issues are so predominant in this case that a class action would be unmanageable. In this regard they point to the hundreds of medicines that meet the definition of Children's Cough Medicine, varying in their labelling, their ingredients, the times over which they were marketed, and the reasons for consumer selection. They point to the absence of evidence supporting a class-wide assessment of damages or gain (as to which see the discussion above in paragraphs 139 *et seq*.). They point to the absence of any pressing need for access to justice on the evidence, as just discussed. And they point to the role of Health Canada as gatekeeper and to the sanctions available to Health Canada, which, they argue, eliminate the need for this proceeding to promote behaviour modification.

**155**  In *Singer*, Strathy J. concluded that a class proceeding would not be a preferable procedure:

[205] I am satisfied that a class proceeding would decidedly *not* be a preferable procedure for the following reasons. First, I am convinced that a class action, at least as envisaged by this plaintiff, would be unmanageable and inefficient. The multiplicity of products, product ingredients and advertising and labelling claims would make the resolution of the common issues extraordinarily complex.

[206] Second, I am not satisfied that access to justice considerations are deserving of particular concern in this case for the reasons discussed under the subject of the identifiable class requirement. I am not even satisfied that Mr. Singer has a real complaint or that he has suffered any damages, but if he wishes to make a point of principle, it could be appropriately pursued in the Small Claims Court or as a test case. An individual action would permit him to pursue claims that would not be available in the class action, such as a common law claim for negligent misrepresentation and claims under the *Competition Act*, provided he can show reliance. Those actions are likely to be more effectively and efficiently prosecuted based on individual allegations of reliance and damages.

[207] Third, there is an appropriate statutory and regulatory regime in place concerning the labelling and advertising of sunscreen products. That regime considers scientific evidence concerning the efficacy of sunscreen products and determines what representations can appropriately be made about each product. If there are concerns about representations made concerning specific products, those concerns can be addressed to the regulator. There is, therefore, a built-in behaviour modification process. To the extent that the plaintiff believes that there have been transgressions that require sanctions, complaints can be directed to the appropriate regulators under the *Food and Drugs Act* and the *Competition Act*.

**156**  The defendants argue that these comments apply with equal force in this case. I disagree.

**157**  First, although there is in this case, as there was in *Singer*, a multiplicity of products and ingredients, the allegation of misrepresentation here is the same in relation to each. That was not so in *Singer*, where the representations varied depending on the product and the label.

**158**  Second, there is in this case no basis for concluding that access to justice can be appropriately achieved through a Provincial Court (Small Claims) action or a test case. Given the volume of expert evidence filed on this application, the suggestion that a point of principle could be satisfactorily made via that route is startling to say the least. Moreover, it would be inappropriate to assess the 'reality' of Ms. Wakelam's complaint at this stage, having found that her pleading discloses a cause of action. That was not the finding in *Singer*. Finally, for the reasons I have discussed above, it cannot be assumed, as it was in *Singer*, that individual issues of reliance arise to the same extent, if at all.

**159**  Third, although there was a statutory and regulatory regime in place concerning the labelling, marketing and advertising of Children's Cough Medicine, I am unable to find that it includes a meaningful built-in behavioural modification process given the premise of this case. That premise is not that the defendants failed to comply with the statutory and regulatory regime. If that were the case, then the regime's sanctions would likely be sufficient. Rather, the premise here is that notwithstanding their compliance with the statutory and regulatory regime, the defendants misrepresented the safety and efficacy of their products. If that proves to be the case, then only through a class proceeding can the defendants be obliged to answer fully for their conduct. As the Supreme Court of Canada pointed out in *Dutton*:

[29] ... Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation. ...

**160**  I conclude that the *Singer* case is not, after all, very much like this one.

**161**  I find that, notwithstanding the individual issues that may arise, a class proceeding is a preferable procedure to resolve the common issues, and that those common issues are not overwhelmed by individual issues. Appropriate management will ensure that that remains the case. The only factor weighing against the preferability of a class proceeding is the access-to-justice issue that arises from the absence of any evidence of one or more persons other than the plaintiff being interested in pursuing the matter. That defect has now been cured.

**162**  The plaintiff has therefore met the requirement of paragraph 4(1)(d).

**5. Is there an appropriate representative plaintiff?**

**163**  The plaintiff is required to satisfy the court that she would fairly and adequately represent the interests of the class, that she is in a position to fulfill her responsibilities, and that she has no interest in the common issues that would conflict with the interests of other class members. Ms. Wakelam has deposed that she is unaware of any conflict, that she understands the role of a representative plaintiff, and that she is prepared to undertake those responsibilities and make herself available to counsel as necessary to fulfill them.

**164**  In addition, the court should be satisfied that the plaintiff is represented by experienced and capable counsel. That point is beyond doubt.

**165**  Finally, the plaintiff must produce a plan for the proceeding that sets out a workable method of advancing it on behalf of the class, and of notifying class members of the proceeding. The plaintiff has done so. The plan may not be perfect, and may require amendment. Nevertheless, it sufficiently addresses the requisite issues and demonstrates that the representative plaintiff and class counsel have devoted sufficient thought to the process.

**166**  I conclude that the plaintiff has satisfied the requirement of paragraph 4(1)(e) of the *Class Proceedings Act.*

**CONCLUSION**

**167**  As the plaintiff has met all of the requirements of subsection 4(1) of the *Class Proceedings Act*, it follows that I must certify this action as a class proceeding, and I do so, subject to this: the claim for damages for unlawful interference with economic relations, as pleaded in paragraphs 32 and 33 of the amended statement of claim, is struck.

**168**  The common issues proposed by the plaintiff as set out in Schedule "A" are suitable for certification with the exception of those relating to unlawful interference with economic interests (3 (a) - (d)) and the distribution of damages and/or trust funds (7 (a)).

**169**  The parties should schedule a hearing to deal with case planning issues at their earliest convenience.

J.C. GRAUER J.

\* \* \* \* \*

Schedule "A"

Common Issues

The plaintiff proposes the following common issues:

**1. *Business Practices and Consumer Protection Act "BPCPA"***

1. Are the sales of the Children's Cough Medicine to the class "consumer transactions" as defined in the *BPCPA*?
2. Are the solicitations and promotions of the Children's Cough Medicine to the class "consumer transactions" as defined in the *BPCPA*?
3. With respect to the sales of the Children's Cough Medicine to the class, are the defendants "suppliers" as defined in the *BPCPA*?
4. Are the class members "consumers" as defined in the *BPCPA*?
5. Did the defendants engage in deceptive acts or practices in the solicitation, offer, advertisement and promotion of the Children's Cough Medicine contrary to the *BPCPA*, as alleged in the statement of claim?
6. If the court finds that the defendants, or any of them, have engaged in deceptive acts or practices contrary to the *BPCPA*, should an injunction be granted restraining those defendants from engaging or attempting to engage in those deceptive acts or practices?
7. If the court finds that the defendants, or any of them, have engaged in deceptive acts or practices contrary to the *BPCPA*, should a declaration be granted that these acts or practices in engaged in by the defendants in respect of consumer transactions contravene the *BPCPA*?
8. If the court finds that the defendants, or any of them, engaged in deceptive acts or practices contrary to the *BPCPA*, should the defendants be required to advertise the court's judgment, declaration, order or injunction and, if so, on what terms or conditions?
9. If the court finds that the defendants, or any of them, has engaged in deceptive acts or practices contrary to the *BPCPA*, should a monetary award be made in favour of the class and, if so, in what amount?

**2. *Competition Act***

1. Did the defendants make the representations and omissions to the public as particularized in the statement of claim?
2. If so, did the defendants breach s. 52 of the *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=), and thereby commit an unlawful act because the representations and omissions:
3. were made for the purpose of promoting the business interests of the defendants;
4. were made to the public; and
5. were false and misleading in a material respect?
6. Did the class suffer damages as a result of the defendants' unlawful breach of s. 52 of the *Competition Act* and, if so, in what amount?
7. Is the class entitled to their costs of investigation, pursuant to s. 36 of the *Competition Act* and, if so, in what amount?

**3. *Unlawful Interference with Economic Interests***

1. Did the defendants, or any of them, intend to injure the class?
2. Did the defendants, or any of them, interfere with the economic interests of the class by unlawful or illegal means?
3. Did the class suffer economic loss as a result of the defendants' interference?
4. What damages, if any, are payable by the defendants, or any of them, to the class?

**4. *Unjust Enrichment, Waiver of Tort and Constructive Trust***

1. Have the defendants, or any of them, been unjustly enriched by the receipt of the revenue that they acquired from the sale of Children's Cough Medicine?
2. Has the class suffered a corresponding deprivation in the amount of the revenue that the defendants, or any of them, acquired from the sale of Children's Cough Medicine?
3. Is there a juridical reason why the defendants, or any of them, should be entitled to retain the revenue that they acquired from the sale of Children's Cough Medicine to the Class?
4. What restitution, if any, is payable by the defendants, or any of them, to the class based on unjust enrichment?
5. Should the defendants, or any of them, be constituted as constructive trustees in favour of the class for any or all of the revenue that they acquired from the sale of Children's Cough Medicine?
6. What is the quantum of the revenue, if any, that the defendants hold as a constructive trust for the class?
7. What restitution, if any, is payable by the defendants to the class based on the doctrine of waiver of tort?
8. Are the defendants, or any of them, liable to account to the class for the wrongful revenues, or profits, that they obtained on the sale of Children's Cough Medicine to the class based on the doctrine of waiver of tort?

**5. *Punitive Damages***

1. Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, how much?

**6. *Interest***

1. What is the liability, if any, of the defendants, or any of them, for court order interest?

**7. *Distribution of Damages and/or Trust Funds***

1. What is the appropriate distribution of any damages (including punitive or exemplary damages), restitution and/or trust funds and interest to the class and who should pay for the cost attributable to that distribution?

**End of Document**

[***Ward v. Wishart, [2001] B.C.J. No. 1445***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23S5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Williamson J.

Heard: July 3 - 5, 2001.

Judgment: July 10, 2001.

Vancouver Registry No. B990032

**[2001] B.C.J. No. 1445** | 2001 BCSC 998 | 106 A.C.W.S. (3d) 650

Between Brenda Lynn Ward, plaintiff, and Renee Beverly Wishart, Linda Jean Wright and John Donald Wright, defendants

(30 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, gratuitous passengers — Damage awards — Injury and death — Head injuries — Neck injuries — Soft tissue injuries — Body injuries — Shoulder — Psychological injuries — Depression.**

|  |
| --- |
| Action by Ward for injuries she sustained in a motor vehicle collision. Ward was riding as a passenger when a car turned in front of the vehicle in which she rode. In the ensuing collision her head struck the windshield and her knee struck the car's console. She suffered head and soft tissue injuries to her upper body which mostly resolved after seven months. However, during the recovery period, she was compromised in her farming activities and the running of her general store. She also experienced depression and alienated her family members. She was now 35 and experienced some residual shoulder problems. She admitted that some of her shoulder pain seemed to have arisen from aquatic exercise recommended by a physiotherapist.  HELD: Action allowed; Ward was awarded $20,000 non-pecuniary damages; $5,000 for loss of future earning capacity; and $500 for costs of future care.  The collision caused part, but not all, of her depression, and her shoulder problems had their genesis in the collision. Her soft tissue injuries were moderately severe. Loss of future earning capacity was slight, but there was a chance that Ward would suffer future pain requiring treatment. There was insufficient evidence to show that any past loss of wages was attributable to the collision. |

**Counsel**

Robert B. McNeney, for the plaintiff. Grant Ritchey, for the defendants.

|  |
| --- |
| **WILLIAMSON J.** |

**1**   On October 19, 1997, the plaintiff Brenda Lynn Ward was a passenger in a motor vehicle driven by the defendant Linda Jean Wright and owned by the defendant John Donald Wright. At the intersection of East Third Avenue and Moody Avenue in North Vancouver, the car in which the plaintiff was riding was struck by an automobile driven by the defendant Renee Beverly Wishart, after that vehicle turned left in front of the plaintiff's vehicle.

**2**  The plaintiff, now 35 years of age, believes that her head struck the windshield and that her knee dented the glove compartment despite the fact that she was wearing a seatbelt. She suffered injuries to her head, neck, shoulders, back, and left ankle. There are residual effects of the soft tissue injury today, over three and one half years since the accident.

**3**  She seeks non-pecuniary damages, and damages for past wage loss, diminished capacity to earn, costs of future care, and special damages.

**4**  The plaintiff lives in a rural setting on eight acres about 20 miles north of Squamish. She has two daughters now aged 12 and six. She is separated from her husband who left the matrimonial home in June 2000.

**5**  Prior to the motor vehicle accident, she looked after animals on her acreage, including goats and chickens, and did a considerable amount of gardening. She also operated a general store which was located in an addition to her home. The store, which was open twelve hours a day, six days a week, sold groceries, camping and fishing gear, flash-lights, as well as milk, pop, chips, candies and cigarettes. The principal customers were tourists visiting the nearby camp grounds, although she testified that local people would buy small items so that they would not have to go all the way into Squamish. She worked most of the hours in the store, did all of the book-keeping, and said that she enjoyed the work. She testified that prior to the accident she was in good health, felt strong, and played softball when her family responsibilities permitted.

**6**  Since the accident, the plaintiff has curtailed her activities, and still suffers the effects of the soft-tissue injuries from time to time. She also went through a period of depression when, she testified, she felt guilty about the extra work that she was placing upon other members of her family. Sometime in 1998 she realized that her marriage was in jeopardy and this increased the amount of stress upon her. It is difficult to ascertain the degree to which the depression is a result of the breakdown of her marriage or a result of her diminished capacity connected to the physical injuries sustained in the accident.

**7**  Immediately after the accident she was taken by ambulance to Lions Gate Hospital in North Vancouver. She said that she felt a lot of pain in her head, like a huge headache, and that she was very sore in her upper back and right shoulder. She also had a sore and bruised knee.

**8**  At the hospital the plaintiff was examined, x-rayed, and released with Tylenol 3. She and her friend, Linda Jean Wright who was the driver of the car in which she was riding, spent the night at a home in North Vancouver and returned to Squamish the next day. That night she slept poorly, described herself as being "thoroughly uncomfortable" and said that she awoke around 3:00 a.m. and had to take more Tylenol 3. For the next ten days or so she described herself as "propped up on a chair" at home and said that she did not move much. She went to the clinic of her family doctor and saw another doctor who told her to keep moving or her body would freeze up. She said she was unable to get much accomplished.

**9**  She testified that initially the pain subsided over a few months but then it came to a plateau. Her family doctor, Dr. Schellenberg, referred her for physiotherapy in December 1997. She also underwent pool therapy under the supervision of a community therapist provided by I.C.B.C. Further, she was treated by a chiropractor, Dr. Myron Dawydiak.

**10**  By December 10, 1997, almost two months after the accident, the plaintiff told the physiotherapist she was back to doing 80 per cent of her job at work, as well as her normal activities of daily living, although she did so with some symptoms. She was unable to do any heavy lifting at work. She had her final physiotherapy session on December 18, 1997. During 1998 she continued to improve.

**11**  In cross-examination, the plaintiff agreed that she informed Dr. Doran, a doctor at her family practitioner's clinic, that the right shoulder pain, running down the back of the right arm was, she believed, associated with some of the exercises that she was doing in the pool therapy programme. She testified that it was this "running down the back of the arm" that was different. She said that the right shoulder pain that she had experienced before did not run down the back of the right arm, and that after she completed the pool exercises the main complaint continued to be the right shoulder. She also testified that she told the chiropractor in April 1998 that she was experiencing right shoulder pain that may be related to aquatic exercises, but said that was also the pain running down the right arm as distinct from the earlier, and subsequently, experienced shoulder pain.

**12**  In cross-examination, she agreed that the occupational therapist Laurie Nelson visited her home on three occasions and that after the last visit, April 29, 1998, indicated that the plaintiff was ready to return to her pre-accident employment full time except for purchasing and re-stocking of supplies. Ms. Nelson also recommended assistance twice a month to do the heavy lifting in the store, for a period of one month. The plaintiff agreed with this and testified that she would have others to help her with the heavy lifting.

**13**  The plaintiff testified in chief that when depression set in, after the accident, her relationship with her husband deteriorated. She said that she became distant, pushing family members away. She felt guilty about the extra work others had to do and felt in the circumstances that her husband was over-worked. Sometime in 1998, she discovered that her husband was having an affair and, as noted above, the relationship ended when he moved out in June 2000. Asked whether "what he did" was unrelated to the motor vehicle accident in cross-examination, she agreed that was so.

CREDIBILITY

**14**  I listened carefully to the evidence of the plaintiff in direct examination, cross-examination and re-direct examination. I found her a credible witness. I accept that she has made some mistakes about the timing of various events and about the duration of particular aspects of her injuries. But these are minor discrepancies and do not impact fundamentally upon her credibility.

DAMAGES - NON-PECUNIARY

**15**  I conclude on the evidence that most of the injuries sustained by the plaintiff in the motor vehicle accident of October 19, 1997, had resolved by May or June 1998. The evidence discloses that physiotherapy, massage therapy and chiropractic treatments, which were extensive in late 1997 and early 1998, were finished by April 1998. This is significant in this case as the evidence from the plaintiff herself was that she went for medical treatment when she felt she needed it. To her credit, the plaintiff worked hard at recovery, including following the directions of her medical advisers.

**16**  In the circumstances, counsel for the defendants says this case should be treated as a soft tissue injury that resolved in a seven month period without any emotional component.

**17**  There are two difficult issues. While I accept that the bulk of the injuries sustained have been resolved in that seven month period, I am concerned about whether any of the depression which, on the evidence, the plaintiff experienced after the spring of 1998 can be attributed to the accident. Second, there is the issue of whether the right shoulder injury which continues, although minimally, can be said to have been caused by the accident.

**18**  I have concluded that the motor vehicle accident was, in part, the cause of the depression which the plaintiff experienced. There is no doubt that another component, and perhaps a major component, was the breakdown of the plaintiff's marriage. I accept the evidence of the plaintiff that some time in 1998 she started to feel withdrawn and distant, experiencing a sense of guilt because of the pressure that she felt that she was placing upon other members of her family because of her inability to function at full capacity. I accept that this aspect of her depression was caused by the motor vehicle accident.

**19**  Further, I accept that the pain in her shoulder had its genesis in the motor vehicle accident or in the pool therapy which she underwent in the spring of 1998. I come to this conclusion after carefully considering Mr. Ritchey's determined submissions concerning that shoulder pain. He emphasizes that the first time the family physician, Dr. Schellenberg, identified right shoulder pain was in November 1998. Dr. Schellenberg testified that the pain that he dealt with on that occasion had nothing to do with the motor vehicle accident.

**20**  However, this must be considered in light of the report of the chiropractor, Dr. Dawydiak, that he made clinical notes of right shoulder pain in April 1998. It was his view that the pain was related to an increase in her aquatic exercises. Further, there is the evidence of the plaintiff on this point, testimony which I accept. I note that there is no other explanation as to source of this shoulder pain. Having said that, I also conclude that the shoulder pain is minimal and episodic.

**21**  In summary, I conclude that the plaintiff suffered soft tissue injuries most of which were resolved within seven months of the motor vehicle accident. I conclude there was a emotional component and that some of the depression which the plaintiff experienced was caused by the accident. I also conclude that the right shoulder pain continues from time to time, but that it was not a very serious limitation.

**22**  The plaintiff, relying upon Unger v. Singh [*(2000), 72 BCLR (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X21S-00000-00&context=); [*2000 BCCA 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X21S-00000-00&context=), submits that cases involving soft tissue injury with some depression attract a range of damages between $35,000 and $125,000. Counsel for the plaintiff submits the appropriate range in this case is $40,000 to $50,000. I am not satisfied that the range set out in the Unger case, which was one in which a jury had given an award of $187,000 for non-pecuniary damages, is appropriate to this case.

**23**  Rather, I find that the appropriate award of damages is closer to the defendants proposed range of $8,000 to $10,000. However, the defendants' position was based on a simple soft tissue injury resolved within seven months. I have found as a fact that the result of this accident was not a simple soft tissue injury but that the depression experienced by the plaintiff was, in part, caused by the accident and that some aspects of the injuries sustained, in particular to the right shoulder area, continue. I note that this was an accident in which the plaintiff struck the windshield with such force that it was cracked. I accept that although she returned to work in her store in March 1998 she had ongoing pain while working. I note that she required physiotherapy, occupational therapy, medications, and counselling. I accept that she was a good patient who worked hard at recovery. In all of the circumstances, I assess non-pecuniary damages at $20,000.

PAST WAGE LOSS

**24**  Counsel for the plaintiff says that in the period after the motor vehicle accident, the injuries interfered with the plaintiff's ability to operate her store. He says that I can infer this was the reason she in fact closed the store in September 1998. He recognizes that there is great difficulty in the circumstances in assessing damages under this head, but proposes an assessment of $5,000.

**25**  Counsel for the defendant says there is simply no evidence of any lost wages. He points to the evidence that the business was cyclical with May to September being the busiest time. He points to the clinical notes suggesting that in December 1997 the plaintiff was back to 80 per cent capacity. He suggests that the store was closed down because of depression arising from her family problems.

**26**  I have considered this evidence and the submissions. I am not satisfied that the plaintiff has proven upon a balance of probabilities any past loss that can be attributed to the accident. Indeed, the plaintiff confirmed in her testimony that her injuries did not affect the ability of the store to earn income, but only her ability to perform some of the functions in the store.

LOSS OF FUTURE EARNING CAPACITY

**27**  The defendants also argue that there is no evidence that the plaintiff has suffered any impairment to her ability to earn in the future. I am not persuaded. Because I have found that there is a continuation of right shoulder pain, I accept that there has been some impairment of her ability to earn future income. In my view, the circumstances of this case fit within those contemplated 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=) at 59. Even if the plaintiff will be able to earn as much as she could have prior to the accident, she is still entitled to compensation because for the rest of her life some occupations will be closed to her. It is impossible to say that over her working life the impairment will not harm her income earning ability. I note that she is not a highly educated person and her work history indicates that she has limited career possibilities, many of which would require physical and repetitive activity.

**28**  However, I am of the view that the impairment is slight. It exists, and is therefore compensable. In the circumstances, I would assess damages for impaired capacity to earn at $5,000.

COST OF FUTURE CARE

**29**  There is little evidence on this issue. However, Dr. van Rijn, a physician specializing in rehabilitation and retained by the plaintiff, stated in his report that it is increasingly likely her remaining symptoms are permanent and will persist in the future. Dr. Schellenberg is not particularly helpful in this regard. He says that the type of soft tissue injuries sustained by the plaintiff "can sometimes cause pain and disability for years." I would not on the basis of this comment make any award for cost of future care. However, given Dr. van Rijn's view, coupled with the chiropractor's opinion that the plaintiff will likely experience bouts of pain in the future which will probably require treatment, I conclude that a small award for cost of future care is warranted. I award $500.

**30**  Subject to the Rules of Court, the plaintiff will have her costs at Scale 3.

WILLIAMSON J.

**End of Document**

[***West Van Holdings Ltd. v. Economical Mutual Insurance Co., [2017] B.C.J. No. 2670***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RBH-0491-JF1Y-B3PS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

DeWitt-Van Oosten J.

Heard: November 23-24, 2017.

Judgment: December 29, 2017.

Docket: S161179

Registry: Vancouver

**[2017] B.C.J. No. 2670** | [*2017 BCSC 2397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T05-70H1-F2MB-S080-00000-00&context=) | [*15 C.E.L.R. (4th) 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T05-70H1-F2MB-S080-00000-00&context=) | [*[2018] I.L.R. para. I-6029*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T05-70H1-F2MB-S080-00000-00&context=) | [*[2018] I.L.R. para. I-6030*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T05-70H1-F2MB-S08D-00000-00&context=) | [*2017 CarswellBC 3660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T05-70H1-F2MB-S080-00000-00&context=) | [*288 A.C.W.S. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T05-70H1-F2MB-S080-00000-00&context=)

Between West Van Holdings Ltd. and West Van Lions Gate Dry Cleaners Ltd., Plaintiffs, and Economical Mutual Insurance Company and Intact Insurance Company, Defendants

(225 paras.)

[Editor's note: Supplementary reasons for judgment were released April 4, 2018. See [*[2018] B.C.J. No. 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5S2J-PSY1-FG68-G2GV-00000-00&context=).]

**Case Summary**

**Insurance law — Insurers — Duties — Duty to defend — Application by insured for declaration that insurers had duty to defend and other relief allowed — Neighbour sued insured claiming that its property had been contaminated from petroleum products and dry-cleaning chemicals that escaped from insured's land — Insurers provided general commercial liability insurance during relevant time — It was not clear exclusions ousted coverage for compensation, including remediation costs, arising out of pollutants that might have been used before insured owned and operated on lands — As long as there was possibility one claim claims was not clearly and unambiguously excluded, duty to defend was triggered.**

**Insurance law — Risk — Exclusions — Application by insured for declaration that insurers had duty to defend and other relief allowed — Neighbour sued insured claiming that its property had been contaminated from petroleum products and dry-cleaning chemicals that escaped from insured's land — Insurers provided general commercial liability insurance during relevant time — It was not clear exclusions ousted coverage for compensation, including remediation costs, arising out of pollutants that might have been used before insured owned and operated on lands — As long as there was possibility one claim claims was not clearly and unambiguously excluded, duty to defend was triggered.**

**Insurance law — Liability insurance — Business and commercial insurance — Exclusions — Application by insured for declaration that insurers had duty to defend and other relief allowed — Neighbour sued insured claiming that its property had been contaminated from petroleum products and dry-cleaning chemicals that escaped from insured's land — Insurers provided general commercial liability insurance during relevant time — It was not clear exclusions ousted coverage for compensation, including remediation costs, arising out of pollutants that might have been used before insured owned and operated on lands — As long as there was possibility one claim claims was not clearly and unambiguously excluded, duty to defend was triggered.**

|  |
| --- |
| Application by the insured for a declaration that the insurers had a duty to defend and other relief. Until 1999, an automotive repair business on the insured's property. Since 1976, a dry-cleaning business had operated on the property. In 2014, the insured was sued for damages arising out of contaminants alleged to have migrated from property owned and used by the insured to adjacent lands. The plaintiff in that action claimed that dry-cleaning chemicals and petroleum products had been used, kept, disposed of, handled or treated in a manner that caused or allowed the contaminants to be discharged into the groundwater and soil of the adjacent lands. From June 1998 to June 2002, Intact provided commercial general liability insurance to the insured. For the years 1998 to 2012, Economical provided commercial general liability insurance to the insured. The policies included insurance coverage for property damage liability. The insured alleged that under their insurance policies with the insurers, the insurers agreed to pay as compensatory damages arising out of property damage brought by an occurrence. Both insurers declined to defend the claim on the grounds that the claims fell outside the scope of coverage. Intact denied coverage on the grounds of the environmental liability exclusion. Economical denied coverage based on the pollution liability exclusion.  HELD: Application allowed.  The neighbour's action raised a claim that fell within the initial grant of coverage from both insurers. The neighbour sought compensation for property damage that resulted from occurrences and the policy periods for the insurers fell within the timeframe at issue. The exclusion clauses did not clearly and unambiguously preclude coverage. It was not clear that the exclusions ousted coverage for compensation, including remediation costs, arising out of pollutants that might have been used before the insured owned and operated on the lands, but for which they were liable in some sense because of deemed responsibility under the Environmental Management Act. As long as there was a possibility that one of the claims was not clearly and unambiguously excluded, the duty to defend was triggered. |

**Statutes, Regulations and Rules Cited:**

Contaminated Sites Regulation, [*B.C. Reg. 375/96*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F5KY-B02G-00000-00&context=),

Environmental Management Act, [*S.B.C. 2003, c. 53, s. 45*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-JSXV-G1MM-00000-00&context=)(1), s. 45(2), s. 46(1), s. 47(1), s. 47(5), s. 50(3)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 9-6*(2)

**Counsel**

Counsel for the Plaintiffs: Neo J. Tuytel, C. Michelle Tribe.

Counsel for the Defendant Economical Mutual Insurance Company: Dean P.J. Lawton, Q.C.

Counsel for the Defendant Intact Insurance Company: John M. Moshanas, Benjamin A. Meadow.

**Reasons for Judgment**

|  |
| --- |
| **DeWITT-VAN OOSTEN J.** |

**I. OVERVIEW**

**1**  West Van Holdings Ltd. ("West Van") and West Van Lions Gate Cleaners Ltd. ("Lions Gate") have been sued for damages arising out of contaminants alleged to have migrated from property owned and used by them, to adjacent lands.

**2**  For the years 1998-2012, the defendants provided commercial general liability insurance to West Van and Lions Gate.

**3**  The plaintiffs say the defendants have an obligation to defend them in the lawsuit. Relying on exclusion clauses in their respective policies, the defendants deny any such obligation.

**II. ISSUES**

**4**  The principal issue in this case is whether the defendants owe a duty to defend the claims made against West Van and Lions Gate.

**5**  To resolve this issue, the Court must determine whether there is any possibility that the claims fall within the coverage provided by the defendants' insurance policies, based on a review of the underlying pleadings.

**6**  If the answer is "yes", the plaintiffs seek summary judgment against the defendants under Rule 9-6(2) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*.

**7**  More specifically, the notice of application seeks:

1. a declaration that the defendant Intact Insurance Company ("Intact") is under a duty to defend pursuant to insurance policy 501105673;
2. a declaration that the defendant Economical Mutual Insurance Company ("Economical") is under a duty to defend pursuant to insurance policy 004837984;
3. an order that the defendants fund the plaintiffs' defence in the lawsuit and indemnify the plaintiffs for their costs to defend;
4. judgment against the defendants, jointly and severally, for the full amount of the plaintiffs' costs to defend;
5. costs of this proceeding, to date, on a solicitor and own client basis; and
6. interest.[**1**](#Forward_fnref_fnr-1)

**III. BACKGROUND**

**A. Claim Against West Van and Lions Gate**

**8**  On February 4, 2014, a notice of civil claim was filed in *8549737 Canada Inc. and 8428450 Canada Inc. v. West Van Holdings Ltd. and West Van Lions Gate Cleaners Ltd.*, S140879 (the "Action").

**9**  The plaintiffs in the Action are the registered and beneficial owners of lands and premises situated at 1583 Marine Drive in West Vancouver.

**10**  They allege that since October 1987, West Van has been the registered owner of lands and premises located next (or adjacent) to them at 550 and 552-16th Street, West Vancouver (the "West Van" lands).

**11**  The Action claims that over time, the West Van lands have been used for more than one purpose, including a dry-cleaning and automotive repair business.

**12**  The automotive repair business is said to have ceased operating in 1999. It is alleged that since 1976, the dry-cleaning business has operated under the management of Lions Gate.

**13**  The Action alleges that at "all material times", dry-cleaning chemicals and petroleum products have been "used, kept, disposed of, handled or treated" on the West Van lands "in a manner that caused or allowed" these contaminants to "be discharged or deposited into, or to escape and enter the soils and groundwater" of 1583 Marine Drive.

**14**  As a result, contamination has been caused to 1583 Marine Drive, including its groundwater.

**15**  Alternatively, the Action alleges that the "use, handling, treatment, keeping and disposal" of dry-cleaning chemicals and petroleum products on the West Van lands constitutes a "non-natural use" of the lands; these contaminants are "dangerous" and "likely to cause harm"; and, West Van and Lions Gate "failed to prevent [their] escape" from the West Van lands to 1583 Marine Drive.

**16**  The Action asserts a duty of care on the part of both plaintiffs. West Van is said to have owed a duty to "ensure that the use of [its lands] did not result in contamination". Lions Gate owed a duty to "ensure that its operations did not result in contamination".

**17**  The Action alleges that at "all material times", groundwater has run or flowed under, and within, the soils of both the West Van lands and 1583 Marine Drive. Moreover, it continues to do so.

**18**  It is said that during the course of West Van's ownership of the lands, contaminants have "migrated from the area in or about" the West Van lands "to the soils and groundwater" of 1583 Marine Drive.

**19**  During Lions Gate's operation, maintenance and control of its dry-cleaning business, contaminants have "migrated from the area in or about" the West Van lands "to the soils and groundwater" of 1583 Marine Drive.

**20**  The end result, according to the Action, is that some or all of these contaminants are present in the "groundwater or other constituents" of the lands and premises at 1583 Marine Drive in excess of the standards prescribed under British Columbia's *Contaminated Sites Regulation*, [*B.C. Reg 375/96*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F5KY-B02G-00000-00&context=). Remediation is required to remove the contamination.

**21**  The plaintiffs in the Action look to both West Van and Lions Gate to "stop the continuation" of contamination to 1583 Marine Drive, pay the costs of remediation and pay damages.

**22**  The pleaded causes of action include ***negligence***, nuisance and liability under the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K.).

**23**  The Action also asserts a statutory cause of action under the *Environmental Management Act*, *S.B.C. 2003, c. 53* (the "*Act*").

**24**  Section 45(1) of the *Act* deems current owners or operators of a "contaminated site" as persons who are "responsible for remediation"". Under s. 45(2), the owners or operators of a site "from which the [contaminating] substance migrated" are also deemed "responsible for remediation", unless they can bring themselves within one of the exceptions delineated under s. 46(1). [Emphasis added.]

**25**  Pursuant to s. 47(1) of the *Act*, a person who is deemed "responsible for remediation" is:

... absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. [Emphasis added.]

**26**  Under s. 47(5) of the *Act*:

Subjection to section 50(3) *[minor contributors]*, any person, including but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part. [Emphasis added.]

**27**  West Van and Lions Gate have filed a response to the Action. Among other things, they seek to defend the Action on the basis that the presence of contaminants at 1583 Marine Drive, and/or in its groundwater, was caused by the acts and omissions of previous owners and/or users of the West Van lands.

**B. Claim against Intact and Economical**

**28**  On February 8, 2016, West Van and Lions Gate filed a notice of civil claim against Economical and Intact (the "NOC").

**29**  This application for summary judgment arises out of the NOC.

**30**  In the NOC, West Van and Lions Gate describe themselves as holding and operating companies, respectively. West Van was incorporated in March 1987. Lions Gate was incorporated in March 1976.

**31**  The plaintiffs allege that under the defendants' insurance policies, Intact and Economical agreed to pay all monies that West Van and Lions Gate become legally obligated to pay as compensatory damages arising out of "property damage" brought about by an "occurrence".

**32**  The plaintiffs also allege both policies stipulate that the defendants, at their cost, will defend West Van and Lions Gate in any civil action brought against them for compensatory damages resulting from said "property damage".

**33**  Between June 1998 and June 2002 (inclusive), Intact insured West Van and Lions Gate under a policy of commercial general liability insurance.

**34**  The coverage provided from 1998 to 1999 included "Property Damage Liability". This was articulated in the Intact policy:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of property damage caused by an occurrence.

**35**  An "occurrence" is defined as "an accident, happening or event, including continuous or repeated exposure to conditions neither expected nor intended from the standpoint of the Insured".

**36**  The term "property damage" is defined as:

1. Physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting there from, or
2. Loss of use of tangible property which has not been physically injured or destroyed provided such loss is caused by an accident occurring during the policy period.

**37**  For 1999, through to 2002, West Van and Lions Gate continued to be insured by Intact. According to the successive policies, coverage was provided for:

... sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" ... which occurs during the Policy Period ... [and was] caused by an "occurrence" ...

**38**  An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".

**39**  The term "property damage" is defined in the successive policies as: (a) "Physical injury to tangible property, including all resulting loss or use of that property"; or (b) "Loss of use of tangible property that is not physically injured".

**40**  Between June 2002 and June 2012 (inclusive), Economical was the insurer for West Van and Lions Gate, again with a focus on commercial general liability insurance.

**41**  For this timeframe, Economical's successive policies committed to pay:

... those sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies ... This insurance applies only to "bodily injury" and "property damage" which occurs during the form period. The "bodily injury" or "property damage" must be caused by an "occurrence" ...

**42**  The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".

**43**  "Property damage" is defined as: (a) "Physical injury to tangible property, including all resulting loss of use of that property"; or (b) "Loss of use of tangible property that is not physically injured".

**44**  Both the Intact and Economical policies recognize, in one form or another, that the business operations on the West Van lands involved dry-cleaning.

**45**  The Intact and Economical policies also contained pollution exclusion clauses, which limited the scope of coverage provided to West Van and Lions Gate.

**46**  Attached as Appendix A to these *Reasons for Judgment* is a chart identifying the policy in place at the material time; its period of coverage; and relevant portions of the impugned exclusions.

**47**  West Van and Lions Gate tendered defence of the Action to Intact and Economical.

**48**  However, both defendants declined to defend on grounds that the claims fall outside the scope of coverage.

**49**  Intact denied coverage to the plaintiffs in February 2016, relying on its "Environmental Liability" exclusion. Economical denied coverage in October 2015, relying on its "Pollution Liability" exclusion.

**IV. LEGAL PRINCIPLES**

**50**  Resolving the main issue in this case requires the application of legal principles governing: (a) the interpretation of insurance contracts; and (b) the duty to defend.

**A. Interpretation of Insurance Contracts**

**51**  The parties have put numerous authorities before me on the interpretation of insurance contracts, including exclusion clauses.

**52**  This includes *Co-operators General Insurance Company v. Kane*, [*2017 BCSC 1720*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PMN-R051-JJD0-G16D-00000-00&context=), wherein Justice Fitzpatrick helpfully summarized the generally-accepted interpretive framework:

[19] ... well-known principles relating to the interpretation of insurance policies can be summarized as follows:

1. the general purpose of insurance is to protect an insured against losses arising from unforeseen and accidental actions: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [*2000 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44Y-00000-00&context=) at paras. 68-69;
2. it is necessary to interpret insurance contracts as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law: *National Bank of Greece v. Katsikonouris*, *[1990] 2 S.C.R. 1029* at 1043;
3. courts should interpret a contract of insurance as a whole: *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*, [*2010 SCC 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1J4-00000-00&context=) at para. 22, citing *Scalera* at para. 71;
4. as contracts of adhesion, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, and avoid interpretations that would give rise to an unrealistic result or that which would not have been in their contemplation at the time the policy was concluded: *Progressive Homes* at para. 23; *Scalera* at para. 71; and
5. as contracts of adhesion, where there is an ambiguity which the rules of construction fail to resolve, courts will construe the policy *contra proferentem* against the insurer. A corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly: *Progressive Homes* at para. 24; *Scalera* at para. 70.

**B. Duty to Defend**

**53**  In *Kane*, Justice Fitzpatrick also set out the analytic framework that governs the duty to defend, at para. 20:

[The above-noted] general interpretation principles apply equally to the duty to defend and exclusion clauses: *Derksen v. 539938 Ontario Ltd.*, [*2001 SCC 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M47R-00000-00&context=) at para. 49. Other general principles that apply in relation to the duty to defend and exclusion clauses are:

1. an insurer is only required to defend a claim where the facts alleged in the pleadings, if proven, would require the insurer to indemnify the insured (i.e. the "pleadings rule"): *Monenco Ltd. v. Commonwealth Insurance Co.*, [*2001 SCC 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48M-00000-00&context=) at para. 28; *Progressive Homes* at para. 19; *Lombard General Insurance Company of Canada v. 328354 B.C. Ltd.*, [*2012 BCSC 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62DV-00000-00&context=) at para. 21; *Canadian Northern Shield Insurance Company v. Intact Insurance Company*, [*2015 BCSC 767*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G8K-Y431-JWR6-S2CB-00000-00&context=) at para. 18;
2. all that is necessary, in order to trigger the duty to defend, is the mere possibility that a claim falls within coverage under the insurance policy based on a review of the pleadings: *Monenco* at paras. 29-30; *Progressive Homes* at para. 19; *Lombard* at para. 23; *Johnson v. Aviva Insurance Company of Canada*, [*2014 ABQB 688*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G7X-SDT1-JTGH-B00F-00000-00&context=) at paras. 33-35;
3. where pleadings are not framed with sufficient precision to determine whether claims are covered by the policy, the duty to defend will be triggered where, on a reasonable reading of the pleadings, coverage can be inferred: *Monenco* at para. 31; [and]
4. "the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy": *Scalera* at para. 75, citing *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=). This is consistent with resolving any ambiguity in favour of the insured: *Monenco* at paras. 31-32; *Lombard* at para. 24; *Johnson* at para. 33.

**54**  In determining the matter before me, I will apply both of these frameworks, as articulated by Justice Fitzpatrick. To the extent I consider it necessary to reference additional interpretive principles, and/or authorities, these references will appear elsewhere in the *Reasons for Judgment*.

**V. POSITION OF THE PARTIES**

**55**  For the most part, the parties agree on the governing legal principles.

**56**  However, they have different views on how these principles should be applied in the circumstances of this case, as well as the end result.

**57**  In setting out their respective positions, I will not capture the whole of the parties' submissions.

**58**  Instead, for the purpose of these *Reasons*, I will reference what I see as the essence of their arguments. I have read the entirety of the written submissions.

**A. Position of the Plaintiffs**

**59**  The plaintiffs say that once the Intact and Economical policies are read, *as a whole*, the potential for liability arising out of the Action "indisputably" falls within the scope of coverage.

**60**  In their view, if a trial of the Action establishes the presence of chemicals, petroleum or other forms of contaminant on the property or in the groundwater at 1583 Marine Drive, this will constitute physical injury to tangible property and it is a form of injury that likely carries an adverse impact (or loss) in use of that property.

**61**  Accordingly, it easily meets the definition of "property damage" in both the Intact and Economical policies.

**62**  The plaintiffs also say the damage will have been shown to have arisen as a result of an "occurrence", and to have been caused during the relevant policy periods.

**63**  The Action alleges that contaminants have been "used, kept, disposed of, handled or treated" on the West Van lands in a manner that caused or allowed them to enter the soil and groundwater of those lands. It is further alleged that the contaminants have escaped or were otherwise released from the West Van lands, and then migrated to the soil and groundwater of 1583 Marine Drive. As a result, contaminants are present at 1583 Marine Drive. By virtue of their presence, they have caused and continue to cause damage.

**64**  According to the plaintiffs, if these facts are established, both migration and the ongoing presence of contaminants involve the "continuous or repeated exposure to conditions" and, as such, each of these scenarios constitute an "accident", "happening" or "event" that has given rise to damage. Furthermore, both policies were in place during the relevant timeframe.

**65**  West Van and Lions Gate acknowledge the policies contain exclusion clauses for "Environmental Liability" and "Pollution Liability" respectively.

**66**  However, it is their position that the "scope and application" of these clauses is limited and they do not preclude coverage for all of the Action's contemplated sources of liability.

**67**  In making this argument, the plaintiffs stress the low threshold they have to meet to trigger the duty to defend: "so long as there is a mere possibility that any claim made in the [A]ction might succeed, which falls within coverage, the duty to defend will not be excluded". [Emphasis added.]

**68**  See, for example, *Precision Plating Ltd. v. Axa Pacific Insurance Company*, [*2015 BCCA 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G97-W001-JGPY-X48G-00000-00&context=) at para. 33, leave to appeal ref'd [*[2015] S.C.C.A. No. 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GXR-78R1-F4W2-61M9-00000-00&context=).

**69**  They furthermore emphasize that at this stage of the proceedings, it does not matter whether the allegations made in the Action can be proven in fact. It is only a potential for liability that must be shown: *Progressive Homes v. Lombard General Insurance Company of Canada*, [*2010 SCC 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1J4-00000-00&context=), at para. 19.

**70**  The plaintiffs stress the importance of bringing a wide lens to the assessment of the claims underlying the Action in determining whether the duty to defend has been triggered. This includes, in the face of imprecise pleadings, *inferring* a potential for liability that falls within the scope of coverage.

**71**  The plaintiffs argue that on a broad reading of the underlying pleadings, West Van and Lions Gate are potentially liable for damages resulting from "occurrences" of a form or type not specified in the Intact and Economical exclusion clauses, at least for certain timeframes, including the act of "migration" or the "presence" of contaminants at 1583 Marine Drive. As a result, the "Environmental Liability" and "Pollution Liability" clauses capture some forms of "occurrence" specific to pollutants, but not all.

**72**  The plaintiffs say that "unless all occurrences which potentially caused or contributed to the loss or damage [claimed in the Action] are clearly and unambiguously excluded, coverage for the duty to defend will not be ousted". [Emphasis added.]

**73**  It is also argued that the Action renders the plaintiffs potentially liable for not only damages resulting from acts or omissions solely attributable to them, but, because of its invocation and reliance on the *Act*, the Action also carries the potential for a compensatory burden arising out of the acts or omissions committed by predecessor owners and/or users of the West Van lands.

**74**  Once the *Act* is added, the plaintiffs say the Action puts them at risk of liability for remediation costs arising out of "occurrences" and "property damage" that may be found solely attributable to them; brought about by concurrent acts or omissions committed by them; contributory acts or omissions; and, "occurrences" and "property damage" that has resulted exclusively from the conduct of predecessor third parties, for which the plaintiffs are retroactively liable by virtue of their status as subsequent owners of, and/or operators on, the West Van lands.

**75**  It is the plaintiffs' position that the potential for concurrent liability, contributory liability, and/or retroactive liability by virtue of statutorily-imposed responsibility for pre-existing third-party acts, is not ousted by the Intact or Economical exclusions.

**76**  At the very least, the scope of the exclusion clauses, and whether they deny coverage for all four sources of potential liability, is not clear.

**77**  In the hearing before me, the plaintiffs spent considerable time highlighting:

1. differences in the wording of Intact's "Environmental Liability" exclusion between policy periods;
2. differences in the wording of Economical's "Pollution Liability" exclusion between policy periods;
3. differences in the wording between Intact and Economical in addressing pollutants, generally; and
4. the broader language chosen by both Intact and Economical, within their respective policies, when crafting other exclusion clauses addressing property damage resulting from contamination.

**78**  From their perspective, these differences in wording are important because "when insurers use different words and phrases in different clauses, such differences must be treated as intentional and such wordings must be given their own meanings".

**79**  Applying this approach to the Intact and Economical policies, it is the position of West Van and Lions Gate that amendments made to the "Environmental Liability" and "Pollution Liability" exclusions, over time, reflect a recognition on the defendants' part that these clauses were unclear and incomplete, and required refinement to ensure that all potential forms of liability were covered.

**80**  Perhaps more importantly, the manner in which the defendants worded other exclusion clauses within their policies specific to contaminants (*e.g*. liability arising out nuclear energy hazards, fungi, fungi derivatives and asbestos) shows that had they wanted to, the defendants could have easily worded the "Environmental Liability" and "Pollution Liability" clauses in a way that made them air-tight. They knew what to do, but chose not to.

**81**  The plaintiffs submit that once the Intact and Economical policies are considered in their entirety, and the exclusion clauses are analyzed in light of their surrounding context, the clauses are demonstrably ambiguous. This ambiguity cannot be resolved with reference to the policies themselves and/or the reasonable expectations of the parties.

**82**  The end result, argue the plaintiffs, is that the scope of coverage for both policies must be construed broadly and the exclusion clauses are to be given a narrow interpretation, *contra proferentem* against the defendants.

**B. Position of Intact**

**83**  Intact argues that at all material times, the policies it had in place with West Van and Lions Gate "specifically excluded coverage for pollution liability".

**84**  Intact agreed to provide the plaintiffs with "... liability coverage for compensatory damages for "Property Damage" as defined, arising from an "occurrence" that took place during the "policy period" between June 18, 1998 and June 18, 2002 subject to the declarations, terms, conditions, exclusions and statutory conditions contained in the Policy". [Emphasis added.]

**85**  Relying on its "Environmental Liability" exclusion, Intact says it explicitly removed from the scope of this coverage *any* potential for liability "arising out of a release of petroleum products and dry cleaning chemicals at, or from any premises, site or location owned or rented by" the plaintiffs.

**86**  In light of this exclusion, which Intact sees as absolute, its successive policies with West Van and Lions Gate do "not provide [any form of] coverage for property damage arising from the actual, alleged or potential discharge, seepage, leakage, migration or escape of "petroleum products" or "dry cleaning chemicals" at, or from any premises, site or location which [is] owned or rented by" the plaintiffs.

**87**  From the perspective of Intact, the substance of the Action seeks monetary relief for precisely this: property damage that resulted from the migration of pollutants from premises that were owned and/or utilised by the plaintiffs. This is readily apparent from the pleadings themselves.

**88**  In light of the manner in which the Action has been framed, the claims made against West Van and Lions Gate "directly and unambiguously" engage the plain meaning of the "Environmental Liability" exclusion.

**89**  As a result, Intact says it has no obligation to defend the plaintiffs or to indemnify them from any liability that may be found against them in the Action.

**C. Position of Economical**

**90**  Like Intact, it is Economical's position that its policies with West Van and Lions Gate explicitly exclude coverage for "property damage caused by a pollutant".

**91**  On plain reading, the policies exclude coverage for "liability arising out of the escape of petroleum products and dry cleaning chemicals at, or from any premises, owned, rented, or occupied by" the plaintiffs. This includes any damage "arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of "petroleum products" or "dry cleaning chemicals".

**92**  Economical argues that the pleadings underlying the Action "clearly set forward allegations of fact that trigger" its "Pollution Liability" exclusion and, as a result, there is no obligation to defend or indemnify the plaintiffs.

**93**  The true nature or substance of the Action alleges property damage arising from migrating petroleum products and dry-cleaning chemicals. These are "clearly pollutants" and fall within the scope of the exclusion.

**94**  Economical denies that the Action alleges contamination resulting from pollutants that were used *before* West Van owned the lands (retroactive liability). It also denies that the pleadings allege a "concurrent or contributing cause" for the contamination sustained to 1583 Marine Drive.

**95**  At the hearing, counsel for Intact adopted the submissions made on behalf of Economical. Presumably, the adoption includes both of the above-noted assertions.

**96**  From Economical's perspective, the language of its successive policies, including the exclusion clauses, is unambiguous.

**97**  The plaintiffs' argument, which Economical says involves a complicated comparative analysis of clauses within the four corners of each policy period, amendments made from one policy period to another and language differences between the policies of the defendants, would only be relevant, if at all, in the face of ambiguity. Economical argues that no ambiguity exists in this case.

**98**  In responding to the plaintiffs' application, both Intact and Economical rely on cases in which exclusion clauses similar to the ones embodied within their policies, or clauses that are "substantially the same", were determined to be unambiguous. These include *699982 Ontario Ltd. et al. v. Intact Insurance Company*, [*2011 CarswellOnt 15756*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFX1-JPP5-22GF-00000-00&context=) (Ont. S.C.); aff'd, [*2012 ONCA 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FC6N-X0JT-00000-00&context=); *Dave's K. & K. Sandblasting (1988) Ltd. v. Aviva Insurance Company of Canada*, [*2007 BCSC 791*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21FX-00000-00&context=); and *Precision Plating Ltd*.

**VI. ANALYSIS**

**A. Whether the Pleadings Fall within the Initial Grant of Coverage**

**99**  The plaintiffs bear the onus of showing that the pleadings underlying the Action "fall within the initial grant of coverage": *Progressive Homes* at para. 29.

**100**  Unlike the circumstances in *Progressive Homes* (see para. 53 of that decision), the defendants have not declined to defend the Action on grounds that the claims made against West Van and Lions Gate fall outside the scope of the initial grant.

**101**  Instead, in its February 2016 denial of coverage, Intact justified the denial on grounds that the "claim advanced in the Action falls squarely within the Policy exclusion in respect of pollution liability".

**102**  Economical took this same approach. In its denial of October 2015, Economical cited its "Pollution Liability" exclusion as the basis for its position.

**103**  I infer from the manner in which the defendants responded to the plaintiffs' invocation of the duty to defend, at first instance, and their submissions before me, that they accept the plaintiffs have met their onus under the first stage of the *Progressive Homes* analysis.

**104**  Or, at the very least, they do not materially challenge this point.

**105**  The defendants do not argue that the contamination said to have occurred to 1583 Marine Drive, including its groundwater, results in something other than "property damage" within the meaning of their policies.

**106**  Nor do the defendants suggest that the "property damage", if established in fact, will have "arisen" from something other than an "occurrence".

**107**  They do not argue that either of the events giving rise to the damage, as alleged in the underlying pleadings, or the damage itself, falls outside their respective policy periods.

**108**  In any event, and independent of the defendants' position, I am satisfied on a consideration of the matter as a whole that the Action raises a claim that falls within the initial grant of coverage from both Intact and Economical: *Progressive Homes* at para. 51.

**109**  Such is the case even with the defendants' own articulations of their initial grants, which are narrower in scope than what is suggested by the plaintiff.

**110**  Intact says it agreed to provide the plaintiffs with liability coverage for compensatory damages for "Property Damage" as defined, arising from an "occurrence" that took place during the "policy period" between June 18, 1998, and June 18, 2002.

**111**  Economical says its policy "only responds" to "property damage" *and* "occurrences" that arise during the relevant form periods.

**112**  In *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [*2000 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44Y-00000-00&context=), the Supreme Court directed, at paras. 75-76, that "wide latitude" be given to the underlying pleadings in assessing whether they raise a claim within the impugned policy.

**113**  Applying this approach to the Action, it is alleged that because of the manner in which dry-cleaning chemicals and petroleum products have been used, stored or otherwise handled on the West Van lands, they have moved into the soil, as well as the groundwater that flows beneath and between the West Van lands and 1583 Marine Drive.

**114**  It is further alleged that over time, this has resulted in dry-cleaning chemicals and petroleum products migrating to 1583 Marine Drive, being present in the soil and groundwater of that property, and causing damage.

**115**  The pleadings seek compensation for "property damage" that resulted from "occurrences".

**116**  The Action claims that both the "occurrences" (whether consisting of migration, the presence of contaminants at 1583 Marine Drive, or both) and their resulting "property damage" have been of a continuing nature, spanning the entirety of Lions Gate's use of the lands; West Van's ownership; and, to the filing date.

**117**  The policy periods for Intact and Economical fall within the timeframe at issue.

**118**  In my view, the nature of the allegations made in the underlying pleadings provide a sufficient basis from which to find that the Action raises one or more claims within the scope of the initial grant, for both defendants.

**119**  I also agree with the plaintiffs that because of the Action's invocation of the *Act*, with the assertion that each of the plaintiffs is a "person responsible for remediation", one or more of the claims that fall within the scope of the initial grant also carry with them the possibility of liability for pollutants that were placed or used on the West Van lands by predecessor owners or operators, and either migrated to 1583 Marine Drive or were already present during the defendants' policy periods, causing damage.

**120**  As explained in *First National Properties v. Northland Road Services*, [*2008 BCSC 894*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G37R-00000-00&context=) at paras. 5-6:

The *[Environmental Management Act]* creates a cause of action that is status rather than fault based. It imposes absolute, retroactive (i.e. retrospective), and joint and separate liability on "a person responsible for remediation at a contaminated site" (s. 47(1)). A responsible person is broadly defined and includes a current or previous owner (defined as a person who is in possession, has the right of control, or occupies or controls the use of real property), and a current or previous operator (defined as a person who is or was in control of or responsible for any operation located at a contaminated site). A person is defined as including a government body, and any director, officer, employee or agent of a person or government body.

Huddart J.A. in *Workshop* [*Holdings Ltd. v. CAE Machinery Ltd.*, [*2003 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G51X-00000-00&context=)] described the impact of these statutory concepts of liability at para;46:

The concepts of absolute and joint and several liability facilitate actions against alleged polluters, make recovery of damages from multiple defendants more likely, and remove the burden of proving causation or fault-based conduct. [Emphasis added.]

See also: *Domovitch v. Willows*, [*2016 BCSC 1068*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K27-9R71-JWBS-63YB-00000-00&context=) at paras. 19-22; *First National Properties v. Northland Road Services*, [*2008 BCSC 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3DH-00000-00&context=) at paras. 55-56; and *Gehring et al. v. Chevron Canada et al.*, [*2006 BCSC 1639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2PK-00000-00&context=).

**121**  In light of s. 47(1) of the *Act*, as pled, the plaintiffs are correct that the Action raises four distinct sources of potential liability against them as described in paras. 73-74 of these *Reasons*:

... the plaintiffs say the Action will put them at risk of liability for remediation costs arising out of "occurrences" and "property damage" that may be found solely attributable to them; brought about by concurrent acts or omissions committed by them; contributory acts or omissions; and, "occurrences" and "property damage" that has resulted exclusively from the conduct of predecessor third parties, for which the plaintiffs are retroactively liable by virtue of their status as subsequent owners of, and/or operators on, the West Van lands.

**122**  In deeming the owners or operators of a site "from which the [contaminating] substance migrated" as "persons responsible for remediation", with absolute and retroactive liability, the *Act* necessarily reaches back and brings historical events into a current owner or operator's present-day risk of liability.

**123**  It is then up to the current owner or operator to demonstrate that it is "not responsible for remediation" under s. 46(1) of the *Act*, or to convince a regulatory decision-maker that the current owner's contribution to the contamination was "minor" and its liability should be limited to the specified amount of attribution: *Act*, s. 50(3).

**124**  In reaching my conclusions on the first stage of the *Progressive Homes* analysis, I have worked from the face of the underlying pleadings and did not consider it necessary to take into account any "extrinsic evidence" put before me by West Van and Lions Gate, or the response to the pleadings filed by the plaintiffs.

**125**  In support of their position on the duty to defend, the plaintiffs tendered various reports and/or other documents relating to environmental inspections that have been completed at 1583 Marine Drive, as well as prior ownership and use of the West Van lands. This material was tendered to "illuminate the ... open-ended allegations in the Action".

**126**  Relying on the Supreme Court's decision in *Monenco Ltd. v. Commonwealth Insurance Co.*, [*2001 SCC 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48M-00000-00&context=) at paras. 36-40, the defendants objected to the admissibility of this evidence on essentially two bases: (1) resort to extrinsic evidence is not necessary in the circumstances of this case; and (2) even if the defendants are wrong about that, *Monenco* makes it clear that extrinsic evidence should only be considered when it has been "explicitly referred to within the pleadings".

**127**  None of the material tendered by the plaintiffs is referred to in the Action.

**128**  As noted, I did not consider it necessary to resort to these materials to assess the true nature of the pleadings, or the potential scope of liability. As a result, resolution of the objection raised by the defendants has been rendered moot. The extrinsic materials played no part in my analysis.

**129**  The issue, in this case, is whether the "Environmental Liability" and "Pollution Liability" exclusions render coverage unavailable to the plaintiffs, notwithstanding the fact that the Action raises one or more claims within the initial grant of coverage.

**B. Whether Coverage is Precluded by the Exclusions**

**130**  In answering this second question, the onus shifts to the defendants.

**131**  Intact and Economical must show that coverage under the initial grant is "clearly and unambiguously" precluded by the exclusion clauses: *Progressive Homes* at para. 51. Only then can it be said there is no possibility they will be called upon to indemnify West Van and Lions Gate on any of the claims asserted in the Action.

**132**  Moreover, as correctly noted by the plaintiffs, "in order for an exclusion clause to oust the duty to defend, it must clearly and unambiguously apply to *all* of the claims made against the insured": *Kane* at para. 72, citing *Progressive Homes* at paras. 54, 67. [Emphasis in the original.]

**133**  It is not disputed that the dry-cleaning chemicals and petroleum products at issue in the Action constitute "pollutants" within the meaning of the Intact and Economical exclusions.

**134**  However, after a review of these clauses, I am not persuaded that they "clearly and unambiguously" preclude coverage within the specific context of this case.

**135**  In particular, it is not clear to me that the exclusions oust coverage for compensation, including remediation costs, arising from pollutants that may have been used *before* West Van and Lions Gate owned and/or operated on the West Van lands, but for which the plaintiffs are liable in some form because of deemed responsibility under the *Act*.

**136**  At the very least, there is a "mere possibility" that coverage for one or more claims made on this basis has not been carved out of the initial grant.

**137**  I find the Intact and Economical exclusions ambiguous in this regard.

**138**  Intact's 1998-1999 "Environmental Liability" clause stipulates that coverage is not available for damage to property "arising" out of the "actual ... discharge ... release or escape of pollutants", "[a]t or from premises owned, rented or occupied by an Insured ...".

**139**  However, no clarity is provided on whether this denial of coverage includes or extends to concurrent liability, contributory liability or retroactive liability for "property damage" arising out of "occurrences" that may have been brought about by an independent third party, but lay at the feet of the insured by virtue of its status as a subsequent owner or operator, and deemed responsibility by statute.

**140**  Intact's argument is that it does not matter how an "occurrence" resulting in contamination is attributed to the insured, or under whose watch it may have taken place.

**141**  The "Environmental Liability" exclusion rules out coverage for "property damage" arising from pollutants--full stop. As long as the *source* of the alleged damage and claim for monetary relief is pollution, the exclusion is engaged and every form of liability, however engendered, necessarily falls in scope.

**142**  The difficulty I have with this argument is that the 1998-1999 exclusion is not crafted that way, when read as a whole.

**143**  Although the clause opens with admittedly broad wording, asserting that the policy's coverage for "property damage" does not apply when the alleged damage is brought about by pollutants, it proceeds to single out certain bases for monetary claims made against the insured that are nonetheless specific to pollutants, including loss or expense that arises out of a "governmental direction or request", and "[f]ines, penalties, punitive or exemplary damages arising directly or indirectly out of the discharge, dispersal, release or escape of any pollutants". [Emphasis added.]

**144**  In my view, the manner in which Intact's 1998-1999 exclusion is worded begs a question. If the opening language of the clause precludes coverage for *any* form of monetary liability arising out of contamination associated with the release or escape of pollutants (compensatory or otherwise), why was it necessary to include the specifics?

**145**  Doing so impliedly recognizes that liability claims against the plaintiffs arising out of the "actual, alleged, or threatened discharge, disposal, release or escape of pollutants" can manifest themselves in different forms, and through direct and indirect attribution.

**146**  I agree with the plaintiffs it also impliedly recognizes that in order to ensure all forms of potential liability are excluded, both direct and indirect, the exclusion clause needs to make this explicit.

**147**  As noted by the Supreme Court in *Derksen v. 539938 Ontario Ltd.*, [*2001 SCC 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M47R-00000-00&context=) at para. 48, "If an insurer wishes to oust coverage in cases where covered perils operate concurrently with excluded perils, all it has to do is expressly state it in the insurance policy".

**148**  I appreciate this is not a case on all fours with *Derksen*; however, the direction provided in para. 48 of that decision is apposite. Although Intact's 1998-1999 "Environmental Liability" exclusion explicitly ousts coverage resulting from *some* forms of liability associated with pollutants, it is silent on others, including the potential for deemed responsibility of the type alleged in the Action.

**149**  The end result, in my view, is ambiguity.

**150**  Intact's 1999-2002 "Environmental Liability" exclusion also says nothing about concurrent, contributory or retroactive liability arising from statutorily deemed responsibility for contamination. As such, it suffers from the same gap.

**151**  Economical's successive policies with West Van and Lions Gate are to this same effect. They address damage to property "arising out of" the "actual, alleged or threatened discharge, dispersal, release or escape of pollutants", as well as any loss or expense "arising out of" a direction or request to "clean up" pollutants by government.

**152**  However, they are silent on the issue of concurrent liability, contributory liability or retroactive liability for "property damage" that arises from "occurrences" that have been brought about by an independent third party, but lay at the feet of the insured by virtue of its status as an owner or operator.

**153**  As with Intact, Economical argues that all forms of potential monetary liability, deemed or otherwise, are necessarily subsumed by the generality and absolutism of its "Pollution Liability" wording. However, I disagree, for essentially the same reasons that I have found Intact's exclusion to be less than clear.

**154**  As noted in *Progressive Homes* at para. 23: "[w]here the language of [an] insurance policy is ambiguous, the courts rely on general rules of contract construction". This includes adopting an interpretation consistent with the "reasonable expectations" of the parties where supported by the text of the policy.

**155**  It also includes avoiding interpretations "that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded": *Progressive Homes* at para. 23.

**156**  I have no evidence of the parties' expectations when they entered into the Intact and Economical insurance contracts or what was in their contemplation at the time.

**157**  However, I agree with the plaintiffs that in addressing this issue, it is appropriate for the Court to consider the "Environmental Liability" and "Pollution Liability" clauses within the context of the entirety of the policy in which they are situated: *Progressive Homes* at para. 37.

**158**  To this end, when other exclusion clauses contained within the Intact and Economical policies are examined, it is apparent there is greater specificity on the issues of concurrent, contributory and retroactive liability.

**159**  For example, both policies contain an exclusion that is directed at "property damage" caused by "nuclear energy hazards". It is explicitly stated that coverage is not available for damage that is caused "directly or indirectly from [a] nuclear energy hazard arising from ... the ownership, maintenance, operation, or use of a nuclear facility ...".

**160**  For policy year 2003-2004, Economical added a "Fungi and Fungal Derivatives Exclusion" that ousts coverage for "loss or damage consisting of or caused directly or indirectly, in whole or in part, by any "fungi" or "spores" ...".

**161**  For years 2004-2006, Economical's "Fungi and Fungal Derivatives" exclusion was specified to apply "regardless of the cause of the loss or damage, other causes of the injury, damage, expense or costs or whether other causes acted concurrently or in any sequence to produce the injury, damage, expenses or costs ...".

**162**  During this same timeframe, Economical's policy included an "Asbestos" exclusion, which denied coverage for property damage arising "directly or indirectly" from asbestos. As with the fungi exclusion, this clause explicitly stated that it applied "regardless of the cause of the loss or damage, other causes of the injury, damage ... or whether other causes acted concurrently or in any sequence ...".

**163**  These are but some examples of other, more specific wording that is contained within the Intact and Economical policies.

**164**  With reference to these other clauses, the plaintiffs' argument is not without merit. If the "Environmental Liability" and "Pollution Liability" exclusions were reasonably expected (or contemplated) by both sides to oust coverage for *any form* of pollutant-related liability, in whole or in part, statutorily-deemed or otherwise, then one would have expected to see the specificity of language that is found elsewhere in the policies, including explicit wording that removes the possibility of coverage for property damage that is attributable to the acts or omissions of predecessor owners or operators, but may legally lay at the feet of the insured.

**165**  In accordance with *Progressive Homes*, courts "should also strive to ensure that similar insurance policies are construed consistently": para. 23.

**166**  To this end, the defendants rely on three cases involving pollution exclusions with substantially similar wording to the Intact and Economical policies. They argue that these authorities provide a complete answer to the plaintiffs' application, and that I should follow them in my interpretation of the "Environmental Liability" and "Pollution Liability" clauses.

**167**  I have reviewed all three cases. In my view, they are distinguishable.

**168**  In *699982 Ontario Ltd.*, the insured owned a shopping plaza. A claim was made against it that pollution from a dry-cleaning business operated by one of the insured's tenants caused damage to the shopping plaza and a neighbouring property.

**169**  The underlying pleadings alleged that pollutants were put on the insured's property, presumably for use by the dry-cleaning tenants. The pollutants then migrated to the neighbouring property.

**170**  It was further alleged that before this occurred, there were pre-existing pollutants on the insured's property, which apparently had come from the neighbouring property, and the insured was said to have improperly allowed these same pollutants to remain, cause damage to its own property and migrate back to the neighbouring property: *699982 Ontario Ltd*. at para. 6.

**171**  The defendant's insurance policy included a "Pollution Exclusion" with similar wording to the policies before me. It precluded coverage for "... property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants ... at or from premises owned ... by any insured": *699982 Ontario Ltd*. at para. 5.

**172**  An application for indemnity and defence costs by 699982 Ontario Ltd. was denied on two bases: (1) the policy contained an exclusion clause whereby coverage was not available for damage that occurred to property owned by the insured (which formed part of the underlying pleadings); and (2) the "Pollution Exclusion" applied.

**173**  In my view, it is clear from the Ontario judgment that in applying the "Pollution Exclusion", Roberts J. was focused on the fact that the underlying pleadings alleged a fault-based nexus between property damage and acts or omissions by the insured's tenants:

[13] The present case is completely different from the instances of an accidental discharge of carbon monoxide from a broken furnace ... or the unexpected escape of coal dust from a school's coal bed ... where the pollution was not released as a result of any direct action on the part of those claimants or as a by-product of their respective business activities.

[14] Here, there is a clear connection pleaded between the dry cleaning operations of 699982's tenants and the alleged pollution. Whether or not 699982's dry cleaner tenants in fact used PCE in their businesses or their businesses caused the pollution and property damages complained of is not the question. It is common ground that, for the purpose of determining whether the policy covers the claims and there is a duty to defend, I must take the allegations in the claims as if they are true ... [Internal references omitted; emphasis added.]

**174**  There is no indication that in considering the scope of the "Pollution Exclusion", the Court was required in that case to turn its mind to, or address the potential for concurrent, contributory or retroactive liability based on contamination that was occasioned by the acts or omissions of an independent third party (such as a predecessor owner or user of the property), but lay at the feet of the insured through a statutory cause of action predicated on deemed responsibility by virtue of ownership or operator status.

**175**  The determination made in *699982 Ontario Ltd*. was upheld on appeal, but the appellate judgment is brief and simply endorses the conclusion of the hearing Judge. As such, it does not assist in better understanding the breadth of the analysis brought to bear on assessing the parameters of the "Pollution Exclusion", within the full context of the underlying pleadings.

**176**  I note that in dismissing the appeal, the Court described the claim against the insured as being "in respect of property damage allegedly caused by pollution from the dry cleaner tenants of a shopping plaza owned by 699982 Ontario Limited ...": [*2012 ONCA 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FC6N-X0JT-00000-00&context=) at para. 1. [Emphasis added.]

**177**  On its face, *6999982 Ontario Ltd*. appears to be a case where the true nature or substance of the pleadings, although factually inclusive of pre-existing pollutants, was nonetheless focused on fault-based liability against the insured.

**178**  A second case advanced by the defendants is *Dave's K. & K. Sandblasting*.

**179**  In that case, the petitioner operated a sandblasting business on leased property. After the lease was terminated and the petitioner left the site, environmental testing determined that the soil was contaminated beyond allowable limits. The property owner paid over $160,000 to remediate the site and sued the petitioner for the cost.

**180**  The property owner "framed its claim" against the petitioner in both contract and tort. Among other things, it submitted that the petitioner breached its lease by failing to remove sandblasting residue from the property and releasing contaminants in excess of allowable standards. It also claimed that the petitioner was negligent in contaminating the property: *Dave's K. & K. Sandblasting* at para. 23.

**181**  The petitioner sought to have its insurer defend the lawsuit. The insurer declined to defend, relying on the pollution exclusion contained within its policy. This clause stipulated that coverage did not apply to property damage "... arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants": *Dave's K. & K. Sandblasting* at para. 25.

**182**  Goepel J. (as he then was), dismissed the petitioner's application. Within the specific context of that case, he found that the allegations brought against the petitioner were "excluded from coverage pursuant to the terms of the pollution exclusion": *Dave's K. & K. Sandblasting* at para. 31.

**183**  Although the petitioner's statement of defence in the underlying action asserted that the impugned contamination was attributable to previous users of the property, or actions that occurred by a third party after the petitioner left the property, the potential for concurrent or contributory liability was "not reflected in the pleadings": *Dave's K. & K. Sandblasting* at para. 30.

**184**  The "allegation against [the petitioner was] that it spread over the Relocated Sandblasting Site mounds of used sandblasting residue that contained concentrations of antimony and chromium". [Emphasis added.] Any *additional* claims made by the property owner against third parties in subsequent amendments to the statement of claim, based on assertions made by the petitioner in its statement of defence, "did not change the claim made against [the petitioner] ...": *Dave's K. & K. Sandblasting* at para. 30. Goepel J. was satisfied that the nature of the allegations specific to the petitioner fell squarely within the pollution exclusion and no duty to defend arose: *Dave's K. & K. Sandblasting* at para. 31.

**185**  As I read Justice Goepel's *Reasons for Judgment*, the characterization of the case by the insurer, as against the petitioner, was accepted. It involved "property damage arising out of [the petitioner's] release of pollutants from premises it occupied", and nothing more: *Dave's K. & K. Sandblasting* at para. 29.

**186**  In other words, that was not a case where the Court had to address whether the pollution exclusion ousted coverage for concurrent, contributory or retroactive liability arising out of contamination that was occasioned by the acts or omissions of an independent third party, but lay at the feet of the insured through a statutory cause of action that is predicated on deemed responsibility by virtue of ownership or operator status alone.

**187**  In my view, this is a distinction with a difference.

**188**  The argument made by the plaintiffs in the case before me was not open to the petitioner in *Dave's K. & K. Sandblasting* because it was not supported by the underlying pleadings. I have made a different determination here.

**189**  Finally, there is *Precision Plating Ltd.*, a decision of the B.C. Court of Appeal.

**190**  In that case, the respondents sought to have the appellant insurer defend them under a commercial general liability insurance policy after a fire at their leased premises was alleged to have caused chemical contamination. The insurer denied it had a duty to defend based on its pollution exclusion: *Precision Plating Ltd*. at paras. 1-3.

**191**  The respondents' premises were located in a multi-tenanted commercial building. They engaged in the business of electroplating. As part of their operations, the respondents maintained vats filled with toxic chemicals. If not properly stored, these chemicals could pollute the surrounding area. In April 2011, a fire occurred and activated the sprinkler system. Water released from the sprinkler system caused the vats to overflow. The end result was that "partially diluted chemical solutions" allegedly "[ran] into the neighbouring businesses within the [respondents'] strata complex, contaminating the surrounding property used by neighbouring businesses": *Precision Plating Ltd*. at paras. 5-6.

**192**  Four tenants within the complex filed actions against the respondents claiming compensation for damage caused by contamination. Similar to the plaintiffs in this case, the respondents in *Precision Plating Ltd*. turned to their insurer to defend them.

**193**  As noted at para. 8 of the decision, the initial grant of coverage in *Precision Plating Ltd*. provided:

To pay on behalf of the insured all sums ... that the Insured shall become obligated to pay by reason of the liability imposed by law upon the Insured or assumed by the insured under contract, for compensatory damages because of:

...

1. Property damage due to an accident or occurrence.

[Emphasis added.]

**194**  The pollution exclusion set out at para. 10 of *Precision Plating Ltd*. reads:

This insurance does not apply to:

1. (i) ... Property Damage caused by, contributed to by or arising out of the actual, alleged or threatened discharge, emission, dispersal, seepage, leakage, migration, release or escape at any time of Pollutants.

...

[Emphasis added.]

**195**  From the Court's perspective, reading the initial grant of coverage and the pollution exclusion together, the policy precluded coverage for "liability for [the] release of pollutants": *Precision Plating Ltd*. at para. 38. [Emphasis added.]

**196**  This construction, at least in part, reflected the way in which the initial grant of coverage was worded. The policy was focused on "potential liability" arising from property damage due to an accident or occurrence, "not the potential for damage itself": *Precision Plating Ltd*. at para. 36.

**197**  It is readily apparent that the language of "liability" within the initial grant, informed the effect of the exclusion clause:

[38] Reading the exclusion together with the description of coverage, the Pollution Exclusion operates so as to exclude coverage for "all sums ... to pay by reason of the liability ... for compensatory damages ... because of ... property damage ... caused by, contributed to by or arising out of the ... release ... of Pollutants". [Emphasis added.]

**198**  In light of this wording, the Court of Appeal held that in determining whether the insurer had a duty to defend, the question "was whether the [underlying] pleadings alleged the escape of pollutants as the source of liability, which would then be a cause of the potential "loss" for the insured": *Precision Plating Ltd*. at para. 41. [Emphasis added.]

**199**  Again, at para. 41: "What the judge needed to determine in this case was whether the pleadings alleged the escape of pollutants as the source of liability, which would then be a cause of the potential "loss" for the insured". [Emphasis added.]

**200**  In my view, *Precision Plating Ltd*. is distinguishable.

**201**  In that case, the pleadings underlying all four actions against the respondents were directed at a discrete event (the fire in the leased premises) and, more importantly, they were focused on alleged acts or omissions by the respondents that caused or allowed for the release or escape of pollutants. The claims brought by the other tenants did not raise as a "source of liability" the respondents' mere status as occupant or user of the leased premises, with statutorily deemed responsibility (and therefore liability) for the costs of remediation: *Precision Plating Ltd*. at paras. 60-64.

**202**  Had this latter type of claim formed part of the underlying pleadings, it is unclear to me whether the Court of Appeal would have reached the same result. When s. 47(1) of the *Act* is invoked in support of a claim for monetary relief based on deemed responsibility arising out of ownership or operator status, the "source of liability" is not necessarily the "escape of pollutants". Rather, it is the mere fact of ownership or operations on the lands or premises from which the escape occurred.

**203**  I am also of the view that the pollution exclusion in *Precision Plating Ltd*. was broader in its wording than the "Environmental Liability" and "Pollution Liability" clauses in this case.

**204**  When read together with the initial grant of coverage, the clause in *Precision Plating Ltd*. pointedly (and explicitly) removed from the initial grant of coverage any "liability" for property damage that was "... caused by, contributed to by or arising out of the ... actual, alleged, or threatened discharge, emission, dispersal, seepage, leakage, migration, release or escape at any time of Pollutants": para. 10. [Emphasis added.]

**205**  The initial grants before me do not use the language of "liability", which seems more readily capable of subsuming different forms of liability, predicated on varied causes. Rather, the coverage provided in this case is focused on monetary relief claimed "because" of damage to property and this narrow focus necessarily informs application of the exclusion clauses.

**206**  Moreover, the "Environmental Liability" and "Pollution Liability" exclusions do not explicitly preclude coverage where the property damage is said to be caused, in whole or in part, by persons who are not in any way connected to the insured. Nor do they explicitly preclude coverage for the release or escape of pollutants that has occurred "at any time".

**207**  Harkening back to the cautionary note expressed in *Derksen v. 539938 Ontario Ltd*. at paras. 48 and 55: "if an insurer wishes to exclude coverage where the loss is concurrently caused by a covered peril and an excluded peril, the insurer must expressly state it".

**208**  In *Precision Plating Ltd.*, the pollution exclusion explicitly ruled out the possibility of coverage for loss suffered by the insured on the basis of contributory liability. In this case, no such language was included. The same is true of concurrent liability and/or retroactive liability for contamination that may arise solely as a result of owner or operator status.

**209**  I am satisfied that the ambiguity of the "Environmental Liability" and "Pollution Liability" exclusions cannot be resolved with reference to generally-accepted principles of construction. As such, it is appropriate for these clauses to be construed *contra proferentem* against the defendants: *Progressive Homes* at para. 24.

**210**  In arguing that the exclusion clauses do not oust coverage, the plaintiffs raised a number of points separate and distinct from the issue of concurrent, contributing or retroactive liability by operation of the *Act*.

**211**  Among other things, this included an argument that on a broad reading of the underlying pleadings, West Van and Lions Gate are potentially liable for damages resulting from "occurrences" of a form or type that were omitted from, or inadequately addressed within the exclusions, including the event of "migration" or the "presence" of contaminants at 1583 Marine Drive.

**212**  In light of my determination that the exclusions do not "clearly and unambiguously" oust coverage for monetary relief arising out of pollutants that were used *before* West Van and Lions Gate owned and/or operated on the West Van lands, it is not necessary for me to address the plaintiffs' further arguments and I decline to do so.

**213**  As noted, "in order for an exclusion clause to oust the duty to defend, it must clearly and unambiguously apply to *all* of the claims made against the insured": *Kane* at para. 72, citing *Progressive Homes*, at paras. 54, 67. [Emphasis in the original.]

**214**  In other words, as long as there is a "mere possibility" that *one* of the claims is not "clearly and unambiguously" excluded, this is sufficient to trigger the duty to defend.

**215**  The defendants have not discharged their burden of showing that their "Environmental Liability" and "Pollution Liability" exclusions "clearly and unambiguously" apply to all of the claims made against the plaintiffs.

**C. Costs**

**216**  The plaintiffs argue that if this Court finds in favour of a duty to defend, they are entitled to recover their legal costs of enforcing the duty on a full indemnity basis.

**217**  In *Kane*, Justice Fitzpatrick noted:

[88] There is British Columbia authority for the proposition that where an insured is required to litigate the issue as to whether his insurer is required to defend him, solicitor and own client costs may follow: *Gore Mutual Insurance Company v. Paterson* (30 September 2011), Vancouver S110676 (B.C.S.C.); *Williams v. Canales*, [*2016 BCSC 1811*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KXB-0V01-JGPY-X00X-00000-00&context=). Both of these cases, and other authorities across Canada, were recently and extensively discussed and applied by Justice N. Brown in *Tanious v. Empire Life insurance Co.*, [*2017 BCSC 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MS1-JVC1-F7VM-S3SM-00000-00&context=) at paras. 33-43.

[89] The results in these cases were based on the unique nature of the insurance contract and in terms of fulfilling the objective under that policy. Simply put, where the policy intended full indemnity in relation to defence costs, it follows that any expenditure by the insured in enforcing that objective would, if successful, be followed by a costs award that similarly achieved that objective ...

[90] There is no need to find reprehensible conduct on the part of the insurer before such a costs award can be made, since such conduct is usually addressed by a special costs award: *Williams* at para. 27. [Emphasis added.]

**218**  Although Intact and Economical question the correctness of the *Kane* approach to costs (as well as the cases referenced therein), they both accept, for the purpose of this case, that I am bound to follow this line of authority on the basis of judicial comity.

**219**  Accordingly, in light of the findings I have made, the plaintiffs are entitled to recover their legal costs in enforcing the defendants' duty to defend on a solicitor and own client basis.

**VII. CONCLUSION**

**220**  For the reasons provided, I find that the duty to defend has been triggered under the Intact and Economical insurance policies.

**221**  Accordingly, under the authority of Rule 9-6(2), I grant the following orders:

1. a declaration that the defendant Intact Insurance Company is under a duty to defend West Van and Lions Gate pursuant to insurance policy 501105673;
2. a declaration that the defendant Economical Mutual Insurance Company is under a duty to defend West Van and Lions Gate pursuant to insurance policy 004837984; and,
3. costs of this proceeding, to date, on a solicitor and own client basis.

**222**  As agreed between the parties at the hearing, the Intact and Economical policies do not provide indemnity for any declaratory, injunctive or other non-monetary relief sought in the Action.

**223**  As further agreed, and consistent with the decision in *Lombard General Insurance Company of Canada v. 328354 BC Ltd.*, [*2012 BCSC 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62DV-00000-00&context=), the apportionment of defence costs in the Action between claims that are covered under the Intact and Economical policies, and claims that are not, is a matter to be addressed following the trial of the Action or settlement.

**224**  As such, I decline to make any order for judgment against the defendants in respect of the plaintiffs' costs to defend, or related interest.

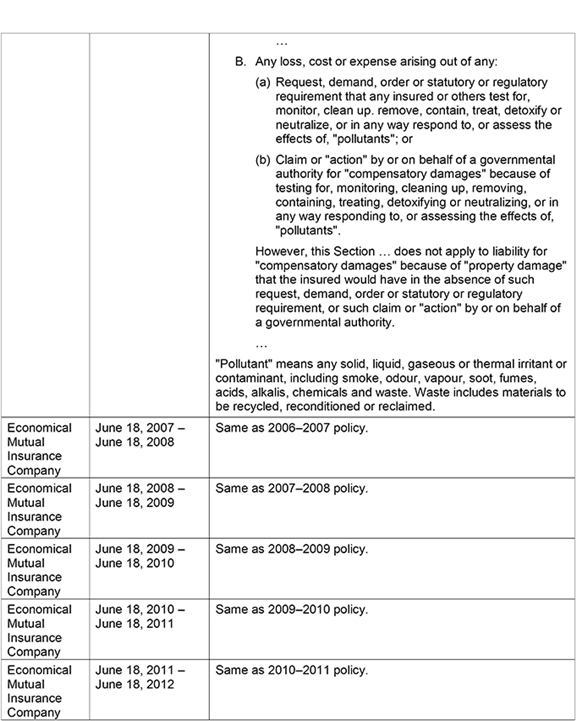
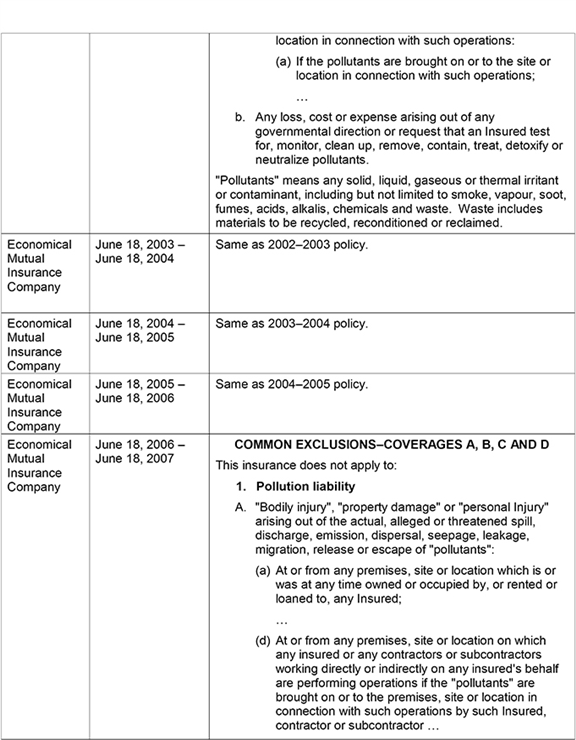
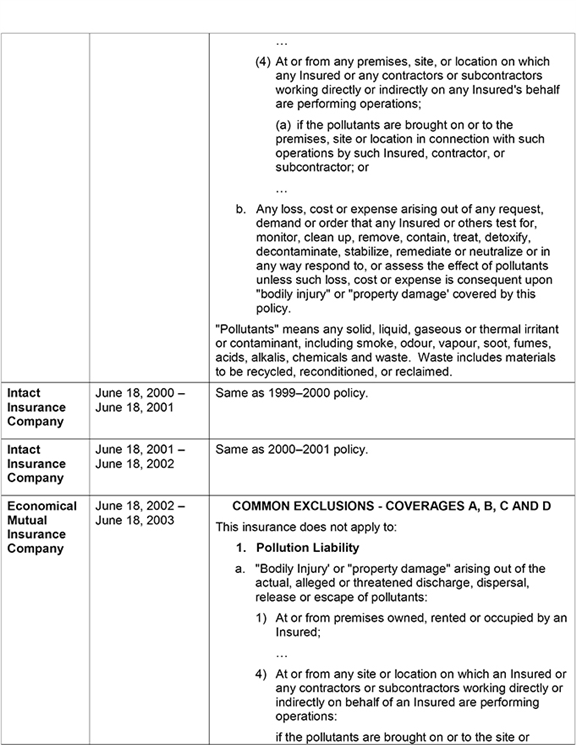
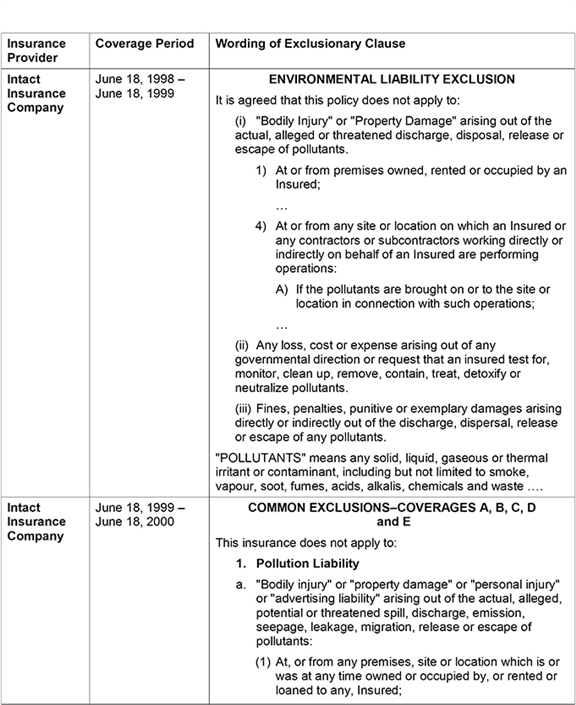
**225**  Finally, if the parties require clarity in settling the terms of these orders, they are at liberty to appear back before me for that purpose.

DeWITT-VAN OOSTEN J.

\* \* \* \* \*

APPENDIX A

**Intact and Economical Insurance Policies**



[**1**](#Backward_fnref_fnr-1) In the plaintiffs' Notice of Application [Corrected & Annotated for Oral Argument], as well as their Notice of Civil Claim filed in February 2016, they have misstated the defendants' insurance policies and periods of coverage. Intact's insurance policy is numbered 501105673 and Economical's insurance policy is numbered 004837984, not the reverse. For the purpose of this Application, I have corrected the nature of the orders sought to reflect the correct policy numbers. Both defendants acknowledge their provision of coverage, as corrected. At the hearing of this matter on November 23 and 24, 2017, neither defendant raised any issues based on the inaccurate identification of their policies in the Notice of Application or Notice of Civil Claim.

**End of Document**

[***Afonina v. Jansson, [2015] I.L.R. para. M-2816***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JNY7-X247-00000-00&context=)

Canadian Insurance Law Reporter Cases

British Columbia Supreme Court

Before: Groves J

Decision: January 7, 2015.

Docket Nos. M103556, M103557

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2010s* > *2015***

**[2015] I.L.R. para. M-2816** | [*[2015] B.C.J. No. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB9-DSH1-F22N-X2C6-00000-00&context=) | [*2015 BCSC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB9-DSH1-F22N-X2C6-00000-00&context=)

Alla Afonina Plaintiff v. Peter Jansson and Her Majesty the Queen in Right of the Province of British Columbia Defendants v. Her Majesty the Queen in Right of the Province of British Columbia Third Party

**Case Summary**

**Tort, motor vehicle — Personal injury damages — Liability — Brain injury — In 2008, plaintiff mother and daughter were injured in single-vehicle accident as passengers — Mother was engineer from Russia, completed business diploma, and worked for government — Mother's contract was not renewed post-accident — Post-accident, daughter withdrew from high school to complete grade 12 at home, dropped out of college, and started working as dominatrix — Plaintiffs sued defendant driver — Defendant disputed extent of plaintiffs' brain injuries and denied liability — Circumstantial evidence was overwhelming that defendant was speeding — Court found defendant was negligent and liable for accident — Mother's non-renewal of work contract was directly related to accident — Court found mother suffered mild traumatic brain injury and continued to suffer effects — Mother was able to work but at very limited employment — Court fixed mother's non-pecuniary loss at $195,000, past wage loss at $158,000, loss of future earning capacity at $400,000, and costs of future care at $131,082 — Court found daughter suffered moderate traumatic brain injury resulting in her current symptoms and academic and employment issues — Daughter was only capable of working in entry-level jobs — Court fixed daughter's non-pecuniary damages at $300,000, loss of future earning capacity at $825,000, and costs of future care at $376,863 — Action allowed.**

|  |
| --- |
| **Facts:** In August 2008, the plaintiff mother and daughter, at the time aged 47 and in grade 12, respectively, were injured in a single-vehicle accident while passengers in a truck being operated by the defendant. The truck ended up in a ditch on the side of the highway. The mother was an engineer from Russia who had immigrated to Canada with her children in 2002. In Canada, the mother held various bookkeeping and government jobs and had also completed a business diploma program and worked towards an Executive MBA degree. The plaintiffs claimed they each suffered a traumatic brain injury. They brought an action against the defendant driver. The extent of the daughter's brain injury and whether the mother suffered a mild traumatic brain injury was in dispute. The mother returned to her job two months post-accident but her contract was not renewed four months later when she failed a math and grammar test. Post-accident, the daughter withdrew from grade 12 and a special media arts program to complete school at home, and later withdrew from her college program. At the time of trial, the daughter was working as a dominatrix. The defendant conceded that the daughter suffered a brain injury and that the mother suffered significant soft tissue injuries. The defendant disputed liability.  HELD: The action was allowed.  The Court found that the circumstantial evidence was overwhelming and supported a finding of ***negligence***: witnesses claimed the truck was driving in excess of the speed limit, and the truck tires were very worn. The Court found that, considering her education and background, the mother's inability to pass the test was directly related to the accident. The Court found the mother suffered a mild traumatic brain injury and continued to suffer its effects, which were significantly disabling. The Court accepted the evidence of the mother's doctor, finding it was consistent with other factors such as the mother's claim that she lost consciousness and was confused and disoriented post- accident. The Court accepted the evidence that the mother was able to work, but the income attainable by her would be very modest. The Court fixed the mother's non-pecuniary loss at $195,000, past wage loss at $158,000 (based on the earnings approach), loss of future earning capacity at $400,000, and costs of future care at $131,082, including costs for medication, occupational therapy, and psychological assistance.  The Court was satisfied that the daughter suffered a moderate traumatic brain injury resulting in her current symptoms. The injury led to the daughter's inability to succeed academically and generate sufficient economic resources to support herself. The Court rejected the argument that the daughter was suffering from a personality disorder pre-accident that resulted in her post-accident behaviour. The Court found the daughter was only capable of working in entry-level jobs. It fixed non-pecuniary damages at $300,000, loss of future earning capacity at $825,000, and costs of future care at $376,863. |

**Counsel**

J.S. Stanley, M. Murphy for the plaintiff; J.D. James; T. Kushneryk for the defendant Jansson; B.M.S. Bandechha for the defendant and third party Her Majesty the Queen in Right of the Province of British Columbia.

**Reasons for Judgment**

|  |
| --- |
| **J.R. GROVES J.** |

**I. INTRODUCTION**

**1**  On August 9, 2008, the plaintiffs, Alla Afonina ("Alla") and Alissa Afonina ("Alissa"), were travelling in a 2006 Toyota Tacoma ("Tacoma") owned and operated by the defendant Peter Jansson ("Jansson"), Alla's former boyfriend. Alexei Koulikov ("Alexei"), Alla's son and Alissa's brother, was also in the vehicle.

**2**  The vehicle was travelling in a south/eastern direction on the Trans-Canada Highway ("Hwy. 1") from Tappen, B.C. towards Salmon Arm, B.C. when a single vehicle motor accident occurred. The Tacoma ended up in a ditch on the eastbound side of the highway. It was late afternoon on a summer day and the road was wet from recent rain.

**3**  Alla and Alissa claim significant personal injuries as a result of the accident. These claims include traumatic brain injury and related symptoms. It is not disputed that Alissa has suffered a brain injury, although the extent of it is in dispute. It is disputed that Alla had suffered a mild traumatic brain injury, though it is agreed she suffered significant soft tissue injuries.

**4**  The defendant does not dispute that an accident occurred but does dispute liability for injuries suffered based on an argument that either the accident was an inevitable accident due to road conditions or that no ***negligence*** has been proven. In the event that liability is determined in favour of the plaintiffs, the defendant Jansson disputes the extent of Alla's injuries. In regards to Alissa's claim, he raises a causation defence, suggesting that Alissa was a troubled youth with personal difficulties prior to the accident and would therefore have struggled to succeed in life in any event.

**5**  I have concluded that Jansson operated his vehicle in a negligent manner on August 9, 2008, causing the accident. I have concluded that Alla suffered a mild traumatic brain injury as a result of the injuries suffered in the accident, and I have concluded that Alissa has suffered a moderate traumatic brain injury as a result of the accident.

**6**  I have assessed the damages suffered by Alla at $943,889.36, and I have assessed the damages suffered by Alissa at $1,525,404.77.

**II. THE ACCIDENT**

**7**  At the time of the accident, Jansson was driving eastbound on Hwy. 1 between Tappen and Salmon Arm, B.C. On this section of the highway, eastbound traffic travels in a roughly southerly direction and westbound traffic in a roughly northerly direction. Alla was a front seat passenger. Alexei was seated behind his mother and Alissa was sitting behind Jansson in their respective passenger seats. The posted speed limit on this section of the highway was 90 kilometres per hour ("km/h").

**8**  A number of witnesses were called and provided the following evidence in regards to the accident.

**9**  On August 9, 2008, Jonathan Hobart was driving westbound with a friend. They saw a Toyota Tacoma pickup travelling in an eastbound direction. Mr. Hobart observed that the weather was overcast and it had just finished raining. The road was wet. He observed the Tacoma slide out into a ditch just before passing his vehicle. He attended at the Tacoma and tried to assist. He observed that the Tacoma was travelling at about 110 km/h just prior to sliding out, although that was just his best guess. He thought the accident was caused by speed in excess of the road conditions. On cross-examination, Mr. Hobart indicated that the vehicle he was driving had no trouble stopping and that the roadway was not slippery. He did not observe any slippery substances on the road.

**10**  On August 9, 2008, Shelly Varnai was a passenger travelling westbound on the Hwy. 1 with her then fiancé, now husband, Leslie Varnai. She noted a truck in an oncoming lane come around the corner at a high speed, fishtailing. Her husband pulled over to the right side of the road in order to miss contact with the vehicle, which had encroached on their lane. When she turned around to observe, she noticed the truck in a ditch. She went to the scene and noticed a woman, Alla, exit the vehicle and struggle to get up the bank towards the highway. Ms. Varnai thought that it was odd that the woman was walking into a dangerous situation, a busy road. Ms. Varnai took her by the arm and guided her to a safe location. She noted that the woman was disoriented and not worried about her children, another fact which Ms. Varnai thought was odd. She noted that a younger female occupant of the vehicle, Alissa, was in rough shape and having seizures.

**11**  Mr. Varnai described the accident as happening on August 9, 2008, in the mid to late afternoon. He and his fiancée were heading westbound to the Lower Mainland from Calgary, A.B. He observed an eastbound truck approach a curve in the highway, lose control, slide out and then back on the roadway, and that it was not driving straight. He observed that the vehicle crossed the yellow line into his lane of traffic as it passed, forcing him to pull to the side. He testified that he saw the vehicle for approximately 100 metres, and thought the speed was between 80-90 km/h. In cross-examination, he noted that he could not be sure of the speed of the vehicle and he noted that the vehicle was, in his view, driving too fast for the weather conditions.

**12**  David Paulsen also witnessed the accident while driving westbound on Hwy. 1. He was returning home to Port Coquitlam, B.C. from Red Deer, A.B. and was driving with his wife, Joanne. He saw a vehicle approach a curve in the road and when it exited the curve, it did not straighten out, but rather went right into a ditch, hit a culvert and crashed. He observed this from a distance of less "than a football field length" away. He could not comment on the speed. He observed a middle-aged woman attempting to crawl out of the vehicle and he helped her stand up. He was the first person on the scene. He noticed a younger woman in the back of the vehicle, in what he characterized as a rag doll state, convulsing and her eyes rolling, clearly in distress. He entered the vehicle to provide support and noted at least two more convulsions in the time until emergency assistance arrived. He noted no difficulties with traction on the roadway that day.

**13**  Constable Kevin Mayes of the Salmon Arm RCMP testified as to his observations on August 9, 2008. On that day, he was a general duty officer in a marked cruiser, travelling on his own. He got a call to attend at a motor vehicle accident east of his location. When he arrived at the scene, he saw a silver Toyota Tacoma vehicle on its side, perpendicular to Hwy. 1, and essentially on the eastbound ditch. He noted the roadway was wet.

**14**  On cross-examination, Constable Mayes confirmed that the roadway was not slippery, and that he observed no oily substances on the road. When asked if the Tacoma's tires were bald, he answered that they were very worn. When asked about the accident, he testified that the only contributory factors that he noted were the condition of the tires and the manner in which the vehicle would have been driven.

**15**  Two engineers completed investigations relevant to the accident. They are both employed by Forensic Dynamics Inc. in Kamloops, B.C. The first engineer, Sarah Stumpf was retained by ICBC to inspect the defendant's vehicle, which she did in October 2008. She did not attend the accident scene. She took some pictures, including pictures which appear to show well-worn tires on the Tacoma. She did not note the tires as appearing bald, and she did not measure the tread depths. Constable Mayes, who noted the condition of the tires as being very worn or bald, identified the photographs taken by Ms. Stumpf as the very worn tires in question.

**16**  Trevor Dinn, also of Forensic Dynamics Inc., was retained by the Ministry of Transportation and Highways ("Ministry"), shortly after the accident. It appears that he conducted slip testing, which I understand to be a process whereby a vehicle is driven on both a dry and a wet road and the coefficients of friction are measured. There is an acceptable range for typical roads, and Mr. Dinn found, on behalf of the Ministry, that the braking score on both wet and dry roads fell within an acceptable range. He did not observe the Tacoma.

**17**  In addition to these independent witnesses, the persons in the vehicle also testified.

**18**  Alissa has no recollection of the accident.

**19**  Alla remembers that they had stopped for gas and to use the washroom at a store just prior to the accident. She recalls that they were planning on going to a movie that evening in Salmon Arm. She was occupied with looking at movie listings in a paper when the vehicle began to go out of control, and her next memory is essentially post-accident.

**20**  Alexei was in the vehicle as well, but he was apparently not significantly injured. He testified that he had asked the defendant to slow down earlier that day when he perceived that the defendant was driving too fast on some windy roads. He was, however, not playing attention to the defendant's driving or speed just before the accident occurred. He did admit that he told the RCMP officer that he thought the speed limit was about 60 km/h, but he said in his evidence at trial that that was just a guess based on the belief that they not been driving very long. He says that shortly after they left the gas station, the vehicle began to fishtail and the defendant lost control of the vehicle.

**21**  The defendant Jansson also testified in this proceeding, and his examination for discovery evidence was read in at trial. The defendant testified that shortly after they left the Tappen Esso station, he proceeded eastbound on Hwy. 1. Almost immediately after leaving this gas station, the highway proceeds uphill and a passing lane becomes available. It is on the downhill section of the same hill, at a slight corner near the base of the hill, that the defendant lost control of the truck. The defendant said two things about this passing lane. First, that he passed two vehicles going uphill. Second, he stated that while he was climbing the hill, i.e. while he was in the passing lane passing two vehicles, there was a "torrential downpour" of rain. He also testified that on the other side of the hill, the torrential downpour had ended and had become a heavy drizzle.

**22**  In his examination for discovery evidence as read in, Jansson indicated that he had never replaced the tires on his truck. He further testified that he knew, prior to the accident, that navigation difficulties on wet roads would result if his tires were bald or had less tread depth. He said in his examination for discovery that he believed that he was going 90 km/h, but he did not look at the speedometer before the accident happened. He said in his discovery that it was possible that he was going faster.

**23**  Jansson was cross-examined extensively on his driving record as it relates to speeding infractions, both convictions and circumstances where he has challenged the ticket and the ticket had not been proven. I do not consider this evidence as evidence of a pattern of behaviour, which would have made it more likely that he was speeding at the time of the accident, nor do I consider it an indicator of the speed he was travelling on that date.

**III. LIABILITY**

**24**  To establish the standard of care, the plaintiffs rely on s. 144 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* [*MVA*]. That section provides that drivers must not drive a vehicle on a highway at a speed that is in excess relevant to road and weather conditions. They also rely on s. 146 of the *MVA*, which prohibits drivers from driving faster than posted speed limits.

**25**  In regards to causation, *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 para. 8, establishes that the test for causation is the "but for" test, "[t]he plaintiff must show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred." At this point in the analysis, I limit my consideration to the issue of whether the accident would have occurred but for Jansson's ***negligence***.

**26**  *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. 27, clearly establishes, as suggested by counsel for both the plaintiff and the defendant, that the doctrine of *res ipsa loquitur*, and its inference of ***negligence*** from the fact of the accident, is no longer the law in Canada. At para 27, Justice Major advises courts, triers of facts, that they should "weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of ***negligence*** against the defendant."

**27**  In the factual circumstances of this case, the circumstantial evidence is overwhelming and it supports a finding of ***negligence*** by the defendant. Mr. Hobart commented on his belief that the defendant was driving in excess of the speed limit. Ms. Varnai was of the same view. Mr. Varnai was not of the view that the defendant was necessarily speeding but rather clear in his evidence that he could not be sure of the speed, and that, in any event, the defendant was driving too fast for the road conditions.

**28**  Additionally, I accept the evidence of Constable Mayes as to the condition of the tires, and I reject the evidence of Ms. Stumpf in this regard. I do so because Constable Mayes was an experienced police officer with more than seven years as a general duty officer at the time of the accident and who had encountered, no doubt, numerous motor vehicle accidents. He was firm in his evidence that the road was not slippery, there were no oily substances on the road, and that the tires were "very worn". Ms. Stumpf, with respect, was a relatively junior engineer at the time of the inspection who took a brief look at a vehicle and did not measure the tread depth on the tires. Tires which, it seems clear from the photographs she took, were well worn, if not bald.

**29**  I also note Mr. Dinn's evidence that he tested this section of road for reasonable braking conditions shortly after the accident, and he found no irregularities, both on dry and wet pavement.

**30**  All those factors, coupled with the fact that the defendant cannot confirm that he was not speeding, although he believes that he was not, suggests to me that the defendant was speeding, and if not, at minimum, was driving too fast for the road conditions. The relatively reckless way in which, by his own admission, he passed two vehicles while going uphill in a torrential rain storm is suggestive that he was not paying good attention to his speed in relation to the road conditions. Further, it is suggestive that he was in all likelihood driving in excess of the speed limit.

**31**  I am satisfied on a balance of probabilities that Jansson was driving in excess of the speed limit and too fast for the road conditions and that but for these two acts of ***negligence*** there would not have been an accident. I am also satisfied on a balance of probabilities that his tires were worn, and that he clearly knew the risk of driving a vehicle with worn tires on wet surfaces.

**32**  The plaintiffs have established that the defendant Jansson is liable in ***negligence*** for this accident.

**IV. ALLA AFONINA'S CLAIM**

**A. Facts/Causation**

**33**  I first consider the cause and extent of Alla's injuries and appropriate damages and then the cause and extent of Alissa's injuries and appropriate damages.

**34**  At the time of the accident, the plaintiff Alla was 47 years of age. She is from Russia and arrived in Canada in the summer of 2002 with her two children, Alexei and Alissa.

**35**  In Russia, Alla was trained as a chemical engineer. She graduated from Mendeleev University and became a professional engineer in 1983. While in Russia, she also took a number of finance-related courses.

**36**  Upon her arrival in Canada in 2002, she did some language training through Langara College and Vancouver Community College, as well as the Open Learning Institute. Additionally, she took ESL courses through the Burnaby School Board and a number of other agencies or so it appears. She also completed a Diploma in Advanced Business Administration from CDI College.

**37**  Prior to the accident, specifically in 2006, while she was working in Victoria, she enrolled in an Executive MBA program at Royal Roads University. Her evidence is that she successfully completed some courses but that she withdrew from this program since she did not enjoy doing courses online. The defendant argues, based on language in her transcript, that she in fact was either asked to withdraw or was not successful.

**38**  When she arrived in Canada, Alla had very limited English. She went through a number of entry-level jobs which were not terribly successful. Eventually she successfully obtained a bookkeeping job in a mechanical shop in North Vancouver. This job involved re-entry of a number of years of past financial information and reorganization of recordkeeping. Once she successfully completed this task, this bookkeeping job ended up only being part-time.

**39**  In December 2006, she obtained a government job, working for a native housing organization associated with BC Housing in Victoria. At that time, she relocated to Victoria with her daughter. Her job was both bookkeeping and administrative. She maintained this job until the program closed in 2007.

**40**  She was then able, through her contacts in BC Housing, to get a job with BC Housing in Vancouver which she started in May 2007. Again her job involved administration work and work associated with a number of subsidized housing projects. She worked in this job successfully until the accident occurred in August 2008. She was then off work for two to three months recovering from the physical injuries associated with the accident. She testified that upon her return to work on October 16, 2008, she felt foggy and had double vision, could not concentrate, was unfocused, and made a number of mistakes. She found multi-tasking difficult and found that the job she could handle effectively prior to the accident had become extremely difficult.

**41**  While employed with BC Housing, it appears on the evidence, that she was employed on a number of short-term contracts that were generally renewed. However, after the accident, specifically on February 29, 2009, her work with BC Housing ended in that her contract was not renewed.

**42**  Some representatives of BC Housing testified at the trial. Their evidence suggests that at some point in 2008, BC Housing began to require persons to pass minimum language and mathematical skills exams in order to maintain their employment. It appears that Alla was unable to complete specifically the mathematical side of this test. She needed 60% to pass and only got 52%. The math testing involved basic arithmetic. The language exam included grammar and punctuation, and required employees to write a letter and to write a narrative about a previous experience.

**43**  What is striking here is that Alla showed all the signs of being a hardworking new resident in Canada who was prepared, prior to the accident, to take courses and to work hard to succeed as a new Canadian. Prior to the accident, she clearly had an ability to do basic mathematics and grammar in that she successfully completed a Business Diploma program at CDI College and she completed a number of courses at Royal Roads University, working towards an Executive MBA degree. Further, most of her work history in Canada involved aspects of bookkeeping. She had an engineering background and had taken University level finance courses in Russia. Mathematics are of course fundamental to these disciplines.

**44**  After the accident, she could not complete a clerk level basic arithmetic, grammar, and punctuation exam at passing level. I am satisfied that this loss of ability is directly related to the accident. I do not accept the defendant's view that Alla did not suffer from a mild traumatic brain injury. I find that she has. This is clearly demonstrated by the significant change in both her academic abilities, her organization and basic functional abilities, and the changes in her personality post-accident, from that of a calm rational caring person to someone who is prone to quick and irrational outbursts.

**45**  Specifically, I do not accept the defendant's proposition that Alla could not have suffered a brain injury because she had a "normal" Glasgow Coma Score, as observed by a quick review 15 minutes after the accident by emergency medical response personnel. I note that what was said by the emergency response worker is inconsistent with the evidence of those initially on the scene, evidence which suggests that Alla was not operating with full capacity. It is also inconsistent with Alla's evidence that she experienced a period of unconsciousness, even if brief, after the accident and with her evidence, which I accept, that she has no memory of the accident. Further, this lack of memory is well borne out in her reports to doctors shortly after the accident.

**46**  I accept that mild traumatic brain injuries are hard to identify. I note that the cause and extent of any injury must be decided on the whole of the evidence: *Christoffersen v. Howarth*, [*2013 BCSC 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M37R-00000-00&context=) at paras. 54-57. In the case before me, a number of factors have to be considered including expert opinion, Glasgow Coma Scores, Alla's testimony and witnesses' pre and post-accident observations of her.

**47**  The expert opinion provided in this case is divergent. The plaintiff provided medical reports from a psychiatrist, Dr. Auby Axler; psychologist, Dr. Doug Cohen; and doctor of physical medicine, Dr. Andrew Travlos. The defendant provided medical reports from a neuroradiologist, Dr. Jocelyne Lapointe; neurologist, Dr. Bernard Tessler; psychiatrist, Dr. Paul Janke; and orthopaedic surgeon, Dr. Jordan Leith. I have reviewed these reports, and I find that Dr. Travlos' and Dr. Janke's reports are the most relevant to the disputed issue of whether Alla is suffering from a mild traumatic brain injury.

**48**  Dr. Travlos opined that Alla is suffering from a mild traumatic brain injury. His diagnosis was based on a MRI, her symptoms, her past medical records, and the findings by neuropsychologists. In his report dated August 22, 2010, he opined that "the fractured rib, the pneumothorax, the chest pains, neck pains, headaches, nausea, fatigue, and right knee bruise were all a direct consequence of the accident." In his update report dated September 19, 2013, he opined that Alla's cognitive issues remain ongoing and had plateaued such that "further therapies will not materially impact on her abilities" but that she may "require assistance to maintain what she has." He further noted that Alla's "mental health remains an ongoing issue. The issues are fairly complicated and it is clear that her emotional health fluctuates a lot." He noted that she has learnt to set up appropriate structures and checks to allow herself to function independently, but opines that she is not capable of making longer-term financial plans and that it is not realistic that she will return to full-time work.

**49**  Though Dr. Janke's report notes Alla's diagnosis of "a diffuse axonal injury", he did not appear at trial to accept this. Dr. Janke appeared to have concluded that this was not a case of a mild traumatic injury, at least in part, because he noted that Alla reported no symptoms of cognitive impairment until five months after the accident. This is inconsistent, however, with Alla's report to doctors at the Brentwood Clinic immediately after the accident. At that time, she reported dizziness, headaches, and concentration problems, and later in the month, she subsequently reported problems with memory, and continued reports of dizziness through September 2008. When these records were put to Dr. Janke on cross examination, he agreed that they are all symptoms of a concussion. Dr. Janke's report is weakened by the lack of reference to these clear reports of cognitive impairment after the accident.

**50**  Dr. Travlos' diagnosis is supported by Dr. Collette's evidence. Dr. Collette saw Alla soon after the accident, and he indicated that in mid-September 2008, Alla was suffering from headaches, dizziness, vertigo, problem vision, fatigue, sleep interruption, and problem with concentration. These are all symptoms of a person who has suffered a concussion. For the most part, these injuries did not exist prior to the accident and certainly the combination or constellation of them was not in existence prior to the accident. I agree with the plaintiff's assertion that for the most part Dr. Collette's evidence about Alla's condition after the accident is uncontradicted.

**51**  Further, Dr. Janke's March 4, 2012, report stated that his "opinion is limited" as a result of his inability to review Alla's neuropsychological testing results, results which he understood were made available to the GF Strong acquired brain injury program, and his inability to review the GF Strong clinical records. In contrast, Dr. Travlos reviewed the GF Strong clinical records for the period of December 8, 2010 to January 8, 2013 when preparing his report.

**52**  Additionally, I note the audio statement given by Alla to the RCMP shortly after the accident. Even accounting for language difficulties, this statement is a clear example of someone who is confused, distressed and disoriented. The statement shows an almost incomplete ability to effectively answer even the simplest of questions and suggests, as noted, confusion and disorientation.

**53**  In further support of their view that Alla has not suffered significant injuries in the accident, specifically a mild traumatic brain injury, counsel for the defendant argues that Alla lacks credibility and reliability based on her demeanour and answers while on the witness stand. They view Alla's cross-examination evidence as argumentative and confrontational and they submit that this detracts from her credibility. They further advance an argument that she has an ability to remember matters which were helpful to her case but was vague and uncertain and claimed an inability to recall when questioned about matters which would potentially hurt her case.

**54**  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=) at para. 19, Justice Dillon summarizes the considerations relevant to the assessment of 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).

**55**  With respect to the able arguments advanced in this regard by defendant's counsel, I disagree with their submission that Alla lacked credibility. Alla's demeanour on the stand was for the most part consistent and respectful. She did on occasion appear nervous but that is not *indicia* of credibility in my view. She appeared to try to answer the questions as best she could. She clearly had some confusion both in cross-examination and direct examination but, having heard her on the stand, over the course of a trial, it appears that that may be a confusion or hesitancy related to language barriers.

**56**  Defendant counsel also suggests that Alla's explanation for her pre-accident Royal Roads University transcript further diminishes her credibility. In particular, that transcript uses the words "required to withdraw" on a number of courses. I note that the transcript also showed that she was able to successfully complete a number of courses prior to the accident. Alla's explanation for leaving Royal Roads was that it was voluntary. She decided that she did not want to continue in that program, and I accept her explanation primarily because her earlier success with the course content is suggestive that she would not be "required to withdraw".

**57**  In summary, there is medical evidence from Dr. Travlos to support a finding that Alla has a mild traumatic brain injury. I accept this evidence because it is consistent with the significant other factors which support a brain injury at the time of the accident. I have noted these factors earlier but to repeat, after the accident, there was a significant change in her cognitive abilities, functioning and personality, which are explained by a mild traumatic injury. Further, I do not accept the medical evidence from Dr. Janke because the factual underpinnings he relied on are not, in fact, present. I have therefore concluded that Alla Afonina suffered a mild traumatic brain injury as a result of the accident.

**58**  I note the submissions for the defendant, which state, "if the court assumed confusion and disorientation only then does the plaintiff meet the definition for concussion". The plaintiff has satisfied me on a balance of probabilities that Alla suffered confusion and disorientation after the accident. I am satisfied that there is a period of time which she blacked out. There is ample evidence of her being in a completely dissociative state right after the accident as the various civilian witnesses noted. These facts, along with the others I have noted above, ground a balance of probabilities finding that Alla suffered a mild traumatic brain injury in the accident, in addition to the soft tissue injuries which are not in dispute.

**B. Factual Conclusions**

**59**  I conclude that Alla has suffered from a mild traumatic brain injury as a result of the injury she received in the motor vehicle accident on August 9, 2008, and as per Dr. Travlos' evidence, Alla's cognitive issues will remain ongoing into the future. She also had numerous soft tissue injuries which have essentially resolved over time. These are not in dispute and are noted specifically in the report of Dr. Travlos of the 22nd of August 2010 referred to earlier in these Reasons.

**60**  In regards to where this leaves Alla today, there are two reports from vocational therapists, one on behalf of the plaintiff submitted by Eileen Cook and one on behalf of the defendant submitted by Samantha Gallagher.

**61**  Ms. Cook was of the view that Alla is not competitively employable. Ms. Cook noted that Alla is currently teaching a limited number of yoga courses to individuals with disabilities but was of the view that increasing this beyond part-time would be both physically and psychologically challenging. Increased hours would require Alla to deal with the increased demands of scheduling and customer service, and Ms. Cook believed Alla is not capable of managing such demands. Ms. Cook suggested that Alla would require the assistance from a specialist in the job placement area, and perhaps a job coach, to assist her in a transition to any employment, which Ms. Cook's report suggested can only be part-time.

**62**  Ms. Gallagher's testimony was focused on providing a critique of Ms. Cook's report. Ms. Gallagher identified a number of light duty jobs, such as grocery clerk, order picker, self-serve gas attendant, mail or inventory clerk, which she opined Alla could be trained to do. She did concede that, due to Alla's disability, there would be fewer jobs available to her and that she would be less attractive or less competitive for placement in these jobs, since a discerning employer would pick the best employee and Alla's limitations may prohibit her from being that person.

**63**  I note additionally that most of the jobs Ms. Gallagher identified require basic math skills (i.e. grocery clerk, self-serve gas attendant) and the need to multi task. I am satisfied on the evidence that Alla struggles with both of these requirements.

**64**  That being said, I cannot and do not conclude that Alla is beyond hope in terms of some level of employment. Her circumstances appeared to have improved slightly just before trial in that she was learning, with the assistance of the various professionals involved in her life, new skills which would make a very modest level of employment attainable by her. I note Dr. Travlos' evidence, which I accept, that Alla can and should work. I do however note that this is perhaps said in the context of work for the benefit of work as opposed to work to allow self-sufficiency as it relates to one's ability to support oneself prior to the accident.

**C. Non-pecuniary loss**

**65**  Alla suffered broken ribs, a pneumothorax, and a number of soft tissue and similar related type injuries as a result of the accident. She was hospitalized for a short period of time and it took a number of months to recover from the significant soft tissue injuries. Dr. Travlos' report reported that her emotional health continues fluctuate and this impacts her overall functioning. Most notably, she suffered a mild traumatic brain injury which, as per Dr. Travlos' report, will affect her for the rest of her life.

**66**  Non-pecuniary damages are of course designed to cover pain, suffering and loss of enjoyment of life: *Dikey v Samieian*, [*2008 BCSC 604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DT-00000-00&context=) at para. 139:

[139] Non-pecuniary damages are those that have not and will not require an actual out-lay of money. The purpose of such an award is to compensate Mr. Dikey for such things as pain, suffering, disability, inconvenience, disfigurement, and loss of enjoyment of life. The award is to compensate him for losses suffered up to the date of trial and that he will suffer in the future.

**67**  Justice Kirkpatrick for the majority of the Court of Appeal 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, reviews the factors to be considered:

[46] The inexhaustive list of common factors cited in *Boyd* 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=)).

**68**  Obviously, someone who is middle-aged such as Alla, would require a higher level of compensation than someone who is elderly, because the time period for compensation is longer. Conversely, she would be compensated in a lesser amount than someone who is young and will suffer from permanent disabilities throughout the course of their longer lifetime. The amount awarded should be fair and reasonable based on all the factors listed above, and awards in similar cases can function as a rough guide of fairness: *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.

**69**  I had an opportunity to review the cases provided by counsel for the defendant and counsel for the plaintiff and I thank them for that for their submissions in that regard. Unfortunately, the cases provided by counsel for the defendant are predicated on the court finding that Alla did not suffer from a mild traumatic brain injury. I have found that she has. Their cases are therefore of a limited value to this Court's consideration of non-pecuniary damages.

**70**  Having reviewed the authorities provided by counsel for the plaintiff, I find them to be within the range of appropriate orders. The numerous cases cited suggest a range of general damages in the amount of $200,000-$225,000. A number of the plaintiffs are within eight to ten years of Alla's age; however, the bulk of them are people who are completely non-employable, and I find that Alla has some modest residual work ability.

**71**  In regards to those cases provided, I find *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=) and *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=) most persuasive. In *Burdett*, the Court of Appeal upholds a non-pecuniary award of $200,000 where a 58 year old, formerly high functioning contractor suffered severe cognitive impairments including an inability to focus, sleep or multitask as a result of the mild traumatic brain injury caused by his motor vehicle accident caused mild traumatic brain injury. In *Young*, the court awards $200,000 where a 51 year old experienced a constellation of symptoms including a mild traumatic brain injury which rendered him unable to continue in his chosen profession.

**72**  In addition to the pain and suffering from the broken ribs and soft tissue injuries, most of which had resolved within six months of the accident, I note that there are a number of significant long term damages which Alla will suffer as a result of the accident. Her mild traumatic brain injury is significantly disabling. She was, as noted, a trained engineer with university training in the area of finances and accounting. She now finds herself a somewhat confused and disoriented woman, someone with an inability to multi-task to any great degree. She has to put mechanisms in place to remind herself about her responsibilities. Although she still has good judgment, she lacks an ability to focus and to organize. These are matters which will plague her for the rest of her life and will make the task of working and the task of providing for one's basic physical needs, somewhat of a challenge. Although there is only modest physical manifestations of her injuries at this stage, the fact that her brain is not functioning as it used to is considerably disabling.

**73**  In all of the circumstances having reviewed the case authorities provided, I fix non-pecuniary loss at $195,000.

**D. Past wage loss**

**74**  Two expert reports related to this issue were put before this Court: one from Darren Benning dated December 30, 2013 and of the other from Mark Szekely dated February 17, 2014. Both Mr. Benning and Mr. Szekely testified during trial.

**75**  Past wage loss, or earning capacity, involves the hypothetical assessment of the plaintiff's lost earning capacity based in part on the plaintiff's earning prior to the accident: *Smith v. Kundsen*, [*2004 BCCA 613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=) at para. 34. While the fact that the loss was caused by the accident must be proven on a balance of probabilities, the assessment of a hypothetical event, such as either past or future lost earning capacity, requires only proof only of a real and substantial possibility of loss: *Smith* at paras. 29-34. In the leading case, *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 paras. 30-31, Justice Smith for the majority describes the nature of the loss and the varied ways in which it may be proven:

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

... 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*.

**76**  I am satisfied based on the evidence garnered by Alla that she has proven that there is a real and substantial possibility that but for the injuries caused by the accident, she would have been able to successfully complete the basic clerk level mathematical, grammar, and punctuation testing required by BC Housing and so continue her pre-accident employment. As such, she is entitled to claim lost wages at her rate of earnings, or something close to it, from the date she lost her job to the date of trial. That appears to be the basis on which both reports were prepared.

**77**  Mr. Benning's report suggested that the total net loss to trial is $158,000. Mr. Szekely's report suggested that the total net loss is $141,000. Mr. Szekely explained that the difference between the two reports is that he took into account a discount, or contingency, based on the fact that Alla may have chosen, to work less than full-time, in other words, part-time.

**78**  I conclude that this part-time contingency should not be applied. It seems clear that but for the accident, she would likely have continued to work for BC Housing. There is no evidence to suggest that the full-time work she did at BC Housing is no longer work that is available to someone.

**79**  Additionally, Alla's circumstance as a new Canadian and her actions prior to the accident are suggestive of someone who has a strong personal and financial motive to work and a strong desire to succeed. She had made great strides in Canada in terms of language acquisition and employment abilities. She clearly has the need for funds for employment income. There is no suggestion in the evidence that there was any circumstance which would have led her to alter her established full-time working practice with BC Housing to seek a part-time position.

**80**  I turn now to the issue of mitigation. As highlighted by the defendant, cases including *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, hold that the plaintiff has a duty to mitigate her damages by seeking out any form of work that remains available to her. In other words, Alla has the burden of proving on the balance of probabilities that she has not been able to work from the time of the accident until the time of the trial. I note that she did remain at BC Housing until the end of February 2009, when her contract was not renewed following the failed test, and that that income has been accounted for in Mr. Benning's report. So the issue before me is whether further deductions to her claimed amount should be made on the basis that she could have pursued some work between March 2009 and the time of trial.

**81**  I have concluded that the extent of the soft tissue injuries, their delayed recovery, and the fact that physically it was only just prior to trial that Alla would have been able to consider the work I find her capable of doing, all suggest a further reduction for mitigation is not appropriate. I also note Alla will need some assistance to get herself ready to return to the part-time work I believe she is capable of doing.

**82**  As such, I accept the premises and the calculation of Mr. Benning's report. I therefore fix past wage loss at a total net amount of $158,000, which consists of the income she would have earned at BC Housing to the date of the trial had she not lost that position as a result of injuries suffered in the accident and incorporates a number of contingencies such as non-participation in the labour force, and unemployment factors.

**E. Future capacity loss**

**83**  I have had an opportunity to review the numerous case authorities provided in the area of loss of future capacity.

**84**  One of the most recent and learned cases in this area is the case of *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=). In this case, Justice Garson for the Court of Appeal summarizes earlier leading decisions and concludes 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,* 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* [*[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=). 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.* 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 added.]

**85**  So the approach, as submitted by both the plaintiff and the defendant based on *Perren*, is to first determine whether there is a real and substantial possibility that the injury will result in a loss of future earning capacity and then to quantify that loss on the basis of either an earnings approach or a capital asset approach. While quantifying the loss, the court recognises that the plaintiff has a duty to seek alternative work in order to mitigate her future loss; *Parypa* at para. 67. I also note the principles to be applied when assessing future earning capacity as 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, and highlight in particular that the assessment of loss of future earning capacity requires the consideration of the overall fairness and reasonableness of the award, as well as contingencies to account for the fact that the court's assumptions may be wrong.

**86**  Alla's eligibility for damages for loss of future capacity is real and amply borne out in the evidence. But for the injuries caused by the accident, I have concluded that there is a real and substantial possibility that she would still be working at BC Housing, and she would continue to be able to do so into the future. In many ways, Alla's loss is easily calculable based on an earnings or economic approach because there is, on the evidence, a definable or mathematical potential loss. She is no longer able to work at a job that not only provided her with adequate income but also held out the possibility of continuation. As a result of the accident, she has a very modest income earning ability, and it is an income earning ability which will only effectively be generated with considerable vocational assistance.

**87**  I agree with submissions of plaintiff's counsel that she is not competitively employable, and the evidence before the court to the date of trial paints the picture of someone who is anxious to work, who needs the income, who has tried numerous different employment options but simply, as a result of the mild traumatic brain injury she suffered in the accident, is unable to organize herself and her life, to work. She has a demonstrated inability to multi-task and keep track of the most simplest matters in order for her to maintain her work. I agree with counsel for the plaintiff that this makes her unreliable and unattractive to perspective employers. With these limitations, I find, despite having lesser in terms of severity brain injury than her daughter, these difficulties make her slightly less employable in my view.

**88**  That being said, I have found that Alla has a very modest residual income earning capacity. She clearly has the ability to organize herself to teach a regular yoga class, which she enjoys, and to do volunteer work in this regard. Again, she will need the necessary vocational assistance to get into some regular part-time work.

**89**  I am satisfied that she has a residual earning capacity on an annualized basis of approximately $6,400 (12 hours per week at $10.25 per hour x 52 weeks = $6,396). This is based on the ability to work at minimum wage at entry-level jobs. That is approximately 15% of the income she would have earned in the last full calendar year before trial had she remained at BC Housing.

**90**  The calculations provided by Mr. Benning in his May 1, 2014, update report, which I find persuasive for the reasons discussed above, suggested two scenarios. First, a future loss of earnings of $417,835 had Alla remained at BC Housing and remained at essentially the same salary. Or second, a future loss of earnings of $520,748 had Alla obtained a job paying her $60,000 annually in 2015 and continued at that job until her retirement. This update report accounted for the new discount rates under the *Law and Equity Regulation*, [*B.C. Reg. 352/81, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC81-DYMS-639H-00000-00&context=).

**91**  As noted, a residual income earning capacity exists and is approximately 15% of what she was earning. This would give a range of loss, based on Mr. Benning's report, of $355,160 to $442,636.

**92**  Mr. Benning's calculations incorporate a variety of appropriate actuarial and economic contingencies such as labour force participation, unemployment, and survival contingencies.

**93**  Although it is only one way that loss of future capacity can be calculated, I am satisfied that it is most appropriate to take an earnings approach in these circumstances. Simply put, but for the accident Alla would have continued to work. She would continue to work at BC Housing or a similar employer. It is likely that she would have received a modest income increases; although, I am not satisfied that she would have earned $60,000 as of 2015 to the date of her retirement. I have fixed the loss of future capacity award at $400,000.

**F. Special damages**

**94**  I have reviewed the evidence in regard to special damages and find that the claims are reasonable in light of the findings in this matter.

**95**  Alla's claim for the cost of medications amounted to $125.61.

**96**  She also claimed $22,749.36 for occupational therapy services provided, for the most part, by Ms. Boniface. Ms. Boniface testified in this proceeding and I am satisfied that the occupational therapy she has provided to Alla was reasonably necessary in light of the injuries she suffered.

**97**  There are additional claims for chiropractic treatments of $3,930, physical therapy user fees of $448, and massage therapy of $160. There are additional physical therapy user fees at the Eight Rinks facility totalling $3,355.

**98**  Many of these therapies relate to on-going soft tissue injuries. I noted earlier that Alla's soft tissue injuries were primarily resolved within six months of the accident; however, the evidence is clear that these injuries still pose continuing, although minor, difficulties for the plaintiff. None of these expenses are unreasonable in light of the injuries suffered in the accident and the frequency in which the therapy has been sought.

**99**  There is a further claim for $6,040 for psychological counselling. This counselling appears to be required in to assist Alla in dealing with the aftermath of a mild traumatic brain injury. There is a claim for Durolane injections of $1,550.65, again which is reasonable, as well as Bikram yoga exercises of $3,645.99. There is a modest claim for prolotherapy of $420, miscellaneous doctor expenses totalling $1,571.75 and further massage therapy on an approximate monthly basis through most of 2013, again related to her physical injuries, totalling $851.

**100**  Finally, there is the claim for the Spinal Decompression Institute, Dr. David MacKenzie, in the amount of $14,960. The documents provided explain that this essentially amounted to intensive chiropractic treatments which were incurred through 2009 and 2010. In addition, there were laser treatments in the latter part of 2010 and into 2011. These again relate to the soft tissue injuries which, although not debilitating, still have had a lingering effect on the plaintiff as a result of the significant soft tissue injuries suffered in the accident. I would allow those claims as well.

**101**  The claims for special expenses totalled $59,807.36. These claims all relate to injuries suffered from the plaintiff in the accident. I allow that amount as claimed.

**G. Cost of future care**

**102**  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 (S.C.), aff'd [*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.), Justice McLachlin, as she then was, set out the leading test on cost of future care: "(1) that there must be a medical justification for claims for the cost of future care; and (2) that the claims must be reasonable." Regardless of expert recommendations, common sense should inform awards of future care: *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 para. 13.

**103**  The plaintiff's submissions included a number of suggestions for the cost of future care. First, Dr. Travlos has recommended five medications: Methylphenidate at annual cost of $314; Pristiq at annual cost of $1,194; Robaxisol at annual cost of $189; Tramacat at annual cost of $93; and Raberprazule at annual cost of $449. The cost of future care analysis and report suggests a total amount of $52,676 in today's dollars to cover the cost of these medications during Alla's lifetime. Those are reasonable future cost expenses.

**104**  Dr. Travlos also recommended occupational therapy and psychological assistance in order to maintain her current, plateaued, level of independence. Having concluded that it is possible with assistance for Alla to earn some income, the costs of occupational therapy and a psychologist are costs which relate to the accident and which she needs in order to achieve employment success. I would fix the occupational therapy costs at $1,500 annually, for a total cost of $35,281, and the psychologist costs in the first year at a cost of $1,817 and then a total cost for year 2 to age 70 of $15,712, for an overall cost of $17,529. These occupational therapy and psychologist costs total $52,810. They are reasonable future care costs.

**105**  Additionally, Dr. Travlos recommended a lumbar support belt at $78 replaced every ten years for a total cost of $184, which is reasonable. The claim for vocational assistance is $13,240 for the first year. This is crucial in light of findings about her ability to work if assistance is in place. The annual claim for home maintenance assistance amounts to $630 annually and a total of $12,172. These three items total $25,596 and are all medically justified and reasonable claims.

**106**  I agree with the submissions of counsel for the defendant in regards to the claim for a kinesiologist, gym pass and yoga membership. The gym pass and yoga membership are items which Alla would have incurred regardless of the accident. A kinesiologist is not in my view necessary in light of Alla's clear emphasis on her own physical health.

**107**  I further agree with counsel for the defendant that the orthopedics, resurfacing, CPAP machine, and CPAP parts are not medical needs related to injuries suffered in the accident and as such are not claimable.

**108**  Based on what I have said above, I would allow cost of future care in the total amount of $131,082.

**H. Loss of interdependent relationship**

**109**  In order to prove a loss of an interdependent relationship, the plaintiff must show a real and substantial possibility that her ability to enter a permanent relationship has been impaired: *Hodgins v. Street*, [*2009 BCSC 673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2FJ-00000-00&context=) at paras. 140-142, 153.

**110**  I am not satisfied that there is any real and substantial possibility that such a loss will be suffered by Alla. Although it is clear that she has suffered a mild traumatic brain injury, her demeanour on the witness stand and the medical evidence she has garnered is not suggestive of someone who is completely incapable of forming a personal relationship with another. In my view, the claim on this basis, both as to past and future, is not supported on the evidence and I would not impose a financial obligation upon the defendant in that regard.

**I. Summary**

**111**  I assess damages to Alla resulting from the accident as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Description** | **Amount** |  |
| (i) | Non-pecuniary loss | $195,000.00 |  |
| (ii) | Past wage loss | $158,000.00 |  |
| (iii) | Future capacity loss | $400,000.00 |  |
| (iv) | Special damages | $59,807.36 |  |
| (v) | Cost of future care | $131,082.00 |  |
|  | TOTAL | $943,889.36 |  |

**V. ALISSA AFONINA'S CLAIM**

**A. Facts/Causation**

**112**  It is not disputed that Alissa has suffered a brain injury as a result of the accident. What is disputed is the extent of that injury and whether her current cognitive and personality difficulties were caused by the accident or were the result of a pre-existing condition. There is MRI evidence which is suggestive of a brain injury. For reasons I discuss in full below, I am satisfied on a balance of probabilities that Alissa has suffered a moderate traumatic brain injury as a result of the accident and that her current difficulties are the result of that moderate traumatic brain injury.

**113**  At the time of the accident, Alissa was in some ways a typical, in other ways, atypical young woman. She had completed Grade 11 and had qualified and was planning to take a speciality program in media-arts, called the Connect Film program, in her Grade 12 year. It is fair to say that she was not overly academically motivated, but she clearly was motivated to succeed in those areas which she enjoyed.

**114**  In that regard, I was impressed by the evidence of Phil Byrne. Mr. Byrne taught Alissa both before and after the accident. Prior to the accident, he found Alissa to be a student who was very bright and interested in her pursuits, and in matters generally. He described her as being in the top 2% in terms of engagement in class activities and assignments. She wanted to pursue a media-arts education. He described her as a goth girl with "artiste presentation" and as "non-conformist". He spoke positively of her high motivation, her goals to become a filmmaker or actress, and her abilities to write imaginative works of fiction. He also noted that her interest in the "big questions" led her to taking a philosophy class that he also taught. He testified that he had no sense that she was troubled emotionally in any way. He found her to be noteworthy on the intellectual scale, in the top 5%, someone who met deadlines and always attended regularly.

**115**  Mr. Byrne noted in cross-examination that prior to the accident, she got an A in a Grade 12 film course, taken in her Grade 11 year, and that this was one of the factors which led her into a placement in the specialized Connect Film program for her Grade 12 year. As described, this course seemed both unique and a good fit for someone of her apparent interest.

**116**  Mr. Byrne also testified to Alissa's abilities after the accident. Alissa began Grade 12 in September 2008, shortly after the accident. At that time, Mr. Byrne was her teacher for four hours every second day in the Connect Film program. He observed a very different Alissa. He said that she showed signs of no impulse control, could not carry through and tasks were not done. Instructions had to be repeated to her. Things had to be read over and over. She became socially isolated and began to have outbursts in class. She made sexual comments during these outbursts that were inappropriate for the class setting. Mr. Byrne was of the view that she did not appear to filter her thoughts and acted as if she was unaware of her social environment. He described her memory as scattered and inconsistent. He described her follow-through as limited, as matters would have to be explained to her repeatedly, and she would then forget the instructions within 20 minutes. Her energy level was notably different. Before the accident he described her as a young livewire, while post-accident, she was often sleepy and put her head down in class. He gave numerous examples of instances where her lack of social appropriateness required counsellors to intervene. Her talk was unfiltered, random, and as he described, not logical for the school social environment, or "out of left field".

**117**  The defendant advances a different view of Alissa for which there is some basis in the evidence. Of note is the fact that Alissa was referred by West Vancouver Secondary School's counsellor, Dr. Aaron White, to a psychiatrist, Dr. Ambrose Cheng, for alleged emotional problems prior to the accident.

**118**  This fact, along with other evidence, is part of the bases for Dr. Smith's, the defendant's psychiatrist, view that prior to the accident, Alissa was suffering a borderline personality disorder. He relied on her self-report of the use of drugs prior to the accident, as well as a self-report of hallucinations and hearing voices.

**119**  However, Dr. Smith was of the view that if there was a borderline personality disorder prior the accident, it would have been obvious to a psychologist or psychiatrist who saw her prior to the accident. Additionally, he agreed that if she had a borderline personality disorder, the hallucinations and hearing of voices would have been expected to continue after the accident. There is no evidence that they have.

**120**  I should say here that Alissa suggested in her evidence that her self-reporting of psychiatric difficulties prior the accident was an attention getting device and that she wanted "to score" herself a counsellor or psychologist like many of her friends in school were doing.

**121**  As a result of her self-report, Alissa saw a psychiatrist, Dr. Cheng. Dr. Cheng gave evidence based on two consulting reports dated May 28, 2008, and June 18, 2008, a time period just prior to the accident. He had no personal recollection of meeting Alissa at the time he gave his evidence but referred to his notes. In regards to the May 28, 2008 visit, the report of hallucinations and hearing voices was initially thought to relate to Alissa's recreational use of drugs, including acid, mescaline and mushrooms. His examination at that time did not note any psychotic symptoms. On cross-examination, Dr. Cheng was asked about a mental status examination and agreed that he had not diagnosed her with a borderline personality disorder prior the accident, despite two consults, because she did not fit the criteria. I note his last meeting with her was a few months before the accident.

**122**  Dr. Smith, the expert on behalf of the defendant, opined from a review of information prior to the accident that Alissa was suffering from borderline personality disorder prior to the accident. I discount the evidence of Dr. Smith for the relevantly basic reason that that is not the conclusion reached by a psychiatrist who saw her, almost immediately before the accident. I accept that the better evidence is the evidence of Dr. Cheng, and I find that on a balance of probabilities that Alissa did not suffer from a borderline personality disorder prior to the accident.

**123**  Dr. Morton Knazan, neurologist for the defendant, diagnosed a mild head injury. He opined that, in this case, any disabilities and neurological injuries experienced longer than six months after the accident could not be attributed to the accident, and suggested that Alissa's behavioural and cognitive symptoms are manifestations of a pre-accident personality structure as opined by Dr. Smith. I do not accept this evidence for the same reason that I do not accept Dr. Smith's evidence.

**124**  Dr. Dennis Magrega, psychologist for the defendant, opined that while he could not conclude whether Alissa had a mild or moderate brain injury or whether she suffered from a pre-existing personality issue or not, her current difficulties are not unexpected based on her pre-accident characteristics generally. I do not find this evidence persuasive for the reasons that follow.

**125**  Earlier on, I stated that Alissa was in some ways very much a typical young woman and in some ways somewhat atypical. In particular, I find that she had typical personal desires to achieve through her education and was well able to achieve those desires when properly focused and motivated. She wanted to pursue a career in media-arts and she had apparently worked hard to get into a specialized program for high school students for which there is a limited accessibility. This high school program according to the evidence, almost guaranteed you admission to a two-year program at Capilano University.

**126**  On the other hand, she had quirks to her personality. She was as described as a goth girl, someone who wanted to challenge what is normal in society by dressing and acting in a non-traditional fashion. She, for whatever reason, sought out apparently unnecessary psychological or psychiatric intervention. She clearly experimented, prior to the accident, with drugs and alcohol. On occasion, she had some difficulty with her mother, but nothing of any long term or lasting significance. I conclude, based on the evidence, she was a young woman, with some tendency to "act out", but nothing beyond the range of normal adolescent behaviour.

**127**  I am not of the view that the evidence before me of Alissa's "atypical behaviour" is sufficient to suggest that those behaviours would have left her in the same circumstances that she finds herself in now. That is clearly not the evidence before me. While she sought out psychiatric help, and experimented in drugs, she was on the other hand, able to identify her desired media-arts training program and successfully complete the pre-requisites for that program. She was a bright, engaging, young woman as described by her teacher.

**128**  After the accident, when the Connect Film program began, she failed miserably and ultimately withdrew from school to complete her Grade 12 year from home. She became lethargic, disruptive, unable to follow course content, and socially isolated. Mr. Byrne's before and after description of her was very most compelling. After High School, she attended at Capilano University where she ultimately changed courses of study in order to decrease her course load, then transferred to Langara College, again at a reduced course load, before finally making the decision to withdraw due to the difficulties she was experiencing.

**129**  I turn now to the plaintiff's experts, which I find more persuasive in light of the entirety of the evidence before me. Dr. Anderson, a psychiatrist for the plaintiff, completed two assessments of Alissa, dated April 21, 2011 and September 27, 2013. He opined in his September report that "[a]s a result of her brain injury she developed significant personality changes consistent with the diagnosis of an organic personality disorder." Her continuing personality disorder symptoms included emotional liability, cognitive fatigue, reduced insight, reduced judgment, disinhibition, mood swings, apathy and inflexible thinking. She also continued to experience "significant ongoing difficulties" due to cognitive impairment and chronic fatigue. He noted that "Ms. Afonina would have difficulty working at most jobs due to her physical, cognitive and emotional difficulties" and that "[p]ersonality changes that occur as a result of brain injury are usually resistant to treatment and the passage of time." These findings are consistent with the two reports completed by Dr. Doug Cohen, plaintiff's psychologist.

**130**  Dr. Foti, a neurologist called on behalf of the plaintiff, diagnosed a moderate traumatic brain injury and noted in terms of prognosis in his December 29, 2013, report that "with memory impairment interfering with new learning and retention ... [i]t appears unlikely that she will succeed in postsecondary education" but that she "is capable of part-time employment, although her interests are quite restricted and behavioural problems would likely interfere with stable long-term employment."

**131**  In regards to employment, after the accident and at some point prior to trial, Alissa began work as a female dominatrix. In *Canada (Attorney General) v. Bedford*, [*2013 SCC 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X24S-00000-00&context=) at para. 60, the Court characterized prostitution as a "risky -- but legal -- activity". When this matter came up in the trial, I was very concerned (and that is perhaps an understatement), as to what direction this evidence would take and how this reality would be analyzed and argued by both counsel for the plaintiff and counsel for the defendant.

**132**  The particular nature of Alissa's chosen work was relevant to the arguments made by both parties at trial. The plaintiff argues that it shows a lack of correct thinking on the part of Alissa. It shows someone who is prepared to engage in risky activities in exchange for money to, as she put it, "to pay the rent and pay for food". It shows, plaintiff counsel argues, an unnecessary risk assumption, due to the loss of cognitive functioning from the brain injury. This is supported by Dr. Anderson's report that she had not put an alarm system or safety measures in place, which he opined was an example of poor insight and judgment.

**133**  From the defendant's perspective, Alissa's chosen work can be used as an argument for some residual ability to organize one's self sufficiently to maintain a modest level of employment income, as opposed to the complete inability to earn income as advocated by the plaintiff. As well, the fact that Alissa can organize her life and make a commitment to her clients on a regular schedule shows, it is argued, an ability to organize one's life to maintain at least a modest level of employment. Further, the defendant argues that the nature of Alla's chosen work was a manifestation of a pre-existing personality disorder and so, they argue, consistent with that theory, which I have already dismissed.

**134**  It is of note that there is no evidence as to what income is generated from this work.

**135**  I believe that both the plaintiff and defendant can show that fact of Alissa's work as a dominatrix supports the finding of some facts which support their ultimate view of the manifestations of the brain injuries as suffered by Alissa in the accident.

**136**  From the plaintiff's perspective, Alissa's chosen profession necessarily involves an assumption of risk. Risk which she had not acted to minimize by implementing an alarm system or safety measures. Plaintiff's counsel, with support from Dr. Anderson's report, argues that that shows diminished judgment on Alissa's part and is a factor which supports a theory of frontal lobe damage from moderate brain injury.

**137**  That being said, this activity also supports, in my view, the defendant's view that Alissa has some residual post-accident employment ability. It shows an ability to organize one's self to meet a deadline, to keep an appointment, to apparently collect remuneration, and to effectively use the remuneration to support one's self. Aside from the issue of non-pecuniary loss, which I will deal with later, a major aspect of Alissa's claim is that she has no residual earning capacity and no ability to work as a result of a brain injury suffered in the motor vehicle accident. I do not accept that proposition.

**B. Factual Conclusions**

**138**  It is not disputed that Alissa suffered a brain injury during the accident as well as a number of other physical injuries. I find on a balance probabilities and the whole of the evidence that the accident caused a moderate traumatic brain injury. I find that it is the brain injury that has led to her post-accident lack of ability to cope in the normal way, and it is the brain injury that has prohibited her from generating sufficient economic resources to support herself, and it is the brain injury which prohibited her from succeeding at her academic and employment endeavours.

**139**  I accept that Alissa has no ability to work on a full-time basis or in any job that requires anything other than basic entry-level skills. The only work she is reasonably qualified for would be a very entry level job in which she can benefit from the repeated nature of a task for a few hours a day. Something like basic food service industry or clerk work is something that Alissa could, I find, handle on a limited part-time basis. That being said, that level of work and income is nowhere near the level she would likely have had had it not been for the brain injury suffered.

**140**  Had it not been for the brain injury caused by the accident, I conclude that there is a real and substantial possibility that Alissa would have completed a college or university certificate program of approximately two years. This would likely have been in a field related to media arts and she would likely have been able to earn income consistent with that level of training in that area of activity. I will deal with the details of that in the subsequent future capacity loss claim noted below.

**141**  Now, as a result of the accident, she is only able to, I find, work approximately 12 to 15 hours per week, at a minimum wage job or something close to that, in a thoroughly structured environment. I further conclude that she would need considerable assistance from job coaches and/or occupational therapists to ensure that she is sufficiently trained in both the job requirements and the personal requirements associated with working.

**C. Non-pecuniary loss**

**142**  As discussed in further detail in the context of Alla's claim above, non-pecuniary damages cover a broad range of compensation and are aimed at unquantifiable losses such as pain, suffering and loss of enjoyment of life: *Dikey* at para. 139.

**143**  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 261, 265, also known as one of the trilogy cases, the Supreme Court of Canada established a $100,000 cap on non-pecuniary damages in cases where ***negligence*** causes catastrophic personal injuries based on the reasoning that "[t]he sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims." In that case, the claimant was a young adult who was rendered quadriplegic. Adjusted for inflation, this cap was roughly $330,000 in 2010, as per *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. 250, and the plaintiff submits that the current adjusted rough cap is $350,000.

**144**  With this case law in mind, I turn to the submissions of counsel. Counsel for the plaintiff argues that the moderate traumatic brain injury Ms. Afonina suffered as a result of the accident places her in a category where she should be awarded the rough upper limit of $350,000. They argue that her life is bleak as a result of the accident. She has a tendency towards destructive behaviour and the making of poor or dangerous decisions. She has lost any ability to form attachments with people. She has no ability to employ herself or to better educate herself. Her chosen, and she hopes temporary, line of work is an example of an inability to make appropriate decisions especially around safety and health.

**145**  The plaintiff's counsel argues for an award approaching the upper limit. In particular, they note that *Spehar v. Beazley*, [*2004 BCCA 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3NB-00000-00&context=) at paras. 14-15, held that severe life altering personal injuries justify an award of the upper limits. *Spehar* involved a 16 year old plaintiff who suffered an extremely severe frontal lobe injury which left her with an organic personality order and an inability to manage her own affairs. In upholding an award at the upper limit, the Court of Appeal accepts that devastating personal injuries may attract an upper limit award even where the injury suffered is different from, or not quite as severe as those suffered in the trilogy cases: at paras. 14-15.

**146**  The plaintiff cites two other cases involving young people: *Sirna v. Smolinski*, [*2007 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21V5-00000-00&context=); *Dikey v. Samieian*, [*2008 BCSC 604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DT-00000-00&context=). In *Sirna*, the court awards $200,000 to a plaintiff who suffered from a mild traumatic brain injury and orthopaedic injuries that left her with cognitive difficulties and chronic pain. In *Dikey*, the court awards $215,000 to a plaintiff who suffered from a moderate traumatic brain injury which resulted in cognitive and emotional difficulties, serious head and jaw injuries, and continuing pain. Neither plaintiff was found to be employable after the accident.

**147**  The defendant's counsel on the other hand, while acknowledging that Alissa suffered a brain injury, considers it a complicated mild brain injury. They again rely on Dr. Smith's view that prior to the accident, the plaintiff had significant psychiatric and psychological disorders which accounts for much of her current circumstances. Again, for reasons which I have noted earlier, I reject this opinion. They claim that despite her injuries, Alissa has an ability to earn some income and I agree in a limited way with that assessment. They argue for non-pecuniary damages in the range of $115,000. In support of this position, the defendant cites a number of cases in which plaintiffs were either found to suffer mild brain injuries (*Slocombe v. Wowchuk*, [*2009 BCSC 967*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0H8-00000-00&context=)), to suffer from a pre-exiting mental disorder (*Beaudry v. Kishigweb*, [*2010 BCSC 915*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22DY-00000-00&context=)), or to have exaggerated their symptoms (*Watt v. Meier*, [*2006 BCSC 1341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1CS-00000-00&context=), rev'd on other grounds [*2007 BCCA 627*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-223C-00000-00&context=); *Clark v. Hebb*, [*2007 BCSC 883*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21NF-00000-00&context=)).

**148**  A key factor in my determination as to the appropriate quantum of non-pecuniary damages is the rejection of the defendant's argument that Alissa suffered a borderline personality disorder prior to the accident. It is a rejection, essentially, of the defendant's view that much of the predicament that Alissa finds herself in, her inability to work full-time, her inability to educate herself, her rash and inappropriate decisions, are related to a pre-existing condition. I however find that the alleged pre-existing condition does not exist.

**149**  Rather, I find that much of the difficulty Alissa finds herself in is as a direct result of the accident. At that time, she was rendered unconscious and suffered seizures. Alissa has sustained irreversible and permanent damage as a result of the moderate traumatic brain injury she suffered in the accident. She was young at the time of the accident and her life has been irrevocable altered in a negative way. She will not recover from the difficulties she currently has. They will plague her for her entire life. They are, to a great degree, vast and all encompassing. They affect everything she does. Absent the injuries, I have concluded that Alissa would have successfully completed some post-secondary education in her chosen field and by 2014 would have been in the work force in a full-time capacity. Although I do note that she does have some limited capacity to earn a modest amount of income, her former goals and chosen field of work are no longer open to her.

**150**  In all these circumstances, the appropriate award for non-pecuniary damages is an award close to the rough upper limit. I have concluded that $300,000 is an appropriate assessment for non-pecuniary damages.

**D. Future loss of capacity**

**151**  As discussed in reference to Alla's claims above, a loss of capacity claim requires a real and substantial possibility of loss: *Perren* at para. 32. I find that this threshold requirement has been met: there is a real and substantial possibility that but for the accident Alissa would have continued with school and found employment in her desired field of study.

**152**  I turn to quantification of this loss and note that loss of capacity is a challenging issue for courts. It is less challenging in this case because it is possible to take an economic, or earnings, approach to calculating the loss.

**153**  To begin with, there is no claim for past wage loss. There is a claim however that Alissa would have been in the work force on a full-time basis by 2014. The first challenge in assessing a loss of future capacity with a young person such as Alissa, who had just finished Grade 11 when the accident occurred, is a determination, based on a number of factors, as to what academic level she would have likely achieved, but for the accident. I note a number of factors in this regard. Firstly, Alissa was not terribly academically inclined. Yet, when she found an area that she was interested in, she was able to excel and to lead her peers. She found such an opportunity prior to the accident in the Connect Film program at her school, a program which her teacher testified would have guaranteed her admission into a two-year program at Capilano University upon successful completion.

**154**  I also note Alissa's family background. Her mother was highly educated in Russia. She holds an engineering degree and prior to choosing to withdraw, had begun working towards a Master in Business Administration at Royal Roads University. Her brother is a well-educated individual, having taken his university training to a master's level in British Columbia and in Ontario.

**155**  Based on Alissa's interests and her achievement prior to the accident, and based on her family history, which is one that is supportive of upper education, it is fair to conclude that Alissa would have entered the work force with at minimum two years of university education.

**156**  In regards to the calculation of that loss, Mr. Benning also provided a number of reports related to Alissa's circumstances which I accept. As noted in my discussion above, his most recent report, dated May 1, 2014, took into consideration the adjusted discount rates under the *Law and Equity Regulation* as well as appropriate contingencies.

**157**  Based on that report, a full future income loss for someone of Alissa's age and gender with two years of college, is estimated at $1,280,583 for her lifetime. That loss calculation is predicated upon a first year's full-time full year earnings of $32,063. The total employment income is slightly higher than that insomuch as it takes into account non-wage benefits and is slightly lower than that when one considers the various contingencies. All these factors are calculated into the ultimate dollar figure.

**158**  I have determined that Alissa has a limited, modest, residual income earning capacity. I have determined that she could work roughly 12 to 15 hours per week in a structured modified environment earning minimum wage. That ranges in income based on 12 hours per week at minimum wage of $10.25 per hour to an annual income of $6,396 and based on a 15 hour week at $10.25 an hour for 52 weeks at a maximum of $7,995. That higher figure is roughly one-quarter of the full-time full year earnings which is the basis for the calculation.

**159**  The evidence of a number of persons called by the defendant is also relevant in this regard. Brian Ball runs the Capilano University Book store. He noted that Alissa was employed at his bookstore for eight days during a rush, for approximately four hours a day. He said he noted no difficulties during the time, though he commented that she was not a stellar employee and perhaps would be a low priority for callback. Scott Barnicoat runs a Cobb's bakery. Alissa attended for a two-hour orientation at his store and for eight hours of training but then never returned. He noted no difficulty with Alissa during this period of time. Additionally, there was evidence called about Alissa's work as an extra and work with a photographer and as a model. A summary of these work experiences showed poor judgment by Alissa and a likely inability to continue the work for any length of time.

**160**  These experiences demonstrated a somewhat "mixed bag" of attempted work experiences post-accident. On the one hand they are suggestive of some ability to work and on the other hand they are suggestive of Alissa's limited ability to succeed outside of a structured work environment.

**161**  Mr. Benning provided an explanation to me in court as to how one would analyze his figures to take into account a residual earning capacity. Based on this explanation and the discussion above, I have concluded that it is appropriate to reduce his estimate by approximately 25% and, as such and acknowledging various additional contingencies, I would fix future capacity loss at $825,000.

**E. Special damages**

**162**  Based on the legal test outlined in the context of Alla's claims above, I accept the plaintiff's submission as to her special damages claim for occupational therapy services, counselling, gym, physical therapy, massage therapy, educational consultants and various user fees.

**163**  Defendant counsel comments that these expenses appear to cover both unrelated and related expenses and requests further clarification. This position is no doubt due to the defendant's view that the plaintiff had pre-existing conditions, a borderline personality disorder in particular, for which treatment is non compensable. On that point, I disagree.

**164**  Documentary evidence which supports the claims for reimbursement for occupational therapy services, chiropractic treatment, psychologist counselling, physiotherapy, massage and general rehabilitation, and the modest assistance of an educational consultant is before this Court. The expenses noted for which there are receipts totalled $23,541.77. These I find to be reasonable expenses related to the plaintiff's attempt to recover from injuries related and caused by the accident, and I would award special damages in the full amount claimed of $23,541.77.

**F. Cost of future care**

**165**  I start this analysis by accepting the proposition advanced by plaintiff's counsel as it relates to Professor Waddams' summary of the concept of full compensation for future care in his text, *The Law of Damages*, loose-leaf (Toronto: Canada Law Book, 1999). Professor Waddams states at pages 3-63:

... [t]he tenor of Dickson J.'s Judgment in *Andrews v. Grand & Toy* makes it clear that the court will lean in favour of the plaintiff in judging the reasonableness of the claim. The court made it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for insuring the adequacy of pecuniary compensation.

[Footnotes omitted.]

**166**  The plaintiff also notes a quote from Justice Dickson for the Supreme Court of Canada in *Andrews* at 241-242:

Money is a barren substitute for health and personal happiness, but to the extent within reason that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

**167**  Based on Mr. Benning's May 1, 2014, report, the plaintiff claims a total cost of $457,830 for future care over the Alissa's lifetime.

**168**  The defendant does not dispute the appropriateness of the medications Pristiq and Amitriptyline. These drugs cost $1,194 and $183 annually. The cost of these medications over the plaintiff's lifetime totals $42,038 and $6,445. Those are medically justified and reasonable expenses.

**169**  In regards to various rehabilitation therapies, psychologists, crisis management, and family education as claimed, the defendant disputes these claims as being unrelated to the accident, again based on their view that they relate to an underlying or pre-existing borderline personality disorder. I have not found that that is the basis for the claim. Rather, I find that the need is related to injuries suffered in the accident. They are medically supported. I allow claims for psychologists at an annual cost of $1,050 for a total award of $36,956, again based on Mr. Benning's report.

**170**  I do not allow the plaintiff's claims for crisis management and family education. They are remote and the regular assistance of a psychologist and occupational therapist, which I address below, cover off these needs.

**171**  Turning to occupational therapy, I agree that that is a reasonable expense for Alissa. She uses her occupational therapist and it is medically recommended. That cost is $2,625 annually or a total cost, based on Mr. Benning's report of $92,391 over Alissa's lifetime. I allow that expense.

**172**  The vocational therapy is important as recommended by occupational therapist, Naz Chow, and vocational therapist, Eileen Cook. This is particularly crucial as it is a cost to be incurred in the first year to assist the plaintiff in preparing and entering the workforce. The cost, according to Mr. Benning's report, is $14,033 and I allow that cost.

**173**  Naz Chow has also recommended extensive rehabilitation assistance. The total cost of the rehabilitation assistance is, based on Mr. Benning's report, $237,409. This involves extensive assistance in year 1 and 2, reduced assistance in year 3 and 4 and further reduced assistance from year 4 onward. The report of Ms. Chow is persuasive in terms of establishing this need; however, I believe the costs of the claim substantially exceed the reasonably achievable benefit. I assess the rehabilitation costs at a lump sum figure of $185,000.

**174**  I do not allow a claim for a sex therapist as recommended. The assistance of a team of occupational therapist and a psychologist can sufficiently address these apparent issues.

**175**  As such, I allow a total cost of future care of $376,863.

**G. Loss of interdependent relationship**

**176**  Substantial evidence was called about this relatively novel type of claim and the appropriate test is as discussed in the context of Alla's claim above.

**177**  The plaintiff argues that she would not be able to form an interdependent relationship due to her injury caused isolation and sexual and general impulsivity. The defendant is of the view that these relationship issues are brought on by the plaintiff's pre-existing borderline personality disorder, again a circumstance I found not borne out by the evidence. That being said, I do agree with the defendant that there is no evidence that the nature of the plaintiff's injuries will have a long term effect on her ability to form a relationship. As correctly stated by the defendant, it would not be appropriate to assume a loss simply on the basis that she is "damaged goods".

**178**  In regards to this claim, the plaintiff has not met the burden of satisfying me that there is a real and substantial possibility that there will be a loss or that the loss is quantifiable in the manner in which they recommend. Simply put, these damages are too remote. I would not allow any claim for loss of interdependent relationship.

**H. Summary**

**179**  I assess damages to Alissa resulting from the accident as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Description** | **Amount** |  |
| (i) | Non-pecuniary loss | $300,000.00 |  |
| (ii) | Future capacity los | $825,000.00 |  |
| (iii) | Special damages | $23,541.77 |  |
| (iv) | Cost of future care | $376,863.00 |  |
|  | TOTAL | $1,525,404.77 |  |

**VI. POST-TRIAL APPLICATION TO RE-OPEN**

**180**  On October 31, 2014, counsel for the defendant applied to re-open the case. They did so on the basis that they had uncovered evidence, post-trial that Alissa had continued to work as a female dominatrix and had done a number of things to potentially expand her business, including interviews and additional advertising.

**181**  I do not allow the application to re-open because frankly it is not necessary. At the time of trial, Alissa admitted to continuing work as a female dominatrix although she expressed a desire not to do it long term. She said she needed to do it to put food on the table. The simple mathematics of her disability income of $900 per month and her rental costs of $1,100 per month, suggests that she needs some money to even make rent on a monthly basis.

**182**  As such, it is not new evidence or surprising evidence that Alissa has continued to work as a female dominatrix. Until such time as she receives a settlement, this is the circumstance that she has to some degree chosen in order to make ends meet.

**183**  I would add that I accept Alissa's evidence that once this matter is resolved and she has the financial wherewithal to support herself, she would not continue work as a dominatrix.

**VII. CONCLUSIONS**

**184**  As such, judgment is granted against the defendant in favour of Alla Afonina in the amount of $943,889.36. Judgment is granted against the defendant in favour of Alissa Afonina in the amount of $1,525,404.77.

**185**  Counsel have not addressed the issue of costs, tax gross-up and management fees. If they cannot agree on these matters, they are at liberty to apply within 60 days to have the matter set before me for further argument on those or any other issues which have arisen as a result of this judgment.

J.R. GROVES J.

**End of Document**

[***Allen v. Girard, [2002] B.C.J. No. 2148***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-6054-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

Hood J.

Heard: April 8 - 12, 2002.

Judgment: September 20, 2002.

Kelowna Registry No. 51305

**[2002] B.C.J. No. 2148** | 2002 BCSC 1354 | 5 B.C.L.R. (4th) 320 | 116 A.C.W.S. (3d) 975 | [2002] B.C.T.C. 1354

Between Les Allen, plaintiff, and Rene Girard and HSBC Securities (Canada) Inc., defendants

(224 paras.)

**Case Summary**

**Brokers — Employment and authority — Authority — Stockbrokers — Liability of broker to principal — Stockbrokers — Ratification of stockbroker's activity by client — Duties of broker to principal — Stockbrokers (incl. commodity brokers) — *Negligence*, standard of care.**

|  |
| --- |
| Allen claimed for damages for ***negligence*** against the defendant brokerage company and broker for losses incurred in his investment portfolio. Allen invested with the brokers in 1999. At the time, he signed profiles and agreements, which established that he wished to proceed with high-risk, aggressive investments. He provided other information, including his net worth. Allen claimed that these documents were incorrect, and that he signed them without reading them. He alleged ***negligence*** on the part of the brokers in making trades without his authorization, causing him losses. He took over his portfolio in 2001, after the major technology market crash. He claimed losses of $150,000. The brokers denied any ***negligence***, claiming that they consulted with Allen before all trades made in his account. The brokers further claimed that Allen had completed the client profile, and authorized the high-risk investments.  HELD: Action dismissed.  Allen was not credible; it was clear that he was an experienced investor who had failed to act when he should have and suffered losses as a result. The brokers had not been negligent in their management of his investments; Allen had knowingly agreed to a high risk, aggressive investment plan. Further, he had authorized all trades, and had been consulted by the brokers before trades were made. Allen had failed to make out his claim, and it would therefore be dismissed. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 40(10).

**Counsel**

J.A. McAfee, for the plaintiff. J.D. Shields, for the defendant, Girard. G.R. Johnson, for HSBC Securities (Canada) Inc.

|  |
| --- |
| **HOOD J.** |

**1**   On April 26, 2002, I dismissed the plaintiff's action with costs to the defendants. These are the Reasons for my decision, as requested by the plaintiff.

**2**  The Statement of Claim leaves much to be desired and lacks the specificity required of pleadings which would enable the defendants to clearly understand what case they had to meet. In broad terms, the plaintiff alleges that he suffered a loss of approximately $150,000 from his investment portfolio or account with HSBC Securities Canada (Inc.), an Investment Broker. This occurred in the Spring of 2000 when the market unexpectedly crashed, resulting in severe losses in share value throughout the investment world. I say, approximately, because the plaintiff's method of proof of loss amounted to little more than a statement that he had lost the moneys from his account; and included a period of time during which no wrongdoing is pleaded or asserted.

**3**  Broadly speaking, the plaintiff's claim against HSBC is that it was negligent in the supervision of his account. The claim against Mr. Girard, the Investment Advisor employed by HSBC, and with whom the plaintiff dealt, is that he was negligent in the handling of the plaintiff's account, including transactions which were discretionary trades.

**4**  When the trial opened, it quickly became clear that there were many loose ends and some complicated matters which had to be dealt with, including issues of discretionary trading, a "pattern of conduct" then being alleged against Mr. Girard, whether similar fact evidence was admissible, and if so the number of witnesses to be called, the nature and extent of their evidence and so on, whether the plaintiff was required to call expert evidence as to the standard of care which the defendants had to meet or whether the defendant company's Manual and the Regulations of the Investment Dealers Association set the standards to be met, and so on, and that credibility was a major issue. With regard to the latter issue I will state here that on many occasions throughout the trial I did not find the plaintiff to be a truthful and credible witness. I will have more to say about this in a moment.

**5**  When asked about the time estimate for the completion of the trial, Mr. McAfee insisted that four and a half days were sufficient, notwithstanding much longer estimates by counsel for the defendants. By the end of trial, it was clear that the time estimate was grossly inadequate. The trial was rushed. It was only as a result of the court working extra hours and the defendants electing not to call evidence, and moving for dismissal on an alternative basis of no evidence and insufficient evidence, that the trial finished late on the final day.

**6**  The pleas of ***negligence*** against Mr. Girard are set out in paragraph 10 of the Statement of Claim. Many of the allegations therein were shown at trial, that is, from the plaintiff's own evidence, to simply be untrue or to have no basis. Not one of the particulars asserted was proven so as to establish ***negligence*** on the part of the defendant Girard which caused or contributed to the cause of the plaintiff's alleged losses.

**7**  The claims against HSBC are set out in paragraph 11. Many of the allegations track those alleged against Mr. Girard. And as in his case, not one of the particulars of ***negligence*** asserted against the defendant HSBC was proven to have occurred and to have caused or contributed to the cause of the asserted loss.

**8**  The case is a factual case. Although the assertions against both defendants are dependent in the main on the truthfulness of the plaintiff, and I do not accept his evidence, I will refer to a few of the assertions made against the defendants as examples. It is asserted against both defendants that they failed to adequately inform the plaintiff client concerning the nature, return on and risks of the investments. I am satisfied that at all material times the plaintiff was an informed and knowledgeable trader or market investor, and was in fact monitoring the market and his stock on CNN television and on his computer. Even when the stock market crashed he did not instruct Mr. Girard to sell his stocks; and at the same time he on his own was buying and selling stocks, taking full advantage of the overheated and tumultuous market, and presumably making some profit, through another trading account he had with an American Broker, Suretrade; and which he sold out while he continued to hold the stocks in his account with HSBC.

**9**  And on his own evidence during their 14-month relationship, the plaintiff insisted that Mr. Girard sell stock in a particular company from his portfolio on only one occasion, and Mr. Girard immediately sold the stock as instructed. This occurred after the market crashed and after the plaintiff had monitored his stock on CNN and the Internet for some time.

**10**  In my opinion, the plaintiff was knowledgeable and knew what was going on. He knew the nature, potential return and risks involved in holding or owning the stocks in his trading account. He made his own decisions whether to retain or sell stocks in his portfolio. In effect, he decided, in layman's terms, to retain the stocks in his portfolio, and to ride the market out. However, like any other stock market loser, at the time he did not foresee that the market would crash, nor did he foresee that having crashed the market would not rebound, or at least that some of the stocks he owned would not recover sufficiently to enable him to recover his losses.

**11**  In my opinion, it was only when the market, and in particular, the stocks in his portfolio did not rebound, that he then began looking for ways to attribute his losses to someone else, the defendants, in the end settling with the high hopes of the burned investor, and without regard to the real facts, on the defendant company's Manual and the Regulations of the Investment Dealers Association. On his own evidence, he clearly was the author of his own misfortune.

**12**  Another common assertion is that the defendants failed to "advise when the losses started to occur and the need to liquidate these funds in order to minimize their losses." It is seen from what I have just said that I am satisfied that the plaintiff was monitoring the market and his stocks and well knew when the market began to slide, and his losses began to occur, but chose not to liquidate in order to minimize his losses at that time. The decision was his. He was not the uninformed, perhaps na've, Broker or Investment Advisor dependant client which he attempted to make himself out to be.

**13**  Again, it is alleged that the defendants failed to monitor on a day to day or week to week basis the handling of his investment portfolio when they knew or ought to have known that a substantial portion of the funds of the plaintiff were at risk in this portfolio. I am sure that the defendants probably did know of the risks attendant upon some of the stocks in the plaintiff's portfolio, particularly if there was a sudden and unexpected drop in the market. However, I am equally sure that the plaintiff was well aware of those risks, that he accepted them, and that he chose not to sell his stock when the risks became a reality. And I observe that I am satisfied that it is more likely than not that any Broker or Investment Advisor or supervisor looking at his account, particularly the documents therein, and to which I will refer in a moment, would have reasonably concluded that his portfolio was consistent with his objectives and with the risks he was prepared to take, and that the account was in order. In short, I have concluded that it is more likely than not that HSBC did monitor or review the plaintiff's account generally, as required by its Manual and the Regulations.

**14**  The primary claim against the defendant company, as contained in paragraph 11(vii), reads as follows:

Failure by the defendant company to exercise proper supervision, particularly under the Vancouver Stock Exchange and Investment Dealers Association's Regulations;

As to this plea, it will be seen that in my view the evidence does not establish that the plaintiff's account was not supervised, or not reviewed properly, pursuant to the Regulations and the Manual. The evidence of HSBC's compliance officer, Ms. Matias, given at discovery, and which I accept, satisfies me that HSBC was required to supervise the plaintiff's account on a monthly basis and to record any problems encountered, such as unusual trading activity, client complaints and so on. But they were only required to record the fact that the file had been reviewed if problems were encountered. Hence, if no problems were encountered, there would be no record of the review having occurred. And I say again, that in my opinion, a review of the plaintiff's file would not have revealed any problem giving rise for concern.

**15**  Paragraph 12 seems to give more specifics with regard to this plea, and reads as follows:

The defendants were further negligent in not following the rules of procedure which have been set out by the Investment Dealers Association of British Columbia and the Vancouver Stock Exchange Rules related to managed or discretionary accounts, which were part and parcel of the Rules and Regulations required to be followed by brokers who were dealing in managed or discretionary accounts.

With regard to this plea, it will be seen that I have concluded on the whole of the evidence before me that Mr. Girard was not conducting discretionary trades in the plaintiff's account, that those trades were authorized trades; that even if Mr. Girard was conducting discretionary trades in the plaintiff's account, those trades were made with the approval and consent of the plaintiff and thus were authorized.

**16**  During his opening, counsel for the plaintiff announced that he was relying on the defendant company's "Policies, Procedures and Compliance Manual", and the Regulations of the Investment Dealers Association, as setting out the standard of conduct which the defendants were required to meet. As in the case of the pleadings, specific provisions of the Regulations or Rules of the Investment Dealers Association of British Columbia, and those of the defendant company's Manual, which were said to be relied on, were not referred to. The defendants and the court were not given the specific sections relied upon until plaintiff's counsel referred to them in his closing submission. And then little more than the specific number of the Regulation or Rule relied upon was referred to.

**17**  The plaintiff is a businessman who owns two fishing lodges in the northern part of British Columbia. He resides in Kelowna when he is not away operating his businesses or is vacationing in Mexico, according to his testimony.

**18**  He started out as an electrician, became an electrical contractor, and then a commercial helicopter pilot. For the past five years he has operated the fishing lodges which are located in remote areas in northern British Columbia.

**19**  He testified on direct examination that during the material years he was out of town as follows: each year he would leave Kelowna at the end of April or around the first of May and attend at the fishing lodges continually until mid or late June. In the summer, he would take sporadic trips, a week to 10 days each, throughout the entire summer. In the fall, he would leave Kelowna in August or the first part of September and come back in mid to late October. This was "like clockwork every year". Additionally, he would take two to three months off every winter and spend them in Mexico. If his evidence is accepted, he was rarely in Kelowna.

**20**  He testified that when he was at the fishing lodges no one could communicate with him by telephone or otherwise. However, he had an automatic phone at each lodge and he could phone out, for example, to the defendants, if he wanted to and he could also check his Kelowna phones for phone messages. However, as I said earlier, no one could phone him on the lodge phone.

**21**  The plaintiff said that he also had a cell phone and a home phone in Kelowna. And on direct, he testified that between February 1999 to June 2000, his phone records did not show any telephone communication between him and the defendant Girard when the plaintiff was out of town. He failed to produce his phone records for the year 2000, and I do not find his 1999 telephone records to be of assistance. His evidence also was that during the 14-month period he dealt with the defendant he guesses that he met with Girard on five to 15 occasions; also that during this period of time he and Girard each phoned the other on numerous occasions. He would telephone Mr. Girard at his office, at his home and on his cell phone, and had other opportunities to talk to him.

**22**  He also testified that he was able to make trades in his accounts by telephone when he was at the fishing lodges. In fact, he made a number of trades, while at a lodge, in 1998 in a trading account which he had with the TD Bank. And some of the stocks he traded were the same stocks which he now alleges were traded by Mr. Girard without his authority. I infer as well that he made trades by telephone in 1999 and in 2000 in his Suretrade account when he was at the lodges and when he was in Mexico.

**23**  It is not clear whether he had access to the CNN television programme or a computer when he was at the lodges. If so, then he would not have had to make the trades by telephone in the case of his TD Bank and Suretrade accounts; although he would have made any trades in his account with HSBC by telephone. He also said that he made trades when he was in Mexico and when he was up north. He came to town, that is Prince George, once a week and at that time had access to a computer, and made trades by telephone.

**24**  I will note here that I am not satisfied on the evidence that the plaintiff's ability to make trades, and to communicate with Mr. Girard to do so, was substantially hindered by the fact that he spent so much time at his lodges and in Mexico, as suggested by the plaintiff. It will be seen also that I have concluded that he was able to communicate with Mr. Girard with regard to trades in his account when he chose to, and that the trades were not discretionary trades; rather they were trades which he instructed Mr. Girard to make after discussing them with him.

**25**  The plaintiff said that prior to February 25, 1999 he had moneys invested with the defendant company's banking branch through Sandra Jenereux who was with the defendant company's banking branch in February of 1999, and was then only licensed to sell mutual funds. As of June 1, 2000 she obtained her licence and is now an Investment Advisor.

**26**  She was handling his investments in mutual funds. He said that at the time he was a very conservative investor, and discussed all investments with her in depth before purchasing the mutual funds.

**27**  The plaintiff said that on February 25, 1999 he was in Ms. Jenereux's office discussing mutual funds with her. At that time she told him that his mutual funds were not doing as well as was expected; that she "suggested I talk to Mr. Girard about investing in different investments." She then phoned Mr. Girard who came to her office. The plaintiff and Mr. Girard then went to Mr. Girard's office. He says that he gave Mr. Girard his background in conservative investing in mutual funds and GICs, and made it clear, as he had with Ms. Jenereux, that he wanted to continue to invest in conservative investments. He told Mr. Girard that Ms. Jenereux suggested that he should see him, that is, Mr. Girard, and get into something different. He recalled at the time discussing some stocks, such as Dell Computers, Microsoft and 3M. He says he also told Mr. Girard that he was looking for someone to develop a long term relationship with because at times he was away from the city for long periods of time, and it was impossible to get a hold of him. He told Mr. Girard that he needed someone "to look after my funds in case the sky was falling", and Mr. Girard told him that he could do that.

**28**  I observe here that this is not what happened, accepting the plaintiff's evidence for the moment, that is that this is not a case of the defendants failing to act when the market crashed. At that time, the plaintiff was home in Kelowna monitoring the market and his stocks on CNN and on his computer. He was well aware of what was happening and chose not to sell his stocks at that time. While he blames Mr. Girard for his losses, because according to him, Mr. Girard in effect recommended to him that he not sell his stocks because he believed that they would recover, and they did not, the decision was his alone to make. And he decided not to instruct Mr. Girard to sell any of his stocks, other than the one stock that he monitored, didn't like, and insisted that Mr. Girard sell.

**29**  When cross-examined with regard to Ms. Jenereux introducing him to Mr. Girard, he denied that the only reason that Ms. Jenereux referred him to an Investment Advisor was the fact that she was not licensed to service his stock market needs. He said "definitely not", that he was in her office to discuss his mutual funds when she told him that the funds were not doing as well as they should have, and recommended that he should see Mr. Girard and get into the stock market and recover higher returns.

**30**  Ms. Jenereux, whose evidence I accept, testified that in 1999 she was the manager of investment services, and was only licensed to sell mutual funds and GICs. She looked after the plaintiff's mutual fund investments.

**31**  She testified that when the plaintiff came in to see her on February 25, she thought he was coming in to discuss his mutual funds or RRSPs with her. Instead, he wanted to get into the stock market or to purchase stocks. She told him that she was not licensed to sell stocks, but she would be happy to refer him to an Investment Advisor who could do so. He agreed and she telephoned "upstairs" to see who was available. Mr. Girard was available and he came down and she introduced him to the plaintiff.

**32**  She said that in her presence the plaintiff did not discuss his investment objects. All he said was that he wanted to buy some tech stocks, and she remembered Microsoft being mentioned. She also remembered the plaintiff saying to her after his meeting with Girard something about how long it took Girard to spend the $100,000, referring to the purchase of Dell Computer stocks which the plaintiff had just authorized Mr. Girard to purchase, after depositing $110,000 into his newly opened account.

**33**  On cross-examination, Ms. Jenereux agreed that the plaintiff may have mentioned Dell Computers during their discussion. She could only remember Microsoft being referred to. She said that in any event he was definitely talking about tech stocks. He was looking for stocks to purchase. She did not refer him on the basis of his returns on his mutual funds. In fact, he had excellent returns on those funds at that time. Her referral was based on something "I could not do."

**34**  When cross-examined by Mr. Shields, she said she could not recall the plaintiff saying that he was interested in Internet stocks as well as tech stocks. She also recalled him mentioning a US Broker, something like Suretrade, and that he was already involved with stocks.

**35**  I turn now to the major documents in this case, particularly the New Client Application Form which the plaintiff signed on February 25, 1999. Mr. McAfee described this document in paragraph 4 of his opening as follows:

The document that becomes particularly important in reference to this law suit is a New Client Application Form which was signed by the plaintiff on February 25, 1999, and sets out the investment objects, income and net worth of the plaintiff, as well as other financial information. The evidence led by the plaintiff will show that this particular form becomes the foundation for the investment strategy of Mr. Girard. There will also be evidence led that will show that the Investment Dealers Association Regulations and the defendants' Operation Manual have a high degree of emphasis on the importance of this document when the accounts are established.

The plaintiff will lead evidence to show that there were a number of misstatements, incorrect and incomplete information provided on this form when it was completed by Mr. Girard and signed by the plaintiff. The Corporate compliance officer for the defendants has given evidence that all future investment decisions and reviews are based on the client application form.

**36**  I will observe here that the New Client Application Form is indeed important. However, contrary to the plaintiff's position, and counsel's opening, the document clearly shows that the plaintiff's stated investment objectives were 100 per cent aggressive trading in high risk stocks. I observe also that in my opinion this objective is consistent with what happened after February 25, 1999, and in particular with some of the kinds of stock which were traded in his HSBC account, and with the nature of the trades conducted. And I am satisfied that when the plaintiff went to see Ms. Jenereux and met with Mr. Girard he wanted to get into the stock market, and into fairly high risk stocks, because he had observed himself from the market, since 1998, that tech companies and Internet companies had produced very substantial returns to their investors.

**37**  Returning to the New Client Application Form, the plaintiff testified that while Mr. Girard asked him the questions, he could not see what Mr. Girard was writing down when he filled in the form. He was adamant that while he signed and initialled the document, he did not read it before he signed it, although he was given the opportunity to do so. He says also that he never did receive a copy of the document. When it was suggested to him on cross-examination that he may have lost a copy of the document, together with other documents which he says he lost during two residential moves, he said it was possible but not likely. It is also his position, as stated by his counsel in his opening, that "there were a number of mistakes, incorrect and incomplete information provided on the form."

**38**  He put it this way, that some of the information contained in the application was his, other information contained therein was not his. He was not asked to expand on this statement. However, I think his counsel has summed it up. In effect, he said that certain important information in the application was not what he told Mr. Girard and, it follows, that Mr. Girard either made it up or grossly misinterpreted what he was told. I am satisfied that the document contains exactly what he told Mr. Girard; and that any manager or compliance person reviewing the file was entitled to rely on its contents.

**39**  His first complaint is that he did not tell Mr. Girard that his estimated liquid net worth was $750,000. What he told him was that was what he was worth. I am satisfied on the evidence, including Mr. Girard's evidence on the point, that the plaintiff knew what he was being asked about, his estimated liquid net worth, and that he stated it was $750,000.

**40**  The second complaint relates to the answer "Yes" given to the question "Have you authorized anyone at HSBC James Capell Canada to use discretion in handling your account?" He maintains that he did not know what discretionary trading meant at the time, or at the time of his discovery. However, it will be seen that he did discuss with Mr. Girard and agreed to Mr. Girard making trades in his account without consulting him, at least in certain circumstances. I will return to the point in a moment.

**41**  The third and most important complaint is that he did not provide the information contained under the topic "Objectives and Risk Factors". There he stated, with respect to his regular account, that his investment objectives are 100 percent aggressive trading, and that his risk factors are 100 percent. I have already indicated my view that this information is consistent with what happened in his HSBC account, although it contained some more secure or conservative stocks as well, and that any Compliance or other officer of the defendant reviewing the plaintiff's account and documents would have concluded that the plaintiff's account was in accordance with his stated objectives. I note also that an account check was made later in August 1999 when an update was requested from the plaintiff, and his update application contained the same information as that in the first application, and this would have bolstered that conclusion.

**42**  It is also stated in the February 25, 1999, Client Application Form under the topic Investment Experience that the plaintiff had moderate investment experience. In this regard, it should be noted that in April of 1998, the plaintiff opened a trading account with the Toronto Dominion Bank's Green Line Investors Services in which he traded stocks, including some internet stocks. And approximately two months after opening his account with HSBC, he opened a trading account with Suretrade in which he traded a substantial amount of stock. And in my opinion, at all times material, the plaintiff was an informed and experienced stock market trader and investor. And in my view, a plea of lack of knowledge or of experience, or of dependency or reliance on Mr. Girard, is not open to him.

**43**  In the February 25 application form under the topic A Cash Account Agreement it is stated:

I certify that the information provided by me in this application is true and complete and I agree to advise you immediately of any material change in the information. I further certify that I am capable of evaluating and bearing the financial risk inherent in buying and selling securities and that trading and all transactions for which approval is sought is suitable for the purposes of my investment objectives. I agree to the terms and conditions set out in the Account Agreement, overleaf, which forms part of the application.

**44**  Under B Margin Account Agreement it is stated:

I hereby apply to be granted a margin facility with respect to this account. I acknowledge and agree to the matters described in Part A the Cash Account Agreement, above.

While the plaintiff signed the Margin Account Agreement in the end his account was a Cash Account.

**45**  I turn to the update Client Application Form which is dated August 24, 1999. Under the topic, "Investment Experience", the box under the topic "none" is checked and then apparently cancelled by the plaintiff's initials, and the box under "Moderate" is checked. Immediately below this information and to the right under the topic, Objectives and Risk Factors, 100 percent is written in for Aggressive Trading and Risk Factors. Immediately below this information are the Cash and Margin Account Agreements which are referred to in the first application. Both are dated and initialled by the plaintiff.

**46**  The plaintiff says that he received the form, which had already been filled in, in the mail. When asked by his counsel whether he read the document before he signed it, he said, "Probably not" and then "I believe I didn't." On cross-examination, he said that he was too busy to read the document, apparently inferring this from its date.

**47**  He then said that he would not have been able to understand it without professional help. He agreed that he had filled out a similar application form for his TD Bank Trading Account, adding that that account was not as important to him. And he would have executed a similar application form when applying for the Suretrade account in April of 1999.

**48**  It is difficult to see how the plaintiff could have signed both the February 25 and August 24 applications, without seeing or reading what he was signing, particularly the second one, where his initials appear in the Investment Experience box, which is just above the Objectives and Risk Factors box, and his initials appear in Part A and Part B of the Account Agreements, which are directly below the Objectives and Risk Factors box, and the figures 100 percent are clearly seen in the latter box. In any event, I did not believe the plaintiff's evidence pertaining to the execution and his knowledge of the contents of these documents.

**49**  I should note also that the plaintiff acknowledged that after each trade conducted in his account HSBC sent a written confirmation of the trade statement to him; that he also received monthly statements containing particulars of all trades made in the previous month, as well as a yearly statement setting out particulars of all the trades made in his account that year. His evidence as to his use of these statements is unclear. At one time he maintained that he did not read them. On another occasion, he suggested that he had read some of them; and there was some evidence that after returning home he would read them and then check the stocks which had been purchased, and their prices, on the Internet, when monitoring the market and his stocks. He also said at discovery that he had gone through the annual statements for 1999 with Mr. Girard, although at trial, three weeks later, he said he could not recall, that he may or may not have done so.

**50**  It is noted that it is stated on each monthly statement "Please inform us if you have any questions concerning any matter, especially errors and omissions." and "Please notify us of any discrepancy in this statement." In this regard, the plaintiff testified on cross-examination that he did not at any time inform HSBC of any error or omission or any discrepancies in any of the monthly statements. Further, he never complained to HSBC or to Mr. Girard about any trades made in his account.

**51**  The plaintiff did suggest at one time that he complained about the account in December 1999. At that time he had gone to see Mr. Girard to make sure that he could be put in a cash situation on short notice, because he was interested in buying a new business, which never occurred. He also expressed concern with the possible effects of the turn of the century on the market. He was told by Mr. Girard that he could cut him a cheque for $200,000 at any time, and I assume that his fears with regard to the millennium were allayed.

**52**  In any event, I am satisfied that the plaintiff never complained to either defendant at any time about any of the trades made in his account. His conduct, including depositing the further sum of $50,000 into his account in November of 1999, was not the conduct of a person who knew nothing about the trades in his account, or who had complaints about them. I am further satisfied that the reason was that the trades were made in accordance with his instructions and his objectives.

**53**  I refer next to a Client Profile Questionnaire which Ms. Jenereux went over with him and had him sign on November 15, 1999. Again, he says that he did not read the document before he signed it. Ms. Jenereux testified that she would have asked the questions contained in the Client Profile Questionnaire, made sure that his answers were correct, and then have had him sign it. She believes she went through each question with him before he signed it. She also gave him the opportunity to read the document before he signed it. She was not sure whether or not she gave him a copy of the document. She said that a copy of the Client Application Form must be given to a client. However, the questionnaire was not an application form, and she was not sure if she gave him a copy.

**54**  In the questionnaire under the topic Existing Portfolios, the plaintiff checked off the following as the current composition of his portfolio:

Consists of broad range of investment vehicles (such as money market instruments, government or corporate bonds, domestic or foreign common stocks, real estate and hedge instruments).

**55**  Under the topic Investment Knowledge, the question posed is "How would you describe your knowledge of the different types of investments available in the marketplace?" The designated answer is "(a) Sophisticated investor possessing extensive knowledge and experience in investing." I observe that this is probably an accurate description of the plaintiff's investment knowledge and experience at the time.

**56**  Under the topic Investment Objectives/Risk Tolerance, the first question is "Please indicate the statement that best describes your objective for your investment." And the answer chosen is "Consistent growth in the value of investment and no need for income."

**57**  The next question is "Investments with higher returns typically involve greater risks. Please indicate which of the following hypothetical returns best depicts the type of return you are most comfortable with." And the answer chosen is "12 percent average return with annual returns between 12.5 percent and 36 percent."

**58**  The final question is "Your response to a drop in the value of your investment is an important consideration when selecting the appropriate portfolio. Please indicate how you would respond if a $50,000 investment you made dropped in value to $40,000 after six months." The answer chosen was "Recognize that markets rise and fall and would 'ride out the loss.'"

THE ARRANGEMENT

**59**  The plaintiff's evidence with regard to the arrangements he made with Mr. Girard was at times vague, conflicting and inconsistent with what actually happened, which clearly was with his knowledge and with his consent. He acknowledged that the focus of his case was that the defendants were not authorized to buy or sell trades in his account without his instructions. In fact, he said in direct examination that only three of the trades made in his account were authorized. And in his opening, his counsel said that all of the trades in his account were discretionary trades and that he had suffered losses in late 1999 which he sought to recover.

**60**  It is seen that such evidence and claim are really contrary to the claim made out in the Statement of Claim, in which it is asserted that the defendants complied with the plaintiff's instructions, in reference to the nature and extension of the trades made in his account, until early 2000. It is also contrary to the plaintiff's own evidence to the effect that the trades in his account were authorized, and in accordance with his instructions and investment objectives, until early 2000.

**61**  At discovery and at trial the plaintiff said that the contents of paragraph 6, 7 and 8 of the Statement of Claim were correct. When examined by Mr. Johnson on August 16, 2001, the plaintiff was asked, "So what I am trying to find out is whether you agree that up until 2000, the philosophy of the investment portfolio and the compliance with the instructions issued by the plaintiff were all in order up until early 2000?" Answer, "I believe that he was following my instructions about investing in secure companies up until that point, yes."

**62**  On different occasions the plaintiff gave different evidence as to what his arrangements were with Mr. Girard. On one occasion he said that he told Mr. Girard about the fact that he would be out of town a great deal, and that he wanted someone to look after his account and "to bail me out if the sky was falling" when he was away. On another, he said that he did not agree that Mr. Girard could make trades in his account without his instructions. He also said that he wanted Mr. Girard to trade in his account when he was at the lodges. And he seemed to agree with counsel when it was suggested to him that his evidence that he had authorized Mr. Girard to trade in his account without his instructions was inconsistent with his evidence, that he had not agreed that Mr. Girard could make trades without his instructions.

**63**  On another occasion, he said he agreed that Mr. Girard was authorized to make trades in his account without instructions, adding "but in secure companies or if a major catastrophe occurred, I wanted to be bailed out of any bad companies." When it was pointed out that trades being made in his account when he was unavailable, were the very things he was now saying that he had not authorized, he reiterated his position that he wanted to be bailed out if the sky was falling. The gist of his evidence in the end, seemingly, was that all the trades in his account were unauthorized, save three of them, and that Mr. Girard was not authorized to make trades in his account without instructions, unless the trades were made in the stock of a secure company, or a major catastrophe occurred.

**64**  I have concluded on the evidence before me, including Mr. Girard's evidence, not only that the trades made in the plaintiff's account were authorized, but also that they were not discretionary trades. I am not persuaded by the plaintiff's argument, based on some of his phone bills which were produced, that there is no evidence that Mr. Girard had his instructions to make the trades. Nor am I satisfied that the plaintiff was absent from Kelowna, or unable to make trades, as much as he says he was. The only impediment to receiving instructions was that apparently he could not be reached at the lodges by phone. However, he could phone out and communicate with Mr. Girard and make arrangements for the purchase or sale of stock. And in fact he did so.

**65**  Mr. Girard says that, in fact, he discussed all trades with the plaintiff and received his instructions before they were made, and that the plaintiff was constantly in contact with him; that he did not at any time transact discretionary trades. I find this to be the case on the conflicting evidence before me.

**66**  Even if I am wrong and in fact Mr. Girard did conduct some discretionary trades, the plaintiff cannot succeed; for in my opinion it would be tantamount to fraud if he were to do so. I say again that the plaintiff's evidence, which is not believable, is inconsistent with what actually happened up to the time that the market crashed. Whatever the exact terms of his agreement with Mr. Girard were, I am satisfied that he well knew what trades were being made in his account, that those trades were made with his knowledge and consent. He was a party to them, and they were authorized. He clearly knew what was going on and never made one complaint to the defendants about the trades in his account.

**67**  At the material time he was an informed, experienced trader attempting to take advantage of the market and to profit on higher risk stocks. Even if it were found that initially the trades in his account were unauthorized discretionary trades, the evidence is overwhelming, that by his silence and conduct he acquiesced in the trades and ratified them. They were authorized trades. It is to be noted that in November 1999, when he now says the trades in his account were unauthorized, he injected a further $50,000 into the account; although he blames Ms. Jenereux for that, saying that he did it on her advice. At the same time he was making many trades on his own in his Suretrade account.

THE SURETRADE ACCOUNT

**68**  The plaintiff has failed to produce any documents or records pertaining to his Suretrade account. The gist of his evidence is that the company was taken over by another company and that he has been unable to obtain any documents from the successor company. He says also that he moved his residence on two occasions, and he believes that he lost his Suretrade documents at that time. I am not impressed with this explanation in the circumstances of this case. However, he did acknowledge having traded in his Suretrade account the same Internet "risky" stocks then being traded in his HSBC account, and that it was possible that his Suretrade stocks mirrored the stocks traded in the latter account.

**69**  One document which the defendants pressed for and received was a copy of the plaintiff's 1999 income tax return, which is somewhat telling. In the return the plaintiff's name is stated to be "Les Allen Stock Trading" and the main product or service "stock trading". According to the return in the year 1999 the trades made by the plaintiff in that year had a total value of $6,790,867.57. The plaintiff agrees that since only $1.2 million in trades were made through his HSBC account, he in fact made over $5.5 million worth of trades in his Suretrade account from May 1999 when the Suretrade account was opened to December 31, 1999, a period of some eight months.

**70**  There simply can be no doubt that at the material times the plaintiff was an informed and experienced investor and stock market trader. He knew in 1999 which stocks, particularly Internet stocks, were risky investments. In fact, he knew this in 1998 when he was trading in his account with TD Bank Greenline Investor Services, an account which he opened in April of that year. The records show that three of the eleven stocks he traded in that account were Internet stocks.

**71**  I note that when examined for discovery on August 16, 2001, by Mr. Johnson, the plaintiff said that he knew nothing about the stock market and, in effect, had never seen a client application form before February 25, 1999. He gave the same evidence when examined for discovery by Mr. Shields on March 15, 2002, a few weeks before the trial. I was not impressed with his trial evidence with regard to these "mistakes". His evidence was simply not true. He had signed a similar application form with the TD Bank on March 5, 1998, in which he said that his estimated worth was over $500,000 and that his investment knowledge was limited. He also stated that his investment objectives for the account under the topic "Account Risk Factors" were 50 per cent medium and 50 per cent high. And he agreed that when he opened the TD account he opened it because the stock market was doing very well, particularly the technology section, including internet stocks, "were booming". This, of course, was before February 25, 1999.

CREDIBIILITY

**72**  I did not find the plaintiff to be an honest and credible witness. In the witness stand he was argumentative and evasive, and displayed a convenient and selective memory. His evidence was in constant conflict internally and with the evidence of the other witnesses and even his own documents. Time and time again, he gave evidence at trial which was in conflict with, or at least qualified, evidence he had given at discovery, often only a few weeks before the trial began. I have concluded that I could not base any finding of fact favouring his case on his uncorroborated evidence.

**73**  I accept the evidence of Ms. Jenereux. I also have no reason not to accept generally the evidence of Mr. Girard, although given at discovery. While his evidence may suffer the usual frailties of recollection and memory like all witnesses, I found it to be generally consistent with other evidence which I accept, including the documents, and with what actually happened. I also have no reason not to accept the evidence of Ms. Matias given at discovery.

THE STANDARD OF CARE

**74**  The defendants say that the plaintiff was required to call expert evidence to establish the standard of care applicable to them. The plaintiff says that the standard of care is that which is laid down by HSBC's Manual and the Regulations of the Investment Dealers Association.

**75**  While I would have preferred proper briefs on this issue, particularly with regard to the law in this province, I will assume, for the benefit of the plaintiff, but without deciding, that the standards which the defendants must meet are those contained in the Manual and Regulations. For in my view it does not matter. The plaintiff cannot succeed whether the standards which the defendants must meet are those of ordinary ***negligence*** or those contained in the Manual and Regulations, if there is a difference.

DISCOVERY EVIDENCE

**76**  I turn now to the defendants' discovery evidence, which was read in, or deemed to have been read in, by Mr. McCaffrey at trial. Mr. Girard was examined on July 17, 2001. At that time, he acknowledged that as a Broker he was expected to follow, inter alia, the Rules and Regulations set out in HSBC's Manual as well as the Investment Dealer Association's Regulations.

**77**  He believes that he first met the plaintiff one week before the client application form was filled in and signed on February 25, 1999; because on page 2 of the application the words "one week" are written in, responding to the question, "How long have you known the client?" He was introduced to the plaintiff by Ms. Jenereux, and he and the plaintiff then went to his office. The meeting lasted approximately 45 minutes to an hour.

**78**  During the meeting, the plaintiff told him that he wanted to buy and sell stocks "on a rapid basis", which the plaintiff called "aggressive trading". He said that he explained to the plaintiff what aggressive trading was, and that the plaintiff assured him that he understood. They talked about risks and rewards and the plaintiff said that he had a portion of his portfolio which he was prepared to take risks with, because he had other assets secured in mutual funds. He said that they "exhausted" the risk factor during the meeting.

**79**  Mr. Girard said that he had a format which he always followed when an application form was filled in. He would go through the form point by point, everything that is in the application, with the client. He would then put checks in the boxes indicating the client information or instructions.

**80**  When asked whether he checked "Yes" in response to the question, "Will any other person or persons have trading authority in this account?" he said, "I assume if I checked the other ones I must have checked that one." It was pointed out that the form provided that if the answer was "Yes", the name, relationship, and account number of the person was to be stated, and that the area was left blank. He had no idea why it was blank.

**81**  He does not recall any discussion with the plaintiff when he made that check. He didn't recall any discussion with the plaintiff in reference to anyone else having trading authority over his account. I note here that Ms. Matias made it clear on her discovery that trading authority is not discretionary trading.

**82**  He was then referred to the next question, "Have you authorized anyone at HSBC, James Capel Canada to use discretion in handling your account?" where the answer "Yes" has been checked off but the area for the naming of the person is left blank. He was asked who he understood that person was and his answer was:

Actually, because I didn't put a name in there I'd assume that the answer was No and the manager should have caught that when he signed the application because it should have been filled in if that was the case. Plus there should have been another document attached to this if indeed it was a discretionary account, which it couldn't have been because it wasn't available at our office.

It was put to the witness that the plaintiff and he both understood that he was going to exercise the authority on behalf of HSBC in reference to that discretion, and he denied that such was the case.

**83**  Ms. Matias also testified that if she had reviewed the plaintiff's account and saw the question and answer she would have ignored it. She said that while the question is contained in the form, she would have considered that the answer was a mistake because HSBC did not permit discretionary trading under any circumstances.

**84**  He was next examined on the contents of box number 3, which is in his handwriting. It contains information he received from the plaintiff. He said that the plaintiff told him "that he had a lot of cash, approximately $750,000 worth", that he was planning to sell some of his business within the year, and that he would have even more cash. He discussed with the plaintiff what liquid net worth was or meant, and the plaintiff told him that he had $750,000 liquid cash or money.

**85**  Mr. Girard also acknowledged that he put the check marks in box 5, which is entitled "Investment Experience". He said in effect, that his check marks reflect the information he was given by the plaintiff, for example, that he had moderate experience in purchasing stocks.

**86**  I observe that at this point the following question was put and the answer given:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 287 |  | Q |  | I am going to suggest to you, Mr. Girard, that in my discussions with Mr. Allen that he has absolutely no experience in purchasing preferred shares, and he has absolutely no experience in reference to purchasing stocks? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Well, one of us is lying. |  |

At trial, the plaintiff was cross-examined on this evidence, pursuant to a limited waiver of privilege. The gist of the plaintiff's answers was that he could not recall telling his counsel that he had absolutely no experience in reference to purchasing stocks. I observe also, of course, that that was simply not the case.

**87**  He was then questioned about the contents of box number 6, which is entitled, "Objectives and Risk Factors". He confirmed that the plaintiff told him that his investment objective was 100 per cent aggressive trading, and that his risk factors were the same. He said:

Mr. Allen told me he had liquid assets of $750,000. He gave me approximately $100,000 of that money, and for that portion of the money it was to be ear-marked as aggressive trading, high risk.

He was adamant that the plaintiff was aware of what he was doing with the account "completely", specifically on the objectives and risk factors. The plaintiff wanted to "buy and sell securities for short-term gain or loss". I observe here that this is exactly the objective and approach taken by the plaintiff when trading in his TD Bank account and, in particular, when trading in his Suretrade account.

**88**  The witness also noted that during his discussion with the plaintiff, "He told me that he periodically would be out guiding, but he lived in town now most of the time. Roughly, that's what we talked about."

**89**  With regard to discretionary trading, the witness was asked:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 392 |  | Q |  | Now, did you understand at any time between February 25, 1999 and May 24, 2000, that Mr. Allen was authorizing you personally to exercise discretion in reference to this account? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Absolutely not. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 393 |  | Q |  | So by absolutely not, you are saying that you never understood at any time that you were being authorized to exercise discretion? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No. Mr. Allen was constantly in contact with me. There was no discretion in that situation. |  |

**90**  Mr. Girard said also that initially he did speak to Ms. Jenereux generally about, for example, "Is this customer a candidate to do the type of investments that he thinks he wants to do?" "That's the kind of conversation." He says that when she introduced him, Ms. Jenereux said, "He has X amount of dollars in mutual funds with me and he wants to invest this amount of money in a more high risk situation." When asked whether she was present when aggressive and high risk trading was discussed with the plaintiff, he said, "Absolutely". He is certain of that. Ms. Jenereux, on the other hand, did not recall such a conversation during which she said was a very brief meeting with the plaintiff and Mr. Girard.

**91**  Mr. Girard was asked about the $110,000 which the plaintiff deposited with him when opening the account, and the shares of Dell Computer which the plaintiff then purchased. He considered the purchase to be aggressive trading. It was "high risk". "It fits within the objectives." He said that the number one rule if you read the materials, referring to the Manual and to the Regulations, is "Know Your Client". He said he knew this client, he understood his situation and, "we proceeded accordingly."

**92**  He was asked why the Dell Computer stock was sold eight days later. He said that perhaps he should explain aggressive trading in the plaintiff's case. He said that it meant that he was buying a stock and making a gain on it and selling that stock. He said it could be a day, a week, or a month. "We would have a gain in that stock or a loss in that stock." He and the plaintiff discussed it and sold it for a profit.

**93**  Mr. Girard was pressed about the fact that in the February 25, 1999 application, "Yes" was ticked off for the question, "Will any other person or persons have trading authority in this account?", while in the August 24, 1999 application update, which he seems to feel he had some involvement with, no answer was given. When asked for an explanation he said:

Well, Mr. McAfee, in all honesty, we were not able to do discretion in the Kelowna branch, so this really is a non-event. We can't do it. And so the answer to the question is "Yes", they are different on both pages but we knew that. It's not --- the answer to these should be "No". So you know, yes, I made a mistake. I apologize if I made a mistake, but the answer to your question is "No", it's not filled out on one and yes it is on the other.

**94**  He agreed that he did not know why the form was not (apparently) completed because it should have been. He said that "If there was a problem with it, the manager should have brought it up." He was referring to the branch manager who was required to sign the client application form, and did so on February 26, 1999, and who as well would perform the branch's account reviews.

**95**  He also said that the August 24, 1999 update application came about because the plaintiff wanted to open up a short selling account. The plaintiff had discussed with him the fact that he had a discount trading account where he was shorting stocks, and he wanted to start shorting stocks in that account. They had quite an in-depth conversation about short selling and the risk. The plaintiff was buying two and three hundred shares of Yahoo, at three or $400 a share. He said:

Mr. Allen was fully aware and always discussed everything. He was very interested and an avid player in this game. For six months, for seven months before I did this application, Mr. Allen was aggressively, I may add, in the market. And now he came to me six months later to update the application to provide a short selling account, which I did, and I accommodated him. Some of the information you feel was missing on this application but it's not missing from the standpoint of I know my client rule, which I know, and which I'm telling you know.

And, me and Mr. Allen sat down on every stock trade that we did and discussed them. He knew who the company was and what we were doing. I provided him the relevant information with regard to those stocks. We discussed it. We decided and we purchased it.

**96**  It was put to Mr. Girard that during the period of time that he looked after the plaintiff's account, for a substantial period of time the plaintiff was out of the country, or was in northern British Columbia, when various trades were made. His response was:

Maybe he was. But like I told you earlier, we could have discussed it in August as to what we want to purchase and looking at Dell Computer at a specific price or whatever the stock may be. So whether or not he was in the country or out of the country, we may have had instructions on what we were going to do in the account.

On another occasion he said that the plaintiff was in constant contact with him. He said also that all the information he needed to make a purchase was to know the amount of shares the plaintiff wanted to purchase, the equity and the dollar figure.

**97**  It was put to him that in December of 1999, and in January and February of 2000, the plaintiff was not in Canada. He said he didn't agree because the plaintiff had attended at his office on January 17. When asked what about December of 1999, he said that the plaintiff came in to see him in December as well, and gave him a bottle of Crown Royal whiskey and a shirt with outdoors something on it and the name of his company. I observe also that the evidence is that there was a meeting between the two men in the month of December. He reiterated that he and the plaintiff discussed every stock which the plaintiff ended up purchasing.

**98**  He was then referred to the pattern of trades which occurred in December of 1999, that there were trades every one to three days during that month. The witness said:

Mr. Allen and me discussed every transaction and viewed the commission rates. And I told you already he had 30 days from the confirmation date to talk to me about it. And if at the end of December of 1999 he had 30 days from that point to talk to me or the management or the compliance officer or the IDA if he wanted. At no time did Mr. Allen say to me or ask me or write to me that he had problem with that. And if I can just finish, if he was so upset in December then why was he buying me a Christmas present? That's not the sign of a person that was upset in my opinion.

**99**  When asked for an explanation as to why there was more trading in December of 1999, he said:

Absolutely there's a reason. From November of 1999 to March of 2000, was the best four months in the history of the stock market. Every broker was super busy, super, super busy, in that time frame. That was the best market of the time. So if you're asking me for a trading account, absolutely there was more trading at that time because of the market.

**100**  When asked who he understood was supervising the plaintiff's account, he said it was the manager, Glen Fung, and someone from compliance. When asked whether anyone in a supervisory capacity at HSBC inquired about the activity in the account in December of 1999, he said that no one talked to him about any problems with the account. I observe here that it is likely that Mr. Fung, whose office was in Vancouver, reviewed the plaintiff's account once a month, as was company policy. However, according to Ms. Matias, there would be no record of his review unless he found a problem in the account. And I have already indicated that, in my view, any supervisor looking at the plaintiff's account would not see any problem. Rather, he or she would see that the account was consistent with the plaintiff's objectives and risk factors set out in his signed application forms.

**101**  He was not aware that the plaintiff was unhappy with his account until the plaintiff's letter of June 21, 2000 was brought to his attention in August of that year. He obtained a copy of the letter from the compliance people at TD Evergreen, his new employer.

**102**  He is familiar with the defendant company's policy Manual, "all securities firms have them". He doesn't review it periodically because he uses a handbook given to him when he took the securities course. It is entitled, "The Conduct and Practices Handbook" for the Securities Industry Professionals, and he receives updated information by bulletin everyday, and he has access to the security commission's website.

**103**  He acknowledged that he knows that the Manual provides that employees of HSBC securities are not supposed to exercise discretion in reference to any purchase or sale of stocks; also that one of the principles set out in the Manual is that all representatives or Investment Advisors should know their clients. His answer was, "Know your client given the information that the client gives you, to the best of your ability."

**104**  He also agreed that he knew that the application form was to be fully completed prior to opening the account; that the Investment Advisor is the person that is responsible for obtaining complete and accurate information from the client. He also agreed that it was important that the information contained in the application form be accurate because it forms the basis of the investment objectives for that particular client. He added:

I'd agree but I'd like to add that a fully completed application form is only as good as the paper it's written on. The information that is given and retained is the most important part of the application and the know your client rule.

**105**  When it was suggested that he was required to investigate whether or not the information given to him by the client was accurate, he referred to the bottom of page 2 of the form, saying that when a person opens a margin account the organization checks with the credit bureau and verifies the client's worthiness for credit and the information. I observe that in the case at bar on the day of their first meeting the plaintiff deposited $110,000 with Mr. Girard, suggesting some credibility; that later in November of 1999, he deposited a further $50,000 into his account.

**106**  I will observe that there are some difficulties or concerns in considering bits and pieces of Mr. Girard's discovery evidence read in at trial, particularly when it is found that the plaintiff is not a truthful and credible witness. It may have been the better practice to follow for the plaintiff to have called Mr. Girard and cross-examined him, if his credibility was seriously in issue as suggested by Mr. McCaffrey.

**107**  I turn now to the evidence given at discovery by Jeanette Matias on behalf of HSBC. At the time she had been a compliance officer with the company for about two and a half years in Toronto. Each office has a manager who was responsible for supervision of the Brokers (I believe she means Investment Advisors) in the branch. Second tiered supervision is compliances responsibility. At the material time, Glen Fung, in Vancouver, was the manager of the Kelowna branch. In effect, he was Mr. Girard's manager. Both the Vancouver and Toronto branches are required to retain records of supervision at the branch level, and at the head office level.

**108**  Ms. Matias was referred to, in general terms, the various overlapping Regulations and Rules which HSBC and the IDA require their employees to follow; with particular regard to supervision of clients' accounts, one of the reasons being to protect the client, and to protect HSBC as well, because they want to make sure that their Investment Advisors follow the Rules as they understand them. Branch managers and head office compliance officers are expected to follow the Rules.

**109**  She acknowledged that the client relationship begins with the completion and execution of the client application form. The form is important for both the client and the Broker, and the future supervision of the account. If the form is not filled out properly and accurately, it could mislead the person that is doing the supervision. The form becomes the basis or the foundation of the relationship between the client and the Broker, in this case, the plaintiff and HSBC, for the future.

**110**  Once the form is completed, it is sent to the branch manager for review. He is the only "gate-keeper" beyond the Investment Advisor. Once he approves the account it goes to head office and the information is then put into head office systems.

**111**  A compliance officer would not necessarily review the form. The manager would be expected to do so, to look at the person's income and net worth and how it relates to the investment objectives and the risks that are set out in the form. She said that the manager:

... should focus on whether the application is completed and that all of the necessary information that he's required to obtain is there and to determine whether the account is acceptable according to the information on the application.

"Acceptable" means, suitable, based on the information that is provided in the form.

**112**  Counsel then referred the witness to the client application form dated February 25, 1999 and the question, "Will any other person or persons have trading authority in this account?" Notwithstanding the fact that the question is contained in the application, Ms. Matias emphasized that at the material time and at the present time, HSBC did not allow discretionary accounts, and both the Investment Advisors and the branch managers knew that. She also pointed out that the question did not refer to discretionary trading, that it refers to "trade authority"; which relates to a third party having trading authority over the client's account.

**113**  She did agree that the question whether or not anyone at HSBC was authorized to use discretion in the handling of the account was referring to discretion. However, she could not say why the question was in the form, given that HSBC did not allow discretionary accounts. She opined that a branch manager seeing the word "Yes" ticked, may have inquired of the Broker why the answer was not no, since "We don't even offer the service." She said that had she seen the application it would have been a non-issue with her, and she would have assumed that it was a mistake. Mr. Girard would not be allowed to have discretion in reference to the account, and it wouldn't be approved.

**114**  Ms. Matias confirmed that when managers supervise an account they are required to record that fact, the action they took and the response that they received. However, that information is not required to be passed on to the compliance department in Toronto. Only queries are required to be recorded and passed on, that is when the manager finds a problem. For example, if he looks at a trade and finds nothing wrong with it, that it is suitable, they are not required to report that they agree with it or that they found it suitable.

**115**  She was then asked how a compliance officer would know whether a branch manager is supervising and doing reviews of an account as required by the Rules. She said:

We send out a monthly managers responsibility report where it outlines their supervisory duties and they are to tick each item off as they do it and then sign it and return it back to us. That is our way of verifying that they have done their supervisory duty.

I will refer to the form in more detail in a moment. I will simply note here that it deals with problems encountered, such as unusual trading activity, written evidence of inquiries made and records of client complaints. Again, it is clear that the manager is not responsible to prepare a report unless he finds something wrong or something of concern to him. Apparently, no reports finding irregular activities in the plaintiff's account or something of concern to the manager, were found at the branch office.

**116**  Ms. Matias said that the two questions in the form under the topic Employment/Financial Information, pertaining to the client's annual income and estimated liquid net worth are important. She would expect the Broker (Investment Advisor) to ask the client about his assets, both liquid and fixed, and document the answer on the form. However, she would not expect the Investment Advisor to record the details of those assets and liabilities. It would be a verbal discussion. She would expect him to ask about the types of securities held by the client with other investment firms. For example, GICs or mutual funds, are a part of liquid net worth, that is cash, and he should update the application in the event that a material change of information becomes known.

**117**  Counsel pressed the witness to agree that when questioning the client about his estimated liquid net worth, in box 3, there is a responsibility on the part of the Broker or Investment Advisor to ask very detailed questions of the client in order to try and establish the accuracy or validity of that figure. She wasn't sure if detailed is the same as complete, but said that complete and accurate information should be obtained.

**118**  She would expect the Investment Advisor (the IA) to generally ask the client what their estimated liquid net worth is, and if the client indicated he required assistance, then she would expect the IA to assist the client. She would not expect the IA to ask a detailed question about how the client arrived at the figure. While it depends on the client to some degree, she would not feel uncomfortable if the IA did not say to the client, "Can we list the details of your liquid net worth?" She noted while the IA was responsible to get the information from the client, as to the extent of the detail it is not required of them in the form. It is just estimated liquid net worth. I observe that I am satisfied on the basis of Mr. Girard's evidence that the plaintiff fully understood what estimated liquid net worth meant, and that he told Mr. Girard that it was $750,000.

**119**  It was put to the witness that the client's net worth objective and the risk factors are extremely important things to know for the defendants, because they are categories that a supervisor and the management looks at it to determine what the client's instructions are. Her answer was, "Among other items, yes." Later, she said she also looked at such things as the fact that the plaintiff is single with no dependents, he owns his own business, and has some investment experience and so on. "Moderate" investment experience means that he is not foreign to investment, that he has some experience with it.

**120**  She was then referred to box 6 which is entitled "Objectives and Risk Factors", noting that 100 per cent aggressive trading and 100 per cent high risk had been filled in. She said that it was not unusual for her to see an application form with such information. She sees them frequently.

**121**  The witness was asked whether she would consider it unusual to have a client that has moderate experience dealing with preferred shares and stocks, to open up a high risk aggressive trading account, particularly when the Advisor only knew the client for one week. She said she couldn't say yes or no because investment experience is not the only issue she would look at in terms of assessing suitability. She said that he could be investing $1,000 of his net worth into 100 per cent aggressive and 100 high risk trading, and she would not find that unusual. She was asked what about an investment of $110,000 and a liquid net worth of $750,000, would she consider that to be unusual. She said that she would not consider it to be unusual, and she acknowledged that her answer points out the importance of the $750,000 figure, because in a supervisory or a compliance capacity, the investment objectives relate to that figure, liquid net worth.

**122**  Ms. Matias was cross-examined in some detail on the fact that when the two accounts were opened they were both margin accounts. She said that in her experience, any time that someone aggressively trades, margin accounts are usually used because of the short settlement time that is required. If it was a cash account, the client would have to come up with the money in a short period of time. If it was a margin account, the loan value is there to accommodate the aggressive activity. Thus, it seems suitable to her that a client would indicate that he wanted to trade aggressively and trade high risk, and still margin; although it depended on his financial status and the other aspects discussed.

**123**  As an example, she said:

If I saw the account was worth $100,000, and relative to the client's net worth, and that he wanted to aggressively trade all of that $100,000 it wouldn't flag me at all, but say someone who had a lower net worth and who was putting much more of that net worth into this kind of trading, then I would say --- that would show --- I would show a concern but all of these factors combined, I personally wouldn't have questioned it.

**124**  She agreed that if she had looked at the account, she would have looked at the income, the trading experience, and the liquid net worth, and this would not give rise to any questions of unsuitability looking at these factors. However, if the liquid net worth, for example, had been $100,000, it would have been different.

**125**  She was then questioned about solicited or unsolicited trades, and undue concentration. The gist of her evidence was that she did not see undue concentration in the plaintiff's account, given his $750,000 liquid assets, and his objective to aggressively trade in high risk stocks. Again, buying and selling $80,000 worth of stocks in one day and buying back three or four days later is not unusual for an account for 100 per cent aggressive trading and high risk and the relative size of the account to the client's net worth. Her evidence, as in most of her previous answers, indicates the importance of the client's estimated liquid net worth, which both the plaintiff and counsel attack with vigour. An assessment of an account varies or depends to a fairly high degree on the $750,000 liquid net worth figure.

**126**  There are two levels of supervision or review triggered by the amount of commission generated in the file on a monthly basis. If the commission exceeds $1,000, the branch manager would review the file. If the commission for a month exceeded $2,500, the compliance department would review the file. The witness said that there were months where the account generated more than $1,000 in commission in a month, and that would have prompted a statement to be produced that would have been sent to the manager for review. However, he was only required to report queries. At the present time, a manager would be required to complete the branch manager's monthly responsibility report that indicates to head office that they have reviewed the statements. Still, no report is required on the review unless there is something that gives rise to an inquiry. But now the head office knows that the manager has reviewed the account. Apparently, this was not mandatory at the material time.

**127**  The witness was referred to account statements for October, November and December of 1999 and January of 2000. It was pointed out that in December, there was much more trade activity than in the other months, and which created $8,000 Canadian in commissions. She said that this did not give rise to concerns on her behalf as a compliance officer because of the objectives and risk factors, taking into consideration the plaintiff's financial status, and the fact that the account was coded for aggressive trading and high risk, and no issues had been brought up before. She would not have considered it a flag. She also noted that it could be different with a branch manager because he may know more about an account than she did.

**128**  It was suggested that there was "churning" going on in the account; that this meant buying and selling either one security or more than one security a number of times over a short period of time, referring to the Dell Computer purchases as an example. She said that that in itself was not the definition of churning. Churning is operating an account with the purpose of generating commissions. She said also that when looking at the plaintiff's account for the month of December 1999, it did not give rise to a concern in reference to churning in that account. The reasons are the same; because the account is coded for aggressive trading and high risk trading, and she would look at prior activity to see if there were frequent short term trading and so on, and whether any issues had been brought up before. She found nothing that would cause her to consider this a flag. It seems to me as well that churning is highly unlikely, given the fact that the plaintiff was so commission conscious.

**129**  She also agreed that the plaintiff's account in December of 1999, was traded at times very aggressively, "almost like a day trade account". She acknowledged that the account was frequently concentrated on only one, two, or three securities, that there was a purchase of security which was then sold and repurchased, that it was predominantly traded in high tech companies with very limited or no histories of profitable operation and so on. It was put to her that given these factors, queries should have been made from her point of view. She again said that this was not the case, given the objectives, risk factors and other financial information.

**130**  The witness was next referred to a purchase of Compusoft shares in March of 2000, which is marked as unsolicited. All of the other trades were not marked unsolicited. She agreed that it was fair to assume that they would be solicited trades.

**131**  When asked what conclusion she would come to seeing one unsolicited trade and all the rest solicited, she said, "I would only notice that the client has his own idea of purchase and that he advised ... advised the broker to buy the Compusoft." She agreed also that she would arrive at the conclusion that all of the rest of the trades were recommended or certainly had input from the broker at the time that they were purchased; that this would not give rise to any concern as far as she was concerned.

**132**  The witness was then questioned with regard to discretionary trading. She agreed that as a compliance officer when doing reviews, one of the things they watch for is discretionary trading. Her answer was:

Yes, you would look for it but the main, I guess, indicator because we don't allow for any discretionary accounts at all, the main, I guess system we have that ensures that the client or the trade has been confirmed or was discussed is that confirmations, trade confirmations are sent out, monthly statements are sent out and that is exactly what these items are supposed to do is for the client to confirm that these transactions were agreed upon.

**133**  I agree with the witness' emphasis on the importance of the trade, monthly and yearly confirmation statements sent to the plaintiff by HSBC. These statements, of course, bypass the Investment Advisor, and they are a very important check on him and on what he is doing in the account. And one might ask the question why would an Investment Advisor transact on his own discretionary trades in an account when he knows that he will be found out as soon as the client reads the trade or monthly confirmation, and that his position in his profession would probably be jeopardized. This is one of the factors which I considered when deciding that in fact Mr. Girard did not transact discretionary trades in the account, especially on his own.

**134**  Finally, the witness was referred to pages 5-13 and 5-14 of the Manual pertaining to monthly reviews of accounts by both the branch manager and head office, and reports pertaining to those reviews. She said the review process by branch managers would not be documented or evidenced unless the review gave rise to queries, referring to Section 5.4.1.2. She said, similarly, head office reviews would not be documented or evidenced unless queries arise, referring to Section 5.4.2.

**135**  She was asked to make inquiries as to whether reviews were conducted by head office when the commissions in the plaintiff's account exceeded $2,500, and if so, to produce any existing records of those reviews. Finally, if reviews were not done, counsel wanted inquires to be made as to why they weren't done. I refer to these inquiries only to point out that numerous similar inquires were made throughout the discovery, and I do not recall being made aware of the answers to them.

THE SUBMISSIONS

**136**  Mr. Shields said that no claim in law was made out. All that was before the court were statements which, as a result of cross-examination and a review of the documents, were actually shown to be simply not true. The documents, particularly the two application forms signed by the plaintiff, show that the plaintiff did want to invest in stocks with higher risks.

**137**  An adverse inference should be drawn from the fact that the plaintiff did not produce his Suretrade documents or records. They would have included an application form signed by him, which would have set out his trading knowledge and objectives. While I would be prepared to draw the inference, I note that there is ample evidence before me which establishes that he was an experienced and knowledgeable investor and trader, and that the actual trades made met his objectives, and were well within his risk factors.

**138**  Mr. Shields pointed out that the plaintiff's position and evidence at trial that many trades made in 1999 were unauthorized cannot stand in the face of paragraphs 6, 7 and 8 of the Statement of Claim, and the plaintiff's own evidence both at discovery and at trial, that the 1999 trades were in compliance with his instructions and his objectives. Clearly, the 1999 trades were authorized.

**139**  The 2000 trades were also authorized. On the plaintiff's own evidence he authorized Mr. Girard to trade on his behalf without instructions. The plaintiff said in direct examination that he took back control of his accounts in 2000. And when the meltdown came, the plaintiff was monitoring the market and his stocks. He discussed the situation with Mr. Girard on a number of occasions but never instructed him to sell out his portfolio. While at the same time the plaintiff was in fact selling out his portfolio with Suretrade. The plaintiff only instructed Mr. Girard to sell one stock, which he was following, and which he insisted on being sold. On receiving those instructions, Mr. Girard sold the stock. The plaintiff's conduct in not selling his stocks in the Spring of 2000 is consistent with his stated investment objectives and risk tolerance in the November 15, 1999 questionnaire in which he indicated he would "ride out his losses".

**140**  Mr. Shields observed that the plaintiff received confirmation slips for every trade in his account as well as monthly and yearly statements. He was asked to advise HSBC of any errors in the statements and he never did. In fact, the first complaint he ever made to the defendants about the stocks in his account was contained in his letter dated June 21, 2000. It was a letter, I observe, which was shown, by the plaintiff's evidence, to contain false or inaccurate assertions. He noted also that the plaintiff was claiming damages, that is, the difference between his portfolio, from December 1999 to October 2000, even though he testified that everything was perfect up to the end of January 2000.

**141**  Mr. Shields submitted that any decrease in the plaintiff's portfolio was the result of the market crash; that there was no evidence that it had anything to do with what the defendants did or did not do. While the plaintiff said that he had difficulty communicating with Mr. Girard at the time of the crash, when he did communicate with him he only told him to sell one stock; although he had himself sold out all his Suretrade portfolio. The fall in the market, an extraneous event, and the failure of the plaintiff to act, caused whatever loss the plaintiff suffered.

**142**  Mr. Shields commenced his submission on the law by referring to the decision of Master Funduk in the Alberta case, Alberta (Treasury Branches) v. Hammond, [*[1996] A.J. No. 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JTNR-M53W-00000-00&context=) at p. 2 where Master Funduk had this to say, citing the decision of Belsil, J. in T.W.T. Enterprises Ltd. v. Westgreen Developments (North) (1927), 127 A.R. 1353 (C.A.) as follows:

It is a common and human trait for people who have lost money in a failed enterprise or investment to look upon themselves as blameless victims and to cast about for a scapegoat, and in doing so fabricate evidence which will impute blame to others for their own failings. Men of straw are in such circumstances easily set up and knocked down.

In my view, the passage is an apt description of what has occurred in the case at bar.

**143**  Mr. Shields submitted that the Manual and the Regulations referred to are irrelevant. They do not form part of a legal relationship between the plaintiff and the defendants. There is no plea that their provisions form part of the contract between them, or that the plaintiff even knew about them. There is even no plea of reliance on the defendant's internal Manual. A person can breach the internal Manual or Regulation and not be liable.

**144**  Counsel next referred to the decision of the Manitoba Court of Appeal in Janz v. Harris [*(1993), 88 Man. R. (2d) 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-JCRC-B4Y2-00000-00&context=) (C.A.) where Twaddle, J.A., speaking for the court, had this to say at p. 8:

|  |  |  |  |
| --- | --- | --- | --- |
| 3 |  | Part of the problem was terminology. Counsel confused unauthorized trades with those which although not specifically authorized, were made by Green within the scope of his discretionary authority. Industry rules place a severe limit on the circumstances in which discretionary trading is permitted but trades made in breach of them are not necessarily unauthorized. A customer may still be bound by them if it is proved that they were made within the scope of the authority actually inferred. |  |
| 4 |  | None of the impugned trades made by Green on the plaintiff's behalf was expressly authorized. Most were made, however, within the scope of a discretionary authority which was clearly given. The remainder, although not initially authorized, were undoubtedly ratified by the plaintiff. What gives the plaintiff a claim for recovery of his losses is Green's fraud. (my emphasis) |  |

**145**  There is no fraud in the case at bar, and the principles referred to are particularly applicable. It is seen that in my view all of the trades made by Mr. Girard were authorized. They were not discretionary trades. I am satisfied that Mr. Girard was authorized to make all the trades he made, and that those trades were made with the informed knowledge, consent and participation of the plaintiff. Further, if there was no authorization initially, and even if the trades were discretionary trades, which in my view is not the case, it is clear on the plaintiff's own evidence, and from his conduct, that he acquiesced in and ratified the trades. And see the decision of the Court of Appeal with regard to acquiescence and ratification given by Thackray J. in Community Savings v. United Association of Journeymen et al, [*[2002] B.C.J. No. 654*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1WB-00000-00&context=), [*2002 BCCA 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1WB-00000-00&context=).

**146**  Counsel also referred to International Futures Ltd. v. Ford [*(1980), 31 B.C.L.R. 209*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JJ1H-X294-00000-00&context=) (S.C.) a decision of Fawkus J. in support of his submission, and with which I agree. See also Connolly v. Walwyn Stodgell [*(1993), 121 N.S.R. (2d) 278*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPV1-F4W2-62SG-00000-00&context=) (N.S.C.A.), particularly at pp. 282-286. In that case, the plaintiff brought an action against his broker claiming ***negligence***, including failure to supervise its employees. The trading was unauthorized and contrary to the T.T.E.S. Regulations by which the defendants, the Broker and its branch manager, who was not a party to the action, were bound. The trial judge found that after the initial foray into unauthorized trading by the branch manager, the plaintiff knew of it; that his knowledge and acquiescence in the manager's unauthorized trading vitiated any fiduciary duty owed by the defendant Broker to the plaintiff and the plaintiff was bound by the manager's actions and could not recover for the direct loss. However, the trial judge also found Walwyn, the defendant Broker, liable for, among other things, not properly supervising the account.

**147**  In the Court of Appeal, Walwyn's appeal was allowed. At p. 284 Jones J.A. referred to Meyer's text, Law of Stockbrokers and Stock Exchanges, 1931, at p. 408 for the proposition that the general principle is that any wrongful act on the Broker's part may at the election of the customer be either ratified or repudiated; that any wrong committed by a Broker, no matter how serious or what its nature, is susceptible of ratification. He cites from the authority, as follows:

The first principle of ratification in stock brokerage transactions is that a customer who wishes to take advantage of his broker's wrongful act must repudiate that act. If he does not, he is deemed to have ratified it. He may not merely sit by and do nothing, but is bound at the risk of the loss of his claim affirmatively to indicate his repudiation:

Ratification can be proved, not only by an expressed assent, but also by implication from principal's acquiescence or failure to dissent within a reasonable time after being informed by the agent of what he has done. (my emphasis)

**148**  Jones J.A. also had this to say at p. 286, and has application in the case at bar:

Himmelman was acting as the agent of Connolly in all of these transactions and accordingly Mr. Connolly was liable to pay for the total losses as he authorized them. That was the effective cause of the loss. It ill behoves Mr. Connolly to complain that had Walwyn properly supervised the account, that the unauthorized trading would have been terminated at an earlier date. That option was open to Mr. Connolly at any time. He was an experienced agent, although in the insurance field, who no doubt was fully aware of the effect of Mr. Himmelman's unauthorized actions.

It is unnecessary to consider the remaining issues. Walwyn has submitted that it was not negligent in the supervision of the account. It is certainly not clear from the trial judge's findings as to the specific acts of ***negligence*** on which he relied or the losses which resulted from such acts. Clearly, a number of his findings on ***negligence*** were not supported by the evidence. In any event in my view the sole cause of the loss was due to Mr. Connolly's approval of the actions of Mr. Himmelman.

|  |  |
| --- | --- |
| (my emphasis) |  |

**149**  In Walwyn, Hallett J.A., Roscoe J.A., concurring, was basically in agreement with Mr. Justice Jones' decision. He too was of the view that even if Walwyn was somewhat at fault in monitoring or supervising the plaintiff's account, this was not causative of the loss. The cause, he said, was Connolly's "private arrangement" with the Investment Advisor, whereby he authorized and affirmed the trades.

**150**  Two other observations by Hallett J.A. are of interest. First, at page 290, he was of the opinion that the trial judge incorrectly considered the review requirements respecting managed accounts "in which discretionary trading is a method of trading" where the Broker Walwyn did not permit discretionary trades.

**151**  Second, having said that, he points out at page 291 that Walwyn did have a supervisory role respecting Connolly's account. He then continued:

However, the principle mechanism a brokerage firm's head office has to detect whether a registered representative (Himmelman) of that firm is involved in unauthorized trades is a practice of sending confirmation slips to the client. Connolly never advised Walwyn's head office that he did not accept the transactions as described in the confirmation slips. Therefore, there was no reason why Walwyn's head office would have reasons to suspect the option transactions were unauthorized as opposed to inappropriate. (my emphasis)

**152**  In the case at bar I have concluded that there is no evidence before me from which I should conclude that HSBC did not properly supervise the plaintiff's account. The fact that there is no record of the supervision is explained by the fact that the supervising manager is not required to make a record unless he finds something wrong. The plaintiff never told HSBC that he did not authorize or accept the trades described in HSBC's confirmation notices or slips. And as I have already said, probably more than once, in my opinion any supervising manager reviewing the plaintiff's file would have reasonably concluded that there was no problem, that the account was consistent with the plaintiff's liquid net worth and with his objectives and risk factors.

**153**  In my view, HSBC did not breach its account supervisory obligation to the plaintiff. Further, as in Walwyn, it ill behooves the plaintiff to complain that had HSBC properly supervised the account, the alleged unauthorized trading would have been terminated at an early date, because that option was always open to the plaintiff. It was up to him. But he was a party to the trades, one way or another.

**154**  Counsel argues that the effective cause of the plaintiff's losses was his authorization of the trades in his account. I agree. As I have opined, the trades made in the plaintiff's account were authorized, and were not discretionary trades. If this is not the case, then he certainly acquiesced in them by his conduct, which I have reviewed in much detail. It was only after the market crashed, and he proposed to do nothing, that any losses occurred and he was the author of those losses.

**155**  Mr. Shields then made reference to two further sets of facts. First he posed the question why would the plaintiff inject a further $50,000 into his portfolio in November 1999 if the many trades made up to that point were unauthorized. He submitted that the payment confirms the agreement between the two men, and is consistent with continued authorization to Mr. Girard.

**156**  Counsel also referred to Mr. Girard's discovery evidence which was read in by counsel for the plaintiff. He observed that it was replete with Mr. Girard's evidence that all the transactions in the account were authorized. He said that two things must follow: first, the plaintiff has led a great deal of inconsistent evidence. Second, while there may be minor discrepancies in Girard's evidence, his credibility on the plaintiff's evidence is not really in issue. This should be contrasted with the plaintiff's credibility. I agree.

**157**  Counsel next referred to the decision of Teetzel J. in Carr v. Murton (1904), 7 O.L.R. 751, at page 752, where he states:

I find no authority which imposes an obligation upon a broker to sell shares during a falling market, after he has demanded further margins and received no reply from his customer. On the contrary, it appears to be settled that in the absence of an order by the customer there is no such duty on the part of the broker, and, therefore, if he does not sell the stock under those circumstances he is not responsible for any loss which may arise to the customer.

Counsel points out that it is clear on the plaintiff's own evidence that he did not give Mr. Girard any instructions to sell his stock; that when he did so Mr. Girard immediately complied with the instruction. There was no obligation on the defendants to sell the stock.

**158**  Mr. Shields then reviewed the allegations of ***negligence*** against Mr. Girard as contained in paragraph 10 of the Statement of Claim, and the evidence bearing thereon, submitting that the plaintiff had not established ***negligence*** on the part of Mr. Girard, or evidence that anything he said or did or didn't do, caused the plaintiff's alleged losses. Accordingly, the action against Mr. Girard should be dismissed. It is seen that I am in basic agreement with Mr. Shield's submissions.

**159**  I turn to Mr. Johnson's submissions. Having heard Mr. Shields' submissions, I will deal only with the question of supervision by HSBC. Mr. Johnson asked the question how could his client prevent unauthorized trades? HSBC sent the plaintiff confirmation notices for every trade, as well as monthly statements and yearly statements. These statements place on the shoulders of the client a duty to speak up if any trade was unauthorized. The Broker has to depend on the client once the notices are sent out. The plaintiff did not respond.

**160**  Mr. Johnson suggested that supervision in a sense is easier in other cases. For example, where an 80-year-old grandmother on pension puts 100 per cent of her portfolio into a mining stock. This is unsuitable. The supervision process is set up to protect particular clients. It is done at levels where commissions reach a certain threshold in an account. Another threshold is a single large transaction. The account is to be reviewed. The Broker looks at the client's recorded information in the forms in the client's file. If the client is a grandmother and the stock is a crazy mining stock, an inquiry is to be expected. However, if you are an experienced high income earning client with the desire to invest in high risk stock, the Broker looks no further. A review of the plaintiff's account would not have raised any flag or concern on the part of the manager.

**161**  In response to Mr. McAfee's suggestion that HSBC should have looked beyond the form signed by the plaintiff, Mr. Johnson posed the question, what should be done in that event? First, the Broker would have the option of calling Mr. Girard, who would not suggest any change in circumstances. A Broker can also send confirmations to the client asking for a report on any discrepancies. This, in fact, is done automatically. It bypasses the Investment Advisor and is a completely independent check. Here, this was done but the plaintiff chose not to complain in response to the confirmation request.

**162**  Counsel submitted that there is a need for a client to make a decision on discretionary trading, if the client finds out there is something wrong. A decision must be made. The client needs to mitigate his or her losses, or will be deemed to have ratified the trades by doing nothing. The client is not permitted to wait for a year, to see if in the end the market is up or down, and then decide to look to the Broker to recover losses.

**163**  Where the client doesn't understand what's going on, there may be a debate about how quickly the client must act. This is not the case here. On the plaintiff's evidence, he knew he could reject any unauthorized trades. He knew also that he could not wait too long to do so. He knew this and chose to do nothing.

**164**  Counsel noted that on direct examination, the plaintiff said that by March of 2000 he had taken control of his account. The evidence as a whole shows that at least by the time of the collapse of the market the plaintiff was a sophisticated investor. There is no evidence that he needed time to decide what to do with his account after March of 2000, and no evidence that he needed professional advice. According to his evidence, he had a number of discussions with Mr. Girard as to what should be done or what his options were. He chose to not to sell the stocks in his HSBC account. While at the same time, he himself sold out his Suretrade account. When the market began to crash, the plaintiff was duty bound to immediately sell his stocks in mitigation, given the condition of the market and the plaintiff's knowledge and familiarity with the market. The plaintiff was the author of his own misfortune. Counsel submitted that the action against HSBC should be dismissed.

**165**  I turn now to the submissions of Mr. McAfee, dealing firstly with his argument on the evidence. It is seen that in my opinion, the plaintiff is not a believable witness. There is little or no evidence before me from him, which is supported or corroborated by evidence independent of him, and which advances his case.

**166**  Counsel seemed to concede that the plaintiff agreed that Mr. Girard followed his instructions and his investment objectives at least to the end of 1999. In any event, I find this to be the case on his evidence, and indeed the contents of the Statement of Claim, which appears to be in conflict with counsel's opening statement which, with respect, contains much which has been shown to be untrue or inaccurate, on the plaintiff's evidence alone.

**167**  Counsel submitted that the December 1999 meeting was of some importance, and that there is no contradictory evidence as to what occurred during the meeting. He said also that it was the plaintiff's evidence that he complained to Mr. Girard at the meeting about trades in his account, in addition to YT2 and cash concerns. I am unable to agree with this submission. On the plaintiff's conflicting evidence, I am satisfied that he did not complain to Mr. Girard at that meeting about any of the trades in his account. No particulars were given of the alleged complaint. And given what was happening in December of 1999, if he had any complaints he surely would have specified them and had something done. And I am satisfied that he made no complaints whatsoever until after the market crashed in the Spring of 2000.

**168**  Mr. McCaffrey says that discretionary trading is not the only question before the court, although it is an important one. He said that the court must consider all the evidence, that it is fine to say that the plaintiff ratified and accepted the discretionary trade, but there is no evidence of ratification. Again, I do not agree with counsel's submissions. I am satisfied, and have little doubt, that all of the trades in the plaintiff's HSBC account were authorized by the plaintiff. They were made pursuant to his instructions to Mr. Girard, and in the furtherance of his investment objectives.

**169**  Further, if it can be said that any of the trades were, in fact, discretionary trades, and in my view that is not the case, it is clear that he was a well-informed market investor and trader, that he knew about the trades in his account, some if not all of which he monitored on the TV and computer, and if he did not initially authorize any trade he certainly approved it, acquiesced in it and ratified it shortly after it was made, and made no complaint whatsoever about it until the stock market crashed. It is seen that these facts, in my opinion, distinguish the case at bar from the cases on which Mr. McCaffrey relies, and to which I will shortly refer.

**170**  Mr. McCaffrey says that in the brokerage industry a Broker or an Investment Advisor cannot breach the internal obligation placed upon it by the Manual and the Regulations and not be liable; that the cases show a high degree of obligation on the part of the Broker and employee to adhere to the Regulations. Again, I am not in agreement with these submissions. Each case must depend on its own facts. In my opinion, there is no obligation on a Broker to protect an informed and knowledgeable client from his own business decisions which turn out to be costly. And this is so, even if the decisions involve a breach of the provisions of the Manual or of the Regulations, for example, where the client enters into an agreement with an Investment Advisor to give him authority to make discretionary trades.

**171**  It certainly would be a good deal for a knowledgeable, aggressive client who, basically on his own, gambled and lost in the stock market, to be able to recover his losses from the Investment Advisor or Broker because a Rule in the Broker's Manual or a Regulation in the Dealer Association's Regulations was breached, but that is not the law. In such a case, as in the present case, the client is a party to and authorizes the trades. He is the author of his own loss, and the breach is neither relevant nor causative. In order for the plaintiff to recover there must be something more, for example, fraud on the part on the Investment Advisor. There is no allegation or evidence of fraud on the part of Mr. Girard in the case at bar.

**172**  Mr. McCaffrey strongly disagreed with Mr. Shields' submission that the credibility of Mr. Girard's evidence was not an issue on the plaintiff's evidence. In my view, Mr. Shields' position is correct, in the sense that there is no evidence before me which would lead me to conclude that Mr. Girard's evidence generally, should not be accepted. I am not prepared to accept the evidence of the plaintiff. This leaves the evidence of Mr. Girard to be considered in light of the whole of the evidence, and I have concluded that it is more likely than not that Mr. Girard's evidence is credible. But even without Mr. Girard's evidence, the plaintiff cannot succeed. He has not met the onus upon him of establishing on a balance of probabilities that any wrongful conduct on the part of the defendants caused or contributed to the cause of his losses.

**173**  Mr. McCaffrey then quickly took me through a number of sections in HSBC's Policies, Procedures and Compliance Manual which he says bear on the defendants' responsibilities to the plaintiff which were breached.

**174**  He first referred to a document entitled "Managers Monthly Responsibility Report" which apparently is completed by managers each month in certain circumstances; and which was referred to by Ms. Matias. The document, he says, is tied to supervision of client accounts by managers and the compliance officer at head office. Thus, there are two levels of supervision which are designed to prevent problems in clients' accounts. These Rules are to protect the clients.

**175**  I observe that on its face the document is concerned with "unusual trading activity" and "written evidence of inquiries made" seen in the client's file when reviewed. And I observe that there is no evidence before me that a supervisor looking at the plaintiff's account would see any of these matters which might be called "flag" matters. On the contrary, what would be seen would be an account in order, one in which the plaintiff's objectives were being pursued.

**176**  Mr. McCaffrey then referred me to two sentences contained in Section 1: "Code of Conduct", at page 1-3 of the Manual, which refers to the conduct of employees and presumably would include Mr. Girard. Those principles are "to conduct all business transactions with integrity, honesty, and in an ethical manner" and, "to guarantee fair and equitable treatment to all clients and employees."

**177**  Counsel then referred me to Section 1.5 which is entitled "Whose Clients Are They?", then Section 1.6. which is entitled "Personal Trading Policy" and then Section 1.6.1 which is entitled "Definition of Controlled Accounts", and subsection (v) which provides as follows:

For the purposes of the policy, the term "controlled accounts" means the following securities account: ...(v) any other account over which the employee has investment discretion or otherwise can exercise control.

**178**  Counsel said that HSBC does not permit discretionary accounts, but the Manual refers to "controlled accounts" which apparently is a discretionary trading account. If discretionary trading is permitted by the Broker, then Sections 1.6.2, 1.6.4 and 1.6.5 come into play. These provisions contain the Rules applicable to the opening of the controlled account. They are to be opened as outlined in the company's Account Opening Procedures, the Compliance Department must be notified, and will provide written consent authorizing the employee to establish the account and so on.

**179**  I do not believe it is necessary to deal further with these sections dealing with controlled accounts. They seemed to be concerned with employee-controlled accounts, rather than discretionary accounts. In any event, they do not appear to be relevant to these proceedings.

**180**  Counsel next referred me to particular subsections of Section 5 which is entitled "Know Your Client/Documentation". Mr. McCaffrey submitted that these provisions are most important because they relate inter alia to the obtaining of the two client application forms which he says are the most important documents in this case. While he barely referred to these sections, I will do so very briefly before returning to his submission.

**181**  Section 5.1 commences with the statement, "When a prospective client wishes to open a new account, IAS are required to use due diligence in gathering and recording the following information." The IA (Investment Advisor, Mr. Girard) must determine the essential facts relative to the client and to every order or account accepted, ensure the acceptance of any orders within the bounds of good business practice, and ensure that recommendations made for any accounts are appropriate for the client and are in keeping with the client's stated investment objectives.

**182**  It is stated under this subsection that all questions contained in the Client Account Application Form must be fully and accurately answered as the information collected on the application allows the company to assess risk potential in the opening of an account and to establish whether special industry Rules apply to the client. It is also provided that the client's investment objectives and risk parameters must be clearly and accurately stated on the application form and "adherence to these objectives and risk factors in the servicing of the account must be continually monitored and maintained."

**183**  I observe here that there is no evidence before me that the defendants did not abide by the provisions of Section 5.1.

**184**  Section 5.2.1 instructs the IA in determining investment objectives and updates to the application form. He should specifically inquire as to the objectives and risk factors, and assist the client in determining the most appropriate level of risk, product type, et cetera, that will achieve the client's overall investment objectives. It is stated as well that each IA should review with his/her clients their investment objectives on a regular basis and update the application form. I note that in this case the plaintiff's investment objectives and risk parameters appear to be clearly and accurately stated in the February 25, 1999 application and in the August 24, 1999 update, given the brief form to be filled out, being objectives, 100 per cent aggressive trading, and risk factors high, that is, 100 per cent.

**185**  In his submission, Mr. McCaffrey seemingly emphasized as being most important, Sections 5.3 and 5.4. Section 5.3 is entitled "Documentation". It deals with documentation requirements for various accounts. It is noted that Section 5.3.3 which is entitled, "Discretionary Accounts" provides that the company does not permit discretionary accounts; that if a client cannot be reached for a period of time, then a power of attorney or trading authorization should be requested from the client, giving authority to an outside party.

**186**  Section 5.4 is entitled "Account Supervision". Section 5.4.1 which is entitled "Branch Manager - Account Supervision Requirement" provides that branch managers must undertake certain activities within the branch for the purposes of assessing compliance with regulatory and the member's requirements. It is stated, "These activities should be designed to identify failures and to adhere to required policies and procedures as well as provide a means of revealing undesirable account activity." The purpose is to overlook and assess the activity of the IAS and their clients.

**187**  Section 5.4.1.1 provides for daily reviews by branch managers. New account applications must be reviewed and approved no later than the next day. A review of the daily Commission Report should be undertaken to detect "unusual trading activity" and will include reviews of potential compliance issues. Branch managers must evidence their reviews.

**188**  Section 5.4.1.2 provides for monthly reviews by the branch manager. The client's statements, where the account has generated commissions in excess of $1,000, will be provided to the branch manager and must be reviewed.

**189**  Section 5.4.1.3 provides for "what to look for". The purpose of the review is to look for unusual trading activity. This includes excessive trade activity, inappropriate/high risk trading strategies, client complaints and the like. It would appear that, as testified to by Ms. Matias, the branch manager's activities under these sections are only recorded where a review reveals a problem, or something which should be looked into. Thus if no problem is ascertained, there may be no record of the review, and in this regard, there is no evidence before me that these provisions were not fulfilled by Mr. Girard's branch manager. The lack of records of the reviews more likely means that the reviews of the plaintiff's account did not reveal any problem.

**190**  As I have said earlier, in my opinion a manager reviewing the account, and the contents of the application forms, could reasonably conclude that all was well. In any event, as I indicated earlier, I am of the opinion that even if the plaintiff's file was not reviewed, or these provisions were otherwise breached, such conduct was not causative of the plaintiff's alleged losses. The plaintiff was the author of his own losses, having authorized the trades.

**191**  Section 5.4.2 is entitled "Head Office - Account Supervision Requirement". The compliance officer must perform daily and monthly account reviews. By Section 5.4.2.1, the compliance officer must each day review the previous day's trading for unusual trading activity. The review is taken in an attempt to detect the concerns addressed in Section 5.4.1.3. Section 5.4.2.2 provides for monthly activity. The compliance officer must review the client's monthly statements, and cover the same areas of concern referred to earlier. Again, I note that these reviews are conducted for the purposes of ascertaining any problems in the account such as excessive trade activity and so on. However, the reviews are only recorded in the event that a problem is ascertained, or an inquiry is required and so on.

**192**  I observe that defence counsel did not make submissions with regard to the various sections contained in the Manual and in the Regulations; that Mr. McCaffrey barely referred to them, without any detail, in his submissions. Hence, I do not propose to deal with them in any detail or to deal with perceived problems in such circumstances. I have considered them generally, with particular regard to Mr. McCaffrey's submissions pertaining to them.

**193**  In this regard, Mr. McCaffrey said that Sections 5.3 and 5.4 were most important to his client's case. This is because whenever the plaintiff's account was reviewed by the manager or by the compliance officer, they would look to the file documentation, particularly the two application forms. He submitted that if the forms are not completed properly and accurately, the client, that is, the plaintiff, loses the protection the document provides. In effect, he says that the defendants failed to use due diligence in gathering and recording some of the information contained in the application forms. Thus, in effect, if the plaintiff's account was reviewed, nothing would be revealed which would alert the manager or the compliance officer that there was any potential problem in the account.

**194**  It is seen that I am unable to agree with these submissions. In my opinion, the two application forms accurately record exactly what the plaintiff told Mr. Girard. And in reviewing the plaintiff's account the branch manager and any head office supervisor were entitled to rely on their content.

**195**  I observe also that the primary problems looked for apparently are unusual trading activity, evidence of inquiries having been made, and of client complaints. Of the three areas, the latter two would not come into play, since there is no evidence of any inquiries or any complaints having been made. And given the plaintiff's stated objectives and risk factors in the two application forms, it is unlikely that anyone reviewing the file would have had any cause or concern about unusual trading activity.

**196**  I turn now to the areas of inaccuracy referred to by counsel. The first relates to item 3, Employment/Financial Information, and the information that the plaintiff's estimated liquid net worth is $750,000. The plaintiff says he was asked what was his net worth and he said $750,000. This says counsel was not "liquid net worth" which he interprets as cash. The information was wrong, and therefore would affect the assessment of the account by any supervisor. A supervisor when checking the account, and seeing that the plaintiff had $750,000 in liquid assets, would conclude that there was no problem. His conclusion might be different if the figure was substantially less. It is seen that I agree that a supervisor checking the account would conclude that there was no problem. I do not agree with the plaintiff's evidence, or his counsel's interpretation thereof, that the $750,000 was wrong. That is what the plaintiff told Mr. Girard.

**197**  Counsel says that Mr. Girard failed to do due diligence in ascertaining the correct amount which is tied to any assessment. He could have obtained more reliable information from Ms. Jenereux but he did not do so. Mr. Girard was bound to make sure that the information was accurate. I do not agree. Rather, I accept Mr. Girard's evidence that he discharged his obligation in obtaining from the plaintiff his estimated liquid net worth.

**198**  Counsel also submitted that the Rules provided that records of reviews by managers and compliance officers must be kept for at least two years; that according to the compliance officer who gave evidence at discovery on behalf of HSBC, Ms. J. Matias, there is no recorded evidence of any review of the plaintiff's file having been conducted. And according to counsel, Mr. Girard said at discovery that he did not receive any inquiries from anyone with regard to the plaintiff's account. I have already dealt with these matters. I am satisfied that there is no recorded evidence of any review of the plaintiff's file simply because the reviews did not reveal any problem in the account. The reason that Mr. Girard did not receive any inquiries from anyone was because the plaintiff did not complain and the reviews of the account did not disclose any problem.

**199**  In answer to defence counsel's submission that the plaintiff is responsible for the inaccurate information, if it is inaccurate, Mr. McCaffrey said that this was not the case; that Ms. Matias said at discovery that the Rules were set up to protect the client. Counsel submitted that this also was an answer to the defence's submission that even if the file was not supervised, the plaintiff did not prove causation. He submitted that Ms. Matias made it clear that if the Rules were not followed "it increased the risk to the client."

**200**  I observe here that if the Rules were not followed it was the plaintiff who did not follow them. I am not prepared to find that the plaintiff did not tell Mr. Girard that his estimated liquid net worth was $750,000. Nor am I prepared to find that his estimated liquid net worth was not $750,000, a matter which one would expect the plaintiff to have proven if that was the case. It is obviously somewhat vaguely attacked at this point, in order to cast doubt on the assessments made of the account by the branch manager, and head office, when they reviewed the account pursuant to Sections 5.4.1 and 5.4.2. The Rules were not set up in order to protect the informed plaintiff from his own conduct.

**201**  The plaintiff's submission on the inaccuracy of the $750,000 figure is based entirely on his evidence, of what he was asked by Mr. Girard, and what he told him. I have no reason to believe that Mr. Girard did not ask him what his estimated liquid net worth was when he was obtaining the information for this standard form; or that he did not received an informed answer. I do know that I do not believe the plaintiff when he said that he didn't read the document before signing it, and I am satisfied that he is responsible for its contents.

**202**  Thus, if the figure is truly inaccurate, and could have mislead someone reviewing the file, and I am not satisfied that this is the case on the evidence, then what flows from that is the plaintiff's responsibility. While it may be true that the Rule is set up to protect the plaintiff, and that if not followed, it could increase the risks to him, at the least, the plaintiff was required to provide accurate information and to make sure that the information was accurate. He well knew that the defendants would be relying on the information he gave them. I note again that when executing the initial application form he agreed with HSBC as follows:

I certify that the information provided by me in this application is true and complete and I agree to advise you immediately of any material change in the information. I further certify that I am capable of evaluating and bearing the financial risk inherent in buying and selling securities and that trading and all transactions for which approval is sought is suitable for the purposes of my investment objectives.

Whatever the duty on HSBC, the plaintiff was duty bound to provide accurate information and in my opinion, whether or not he read the document, HSBC was entitled to rely on its contents.

**203**  Mr. McCaffrey then referred to the evidence pertaining to communications between the plaintiff and Mr. Girard, emphasizing that there were no telephone records of calls from Mr. Girard or from HSBC to the plaintiff, and few records of calls from the plaintiff to them; that the evidence was that no one could phone in to the plaintiff when he was at his lodges, that he could only phone out, which is of some importance.

**204**  I believe I indicated earlier that I did not find the plaintiff's incomplete telephone records to be of assistance, and I certainly cannot rely on his evidence. On the plaintiff's own evidence he made trades while he was in Mexico and while he was up north. He went to town once a week, that is to Prince George, where he had access to a computer, television and a regular phone, and made trades. And I have concluded that he had sufficient communication with Mr. Girard to instruct him with regard to each trade made in his account.

**205**  Mr. McCaffrey next referred to what he called a very important piece of evidence from Mr. Girard, as to what was discussed in Ms. Jenereux's office. Mr. Girard said that in Ms. Jenereux's presence, the plaintiff said that he wanted to have a high risk, aggressive trading account. The plaintiff denies this. Mr. Girard was certain that Ms. Jenereux was present when the conversation took place. When asked about this, Ms. Jenereux said that she never heard that. Counsel said that the evidence is extremely important because that was what was filled out in the form later.

**206**  I do not agree that it follows that if the plaintiff did not make the statement in the presence of Ms. Jenereux, it is probable that he did not give that information to Mr. Girard later when the form was being filled out. My note of Ms. Jenereux's response is "I don't believe he did - I don't recall a conversation like that - we were in my office for a very brief period of time." Earlier she had said that the meeting was very brief, lasting no more than five minutes. And I have already expressed my view that I am satisfied that the information which Mr. Girard put down in the application form was information which he was given by the plaintiff. This includes the most important information to all those concerned, that his investment objective was 100 per cent aggressive trading and that his risk factors were high, that is, 100 per cent.

**207**  I observe also that this information is consistent with other evidence which satisfies me that at the time it was more likely than not that the plaintiff wanted to get into the stock market, and to participate in the higher returns which he had observed the more risky stocks were producing, and which had caused him to open his trading account with the TD Bank. In my opinion, that is why he went to see Ms. Jenereux, and then Mr. Girard, in the first place. He got exactly what he wanted.

**208**  I turn now to Mr. McCaffrey's written submission. He commences by dealing with the IDA Regulations which seemingly track the Rules in HSBC's Manual pertaining to the opening and supervising of accounts, both by members and head office, daily and monthly reviews of accounts, and the keeping of records of supervisory reviews and so on. The terms "discretionary account" and "managed account" seem to include each other. In this regard, it should be noted that HSBC's Manual provides that the company does not offer managed accounts, Section 5.5.4, and does not permit discretionary accounts, Section 5.3.3.

**209**  I see no reason to review the sections referred to by Mr. McCaffrey by number. As in the case of the Manual, branch manager and head office account reviews are required on a daily and monthly basis. The reviews are undertaken to attempt to detect activities such as unusual trading activities. For all reviews, evidence should be kept of inquiries, responses and actions and so on. I again note that I am satisfied that branch manager and head office reviews of the plaintiff's account were probably conducted; that they would not have reviewed any problem. And in any event, any breach of the supervisory or review provisions was not causative of the plaintiff's losses.

**210**  Mr. McCaffrey simply says:

The evidence on the discovery of Jeanette Matias and also the evidence of Mr. Girard was that there was not one piece of evidence in writing suggesting any reviews were completed. Mr. Girard gave evidence that he was never contacted by his manager or the regional office in reference to any supervision inquiries in reference to the Les Allen account. There can only be, on conclusion, that there was simply no supervision.

I have already dealt with these submissions, and my conclusion is that it is more likely than not that proper supervision took place.

**211**  I turn now to Mr. McCaffrey's submission on the law. He commences by stating:

It is self evident by looking at the cases that the earlier cases in the late 1980s and 1990s do not suggest that there is anywhere near as high a standard of care as the most recent cases dealing with brokerage claims.

I have already expressed my disagreement with this submission.

**212**  Counsel then referred to Sharpe v. McCarthy, [*[1993] B.C.J. No. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1CH-00000-00&context=), a decision of Hamilton J., and in the Court of Appeal, [*(1994), 94 B.C.L.R. (2d) 384*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F57G-S14M-00000-00&context=), for the proposition that when there is discretionary trading, the plaintiff has the option to accept the positive trades and reject negative trades. The case is clearly factually distinguishable from the case at bar. There, the plaintiff transacted discretionary trades in the plaintiff's account without his knowledge or consent, and was found guilty of fraudulent conduct and of breach of fiduciary duty in doing so. Here, the plaintiff had full knowledge of all the trades made in his account, which he approved and consented to. All of the trades made in his account were authorized by the plaintiff. Even if it could be said that initially the trades were not authorized, which is not the case, the plaintiff clearly acquiesced in and ratified the trades. He cannot now pick and choose the positive trades and reject the negative trades.

**213**  Counsel next referred to Parks v. Midland Walwyn, [*[1995] O.J. No. 2073*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCW1-F1WF-M0GK-00000-00&context=), Court file number 92-CQ-30790CM, a decision of Madam Justice MacDonald of the Ontario Court of Justice. See also the decision of the Court of Appeal for Ontario, [*[1998] O.J. No. 1038*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62VP-00000-00&context=), by endorsement, date 19980312, docket C22469, upholding her decision. Parks was a case involving an experienced investor client who made his own decision in pursuit of highly speculative investments, somewhat like the case at bar. The case does not support the case put forward by the plaintiff.

**214**  Counsel says he cites this case for two important principles, the first being Judge MacDonald's views with regard to inaccuracies in the new client application form, and the second being her views with regard to the effect of breaches of the Rules. In the first instance, Madam Justice MacDonald found that notwithstanding inaccuracies or omissions in the application form, the information could reasonably lead to the conclusion that the plaintiff had the financial capacity to do what he proposed and that this was a suitable strategy for him. She also found that the inaccuracies and omissions were not the cause of the plaintiff's losses.

**215**  In the second instance, Her Ladyship found that the non-compliance with the Rules and Regulations did not constitute actionable ***negligence***, and was not the cause of the plaintiff's losses.

**216**  Mr. McCaffrey distinguishes the case at bar saying:

... Where, in our particular case, the defendant Girard endeavours to justify the investments as a result of wrong information that was placed on the new client application form as a result of his improper investigations (i.e. the $750,000 cash liquid net worth).

I have already expressed my views to the contrary on this point. The plaintiff is responsible for the contents of the application forms which he signed, and the defendants were entitled to rely upon them. I am satisfied that what Mr. Girard recorded was what he was told by the plaintiff. Further, any supervisor of the account reviewing it would have reasonably come to the conclusion that the trades were well within both his risk and objective factors, and that there was nothing to be concerned about. Even if it could be said that the $750,000 figure was inaccurate, and that the account was never supervised or reviewed, I am not satisfied that such non-compliance was the cause of the plaintiff's losses. The plaintiff could have stopped matters by simply making a phone call at any time. He chose not to do so, and for obvious reasons, i.e, he was a full party to everything that happened in his account, and was the author of his own losses.

**217**  I do not find the next case referred to, 87521 Ontario Ltd. v. Nesbitt Burns Inc., [*[1999] O.J. No. 3825*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD81-JX8W-M4YC-00000-00&context=), a decision of Campbell J. of the Ontario Superior Court of Justice, to be of assistance to the plaintiff as well. In that case, the defendants could not satisfy the court that the plaintiff clearly understood and agreed to the investment which was made as being suitable for his investment objectives. His consent then was not an informed consent.

**218**  Judge Campbell does review some of the general principles applicable in these cases. The duty owed by the Broker and the Investment Advisor each depends on the specifics of their relationship with the client. But non-compliance with the IDA Regulations or the Brokers Manual do not in and of themselves give rise to liability on the part of the Investment Advisor or the Broker.

**219**  While Keenan J. does say in Varcoe v. Sterling [*(1992), 7 O.R. (3d) 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M4HH-00000-00&context=), at pages 239 and 240, after a careful review of the facts before him, that a Broker who violates his own self-proclaimed rules and exposes the customer to a higher degree of risk is in breach of that duty of care, it is clear from the context that such non-compliance must be causative of the client's losses. It is also clear in the case at bar that the plaintiff's relationship with Mr. Girard and HSBC was not a fiduciary relationship. The plaintiff's knowledge and indeed his pattern of conduct, including making money in and selling off his Suretrade account during the crash, while not instructing Mr. Girard to sell any of his stock in his HSBC account, save one, shows that he was not relying on the defendants' advice in making his decisions, but made his own decisions.

**220**  Even if Mr. Girard in fact told him to "hold on" (while the plaintiff was selling out his Suretrade account) it does not bring home liability on the part of either defendant. The defendants do not guarantee the plaintiff's financial success, the sudden "meltdown" of the market was unforeseen, and the market did right itself in time, although stocks in certain industry would never rebound.

**221**  Counsel also relies on the decision of Smith J. in Seccord v. Global Securities Corp., [*[2000] B.C.J. No. 2096*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1GW-00000-00&context=), Vancouver C966584, [*2000 BCSC 1544*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1GW-00000-00&context=) "for the degree of responsibility of the Broker to the client." There Smith J. found that there was a fiduciary relationship between the client, the Broker and the Investment Advisor. It was also found that the Broker was in breach of his duty of care to supervise the accounts of the plaintiffs, who had no experience on their own to guide them, and given the high level of activity and turnover in their accounts. The case is clearly distinguishable from the case at bar.

**222**  I see no reason to deal with the remaining cases referred to by counsel, including Laflamme v. Prudential-Bache Commodities Canada Ltd., [*[2000] S.C.J. No. 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S12D-00000-00&context=) (S.C.C.), which also deals with the liability of a securities dealer acting as a portfolio manager, for a 60-year-old inexperienced uninformed client, the purpose being to create a retirement fund for the plaintiff. The transgressions of the manager were many, including failure to be properly knowledgeable about his client's situation, and completely ignoring the client's investment objectives such that it was found that the plaintiff's losses were due to the ongoing mismanagement of his portfolio; and Trans Pacific Sales Ltd. (Trustees for) v. Sprott Securities Ltd., [*[2001] O.J. No. 597*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-JK4W-M3VH-00000-00&context=), where the Broker was found liable to the fairly knowledgeable and experienced 80-year-old client, for recommending speculative investments that were not suitable for him, and in failing to advise him of the risk factors relevant to the investments. The issues in those cases were quite different.

**223**  In summary, the plaintiff has not proven his case. Rather, he has proven that he has no case and the law does not favour him.

**224**  These are my Reasons for dismissing the plaintiff's action, with costs to both defendants, pursuant to the provisions of Rule 40(10) on the grounds that the evidence before me is insufficient to make out the plaintiff's case, having considered and weighed all the evidence before me, and the defendants having elected not to call evidence. The case may also be looked upon as simply one where at the end of the trial, the plaintiff not having made out his case, the action was dismissed.

HOOD J.

**End of Document**

[***Barr v. The Owners, Strata Plan LMS 2286, [2019] I.L.R. para. G-2847***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XKS-WX51-FGCG-S1JT-00000-00&context=)

Canadian Insurance Law Reporter Cases

Supreme Court of British Columbia

Before: Horsman J

Decision: June 10, 2019.

Docket No. S160211

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2010s* > *2019***

**[2019] I.L.R. para. G-2847** | [*[2019] B.C.J. No. 1047*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5WB7-DGJ1-F1H1-21SR-00000-00&context=) | [*2019 BCSC 917*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5WB7-DGJ1-F1H1-21SR-00000-00&context=)

Ronald Carl Barr v. The Owners, Strata Plan LMS2286, Neil Walter Allen, Cory Alexander Zachrisson, Chrystal Hui Bee Teh, Markic Development & Restoration Ltd., John Doe #2, John Doe #3, John Doe #4, Jane Doe #1, Jane Doe #2, Jane Doe #3, and Jane Doe #4; The Corporation of the City of North Vancouver (Third Party)

**Case Summary**

**Occupier's liability — Strata corporation — Trip and fall — Liability — Causation — In 2014, plaintiff tenant fell on walkway leading from sidewalk to condominium units at defendant strata corporation — Walkway contained four steps and strata had retained co-defendant remediation company to fix bricks that had become uneven — Plaintiff claimed that he must have tripped on lip between loose gravel and paving stones — Plaintiff brought action against strata corporation and remediation company, claiming *negligence* — Plaintiff applied for summary judgment and defendants applied for order dismissing action against them — Plaintiffs conceded they were occupiers under Occupiers Liability Act -- Court did not find that evidence logically supported inference of causation — Photographs of stairs showed slight unevenness in walkway, which was not objectively unreasonable degree of unevenness for walking surface — Lip in photographs did not, on its own, suggest inherently hazardous condition — Remediation work was in place for number of months without other incidents — As evidence did not support drawing of rational inference of causation, it was not necessary for Court to consider if hazard of temporary remediation was breach of defendants' duties — Plaintiff failed to prove that defendants were liable for his injuries — Plaintiff's action dismissed — Plaintiff's application dismissed — Defendants' application allowed — Occupiers Liability Act,** [***RSBC 1996, c. 337, s. 1***](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P5-00000-00&context=)**.**

|  |
| --- |
| **Facts:** In January 2014, the plaintiff fell on a walkway leading from the sidewalk to the condominium units at the defendant strata corporation. At the time, the plaintiff, aged 66, was the tenant of a unit. The walkway at issue was not a walkway he typically used. The walkway contained four steps. The strata had retained the co-defendant remediation company to fix bricks that had become uneven at the top of the stairs due to the presence of a tree root. The temporary remediation involved removing uneven bricks and replacing them with gravel. The plaintiff had not noticed the remediation work. He was found unconscious and lying face down on the walkway by an employee of the remediation company. The plaintiff claimed that he remembered walking up the stairs and then falling. He claimed that he must have tripped on a lip between the loose gravel and the paving stones.  The plaintiff brought an action against the strata corporation and the remediation company, claiming ***negligence*** and seeking damages in relation to his injuries. The plaintiff applied for a summary judgment. The defendants applied for an order dismissing the action against them. They conceded that they were occupiers under the *Occupiers Liability Act*.  HELD: The plaintiff's application was dismissed.  The defendants' application was allowed. The Court did not find that the evidence logically supported an inference of causation. The photographs of the stairs on which the plaintiff relied showed a slight unevenness in the surface of the walkway, at best, which could hardly be described as objectively unreasonable in terms of the degree of unevenness for a walking surface, the Court found. The lip in the photographs did not, on its own, suggest an inherently hazardous condition. The defendants' evidence was that the remediation work was in place for a number of months without other incidents. The plaintiff also failed to report the incident to the strata until May 2014, after he had moved out. The evidence did not permit the Court to find that the plaintiff's fall was caused by the temporary remediation. As the evidence did not support the drawing of a rational inference of causation, it was not necessary for the Court to consider whether the condition or hazard of the temporary remediation was a breach of the defendants' duties. The plaintiff failed to prove that the defendants were liable for his injuries. His action was dismissed. |

**Counsel**

W.G. Mazzei and S. Elworthy for the plaintiff; J.N. Halperin for the defendant The Owners, Strata Plan LMS2286; T.S. Newnham for the defendant Markic Development and Restoration Ltd.

**Reasons for Judgment**

|  |
| --- |
| **K. HORSMAN J.** |

**INTRODUCTION**

**1**  This action arises from the plaintiff's fall, on January 14, 2014, on common property owned by the defendant The Owners, Strata Plan LMS2286 (the "Strata"). The defendant Markic Development & Restoration Ltd. ("Markic") was retained by the Strata to perform remediation work on the common property of the Strata. The plaintiff alleges that the remediation work created a hazard that caused his fall. The plaintiff claims damages against the Strata and Markic in ***negligence*** and pursuant to the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337* [*OLA*].

**2**  The action has been discontinued against the individual defendants. The Third Party Notice filed by the Strata against the Corporation of the City of North Vancouver was never served.

**3**  The plaintiff and both remaining defendants, the Strata and Markic, have filed summary trial applications seeking to have the issue of liability severed and determined at a summary trial. There is presently a 12-day jury trial scheduled to commence on December 2, 2019. The parties agree that the issue of liability can and should be determined in advance on a summary trial, and also agree that it would be just and efficient to do so.

**4**  Accordingly, the plaintiff applies for an order that the Strata and Markic are liable for injuries resulting from his fall on January 14, 2014, with damages to be assessed at trial. The defendants each apply for an order dismissing the action against them on the basis that they are not liable for the plaintiff's injuries.

**FACTUAL BACKGROUND**

**The plaintiff's fall**

**5**  Strata Plan LMS2286 is comprised of four civic addresses: 250, 254, 260 and 270 East Keith Road, North Vancouver (the "Strata Complex"). 250 and 270 East Keith Road are attached townhouse buildings containing six and eight units, respectively. 254 and 260 East Keith Road are stand-alone houses.

**6**  At the time of his fall, the plaintiff was 66 years old and a tenant and occupant of a garden-level suite in 254 East Keith Road. The plaintiff resided at this address from approximately May 2013 to May 2014.

**7**  It is possible to access the Strata Complex by foot from East Keith Road using a number of walkways off of the municipal sidewalk. As viewed from East Keith Road, there is one walkway just to the left of and leading to unit 254 (the "254 Walkway"), and another walkway to the right-hand side of and leading to unit 260 (the "260 Walkway"). Both pathways have a set of stairs. There are three steps on the 254 Walkway and four steps on the 260 Walkway. Both walkways are on common property of the Strata and both provide access to either unit from the sidewalk.

**8**  At some point in time prior to January 2014, the bricks at the top of the stairs on the 260 Walkway had become uneven as a result of the pressure of roots from a nearby tree. The Strata retained Markic to perform temporary remediation on the 260 Walkway. It was anticipated that the tree that was causing the problem would eventually be removed and a permanent repair to the 260 Walkway would follow. The temporary remediation consisted of the removal of the uneven bricks and their replacement with gravel (the "Temporary Remediation").

**9**  On the morning of January 14, 2014, the plaintiff took the 260 Walkway to access his suite. This was unusual as the plaintiff ordinarily used the 254 Walkway. When asked in examination for discovery, the plaintiff could not remember the last time prior to his fall that he had taken the 260 Walkway.

**10**  The plaintiff did not notice the Temporary Remediation as he approached the 260 Walkway on January 14, 2014. At approximately 11 a.m., Roy Behan, then an employee of Markic, found the plaintiff unconscious and lying face down on the 260 Walkway some distance from the top of the concrete stairs. The plaintiff's feet were pointed towards East Keith Road. Mr. Behan estimated that the plaintiff was lying about 15-20 feet away from the top of the stairs. The plaintiff estimates, relying on the photographic evidence, that the distance was shorter. Mr. Behan did not note anything on the ground where the plaintiff was lying that might have explained his fall. His first thought was that the plaintiff had a heart attack or stroke.

**11**  The plaintiff was transported by ambulance to Lions Gate Hospital. The patient care report prepared by the BC Ambulance Service contains this note: "*pt states he remembers tripping on an unanticipated step + fell to the ground*".

**12**  The first time the plaintiff mentioned his fall to anyone affiliated with the Strata was in May 2014 after he had moved out.

**13**  Elizabeth Chambers, the Strata's property manager, deposes that the Temporary Remediation remained in place on the 260 Walkway for a number of months. She says there were no other incidents arising from the Temporary Remediation and that she did not receive any complaints or concerns about the Temporary Remediation while it was in place.

**The plaintiff's evidence of the cause of his fall**

**14**  In his examination for discovery evidence, the plaintiff testified that all he could remember about the fall was "*falling forward and that's the last thing I remember before I woke up in the hospital*". The plaintiff says that he thought he must have tripped because that seemed to make the most logical sense to him. The following is an excerpt from his examination for discovery transcript:

1. So why did you fall?
2. I don't know. All I remember is walking up the stairs, and the next thing I knew, I was falling to the ground, and that's the last thing I remember.
3. So you have no idea what the mechanism of your fall was in terms of whether you slipped on something or whether you tripped on something?
4. Well, I think I tripped on something, but that's just what makes the most sense to me.
5. You're speculating?
6. Yes.

**15**  In his affidavit, filed in support of the summary trial application, the plaintiff similarly deposes that:

I recall walking up the stairs of Unit 260 on the morning of January 14, 2014. I also have a recollection of the sensation of tripping and falling. My very next memory is waking up in hospital.

**16**  The plaintiff says that he is nevertheless certain that he did not trip on the stairs of the 260 Walkway.

**17**  The plaintiff's theory is that he must have tripped on a "lip" between the loose gravel that was placed as part of the Temporary Remediation and the paving stones of the 260 Walkway. The plaintiff has put in evidence photographs taken by his daughter on the afternoon of January 14, 2014 which depict a small lip between the loose gravel and the paving stones, which appears to exist only at the edges. It is very difficult to determine from the photographs the exact measurement of the lip. It could certainly not be characterized as pronounced.

**ISSUES**

**18**  The parties' competing applications raise the following issues:

1. Is the discrete issue of liability suitable for determination by way of a summary trial?
2. If so, are the defendants liable?

**ANALYSIS**

**Issue I: Suitability of a summary trial**

**19**  As noted, the plaintiff and defendants are in agreement that the discrete issue of liability can and should be resolved on a summary trial. Of course, the parties' agreement does not bind the court. I must still consider whether the issue is suitable for summary trial having regard to the criteria in Rule 9 7(15)(a) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009* [*Rules*].

**20**  Rule 9-7(15)(a) of the *Rules* provides:

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.

**21**  A court may decline to decide a discrete issue in a case on a summary trial application if it is found to be unfair or impractical to "litigate in slices". However, there is no presumption against granting judgment on discrete issues under Rule 9-7(15). It may be efficient to determine a discrete issue in advance of trial and in isolation from the remaining issues, provided this can be done without impacting the remaining issues in dispute: *Greater Vancouver Water District v. Bilfinger Berger AG*, [*2015 BCSC 485*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60MF-00000-00&context=) at paras. 95-98. Where the issues are intertwined, the case for a summary trial of a discrete issue is less compelling.

**22**  The relevant authorities suggest that where a party seeks judgment on the discrete issue of liability pursuant to Rule 9-7(2), the principles that govern applications for severance apply: *Zary v. Canada Mortgage and Housing Corporation*, [*2015 BCSC 1145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GF9-8HG1-FCYK-20XG-00000-00&context=) at para. 27. The factors that govern an application for severance mirror those that apply to an application for summary judgment on a discrete issue. A compelling reason to order severance is the likelihood of a significant savings in time and expense realized by a summary trial: *Burg Properties Ltd. v. Economical Mutual Insurance Company*, [*2013 BCSC 209*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G29R-00000-00&context=) at para. 27, citing *Bramwell v. Greater Vancouver Transportation Authority*, [*2008 BCSC 1180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M39T-00000-00&context=) at para. 12.

**23**  In the circumstances of the present case, I consider it appropriate to decide the issue of liability on a summary trial. It is possible to make the factual findings necessary to determine liability on the record before me. Indeed, as counsel for the plaintiff points out, and I agree, this is not a case in which the evidentiary record is likely to improve at trial. The plaintiff has exhausted his memory of the circumstances of his fall. The defendants have had the opportunity to examine the plaintiff for discovery and relevant portions of his evidence are included in the summary trial application record. The fall occurred over five years ago so there is no prospect of the discovery of additional evidence specific to the condition of the site at the relevant time.

**24**  All parties are in agreement that there will be a significant savings of time and expense if the issue of liability is decided now. If the defendants are found liable, the currently scheduled trial will be shortened and the prospects for a pre-trial settlement will improve. If the defendants are not found liable, the trial will be avoided altogether. The damages issues are complicated by the plaintiff's pre-existing medical conditions. The issue of liability is a discrete one that can be resolved in isolation from the issue of damages.

**Issue II: Liability**

**Legal Principles**

**25**  Section 3 of the *OLA* imposes a duty on an occupier of premises to take care that in all the circumstances is reasonable to see that a person will be reasonably safe in using the premises. At common law, a defendant may owe a duty of care to a plaintiff if it is foreseeable that the acts or omissions of the defendant may harm the plaintiff, and also there is a relationship of sufficient proximity between the two to justify the imposition of a duty of care: *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=) at para. 41.

**26**  I did not understand either defendant on the summary trial to dispute the existence of a duty of care on their part, whether arising under the *OLA* or at common law. The real issue is whether the evidence establishes a breach of the standard of care owed by the defendants that is causally related to the plaintiff's injuries.

**27**  The standard of care under the *OLA* and under common law principles of ***negligence*** is the same: it is to protect others from an objectively unreasonable risk of harm: *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 para. 30. The plaintiff bears the burden of proof on a balance of probabilities. A presumption of ***negligence*** is not created simply because a plaintiff is injured: *Bauman v*. Stein [*(1991), 78 D.L.R. (4th) 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X150-00000-00&context=) (B.C.C.A.). The *OLA* does not create a presumption of ***negligence*** and the fact that someone slips and falls on an occupier's property does not shift the onus of proof: *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=) at paras. 20-21.

**28**  The applicable standard of care is one of reasonableness and not perfection. An occupier does not constitute an insurer against every eventuality that may occur on the premises: *Lavalee v. Bristol Management*, [*2005 BCSC 1666*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2NT-00000-00&context=) at para. 29.

**29**  In order to establish liability under the *OLA*, a plaintiff must show that the condition or hazard on the occupier's property caused their slip and fall, and that the condition or hazard existed as a result of the defendant's breach of duty: *Van Slee v. Canada Safeway Limited*, [*2008 BCSC 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20FM-00000-00&context=) [*Van Slee*]. A finding of liability under both the *OLA* and in common law ***negligence*** must be based on evidence and not speculation: *Lansdowne v. United Church of Canada*, [*2000 BCSC 1604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27W-00000-00&context=) at para. 22; *Van Slee* at para. 31.

**30**  This is not to say that a finding of ***negligence*** requires direct evidence of the cause of an accident. The trier of fact may reasonably draw an inference of causation based on all of the evidence, assessed through the application of logic and common sense. There is a difference between speculation and conjecture on the one hand and rational conclusions that flow logically and reasonably from the evidence on the other: *Druet v. Sandman Hotels, Inns & Suites Limited*, [*2011 BCSC 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B18G-00000-00&context=) [*Druet*] at para. 34; *Goddard v. Bayside Property Services Ltd.*, [*2019 BCCA 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5W42-8GJ1-FG68-G3P3-00000-00&context=) at para. 4.

***Application to the facts***

**31**  The plaintiff says that the Strata owed him a duty under s. 3 of the *OLA* to ensure that he would be reasonably safe in using the premises, and that Markic owed a common law duty to persons walking in the remediation area to carry out the Temporary Remediation in a manner that did not constitute a hazard.

**32**  To establish liability on behalf of either defendant the plaintiff must prove, on a balance of probabilities, first that a condition or hazard in the area of the Temporary Remediation caused his fall, and second that the condition or hazard existed due to a breach of duty by the defendants. The fact that the plaintiff cannot recall the precise mechanism of his fall is not determinative. The plaintiff is not required to lead direct evidence of causation provided that the evidence as a whole permit the drawing of a reasonable inference of causation.

**33**  In his Amended Notice of Civil Claim, the plaintiff advanced two theories for the cause of the fall: either that he "slipped on the loose stones or tripped on the bricks that were protruding above the loose stones". The plaintiff's notice of application for judgment at the summary trial advances only the latter theory. The plaintiff's case, as argued on the summary trial, is that a lip between the loose gravel and the paved stones was a hazard which caused his fall.

**34**  The plaintiff relies on the following evidence to support an inference of causation:

1. the photographs taken by the plaintiff's daughter of the Temporary Remediation on the afternoon of January 14, 2014, which depict the lip;
2. the evidence of Mr. Behan as to the location that he found the plaintiff on the morning of January 14, 2014;
3. the distance between the Temporary Remediation and the location in which Mr. Behan found the plaintiff;
4. the plaintiff's evidence that he had a recollection of the sensation of tripping and falling at the time of the fall; and
5. the plaintiff's evidence that he is certain that he did not trip on the stairs of the 260 Walkway.

**35**  The plaintiff relies on *Druet* as an example of circumstances in which the court was able to find causation on the basis of common sense inferences from the evidence. The plaintiff in *Druet* slipped and fell in a hotel lobby. At trial, the plaintiff tendered expert evidence from an engineer that the tile floor in the hotel lobby was unacceptably slippery when wet or walked upon with wet shoes. Justice Savage, as he then was, drew an inference from the expert evidence, and evidence that it had been raining that day and the plaintiff's shoes were wet, that the combination of the slipperiness and moisture on the plaintiff's shoes caused the fall.

**36**  An inference of causation was drawn in the absence of expert evidence in *Burnett v. Canada Safeway Ltd.*, [*[1983] B.C.J. No. 1073*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JWR6-S0Y6-00000-00&context=) (S.C.), aff'd [*[1984] B.C.J. No. 1848*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M2VM-00000-00&context=) (C.A.) [*Burnett*], another case relied on by the plaintiff. The plaintiff in *Burnett* slipped and fell on a waxed linoleum floor in a Safeway store. There was no direct evidence that water was on the floor where the plaintiff fell. However, the trial judge drew an inference of causation from evidence that a Safeway employee was spraying water on vegetables in the vicinity that the plaintiff fell, and evidence that the device used to mist vegetables often left water on the floor. In upholding the trial judgment, the Court of Appeal held that the evidence, while "sparse", permitted the inference drawn by the trial judge that water on the floor had caused the fall.

**37**  In contrast to these decisions, I do not consider that the evidence in the present case logically supports an inference of causation.

**38**  The plaintiff's theory is heavily reliant on the photographs of the Temporary Remediation which he says depict a hazard. Based on my review of the photographs, I cannot agree with that characterization. The photographs depict what appears to be, at best, a slight unevenness in the surface of the 260 Walkway that could hardly be described as a recognizable risk, or even objectively unreasonable in terms of the degree of evenness that one might expect from a walking surface.

**39**  The defendants' evidence is that the Temporary Remediation was in place for a number of months without incident, aside from the plaintiff's fall. The Strata received no complaints or comments about the Temporary Remediation. The plaintiff himself failed to report his fall to the Strata until May 2014, after he had moved out of the Strata.

**40**  In considering the defendants' evidence on this point, I am mindful that such evidence of prior safety and continued safe use, while relevant, is not determinative as to whether the area was reasonably safe at the time of the plaintiff's fall: *Khoury v. Vancouver (City)*, [*2015 BCSC 805*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G4S-FF61-K0HK-24T6-00000-00&context=) at para. 43.

**41**  Unlike *Druet*, there is no expert evidence in this case to support the inference that the condition of the remediation area on the premises was hazardous. Further, the lip depicted in the photographs of the Temporary Remediation does not, on its own, suggest an inherently hazardous condition akin to the water on a waxed linoleum floor that supported the inference of causation drawn in *Burnett*. In the present case, the plaintiff's theory is a circular one. The plaintiff says, in essence, that the Temporary Remediation must have been a hazard because he fell, and because it was a hazard it must be the cause of his fall. He is effectively asking that I infer ***negligence*** from the fact of his fall.

**42**  The parties devoted a significant amount of time at the summary trial debating whether there might be an alternative explanation for the plaintiff's fall in the fact that the 260 Walkway had four stairs while the 254 Walkway, the plaintiff's usual route, had only three. The defendants point to the patient care report which quotes the plaintiff as stating that the fall was due to him "*tripping on an unanticipated step*". The plaintiff points to his affidavit filed on the summary trial in which the plaintiff attests to his certainty that he did not trip on the stairs. The defendants say that the plaintiff is not credible on this issue and that I should prefer the version of events reflected in the patient care report.

**43**  If it was necessary for me to determine the reason for the plaintiff's fall on this application, this conflict in the evidence might prevent a summary resolution of the liability issue. However, I do not consider it necessary to decide whether the actual cause of the plaintiff's fall was an unanticipated step or any other alternative explanation. The plaintiff might have fallen for any number of reasons. He might have lost his balance, he might have felt faint, or he might have simply tripped on a portion of the 260 Walkway that was not part of the Temporary Remediation.

**44**  I am simply unable to conclude on a balance of probabilities that the plaintiff's fall was caused by the Temporary Remediation. The evidence does not support the drawing of a rational inference of causation. Accordingly, it is unnecessary for me to consider whether the condition or hazard of the Temporary Remediation was a breach of the duties owed by the defendants. It is also unnecessary for me to consider the defendants' defence of contributory ***negligence*** on the part of the plaintiff.

**CONCLUSION**

**45**  The plaintiff has not proven that the defendants are liable to him for injuries caused by the fall.

**46**  The plaintiff's action against the defendants is dismissed. The defendants are entitled to recover their costs of these applications at scale B.

K. HORSMAN J.

**End of Document**

[***Burke v. Schwetje, [2017] B.C.J. No. 2320***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R32-47Y1-F2TK-220D-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: April 10-13 and 18-20, 2017.

Judgment: November 20, 2017.

Docket: M123109

Registry: Vancouver

**[2017] B.C.J. No. 2320** | [*2017 BCSC 2098*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5S2S-6Y71-JBDT-B4FM-00000-00&context=)

Between Arnold Burke, Plaintiff, and Leokadia Schwetje and Heinrich Schwetje, Defendants

(203 paras.)

**Counsel**

Counsel for the Plaintiff: M. Siren.

Counsel for the Defendants: D. Jeffrey.

**Table of Contents**

**INTRODUCTION**

**FACTS**

A. The Accident and the plaintiff's injuries

B. The plaintiff's occupational history pre- and post-Collision

C. The plaintiff at home

The expert evidence

**DAMAGES**

A. Causation

B. Damages

Non-Pecuniary Damages

Past Wage Loss/ Loss of opportunity

**FUTURE WAGE LOSS AND FUTURE LOSS OF EARNING CAPACITY**

**LOSS OF HOUSEKEEPING AND YARD WORK CAPACITY**

**COST OF FUTURE CARE**

**SPECIAL DAMAGES**

**CURRENCY CONVERSION**

**CONCLUSION**

**Reasons for Judgment**

|  |
| --- |
| **L.D. RUSSELL J.** |

**Introduction**

**1**  Mr. Burke (the "plaintiff") was injured in a serious motor vehicle collision on May 28, 2010 on Highway 3 near Cawston, British Columbia at about 3:00 p.m. (the "Collision"). Cawston is a small town located in the vicinity of Osoyoos, B.C.

**2**  Both vehicles involved were total losses.

**3**  Liability is admitted.

**4**  The plaintiff suffered a permanent injury to his right hand and wrist. The extent and effect of that injury from the time of impact into the future is at issue in the case.

**5**  The injury's effect and its interrelationship with another disabling condition in the plaintiff's hands makes the determination of future loss somewhat complex.

**Facts**

**A. The Accident and the plaintiff's injuries**

**6**  The plaintiff and his wife were en route to Oroville, WA from Blaine, WA to visit cousins for the weekend. The majority of the route went through British Columbia.

**7**  The trip started just three days before the plaintiff's 67th birthday.

**8**  It was a bright, dry day and the roads were clear.

**9**  The plaintiff was eastbound on Highway 3 which is a two-lane highway.

**10**  The speed limit on the highway at that location is 80 kmh. The plaintiff was travelling at the speed limit with both hands on the steering wheel at positions 10 and 3.

**11**  He came over a hill to see a westbound oncoming car in his lane. He attempted to avoid the car but could not do so.

**12**  The defendant hit the plaintiff's Chevrolet Equinox, an SUV, almost head-on but the driver's side of the car took most of the impact.

**13**  On impact, both airbags in the front of the plaintiff's car deployed.

**14**  His left front wheel and transmission were sheared off by the impact. He attempted to brake to avoid crashing into the ditch and had to "go to the bottom" to stop the car. He managed to stop just before hitting the ditch.

**15**  A car stopped to assist and its occupants got the plaintiff's wife out of the passenger's side door. The plaintiff could not open his door and was pulled out through the passenger door.

**16**  He was taken to South Okanagan General Hospital in Osoyoos by ambulance. Once there, he was examined and x-rayed but despite left shoulder pain, a tender left clavicle and a bruised right foot, there were no obvious injuries.

**17**  He was prescribed Tylenol #3 and discharged.

**18**  Once home, he had seatbelt bruising on his chest, his neck was stiff and his hands and wrists began aching despite there being no visible injuries to his hands. He could not pick up small objects.

**19**  Three to four months after the accident, his hands and wrists remained painful. He described the sensation being like "needles going through his hands".

**20**  Any manual labour he tried to perform caused his hands to swell. His occupation as a purse seine fisherman requires significant amounts of manual labour. He was forced to stop performing many of his duties and had to ask his crew to do them.

**21**  The stiffness in his neck and upper back lasted about a year.

**22**  The chest bruising resolved within weeks of the Collision.

**23**  The thumb and wrist pain that the plaintiff began to suffer three to four days post-Collision have continued even after extensive physiotherapy and finally, the administration of painful cortisone shots into the base of his thumbs.

**24**  The left hand symptoms were less severe than the right. The cortisone gave the plaintiff some relief, but the plaintiff continues to suffer pain in his wrists and thumbs to date.

**25**  I will deal with the surgical options available when I deal with the expert reports, because they are central to the issues in this case.

**B. The plaintiff's occupational history pre- and post-Collision**

**26**  The plaintiff worked for many years as a crew member or as a skipper on a purse seiner for Darrell Kapp ("Mr. Kapp"), who owned the boat. It is called the ***Evermore***.

**27**  A purse seine is so named because along the bottom of a round net deployed behind the fishing boat are a number of rings. A line (referred to as a purse-line) passes through all the rings, and when pulled, draws the rings close to one another, preventing the fish from swimming down to escape the net. The net is initially set by the use of a small skiff attached to the stern of the main boat and hooked to the net. Once the skiff is let go, it goes around the net and meets the fish boat in the middle. The skiff also assists in pulling the net to the boat.

**28**  The purse-line is put on a winch that pulls the bottom to the top and encircles the fish.

**29**  The net itself has cork floats around the top to make it buoyant and has lead weights around the bottom of the webbing to keep the net down.

**30**  Behind the "house" that comprises the galley and crew quarters is a deck where the drum or school pulls in the line attached to the net. This is operated by hydraulics that wind in the net. The hold for the fish that are taken is also located behind the house.

**31**  After the net is pulled in, the purse-line is pulled up to get the net as far out of the water as possible. That line is put through the rings and as the line comes through, the rings are placed on the ring bar. The rings are eight inches in diameter and weigh 10 lbs. each. There are usually 52 such rings. The crew (including the skipper) picks up the rings, although the skipper can delegate to a crew member to pick up the rings the skipper would otherwise pick up.

**32**  Three rings are left on the net from the collection process. A choker line three feet long and made of spectra is put through these three rings and placed on a winch to keep the lead line up. This is necessary to keep the net from sinking.

**33**  Once the net is brought up as far as possible, it is taken through a winch called a choking winch. It is put around the hold to keep the net in one spot. Separate chokers are placed around the wrist to form a bun of wrapped cables about 2 feet long. A separate winch is used to bring this up.

**34**  The average weight of fish in the net is about 100 tonnes, so this entire operation must be done twice.

**35**  Each time the net is lifted to the surface to bring up the fish takes about one-half hour. The fish are pumped into the hold.

**36**  The skipper is generally responsible for lifting up the 60-foot breast line, a quarter-inch line that goes to the bottom of the net. It must be tied off to prevent fish from escaping the purse.

**37**  Even though winches and hydraulics assist in the process of pulling up the nets, the process is mostly done by manual labour.

**38**  There are generally four members of the crew on a seiner and the skipper makes five.

**39**  The skipper takes 18% of the net share. The crew receives 8% or so divided among them.

**40**  The skipper has the responsibility to run the boat, do the navigation, put the net out and bring it in, bring the boat to port and unload it and ensure the conditions are sufficiently safe to remain in the fishing grounds.

**41**  An average day in the local fishing grounds would begin at 4:00-4:30 a.m. Occasionally it is necessary to wait for the spotter plane to find the aggregation of fish because there can be fog. The boat could make two to three trips to find fish and each time must encircle the fish, pull them in and then head back to unload before starting the process again.

**42**  During the season, the crews work seven days a week.

**43**  Openings are allotted on a quota schedule. If the quota is 20,000 metric tonnes, the crew works until the quota is met.

**44**  Every fishing season begins with repair and maintenance tasks to be done to the nets first and then the boat. Net repairs involve cutting out the ripped sections and sewing in and adding new pieces of line to the nets. This is done by hand and takes three weeks to a month.

**45**  The net work in particular requires fine hand dexterity since the size of the webbing on the nets is smaller than 1/16 inch thick, the main body of the web is 1/16 inch thick and the cork line is 5/8 inch thick. All of the lines described here are less than 1 inch thick.

**46**  The boat repairs are usually made in February if going to Alaska for herring. The trip north begins about the 8th of March and fishing goes until the 1st to the middle of April.

**47**  Usually it takes up to six weeks of work to prepare for a foray into the fishing grounds. The work is eight hours a day and five days a week with the boat owner paying the crew. The plaintiff was paid $20 per hour for this work.

**48**  The work to prepare for the herring fishery in Alaska takes all of January and February.

**49**  During the herring fishery, the plaintiff worked as the skiff boat operator while Mr. Kapp operated the boat as a captain. The plaintiff received about 8% of the catch in this position.

**50**  After returning from the herring fishery, and around the middle of May, the plaintiff would begin boat and net repairs for the sardine fishing season. These repairs would be completed before the 1st of July, so in the average year, gave the plaintiff about six weeks of work, eight hours a day at $20 per hour.

**51**  The sardine season could run up to four months, depending on the quota for the boat, which itself was based on biomass testing, a way to analyze the available and sustainable amount of fish that could be taken.

**52**  For the sardine fishery, the plaintiff skippered the *Evermore*. For this function, he would receive 18% of the catch.

**53**  In 2010, the plaintiff was able to perform as a skipper for the sardine fishery for Mr. Kapp but he was not able to do the sardine net and boat repairs in June 2010. This meant that he could do the July 2010 sardine fishing and the September-October 2010 sardine fishing.

**54**  In 2011, the plaintiff was unable to do the net repairs for the herring fishery or the net and boat repairs for the sardine fishery.

**55**  In 2012, despite being asked by Mr. Kapp if he would work for him during that fishing season, the plaintiff went to work for his son. He did not participate in the net and boat repairs for Mr. Kapp as he was waiting for his son to finalize the purchase of his boat.

**56**  In any event, the plaintiff testified that he did not return to performing any boat or gear work after the Collision due to the pain in his wrists and hands.

**57**  The plaintiff fished with his son in the salmon fishery in Alaska until the end of August of 2012. Because he held the permit for the fishery, he received 10% of the net value.

**58**  In 2013, the plaintiff once again intended to work on his son's boat. However, unbeknownst to the plaintiff, his son was negotiating to sell his boat and did so in May 2013, late in the year of the fishing season.

**59**  Mr. Kapp had been left without a skipper for the *Evermore* in 2012 due to the plaintiff's decision to help his son. As a result, he ran the *Evermore* himself in 2012 and then sold the boat in 2013, thus limiting the future opportunities for the plaintiff after his son sold his boat.

**60**  The plaintiff was able to find work as a skipper with Jeff Markuson in 2013 and earned about $13,000 catching pink salmon that summer. However, Mr. Markuson joined the rapidly escalating market for fish boats that summer and sold his boat as well after the pink season ended.

**61**  The plaintiff had some experience in 2007 as a member of the crew of a fishing boat. However, apart from his time operating the skiff in 2011 for Mr. Kapp for the herring fishery, he has not worked as a deckhand since the Collision.

**62**  The plaintiff says he is unable to perform the deck work on a boat due to the wrist/thumb pain he suffers.

**63**  The availability of such work post-Collision because of other variables is at issue.

**64**  After 2013, he did not work again as a captain but was able to lease his fishing permit in 2014 for $20,000 and 2015 for $25,000.

**C. The plaintiff at home**

**65**  The plaintiff's home is in Blaine, WA. He has a one-acre property that, until the Collision, he was able to maintain without help. He would trim the trees, mow the lawn and use the weed-eater.

**66**  Since the Collision, he has not been able to do the mowing because the pulling action required on the ride-on mower hurts his hands.

**67**  He is still able to do these tasks and such household tasks as vacuuming but suffers pain when he does them because the pain in his wrists and thumbs is aggravated from grasping objects or performing labour using his hands.

**68**  Because he suffers pain with these activities, he has hired assistance to help with the gardening tasks in particular.

**The expert evidence**

**69**  There were two highly qualified orthopedic surgeons called by the parties.

**70**  Both were helpful, objective and not argumentative. They were the best examples of what experts should do for the court.

**71**  Both are experts in upper extremity surgery.

**72**  Dr. Vaisler performed an IME on the plaintiff and provided four reports, the last being provided in rebuttal of Dr. Goetz's report, prepared at the request of the defendants.

**73**  Dr. Goetz also provided four reports.

**74**  The condition of the plaintiff's hands and wrists was complicated by carpal tunnel syndrome ("CTS"), a painful affliction caused by the compression of the median nerve beneath the transverse carpal ligament, resulting in interruption to the nerve distribution to the thumb, index, middle and ring fingers on the palmate side of the hand.

**75**  The symptoms of CTS include numbness, tingling, a 'pins and needles' feeling especially at night in the hand, particularly in the thumb, index, and middle fingers. CTS can also cause wrist pain, and weakness in the grip.

**76**  This condition likely had been developing over many years but its symptoms became acute in 2013, necessitating right wrist surgery in 2015 and left wrist surgery in 2016.

**77**  As Dr. Goetz notes, the plaintiff has a predisposition to CTS because of his diabetes and arthritis in the wrist.

**78**  The plaintiff is a reluctant surgical candidate and so delayed his surgeries. The 2016 CTS surgery on his left wrist gave him almost complete relief.

**79**  The CTS in the plaintiff's right wrist was too advanced for complete recovery since the neuropathy of the median nerve was too severe to obtain the degree of relief he later obtained from his left wrist surgery. However, the 2015 surgery helped since the night pain he suffered was reduced, but the tingling in his right hand remains to the present.

**80**  It is agreed that the CTS is unrelated to the injuries caused by the Collision. Its relevance is to damages for loss of future capacity.

**81**  There were only minor differences between the experts. Both accept that the plaintiff likely had pre-existing mostly asymptomatic arthritis in his hands.

**82**  Dr. Goetz opines that the pain suffered by the plaintiff in his hands and wrists is caused by either scaphoid trapezium trapezoid joint ("STT") arthritis or carpometacarpal joint ("CMC") arthritis and originates at the base of his thumbs. It is his view that this condition would likely have become symptomatic at some point in any event of the Collision, but he cannot say when.

**83**  With respect to the pain in the plaintiff's wrists, Dr. Goetz states that scapholunate advanced collapse ("SLAC") is likely the cause and is more probably the origin of the greater part of the plaintiff's pain.

**84**  SLAC results usually from trauma but can take many years to become symptomatic. The condition is caused when the ligaments between the scaphoid bone and the lunate bone rupture. The scaphoid and the lunate bones are small bones found at the base of the hand.

**85**  The ruptured ligaments leave a space between the bones causing them to misalign and ultimately result in the bones rubbing, resulting in arthritis.

**86**  Dr. Goetz pointed to a mention by Dr. Allen, the plaintiff's family physician, that the plaintiff had minimal symptoms in his hands pre-Collision to counter the plaintiff's later reports that he had no issues with his hands pre-Collision.

**87**  There does seem to be some possibility that the plaintiff was not symptomatic or was minimally symptomatic pre-Collision, but there is no doubt that the pre-existing condition was sufficiently advanced to result in almost immediate pain and swelling in his hands post-Collision.

**88**  Dr. Vaisler is also somewhat equivocal in his conclusion that the Collision caused the painful arthritis to become symptomatic. He points out at various locations in his reports that the plaintiff did not report problems with his hands and wrists before the Collision, although he also refers to Dr. Allen's comment that the plaintiff only reported minimal symptoms.

**89**  There is little doubt that there can be no certainty in this kind of medical evidence and there are substantial areas of agreement between Drs. Vaisler and Goetz.

**90**  Dr. Goetz states his difference with Dr. Vaisler's diagnosis at page 3 of his January 12, 2017 report as follows:

In the Independent Medical-Legal examination of Dr. Barry Vaisler, dated September 22, 2016, Dr. Vaisler states that he felt that the patient had evidence of arthritis throughout the hands and in the finger joints, and also evidence of arthritis of the thumb and evidence of arthritis at the wrist. It was Dr. Vaisler's opinion that the primary source of pain within the wrist was at the CMC [carpometacarpal] joint of the thumb.

This is at odds with my assessment. In my assessment, the patient has evidence of significant pain along the radioscaphoid joint and even the mid carpal joint. The pain at the CMC joint was present but was not associated with crepitus on grind testing as is usually the case. When the patient was distracted, I was able to move the CMC joint without complaints of pain; however, when the patient was [not] distracted, if I placed pressure on the radioscaphoid joint, the patient had immediate reports of pain.

In conclusion, it is my opinion that the patient's pain in the wrist is primarily from the scapholunate advanced collapse [SLAC] arthritis of the wrist and not from the CMC joint arthritis of the thumb. It is possible that the CMC joint arthritis of the thumb plays some role in the wrist pain experienced by Mr. Burke; however, it is my opinion that the most significant pain he experiences is from the wrist. He denies any wrist pain prior to the motor vehicle accident and only experience[d] wrist pain after the motor vehicle accident. Based on my assessment of these x-rays, I think this possible, but highly unlikely.

**91**  The relevance of this difference between the two orthopedic surgeons is that the arthritis emanating from the Stage III SLAC wrist, if it is the causative agent in the plaintiff's thumb and wrist pain, in Dr. Goetz's opinion, appears to have been caused by an injury sometime in the past that would likely have caused symptoms pre-Collision.

**92**  I will note that Dr. Goetz agreed in cross-examination that it was possible the SLAC wrist arthritis was not symptomatic pre-Collision.

**93**  While I find Dr. Goetz's analysis to present a more likely scenario for the cause of the plaintiff's pain, it is also clear that the plaintiff was able to continue working pre-Collision notwithstanding the relatively extreme and pre-existing deterioration of his wrists, and the arthritis in his fingers.

**94**  It is also clear from the medical reports of Dr. Goetz that the plaintiff suffered from a number of impairing conditions in his hands including SLAC arthritis of his wrist more notable in his right; mild CMC and/or STT joint arthritis at the base of his thumb; arthritis in his fingers ? limiting the range of motion of his fingers ? that is not related to the Collision; and bilateral carpal tunnel syndrome significantly worse on the right, with evidence of permanent loss of sensation and ability to grip small objects with the right hand, and incomplete recovery for the right side following carpal tunnel release surgery. Recovery on the left side was complete.

**95**  There are surgical options available for the thumb and wrist for the CMC or STT arthritis and for the SLAC arthritis that could improve the plaintiff's quality of life by reducing his pain and possibly restoring some range of motion and some grip strength.

**96**  But there is no surgical remedy for the arthritis in his fingers, which will remain stiff and may worsen with time. There is, similarly, no further remedy for the incomplete recovery from CTS in his right wrist.

**97**  Any surgery would require time for convalescence with a period of disability of up to six months.

**98**  However, before any surgery can be recommended, it is necessary to isolate the location of the plaintiff's pain through the use of sequential selective injections, one into the CMC joint and one into the radiocarpal joint. This would allow a determination of whether there is pain from both sources or predominantly from one source.

**99**  After a careful review of the medical reports of Drs. Vaisler and Goetz, I find that it is likely the thumb and wrist pain suffered by the plaintiff post-Collision resulted from a significant aggravation of previously largely asymptomatic conditions in the plaintiff's hands and wrists.

**Damages**

**A. Causation**

**100**  The plaintiff must satisfy the Court, on a balance of probabilities that, but for the defendants' negligent act, he would not have sustained his injuries.

**101**  The "but-for" test is the general test for factual causation. The negligent conduct must be substantially connected to the injury. This test was affirmed and set out 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:

[8] 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.

[9] 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. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, *per* Lord Bridge; *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=).

[10] 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. See *Snell* 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=). See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe* (1945), 71 C.L.R. 637 (H.C.), at p. 649; *Bennett v. Minister of Community Welfare* (1992), 176 C.L.R. 408 (H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.

[Emphasis in original.]

**102**  The trial judge is to adopt a "robust and pragmatic approach to determining if a plaintiff has established that the defendant's ***negligence*** caused her loss": *Clements* at para. 46. At the same time, causation need not be established with scientific precision: *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. Where causation is established by inference only, it is open to the defendant to argue or call evidence that the injury was inevitable: *Clements* at para. 11. There is no such evidence here.

**103**  The plaintiff must also establish legal causation, which arises once factual causation is proven. Legal causation is examined at the damages stage of the analysis. I will deal with legal causation under the head of non-pecuniary damages.

**104**  In considering the issue of factual causation, I have reviewed the medical evidence and the evidence of the plaintiff.

**105**  It is clear that he was a strong, hardworking commercial fisherman before the Collision, with a job that required physical strength and endurance. He was able to do his job without interruption and planned to continue in that occupation indefinitely subject to the vagaries of health that we all face.

**106**  The Collision was a serious one, that destroyed both cars, and it now appears that the consequences of the accident include continuing pain in the plaintiff's hands and wrists, mainly in the right wrist. These have not resolved.

**107**  The defendants must put the plaintiff back in the original position he would have been in had the defendants not caused the Collision: *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. 32.

**108**  As well, once causation is established on the standard set out in *Clement*, the defendants are liable for all the consequences that flow from the injuries caused to the plaintiff.

**109**  I find that the plaintiff has proved factual causation: but for the defendants' ***negligence***, the plaintiff would not have suffered the injuries from which he continues to endure pain.

**110**  However, the gloss on the issue of factual causation requires that the original condition of the plaintiff be considered so that the determination can be made that all of the injuries suffered would not have occurred but for the defendants' conduct.

**111**  As I have noted in my analysis of the medical evidence, there is substantial support for the proposition that the plaintiff's original condition included a number of quiescent but present conditions in his hands and wrists that would likely have become increasingly symptomatic over time in any event of the Collision.

**112**  I must consider the contingency that those conditions would have interfered with the plaintiff's ability to continue working as a commercial fisherman when I assess loss of future capacity. However, the fact that the defendants' conduct triggered the major onset of symptoms of a previously endurable condition supports a finding of factual causation.

**B. Damages**

***Non-Pecuniary Damages***

**113**  As stated above, to be entitled to damages the plaintiff must establish legal causation in addition to factual causation. The plaintiff's injury must be a reasonably foreseeable consequence of the defendant's ***negligence***. Reasonableness is assessed by examining whether it was foreseeable that a person of ordinary fortitude would suffer the injury at issue: *Mustafa v. Culligan*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=) at para. 18. Neither the exact damage nor the exact manner of its occurrence need be foreseeable; one need only be able to foresee in a general way the class or character of injury which occurred: *Millette v. Cote*, [*[1976] 1 S.C.R. 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24KB-00000-00&context=) at para. 8. In the circumstances of this case, it is reasonably foreseeable that a head-on collision, caused by the defendant having crossed the centre line of a highway and thereby entering the plaintiff's lane of travel, would cause serious, if not permanent, injury to the plaintiff's hand and wrist.

**114**  Non-pecuniary damages compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. This type of compensation must be fair to all parties. This is done in part by comparing the circumstances at issue with other cases of similar circumstances.

**115**  A non-exhaustive list of relevant factors to consider when determining an appropriate award for non-pecuniary loss was developed 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=) at para. 46, leave to appeal ref'd [*[2006] S.C.C.A. No. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M45M-00000-00&context=):

[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] 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=)).

**116**  However, a non-pecuniary damages award will ultimately turn on the particular circumstances of the case.

**117**  I am aware that the plaintiff has not been able to continue as a commercial fisherman since 2013 and before that, had some serious functional limitations on his abilities. His culture, his friendships and his livelihood have all changed substantially since the Collision and because of the Collision.

**118**  The plaintiff's right wrist symptoms were aggravated significantly by the Collision and he has had continuing pain in his thumb and his wrist for which he takes OTC medications and may choose to have one or possibly two surgeries.

**119**  As a man of 67 at the time of the Collision, his career has been shortened by the aggravation of his previously only mildly symptomatic arthritis.

**120**  I have reviewed the cases provided by both parties and note that they are close in their assessment of entitlement.

**121**  I have reviewed the following:

1. *Dulay v. Lachance*, [*2012 BCSC 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-621G-00000-00&context=): the plaintiff was awarded $75,000 for knee arthritis made symptomatic by a motor vehicle accident;
2. *Burtwell v. McCaffrey*, [*2013 BCSC 886*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20KV-00000-00&context=): the plaintiff was awarded $80,000 for injuries to her wrist, shoulder and back. She had two surgeries but only her shoulder pain was resolved, leaving her with continued wrist pain;
3. *Westbroek v. Brizuela*, [*2012 BCSC 1955*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X35V-00000-00&context=): the plaintiff suffered loss of function in his dominant hand and forearm and could no longer work full-time at his occupation as a mechanic. He was awarded $90,000;
4. *Bevacqua v. Yaworski*, [*2012 BCSC 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24CV-00000-00&context=). 76-year-old plaintiff awarded $85,000 "general damages" after developing severe arthritis in her right wrist and injury to her right foot and ankle from a pedestrian accident. Her wrist pain continued and foot and ankle issues left her afraid to walk on her own. She lost her independence and moved in with her daughter;
5. *Ozeer v. Young*, [*2015 BCSC 542*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60N2-00000-00&context=): the plaintiff was awarded $95,000 when he suffered a severe fracture to his dominant wrist along with some soft tissue injuries that resolved. The wrist fracture required three surgeries to complete but career aspirations were limited, arthritis would likely follow and wrist fusion surgery might be required.

**122**  Given the agreement of the defendants with the quantum of non-pecuniary damages which the plaintiff seeks and my finding that that amount is appropriate in the circumstances, I award him $95,000.

**123**  The award of damages under this head includes an amount for loss of housekeeping or gardening capacity. I will discuss this further below.

***Past Wage Loss/ Loss of opportunity***

**124**  The plaintiff does not claim for wage loss for 2010, 2011 and 2012.

**125**  An expert report was prepared for the plaintiff by an actuary, Mr. Neil Chicoine.

**126**  Mr. Chicoine is not a labour market economist. Therefore, I do not know if his multiplier takes into account such factors as market price fluctuations, and actual year-to-year conditions in the fisheries in which the plaintiff specifically participated: Washington, Oregon and Alaska.

**127**  I am aware that the plaintiff fished once in California for squid but I am not aware of any evidence of him accessing any other fishing grounds.

**128**  For example, in 2014, the sardine run in Oregon was either closed or very abbreviated, thus affecting the income earning ability of commercial fishermen who rely on that run.

**129**  Mr. Chicoine has derived his figures from taking the mean net annual wage for fishermen in Washington State and subtracting the amount declared as net income by the plaintiff for the years 2013, 2014, 2015, 2016 and 2017 to the date of trial.

**130**  He has assumed that the plaintiff would remain working at the same level of productivity that he has always done notwithstanding his age. The plaintiff was born in 1943 and would have reached the age of 74 by the date of trial.

**131**  In my view, this is an unsafe assumption.

**132**  The plaintiff has serious arthritis in his fingers ? unrelated to the Collision ? that affects his ability to grasp ropes since he cannot fully flex his fingers, and he has carpal tunnel syndrome that necessitated surgery in 2015 and 2016. The carpal tunnel surgery was not wholly successful, leaving his right hand with permanent deficits that would have affected his productivity.

**133**  At minimum, the CTS surgeries would have required some convalescence and since they took place in March 2015 and February 2016, there would have been some effect on the plaintiff's ability to take part in fishing operations those years or to be fully productive when he did take part.

**134**  Mr. Chicoine does not claim to be knowledgeable concerning the American tax regime. He has stated in his report that he believes all damages from lawsuits are received tax-free in the U.S. and that Washington State has no income tax.

**135**  He gleaned this information second-hand from the plaintiff's accountant in Bellingham and added it to his report. This means that his declaration that the report is based on his work only is not accurate.

**136**  I note, too, that Mr. Chicoine does not take into consideration any deduction for the self-employment tax that self-employed fishermen such as the plaintiff must pay in Washington State.

**137**  I cannot give any weight to his statements about the American tax system.

**138**  In considering past loss of earning capacity, I am to consider what the plaintiff would have, not could have, earned but for the injury that was sustained: *Hoy v. Williams*, [*2014 BCSC 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1SJ-00000-00&context=) at para. 141.

**139**  Kent J. goes on to state the law as follows:

. . . The burden of proof of actual past events is 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: *Athey v. Leonati at para. 27; 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. 38.

**140**  To make this determination, "independent intervening events" that would have affected the plaintiff's original position adversely, must be reviewed and considered and if necessary, used to reduce the net loss attributable to the defendants' ***negligence***: *Athey v. Leonati*, at 31-32.

**141**  This principle is applicable not only to non-pecuniary damages but as well to damages for past or future loss or impairment of earning capacity.

**142**  As an example of an unrelated intervening event, the plaintiff chose to work with his son in 2012 and thus earned less than he would have working for Mr. Kapp.

**143**  The plaintiff has quite properly not claimed any fishing loss for the year 2012 but his choice to work with his son had the unintended consequence of inspiring Mr. Kapp to sell his boat the following year since Mr. Kapp had had to run it himself when the plaintiff was unavailable in 2012.

**144**  In 2013, when the plaintiff had intended to keep working with his son, his son sold his boat in May, well into the season, without any advance notice to the plaintiff. This removed the plaintiff's opportunity to work with his son and Mr. Kapp had also sold his boat before the plaintiff's son sold his so there was no work available with him.

**145**  Both of these events combined to deprive the plaintiff of work, but the major loss he suffered in 2013 cannot be attributed to the defendants.

**146**  The plaintiff did find some work as a skipper with Mr. Markuson in 2013 without any accommodation for his wrist and thumbs but after that season, Mr. Markuson sold his boat, thus removing yet another opportunity for the plaintiff in subsequent years.

**147**  Another variable that presents an intervening event is the fact that the sardine run was abbreviated in 2013 and even more abbreviated in 2014.

**148**  The mechanical failure of the boat leased by the plaintiff's son in 2013 obviated the opportunity to work for him.

**149**  In 2014, his son's leased boat was already fully crewed by the owner so there was no opportunity for the plaintiff, a circumstance beyond the defendants' control.

**150**  I have no evidence concerning the reasons why Jason Burke did not hire his father in 2015.

**151**  I admit to being somewhat puzzled by the evidence of Ryan Kapp that he would have hired the plaintiff as a captain in the years 2014, 2015 and 2016 and beyond were it not for the plaintiff's impairments.

**152**  The plaintiff has stated that the physical duties of a captain are quite limited compared to the labour required of a deckhand.

**153**  As a skipper, he is the wheelman, responsible for the navigation of the boat, the setting and bringing in of the net and directing the deckhands. According to his testimony, post-Collision, he was able to navigate and steer the boat, run the hydraulic winches and levers for the nets, and direct the crew.

**154**  While I accept he could not set the chokers around the net when it was being pulled into the boat, he said he directed the new crew member how to do this.

**155**  The plaintiff testified that it takes a young man to do the heavy labour required of a deckhand on a fishboat and an experienced man to direct the deckhand how to do the work properly.

**156**  I fail to see the limits on the plaintiff's physical capabilities that would have interfered with his ability to captain Ryan Kapp's boat particularly given Ryan Kapp's evidence that the plaintiff's long experience was of enormous value.

**157**  I find the plaintiff's evidence inconsistent with Ryan Kapp's evidence that he would have hired the plaintiff had he not been injured. I cannot find that Ryan Kapp's evidence establishes the plaintiff's losses in the years 2014, 2015 and 2016 and beyond to the date of trial.

**158**  I am prepared to find that the plaintiff proved some past wage loss as a result of his injuries but the very substantial loss posited by the plaintiff is not supported in the evidence because of the past intervening events I have set out.

**159**  I find that there is a real and substantial possibility that the plaintiff lost boat and net work for the years 2011, 2012, 2013, and 2014 due to his injuries. Beyond 2014, and up to the date of trial, his CTS and surgeries and his other additional unrelated hand problems would have made it impossible for him to do this work in any event.

**160**  The only information I have on the value of the lost boat and net work is that he would have worked for four to six weeks each of the four years noted (that I will average at five weeks per year) at $20 per hour X five days per week at eight hours per day for a total of $16,000.

**161**  This is a gross loss of past income and must be netted for whatever taxes the plaintiff would have had to pay under any applicable income tax rules in Washington State, including the self-employment tax that was not included in Mr. Chicoine's figures.

**162**  In addition, I find there is a real and substantial possibility that the plaintiff lost some fishing income over all the years from the Collision and due to the Collision to the trial before his unrelated impairments overtook his ability to work.

**163**  Doing the best I can with the available information, for the years 2013 and 2014, I will award a total of $26,000 on the basis that had the plaintiff been unimpaired by the injuries caused by the Collision, he would probably have found more or better-paid work as a skipper. He did work as a skipper in early 2013 catching pink salmon for Jeff Markuson and earned $13,000.

**164**  As with the award for boat and net work, beyond 2014, the CTS and following surgeries and other additional unrelated hand problems would have made it impossible for him to take on full duties on a fishing boat either as a deckhand or a skipper.

**165**  In summary, as damages for loss of past capacity, I award a total of USD $42,000 gross. I will leave it to the parties to determine the appropriate deduction for taxes that must be deducted to comply with the provisions of the *Insurance (Vehicle) Act*, *R.S.B.C.1996, c. 231* at ss. 95, 97 and 98.

**Future wage loss and future loss of earning capacity**

**166**  The principles applicable to this head of damages are well-known.

**167**  In a decision of Voith J., *Brewster v. Li*, [*2013 BCSC 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CN-00000-00&context=), he sets out some of the principles to be considered in making an award under this head. In particular, at para. 142, Voith J. cites a decision of the BC Court of Appeal 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=), as follows:

[100] 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: [citations omitted]. 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=) [further citations omitted]. 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[.] [Underlining added in *Reilly v. Lynn*].

**168**  At para. 32 of *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=), Garson J.A. discusses the requirement for the plaintiff to prove a "real and substantial possibility of a future event leading to an income loss" with the quantification of that loss of earning capacity determined on an earnings approach or a capital asset approach. This future loss of income may still be proved notwithstanding the fact that the plaintiff has returned to his or her employment.

**169**  Further, this head of damages need not be proved on a balance of probabilities but as noted above, the plaintiff need only show a real and substantial possibility of loss as a result of injuries suffered in the Collision for which liability is admitted.

**170**  As stated by Goepel J.A. in dissent 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*:*

[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.

**171**  The factors to be considered in making such an assessment are found in the following cases: *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. 31; *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.).

**172**  These relevant factors are oft-cited but bear repeating once again:

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 or her, had she or he not been injured; and
4. whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market. However, I consider this point to be somewhat diluted as a result of the Court of Appeal's dismissal of the trial judge's award of damages founded on this factor: *Kim v. Morier*, [*2014 BCCA 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MC-00000-00&context=) at para. 8.

**173**  In the circumstances of this case, I must consider when the plaintiff would have stopped working. However, I conclude that the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open to him had he not been injured.

**174**  He was born in June 1943 and at the date of the Collision was 68 years old. He is now 74 years old.

**175**  He is diabetic and suffers from extensive arthritis unrelated to the Collision but which affects the proper working of his hands and fingers including loss of grip strength. As Dr. Goetz opines, such arthritis is unlikely to improve over time.

**176**  He has had two surgeries for CTS but is left with permanent deficits in his dominant hand, his right hand. The surgeries themselves would have healed by 2017.

**177**  Commercial fishing is a demanding occupation requiring heavy labour often in cold and wet conditions. Both stamina and balance are also required.

**178**  Being on a pitching fishing vessel in high seas would be highly dangerous for a person like the plaintiff who cannot reliably hold on to ropes or rails. His tendency to drop tools due to his loss of hand strength and grip unrelated to the Collision would also put fellow crew members at risk.

**179**  Were it not for the number of hand problems the plaintiff suffers from that are unrelated to the Collision, I would accept that he could possibly have worked until age 80 as counsel argued. I say this because I recognize that it is as much the culture surrounding his occupation that he has lost as it is the actual employment and fishermen of reasonably advanced age are not uncommon.

**180**  However, the fact remains that while the plaintiff's Collision-related injuries taken in isolation would have meant a real and substantial possibility of loss of future income but for the Collision, those injuries were subject to an overlay of the other problems and related surgeries I have described in the section entitled "Past wage loss" that would themselves have slowed the plaintiff down to the point he would likely have had to retire by age 75.

**181**  That means as of the date of trial, he would have worked another year and a half, only part of which would correspond with the usual fishing season he worked from January to August - September 2018.

**182**  I must take into account both positive and negative contingencies such as the positive contingency that he would have been hired for the value of his permit without any actual physical duties, and the negative contingency that the number of boats on which such a position might have been available has been substantially reduced.

**183**  I must also look to the overall reasonableness and fairness of the award.

**184**  In the circumstances, I am prepared to accept the submission of the defendants that one year of the plaintiff's pre-Collision three-year average earnings of USD $43,447 would have the effect of putting the plaintiff in the same position respecting his future earning capacity that he would have been in but for the Collision while at the same time recognizing the attendant risks.

**185**  This figure considers all of the contingencies noted which, in my view, balance out.

**186**  I consider that such an award relies on the factual anchors I have discussed as well as a mathematical anchor for his future loss calculated from his actual earnings in the past. *Knapp v. O'Neill*, [*2017 YKCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XR8-3VW1-JBDT-B2S0-00000-00&context=).

**187**  This figure must be netted for tax and I leave that calculation to the parties.

**188**  I have not chosen to rely on Mr. Chicoine's actuarial report for either past or future loss of capacity for several reasons. I do not find his assumptions reliable, I consider his failure to consult the plaintiff so he could analyse the real conditions of the plaintiff's occupational history to be a significant omission, and because he has not used an economic future income loss multiplier that would have taken into consideration labour market contingencies in addition to the premature death contingency that is part of the actuarial multiplier he has used.

**Loss of housekeeping and yard work capacity**

**189**  I will not award loss of housekeeping capacity since I have awarded an amount of non-pecuniary damages that would include an amount for "loss of personal capacity".

**190**  In the circumstances of this case, it remains possible for the plaintiff to do his own vacuuming and gardening but at a slower pace and no doubt, with some pain.

**191**  In the result, including the loss of housekeeping capacity in non-pecuniary damages is appropriate: *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=) at para. 19.

**Cost of future care**

**192**  Both counsel cite *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=) for the proposition that an award under this head is a notional award and must be reasonable and medically justified.

**193**  The only evidence before me of any Collision-related cost of future care the plaintiff is likely to incur is for over the counter pain medication, Aleve, when his pain bothers him.

**194**  The plaintiff testified he had decided he would not have thumb or wrist surgery after discussing it with Dr. Baader.

**195**  I cannot award damages for the possibility that he will have surgery for his Collision-related injuries in future because there is no real and substantial possibility that he will choose to have it. Even a notional award under this head would be entirely speculative as would be any associated costs.

**196**  While I do not have any evidence of the cost of a bottle of Aleve, I am satisfied the plaintiff will use it from time to time to deal with the pain of his Collision-related injuries and I will make a small award recognizing his need.

**197**  I will therefore award him USD $500 for the cost of Aleve over the future.

**Special damages**

**198**  No claim for special damages is advanced by the plaintiff since the costs were indemnified by an insurer and there is no subrogate claim made.

**Currency Conversion**

**199**  Since the plaintiff is an American citizen and his damages relate to his losses in Washington where he lives, all of the heads of damages he has been awarded except non-pecuniary damages must be converted to U.S. currency at the rate payable the day before the judgment is paid and he will be paid in the equivalent amount of Canadian funds required to purchase the American currency: *Foreign Money Claims Act*, *R.S.B.C. 1996, c. 155* at s. 1:

**Payment in foreign money equivalent**

**1** (1) If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

1. The conversion date is the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

**Conclusion**

**200**  The plaintiff's damages are as follows:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary damages | CAD $95,000.00 |  |
| Past loss of income | USD $42,000.00 |  |
| Future loss of capacity | USD $43,447.00 |  |
| Cost of future care | USD $500.00 |  |

**201**  Some of the figures above require netting for tax.

**202**  The plaintiff will have his costs subject to any requirement that must be spoken to.

**203**  In that case, counsel may arrange a time to appear before me through the Registry.

L.D. RUSSELL J.

**End of Document**

[***Drage v. Page, [2002] B.C.J. No. 1848***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JCJ5-2012-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Wedge J.

Oral judgment: March 28, 2002.

New Westminster Registry No. S062091

**[2002] B.C.J. No. 1848** | 2002 BCSC 1214 | 116 A.C.W.S. (3d) 762

Between Shelley Drage, plaintiff, and Dr. David A. Page, Dr. Caroline Pon, Dr. David J. Fitzpatrick and the Chilliwack General Hospital Society, defendants

(50 paras.)

**Case Summary**

**Practice — Judgments and orders — Summary judgments — When available — Requirement that question at issue be beyond doubt — Medicine — Liability of practitioners — *Negligence* or fault — Wrong diagnosis.**

|  |
| --- |
| Application by the defendant doctors, Page and Fitzpatrick, to dismiss the action. The plaintiff, Drage, claimed damages arising from the doctors' ***negligence*** when she was left with the mistaken understanding that she had pancreatic cancer. Drage had attended the hospital complaining of pain. An ultrasound was ordered by Fitzpatrick. An ultrasound relating to a different patient was mistakenly transcribed in Drage's name. Neither Fitzpatrick nor Page was involved in the preparation of this report. Page received and reviewed the report. He explained the results to Drage and booked a CT scan for her the next day. Drage believed upon leaving Page's office that she had pancreatic cancer. She learned of the error before the CT scan was performed. She alleged damage for pain and suffering and emotional shock.  HELD: Application allowed.  The claim was dismissed as against Page and Fitzpatrick. They were not negligent with respect to the ultrasound report. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A, 18A(11).

**Counsel**

D. McCrimmon, for the plaintiff. D. Pilley and M. Thomas, for the defendants.

|  |
| --- |
| **WEDGE J. (orally)** |

**1**   The defendants, Dr. David Page and Dr. David Fitzpatrick, apply under Rule 18A of the Rules of Court for an order that this action be dismissed against them.

**2**  The plaintiff, Shelley Drage, alleges that as a result of ***negligence*** on the part of the defendant doctors she was left with the understanding that she had pancreatic cancer when in fact she did not. She claims damages for losses she suffered as a result of their ***negligence***.

**3**  By way of overview, the plaintiff attended at the emergency department of the Chilliwack General Hospital on September 8, 1999, complaining of rear flank pain and abdominal pain. The plaintiff was treated in emergency by Dr. Fitzpatrick, who ordered an ultrasound of her kidneys and other tests. The plaintiff attended the hospital the next day for an ultrasound.

**4**  An ultrasound report that should have related to another patient was transcribed mistakenly in the plaintiff's name. It is common ground that neither Dr. Fitzpatrick nor Dr. Page was involved in the preparation of this report, nor was it the duty of either doctor to be involved in its preparation. After Dr. Page received and reviewed the ultrasound report, he contacted the plaintiff and asked her to attend at his office. During the office visit, Dr. Page explained the ultrasound results to her. He told her he had booked a CT scan for her and that she must attend the hospital for the scan the next day. The plaintiff left Dr. Page's office believing that she had pancreatic cancer.

**5**  The next day the plaintiff attended at the hospital for the CT scan. At that time it was determined that the ultrasound report that had been generated in her name was in fact for another patient. She did not have a mass on her pancreas and she did not require a CT scan.

**6**  The plaintiff is claiming damages for pain and suffering and emotional shock from all of the defendants. The particulars of the alleged ***negligence*** of Dr. Fitzpatrick and Dr. Page are set out in the statement of claim at para. 11, which states:

The particulars of the ***negligence*** of the defendants are as follows:

1. in mixing up the results of the plaintiff's tests with those of another patient;
2. in failing to notice that the test results conveyed to the plaintiff were not those of the plaintiff; and
3. in the application of inappropriate treatment and tests.

**7**  Dr. Fitzpatrick and Dr. Page deny the allegations of ***negligence*** and seek, by way of this application, to have the action against them struck. The other defendants in the action take no position on this application.

FACTS

**8**  I will now deal with the facts in more detail. Dr. Page is a general practitioner. The plaintiff was his patient from May, 1998 to November 8, 1999.

**9**  On Wednesday, September 8, 1999, the plaintiff was bothered by low back pain at work. She left work and attended at the emergency department at the Chilliwack General Hospital. Dr. Fitzpatrick, on duty as an emergency physician, examined the plaintiff in emergency and obtained the following symptoms from her: right flank pain, lower abdominal pain, nausea, weight loss, aches and pains and a deep chesty cough. The plaintiff may have told Dr. Fitzpatrick that she was worried she might have cancer. The plaintiff's father had died of cancer when the plaintiff was very young.

**10**  Dr. Fitzpatrick then examined the plaintiff and formulated a preliminary diagnosis. The plaintiff had a chest infection, muscular back pain and anxiety. Dr. Fitzpatrick ordered blood work, a chest X-ray and an ultrasound. He ordered the ultrasound in order to rule out a reasonable explanation for the back pain.

**11**  Dr. Fitzpatrick arranged for the plaintiff to attend at the radiology department at the hospital for the renal ultrasound the next day, Thursday, September 9th, 1999. He advised the plaintiff to follow up with her general practitioner to obtain the results of the ultrasound. The plaintiff had no contact with Dr. Fitzpatrick other than the one emergency visit and, it appears, had no complaint with the treatment that she received from Dr. Fitzpatrick during that visit.

**12**  The plaintiff attended the radiology department at the hospital the day after her visit to the emergency. The technologist performed the ultrasound on her. The plaintiff expected that she would contact Dr. Page in a week or so to arrange an appointment to obtain the results of the ultrasound.

**13**  Several days after her visit to the emergency, the hospital provided Dr. Fitzpatrick with an ultrasound report for the plaintiff. It was an abdominal ultrasound. This report was generated by the hospital and it indicated the following: the information in the report pertained to the plaintiff; the plaintiff attended at the radiology department on September 9, 1999 for the ultrasound test; the plaintiff was post-cholecystectomy (i.e. she had at some point in the past had her gallbladder removed); she had an aneurysm of the distal aorta; she had an area that was suspicious for a small mass in the head of the pancreas; and finally, there should be follow-up clarification with a CT scan.

**14**  Although Dr. Fitzpatrick had requested a renal ultrasound for the plaintiff, he deposed that it is not uncommon for the hospital to perform an abdominal ultrasound when a renal ultrasound is requested. An abdominal ultrasound is simply over-inclusive as compared to a renal ultrasound.

**15**  Dr. Page deposed that on September 10, 1999, he received a fax from Dr. Fitzpatrick containing the ultrasound report and a notation indicating that Dr. Page should be aware of the findings in the report. Dr. Page also received a copy of the ultrasound report from the hospital. He made arrangements to have the plaintiff contacted on Monday so that an appointment could be arranged to discuss the report with her. Dr. Page did not contact the plaintiff on Friday, September 10th, because he knew a CT scan would not be available over the weekend. The plaintiff attended at Dr. Page's office on Tuesday, September 14, 1999 to obtain the results of the ultrasound report and discuss follow-up.

**16**  Dr. Page deposed that he had the following conversation with the plaintiff about the ultrasound report:

I advised the plaintiff that Exhibit "A", [i.e., the ultrasound report], indicated that she had an aneurysm in her aorta, and that we would refer her to a vascular surgeon for his or her advice on this matter. With respect to the findings noted in Exhibit "A" on the pancreas, I advised the plaintiff that the radiologist had noted that there was an area in her pancreas that was suspicious for a mass, but that the radiologist was not sure whether there in fact was a mass, and that the radiologist had recommended that we do a CT scan to clarify whether there was a mass on the pancreas.

The plaintiff asked me what the mass could be and my reply to this question was as follows:

1. I advised the plaintiff that the worst thing that a mass in the pancreas could be was a cancer;
2. I advised the plaintiff that a CT scan would be helpful to investigate this further;
3. I emphasized to the plaintiff that we were not sure whether there was anything at all in the pancreas; and
4. I repeated to the plaintiff two or three times the wording in [the report] that the results were only suspicious of a mass in the head of the pancreas, and that the ultrasound was not definitive.

**17**  The plaintiff acknowledged in her examination for discovery that she did not recall the details of many parts of her conversation with Dr. Page. The only significant divergence in the evidence of the plaintiff and Dr. Page with respect to the conversation in his office is that the plaintiff says she asked Dr. Page if she had cancer and he replied "yes".

**18**  Dr. Page's evidence is that he described cancer as being the worst thing the mass could be, but that further investigation by way of CT scan was necessary. Dr. Page contacted the hospital and obtained an appointment for the scan for the following day. He told the plaintiff to attend the hospital the next day for the scan.

**19**  After the meeting with Dr. Page, the plaintiff went home. She advised her employer that she could not come in to work the next day because she had to go to the hospital to have a CT scan. She then contacted her sister to tell her about the meeting she had with Dr. Page.

**20**  That evening, the plaintiff's sister obtained information about pancreatic cancer on the Internet and advised the plaintiff there was a poor survival rate for people with pancreatic cancer and they die quickly. The plaintiff then discussed funeral arrangements with her sister as well as arrangements for the care of her son.

**21**  The defendant doctors do not doubt the plaintiff had a very difficult night of it, given that she came away from Dr. Page's office with the impression that she had been diagnosed with pancreatic cancer.

**22**  On Wednesday, September 15th, 1999, the plaintiff attended at the radiology department for a CT scan. A technician took a number of preliminary X-rays. The plaintiff was then left alone for 25 minutes or so. The technician returned to the plaintiff and advised her there had been a mistake - she did not require a CT scan and was free to go. She was also told that if she wanted another ultrasound, it could be arranged through her family doctor. However, at the insistence of the plaintiff's sister, the hospital performed another ultrasound immediately.

**23**  The plaintiff then left the hospital to go home. She was still unaware that the original ultrasound report had been generated erroneously under her name.

**24**  Instead of going home, the plaintiff returned to Dr. Page's office to determine what had happened. Dr. Page advised her the hospital had made a mistake and she did not have the conditions that were listed in the report. The plaintiff demanded a copy of the report and was stunned to see that all of the information about her was accurate: the date her ultrasound was performed, her file number, her phone number and other relevant demographic information. The report itself was false because it pertained to someone other than the plaintiff.

**25**  Dr. Page received a corrected report from the hospital with respect to the ultrasound that had been performed on the plaintiff. This report noted the following:

The patient was booked for a CT scan. However, the previous issued report was incorrect and on another patient. The previous examination was a renal ultrasound which demonstrated both kidneys to be normal.

Dr. Fitzpatrick

**26**  I will turn first to the allegation against Dr. Fitzpatrick, which is contained in paragraph 11(b) of the statement of claim. It is alleged he failed to notice that the results in the ultrasound report did not belong to the plaintiff.

**27**  Although Dr. Fitzpatrick requested a renal ultrasound and the contentious ultrasound report was an abdominal ultrasound, he deposed that it is not uncommon for the hospital to generate an abdominal ultrasound report when a renal ultrasound report is requested. An abdominal ultrasound includes the required information concerning the kidneys. That evidence was not challenged by the plaintiff.

**28**  Dr. David Essler is an emergency physician who provided an expert opinion with respect to Dr. Fitzpatrick's care. Doctor Essler noted that Dr. Fitzpatrick, as an emergency physician, met the required standard of care to the plaintiff by arranging an ultrasound test for her and by advising her to obtain the results of the test from her general practitioner. Dr. Essler states on the concluding page of his report:

To provide some insight into how Dr. Fitzpatrick might have dealt with this report, it is helpful to consider the role of emergency physicians in providing follow-up medical care as compared with other physicians who provide ongoing care. A typical emergency physician will see approximately 30 patients in an eight-hour emergency department shift. His or her role is to stabilize these patients and then either arrange for hospitalization or discharge and follow-up with their GP or specialist.

A few days after a typical emergency department shift, the emergency physician will receive 20 to 30 laboratory and X-ray reports in his or her hospital mailbox. These will be thumbed through quickly and perhaps one or two will contain findings of significance that may require further investigation. Normally, such reports will contain a cc. to the emergency physician and GP.

If the emergency physician has already advised the patient to follow up with their GP, then no further action need be taken. It is assumed that the GP will get a copy of the report and arrange further testing if indicated. If the patient has no GP, the emergency physician must make other arrangements. This would usually involve telephoning the patient.

My point is that the role of the emergency physician is actually quite limited once the patient leaves the emergency department. I believe that most emergency physicians spend little time pondering over the significance of and explanation for abnormal results in reports received after the patient has been discharged from their care. It will fall on the shoulders of the primary care physician to decide on the significance of an abnormal report and determine which, if any, other tests are then required. In this case I would say that Dr. Fitzpatrick had already discharged his responsibility to Ms. Drage by arranging for her to have an ultrasound test and follow up with her GP. Given that the ultrasound report he received on Ms. Drage contains no impossible findings, I would not expect him to notice or in fact even consider that it in fact applied to another patient.

In summary, my opinion is that Dr. Fitzpatrick met the expected standard in all respects and, in fact, it exceeded it by taking the additional step of faxing a copy of the abnormal report to Dr. Page.

Dr. Page

**29**  The allegations against Dr. Page are, as I have noted, contained in paragraph 11 of the statement of claim. Although Dr. Page had no role in producing the ultrasound report, the statement of claim raises the question of whether he should have been aware that the hospital erroneously generated the results of another patient under the plaintiff's name.

**30**  Dr. Page deposed that he was unaware of any recurring problems with the accuracy of reports generated by the hospital. That assertion was not disputed by the plaintiff.

**31**  Dr. Bradley Fritz is a family doctor who provided an expert report with respect to Dr. Page's care. On p. 5 of his report he notes:

Dr. Page, as outlined above, was presented with what he believed to be a valid report with respect to Shelley Drage. As Dr. Page was unaware of any pattern of erroneous reports being generated on a regular basis from the radiology department of Chilliwack General Hospital, and as he was aware that Ms. Drage had an ultrasound ordered, and as the initial report of the ultrasound of September 9, 1999 contained the correct demographic information of Ms. Drage, it was appropriate, in my opinion, for Dr. Page to assume that the report referred to Ms. Drage.

**32**  The question arising from paragraph 11(b) is whether there was anything in the ultrasound report that should have caused Dr. Page to question its accuracy. As earlier noted, the ultrasound report contained the following information: the patient was the plaintiff; the plaintiff attended at the radiology department on September 9, 1999 for an ultrasound; she was post-cholecystectomy; she had previously undergone an abdominal aortic aneurysm; she was suspicious for a mass in the pancreas. On pp. 4 and 5 of his report, Dr. Fritz notes the following:

The question arises as to whether Dr. Page should have concluded that, given the report stated the patient was post-cholecystectomy, the report did not refer to Shelley Drage. Understandably, given that the report indicated the presence of two potentially life threatening conditions in a relatively young person, Dr. Page did not consider that the report said the patient was post-cholecystectomy to be significant. This type of error is understandable, given the serious implications of an abdominal aortic aneurysm and the possible mass in the head of the pancreas.

Furthermore, although Dr. Page had taken a history of past health from Ms. Drage, it is not uncommon for patients to forget to tell a new physician about some of their past history, including operations.

Furthermore, Dr. Page was unaware of there having been any significant errors in the quality of reports he had received from the radiology department at Chilliwack General Hospital since he had been in practice in that community.

Finally, the report contained correct demographics regarding Shelley Drage, and she confirmed that she had had an ultrasound examination on that date.

I therefore would not fault Dr. Page for assuming that this report was accurate. Although both an abdominal aortic aneurysm and a mass in the head of the pancreas would be unusual in a 46 year old woman, these problems can occur in people of this age and the appropriate response by a physician would be to aggressively indicate further investigations. In my opinion, I would not have expected Dr. Page to question whether the report referred to Ms. Drage or to question the radiologist's opinion.

**33**  Paragraph 11(c) of the statement of claim alleges that Dr. Page ordered inappropriate treatment or tests in response to the ultrasound report. Dr. Page deposed that with respect to the aneurysm in the plaintiff's aorta, he recommended a referral to a vascular surgeon. With respect to the suspicion of a mass in the pancreas, he recommended further immediate investigation with a CT scan.

**34**  With respect to the appropriateness of ordering these tests, the opinion of Dr. Fritz was as follows:

When presented with this ultrasound report, it was incumbent of Dr. Page to order the CT scan, which was the appropriate investigation to confirm the presence of a mass in the head of the pancreas. To his credit, he arranged the CT scan on an urgent basis. The normal wait time for such a scan would be one to two months.

With respect to the presence of an abdominal aortic aneurysm, an appropriate course of action for a family physician would be to refer the patient to a vascular surgeon for an opinion regarding further investigation and possible treatment.

Proceedings under Rule 18A

**35**  Rule 18A(11) provides:

On the hearing of the application, the court may:

1. grant judgment in favour of any party, either on an issue or generally, unless:
2. 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
3. the court is of the opinion that it would be unjust to decide the issues on the application.

**36**  An application pursuant to Rule 18A is a trial, although it is a summary trial. As counsel for the defendant doctors notes, the plaintiff is obliged to produce evidence as at any trial. The onus is on the plaintiff to prove her allegations against Dr. Fitzpatrick and Dr. Page.

**37**  Counsel for the plaintiff argued there were significant discrepancies in the evidence and, as a result, the issues in the action are not capable of resolution by way of a summary trial.

**38**  In my view this is an appropriate case for Rule 18A disposition. There are differences in the evidence of the plaintiff and Dr. Page as to what occurred at the September 14, 1999 meeting between them, but I conclude that the factual differences are not relevant to the allegations of ***negligence*** brought against Dr. Page.

**39**  As counsel for the plaintiff frankly and appropriately conceded, the plaintiff is not relying on the manner in which the test results were delivered. The plaintiff's allegation, as disclosed by the pleadings, is that Dr. Page was negligent in relying on the report, the contents of which he communicated to the plaintiff. The plaintiff's concern was the substance of what she was told. Her concern was the fact that the ultrasound results suggested that she had pancreatic cancer. Dr. Page's reliance on the report - in other words, his failure to discern that the results pertained to another patient - forms the basis for the allegations of ***negligence***.

**40**  Counsel for the plaintiff submits that the evidence discloses a further discrepancy between the two doctors. Dr. Fitzpatrick recalled phoning Dr. Page on Friday, September 10th, the day after the ultrasound report came to his attention, to emphasize that the follow-up action should be taken. Dr. Page did not recall that conversation.

**41**  Again, in my view, this discrepancy is not material. Whether or not Dr. Fitzpatrick called Dr. Page, the fact is Dr. Page did take the appropriate step to follow up with the CT scan immediately after reviewing the ultrasound report.

**42**  Finally, counsel for the plaintiff argued there is likely something sinister about the fact that both doctors destroyed Dr. Fitzpatrick's faxed copy of the ultrasound report, which contained the note to Dr. Page about immediate follow-up. Counsel for the plaintiff suggested that the note might have said something to the effect that the plaintiff did in fact have cancer.

**43**  First of all, that is entirely speculation; there was no evidence to support this theory. Secondly, in my view it is immaterial. Both doctors offered reasonable explanations as to why they did not, in the normal course of their practices, keep a faxed copy of a report in circumstances such as these. Further, even if Dr. Fitzpatrick's note was something other than a direction to Dr. Page to follow up on this matter, the allegation of ***negligence*** is limited to the reliance by the doctors on the report. The content of Dr. Fitzpatrick's note to Dr. Page is thus irrelevant.

**44**  I conclude on the evidence that the action against both Dr. Fitzpatrick and Dr. Page must be dismissed. Both doctors have established, on their evidence and on the evidence of medical experts who have filed reports on their behalf, that they met the standard of care ordinarily exercised by similar practitioners in similar cases. The reports of Dr. Fritz and Dr. Essler refute the allegations of ***negligence*** brought by the plaintiff in this case.

**45**  I do not agree with the submission of the plaintiff that lay people are capable of determining the standard of care issues in this case without the assistance of expert medical evidence. In my view, the appropriate standard of care in circumstances such as these is not a matter within the everyday knowledge and experience of lay people. The issue required the kind of expert evidence tendered by the defendant doctors in this case. The expert evidence established that both doctors met the standard of care required by doctors in these circumstances. The onus was on the plaintiff to prove ***negligence*** and that onus was not met.

**46**  In closing, I would like to reiterate that no one doubts the plaintiff had a very, very difficult time after she left Dr. Page's office. She thought she had been diagnosed with pancreatic cancer. However, that was not the result of any ***negligence*** on the part of either doctor in this case.

**47**  The action with respect to Drs. Fitzpatrick and Page is dismissed and they are entitled to their costs.

**48**  MR. McCRIMMON: My lady, I'm wondering if the matter of costs might wait until the conclusion of the trial ...

**49**  (SUBMISSIONS ON COSTS)

**50**  THE COURT: Drs. Fitzpatrick and Page are entitled to their costs.

WEDGE J.

**End of Document**

[***Kahlon (Litigation guardian of) v. Vancouver Coastal Health Authority, 2009 CHFL para. 15,560***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-H241-JNS1-M0P2-00000-00&context=)

Canadian Health Facilities Law Guide

British Columbia Supreme Court

Before: Sigurdson J.

Decision: July 7, 2009.

Docket No. S062228

***Canadian Health Facilities Law Guide*  > *Cases* > *2000s* > *2009***

**2009 CHFL para. 15,560** | [*2009 BCSC 922*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0DV-00000-00&context=)

Kahlon (Committee and litigation guardian of) v. Vancouver Coastal Health Authority (operating as public hospitals under the name and style of Vancouver Hospital and Health Sciences Centre, U.B.C. site, and Richmond Hospital), Vancouver Hospital and Health Sciences Centre, U.B.C. Site, and Richmond Hospital, University of British Columbia (operating the Allan McGavin Sports Medicine Centre), Allan McGavin Sports Medicine Centre, Khan, Flak, Li, Bermann, Reid, Dr. John Doe #1, Dr. John Doe #2, Dr. Jane Doe #1, Dr. Jane Doe #2, Radiologist Joe Doe, and Radiological Technician Joe Floe

**Case Summary**

***Negligence* — Plaintiff was referred for CT scan as result of back pain — Plaintiff attended initial scan but did not return for further testing or meeting with doctor — Scan misfiled and not reported until one year later — Plaintiff worsened and was diagnosed with TB meningitis — Delayed diagnosis resulted in complete incapacity — Hospital negligent for breakdown of its procedures — Doctors not negligent — Plaintiff contributory negligent for not taking reasonable care of own well-being.**

|  |
| --- |
| **Facts:** The plaintiff suffered back pain and was ultimately referred for a CT scan of his spine. The radiologist requested him to return for an enhanced scan, but the plaintiff failed to do so. The scan was misfiled and not reported on until over a year later. Had the scan been reported at the time or several months after, a chain of inquiry would have resulted in a proper diagnosis of tuberculosis meningitis. As a result of the delayed diagnosis, the plaintiff was completely incapacitated and required constant 24-hour care. The plaintiff alleged the hospital was negligent for the serious breakdown of procedure in reshelving his scan. The plaintiff alleged various doctors were negligent in not following up in his initial CT scan. The defendants argued that the plaintiff was wholly responsible for his circumstances by not following doctors' recommendations at various times or, in the alternative, was contributorily negligent.  HELD: The action was allowed in part; the plaintiff was 30% contributorily negligent.  The Court first determined that the hospital was negligent: there was knowledge of misfiled films in the past; there were disastrous consequences from a breakdown in its procedures; and it did not have a back-up system in place to ensure that all films were duly reported on. The Court determined that none of the plaintiff's physicians had been negligent: the radiologist was not responsible for ensuring other players in the process were fulfilling their roles unless he was aware of a problem with the process; the back specialist's follow-up system was the standard practice for a case of this kind; and the plaintiff had not established causation with respect to his family doctor. With respect to contributory ***negligence***, the Court had to infer the plaintiff's state of mind from the evidence, given his incapacity to testify. The evidence suggested that he believed his problem to be minor and he procrastinated. As such, the plaintiff was contributorily negligent in not taking reasonable care for his own health by failing to return for another scan and failing to return to the back specialist to discuss the initial scan. Nonetheless, the Court assessed the plaintiff's behaviour as substantially less blameworthy than that of the hospital, to which it apportioned 70% fault. Finally, the Court assessed the plaintiff's life expectancy as an additional 17 years, and also determined non-agreed upon damages such as type of care to be provided and in-trust claims made by the plaintiff's family. |

**Counsel**

R. Webster, Q.C., D. Corrin, P. McGivern and L. Wong for the plaintiff; C. Khanna and K. Jakeman for the defendant doctors; C. Woods, Q.C. and D. Bell for the defendant hospital.

**End of Document**

[***Kristiansen v. Grewal, [2014] B.C.J. No. 641***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-622X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

S.R. Romilly J.

Heard: January 27-31 and February 3 and 5, 2014.

Judgment: April 10, 2014.

Docket: 11 0576

Registry: Victoria

**[2014] B.C.J. No. 641** | [*2014 BCSC 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JNY7-X1WR-00000-00&context=)

Between Shantel Dawn Kristiansen, Plaintiff, and Jenny Grewal, Michael Amandeep Grewal, and Manjit Grewal, Defendants

(148 paras.)

**Counsel**

Counsel for the Plaintiff: F. Kenneth Walton, Q.C.

Counsel for the Defendants: Christian Wilson.

**Reasons for Judgment**

|  |
| --- |
| **S.R. ROMILLY J.** |

**I.** **INTRODUCTION**

**1**  The plaintiff seeks damages for personal injury as a result of a motor vehicle accident. Liability is admitted.

**2**  On December 4, 2009, the plaintiff was driving her 1991 Pontiac Sunbird along Jacklin Road in Victoria, B.C. She had just passed the intersection with Sooke Road and was proceeding uphill. As she did, the defendant Jenny Grewal, who was driving a 2008 Jeep Wrangler, exited a parking lot to the plaintiff's right and struck the right rear section of the plaintiff's vehicle (the "Accident").

**3**  The plaintiff did not strike her head or lose consciousness. When the parties exchanged information at the scene, Ms. Grewal noted that the plaintiff was quite upset and crying.

**4**  The plaintiff alleges that she sustained the following injuries as a result of the Accident: pain and suffering; nausea; headaches; neck pain and restriction in rotation; tingling where her spine meets her skull; shoulder pain and shoulder blade pain on her left side; lower back pain; posttraumatic stress disorder ("PTSD"); cognitive disorder not otherwise specified; and traumatic brain injury.

**II.** **PARTIES' POSITIONS**

**Position of the Plaintiff**

**5**  The plaintiff claims that she continues to suffer chronic pain as a direct result of the Accident. She further claims that she suffers from psychological complaints and PTSD, which makes her unemployable.

**6**  The plaintiff claims damages under the following heads:

1. general or non-pecuniary damages, as assessed by the court;
2. $72,086.04 for past wage loss from September 5, 2011;
3. loss of future earning capacity, as assessed by the court;
4. special damages:
5. $931.11 for prescriptions;
6. $16,331.72 for physiotherapy;
7. $1,595.00 for psychotherapy; and
8. $895.94 for miscellaneous expenses;
9. cost of future care, as assessed by the court;
10. interest pursuant to the *Court Order Interest Act*; and
11. costs.

**Position of the Defendants**

**7**  The defendants do not dispute that the plaintiff suffered mild to moderate soft tissue injuries in the Accident.

**8**  However, the defendants submit that the Accident was not the cause of the plaintiff's psychological complaints and alleged cognitive impairments. They point to the fact that the injuries the plaintiff sustained did not prevent her from continuing to work on a full-time basis for 21 months after the Accident, after which the plaintiff's psychological complaints began. They say that since the plaintiff's psychological complaints were first observed 21 months after the Accident, they are too remote to be recoverable in law.

**9**  The defendants further submit that the duration and severity of the plaintiff's physical complaints should be evaluated with particular scrutiny in light of her ability to continue to work on a full-time basis for 21 months after the Accident, and the subsequent overlay of psychological complaints that began on September 5, 2011, which they say were not related to the Accident.

**10**  The defendants further submit that in light of the plaintiff's pre and post-Accident medical history, the court should award non-pecuniary damages for her soft tissue injuries in the range of $50,000 to $60,000.

**III.** **CREDIBILITY**

**11**  Before I begin my review of some of the evidence and make my findings of fact, permit me to say that I found the plaintiff to be a very credible witness and I was impressed with her candour when she gave her testimony.

**12**  As I noted in *Pacheco v. Antunovich*, [*2014 BCSC 176*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1P6-00000-00&context=) at para. 10, the "credibility of the plaintiff is very important ... where the foundation for most of the plaintiff's complaints is subjective." See also: *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.

**13**  I also found Katlin Griffiths, the plaintiff's long-time friend; Brandi Vaincourt, the plaintiff's former manager; and Colin Kristiansen, the plaintiff's estranged husband, to be very credible witnesses.

**14**  Among the experts, I found that Dr. Koch's report and his testimony in court seemed to lack objectivity. In fact, he seemed to be more of an advocate for the defendants and ICBC. I have difficulty accepting any of his evidence.

**IV.** **EVIDENCE**

**15**  The plaintiff was born on March 11, 1985. She began working at Cash Store Financial on September 21, 2008. She married Colin Kristiansen on September 9, 2009.

**16**  The Accident occurred on December 4, 2009. The then 24-year-old plaintiff was proceeding uphill in a residential neighbourhood in Colwood, a municipality in the western part of greater Victoria. The plaintiff was in her pyjamas and had just dropped her husband off at his place of work. She was on her way home.

**17**  At around 7:30 a.m., the defendant driver, Jenny Grewal, drove out of her condominium's driveway and apparently did not see the plaintiff. Ms. Grewal drove the Jeep into the side of the Pontiac, causing the back end of the plaintiff's vehicle to end up in the oncoming lane. The nose of the Jeep came to rest across the yellow centre line. The plaintiff testified that she felt the impact was "hard".

**18**  The damage to the plaintiff's vehicle was to the passenger door and rear wheel well (it was a 2-door automobile). The tire at that location would rub against the body of the vehicle whenever the car hit a bump in the road. The Pontiac was subsequently written off. Damage to the Jeep's passenger side front end totalled $800.67.

**19**  After the Accident, the plaintiff drove to the side of the road. When the defendant driver tapped on her window, she noticed the plaintiff was upset and crying. The plaintiff called her mother from the Accident scene and her mother also testified that the plaintiff was crying. The plaintiff's mother said that she advised the plaintiff not to bother with the police because the car was still driveable. The plaintiff's mother further testified that she saw the plaintiff that evening and noted that the plaintiff was shaky, crying, couldn't lift her arms, and was distraught over the car.

**20**  The plaintiff had not been injured in a motor vehicle accident prior to this one.

**21**  At the scene, the drivers exchanged information and the plaintiff called her mother and husband. The plaintiff then went home and reported the Accident to her insurance company. By that time, she was experiencing low back pain, an area which had never before been troublesome.

**22**  According to the plaintiff, the effects of the Accident were: headaches; neck, shoulder and arm problems; increased memory difficulties; and low back complaints.

**23**  On December 28, 2009, about three weeks after the Accident, the plaintiff's right shoulder was hurting badly. According to the plaintiff, the pain was so severe that she was hyperventilating and was taken to a clinic. The medical personnel at the clinic sent her by ambulance to Victoria General Hospital. The plaintiff testified that she emphasized to the ambulance attendant that she had a neck problem, so that he would not think she had meningitis.

**Plaintiff's Pre-Accident Physical Health**

**24**  The plaintiff's pre-Accident health was relatively good. However, at age 20, four years before the Accident, she had a very serious and potentially life-threatening left leg operation. It took a year for her to learn to walk again. As a result of this operation, she had a slight drop foot in her left leg. According to her, there was a minimal effect on her working.

**25**  She testified that her mental health was good before the Accident; however, her memory eroded after the surgery. She had to use a day timer book to keep track of appointments.

**Injuries Sustained in the Accident**

***a.*** ***Headaches***

**26**  The plaintiff claims that she has had headaches, both ordinary and migraine, which she was not prone to before the Accident. She said that she might have had a migraine headache two times a year before the Accident. Since then, she began having daily migraine-like headaches where she would have to be in a dark place as she was sensitive to light, sound and smell. She testified at trial that these headaches are now down to twice a month.

**27**  She testified that she also had ordinary headaches. They were initially daily, then less and less. She testified that when she became a Branch Manager in December 2010, a year after the Accident, her headaches were three times a week. They now occur about three times a month.

***b.*** ***Neck and Shoulders***

**28**  The plaintiff testified that she had no previous trouble with her neck and shoulders. Immediately after the Accident, she said that she had painful restriction and tingling where her neck meets her skull. Consequently, she started to nurse her injuries and avoided turning her head.

**29**  She testified that she has had pain every single day since the Accident. Some days are better than others. Today she thinks she is as good as she is going to get. On extremely bad days, carrying a coffee mug is hard. Pulling a shirt over her head or holding a purse were also challenges for her. She testified that if she held a purse on her shoulder it created tension in the area of her collarbone and neck.

**30**  The plaintiff also testified that she did not have her hair cut for about a year after the Accident because tugging on her hair was excruciating to her neck and shoulders. She testified that she did not feel as good about herself as a result. She testified that her hair became grey after the operation when she was 20, but colouring her hair hurts her so she uses a spray to keep it black.

**31**  She further testified that she cannot make up her bed. She can put the pillowcases on but testified that it took her one to two hours to put the cover on the duvet.

**32**  She testified that holding her elbows and arms up causes fatigue and pain when using a mouse or keyboard, unless she uses an ergonomic gel pad.

***c.*** ***Arms***

**33**  The plaintiff testified that her arms were healthy before the Accident. Now, she can only lift them to about the 10:00 o'clock position, as she demonstrated on the witness stand.

**34**  The plaintiff testified that she has difficulty holding her phone. For that reason, she obtained a headset for work and a "Jawbone" headset for her cellular telephone, on the advice of Dr. Stanwood, her family doctor. The headset at work was on the advice of her rehabilitation consultant, Barbara Phillips.

**35**  The plaintiff testified that she has problems handing objects to people, as holding items causes fatigue and sometimes the object drops to the floor.

**36**  The plaintiff testified that her arms can hurt even when she does nothing all day. Sometimes they hurt because of her aggravating them due to use. In bed, putting her arm down the side of her pyjama leg helps to reduce discomfort. She testified that when they lived together, her husband Colin would hold her arm in a correct position while they watched movies at home.

**37**  She testified that she cannot open cans unless she uses an electric can opener. Sometimes she has other people open cans for her. She testified that the cranking motion aggravates her neck and shoulder area. She also testified that she uses a special cloth or rubber mat when opening a jar.

**38**  The plaintiff also testified that she compartmentalizes household items into small baskets, so as not to aggravate her arms and shoulders when she needs to retrieve them. She puts much used items at the best height while less used items are stored higher or lower. She testified that she puts teapots and food items at the front of a cupboard, so that she does not have to reach very far in to retrieve an item.

**39**  She testified that she cannot use an umbrella because it requires her to keep her arms up. She uses hoods and scarves instead.

***d.*** ***Low Back***

**40**  The plaintiff testified that she had no problems in her low back before the Accident. She had an area of vertebrae near her bra strap that was sometimes painful, but nothing else.

**41**  The plaintiff testified that her sciatic area now hurts her. The range of motion in her lower back is restricted some days. Most days she can touch the floor, but sometimes she cannot. According to her, coming up from a bent position is what causes the most pain, a shooting pain in her lower back.

**42**  She now only has one pair of shoes with shoelaces, her gym shoes, which she leaves tied all the time and slips into them. She testified most of her shoes now are slip-ons or zip-ups because they are easier to put on.

***e.*** ***Memory***

**43**  The plaintiff testified that before the Accident her memory had been affected by the left leg operation. She had to use a day timer to keep track of appointments, something she had not had to do before the surgery.

**44**  However, she claims that after the Accident, her memory loss has become more severe. She has had to use the day timer not only to keep track of appointments, but also to write down things that she had done so that she could keep track of what she was doing. She testified that even with the use of a day timer, she still forgets appointments. She even forgets things that occur weekly or daily, such as picking up her niece from school. She sometimes forgets to look at her day timer and misses appointments. Other times she shows up early at appointments because she has misstated when she is supposed to be at a particular place. She also forgot about her best friend's surgery.

**Treatment of Injuries**

**45**  Six days after the Accident, the plaintiff went to Parkway Physiotherapy and Performance Centre on the recommendation of Dr. Stanwood. She was at Parkway until no provider would pay for her treatment. She then went to Langford Physiotherapy and Medical Acupuncture to see physiotherapist Rod Mitchell, whose business was across the hallway from her employer. Mr. Mitchell would take a direction to pay.

**46**  The plaintiff testified that over the years she has gone through quite a number of modalities in order to improve, including: physiotherapy; intramuscular stimulation ("IMS"); treatments at the Myo Clinic with needles; saline injections; massage therapy; acupuncture; a personal trainer; and exercising as directed by a personal trainer at a public gym.

**47**  Massage helped her for about 48 hours, but was excruciating at the time that she underwent it. She also could no longer afford it as it cost $98 a session.

**48**  The plaintiff had gastric bypass surgery on November 7, 2011. This resulted in her losing approximately 90 pounds, which made the stress on her joints less. However, according to her, weight loss did not make an appreciable difference in her condition with respect to her physical injuries.

**49**  The plaintiff testified that physiotherapy and manual manipulation helped ease her pain, but did not relieve it. It helped her move more easily and she found she was less "jammed up" for about 24 to 48 hours.

**50**  She testified that IMS reduced pain. It is very painful for half an hour afterwards, but the effects last 48 hours. She also had acupuncture, which she said helped a lot with headaches, but the relief did not last even 24 hours.

**Accommodation of Injuries**

**51**  The plaintiff testified that she has had to do numerous things, including reducing activity, to avoid causing migraines. For her neck, shoulder, and arm pain, she developed coping mechanisms, such as using a metal riser around the house. She also started using lightweight baskets as compartments to store things because pressure from using her shoulder gives her headaches. She testified that she finds washing her hair and raising her arms irritates her, so she does it less frequently than she did before the Accident (every four days as opposed to every second day). She does not blow dry her hair any longer; she washes it in the evening so it dries overnight.

**52**  According to the plaintiff, another mechanism that she employs is avoiding certain tasks around the house and asking other people do things for her, such as laundry and scrubbing pots. She also gets help in the shower, asks strangers at the store to help her put items in her basket, and requests carryout service to her car.

**53**  She testified that she has to consider her daily needs when she goes out, but it is hard to anticipate what those will be. She has a rolling cart for her purse and pillows. She pushes her seat back in the car and uses a pillow behind her back. If her arms are bothering her, she puts pillows on her sides so that her forearms rest on a surface, an example being when she uses a mouse or a keyboard. Fidgeting and rocking helps her feel comfortable. She will pin her arms against her body or sit on her left hand, as she did on the stand, so as not to aggravate her arm.

**54**  As far as feeding her family is concerned, she testified that on good days she makes huge portions and freezes them, so that on bad days there is food available to be baked in the oven.

**55**  She testified that she uses a small mirror because she cannot stand when she uses the mirror in the bathroom. She uses a riser in her living room, dining room, and in her bed. She testified that she cannot use her upper body to lift herself from the bathtub.

**Change in Personality**

**56**  Prior to the Accident, the plaintiff was very outgoing. She would go out on the town and to theatres and movies. Her obesity never bothered her and she was self-confident. When Colin proposed, he asked if they should wait to be married until after her gastric bypass surgery and she said "no".

**57**  Evidence of the drastic change in her post-Accident personality was given by witnesses Brandi Vaincourt, Katlin Griffiths, and Shantel's mother, Joanne McCarthy.

**Continued Employment Post-Accident**

**58**  The plaintiff testified that when she was a young child she had a learning disability, which meant that she could only spend about half an hour on a topic before having to move to something else, otherwise she would not comprehend. This was not a problem for her when she was at work because her work is fast paced and she changes tasks often.

**59**  In December 2010, a long-time ambition to become a Branch Manager was realized. She became Branch Manager of a standalone "Instaloans" location. She worked with two other staff. This was a significantly busier branch than the one in Langford. There was a lot more work and more walk-in customers. Her employer encouraged its managers to "manage your branch as if it was your own business". She described a great many duties. There were some very busy days, depending on when government agencies would pay out things like CPP or Family Child Credits. The staff only work up to 40 hours per week, and if someone did not show up, she was supposed to work those hours.

**60**  As Branch Manager, she was entitled to earn bonuses. Every month in 2011, from January to her last full month in August, she earned bonuses. In the meantime, according to her, her Accident-related injuries were causing her difficulties at work. She took pain medications. She said her pain was intolerable. She could not get in to physiotherapy because Langford Physiotherapy had reduced their hours and she was 35 to 40 minutes away from that location. Parkway had a team of physiotherapists, but it closed at 7:00 p.m.

**61**  She also had various personnel problems at the branch. Of the two people who worked with her, one of them was a transferee from Ontario who would sometimes not show up and finally resigned on June 30, 2011. After that, she had two trainees who could not be left alone for two weeks according to company policy. She had an ergonomic assessment when she became Branch Manager, but could not afford to pay for many of the suggestions.

**62**  She testified that the recommended headset helped, but her office was physically too small to do all of the recommended changes that Barbara Phillips had suggested. She was unaware that her employer could help pay for some of the recommendations.

**63**  While she was a Branch Manager, she made five applications for a Regional Manager position, none of which were successful. She felt that being a Regional Manager would accommodate her pain problems better because she would then be able to work out of one location, have no customer files, and be at a desk in an office with a laptop. In other words, she thought it would offer a more sedentary position.

**V.** **EXPERT EVIDENCE**

**64**  At trial, the plaintiff tendered expert evidence from a physician, physiatrist, neuropsychologist, psychologist, neurologist, rehabilitation specialist, vocational consultant, two physiotherapists, two psychiatrists, and an economist. The defendants tendered rebuttal expert evidence, including evidence from an orthopaedic surgeon. The following is a very brief summary of some of the medical evidence. Additional expert evidence will be discussed in the remainder of the judgment below.

**65**  Dr. Stanwood gave evidence. He had been the plaintiff's doctor from when she was a young infant. He first saw the plaintiff after the Accident on December 7, 2009. In his first report dated February 20, 2012, he stated:

... During this visit the details of the accident were reviewed. Shantel had complaints of pain in her neck and lower back as well as some tingling at the base of her skull. ... On examination she had a reduction in the range of motion most noticeable with rotation and side flexion. ... I suggested that she seek the help of a physiotherapist ...

**66**  The plaintiff returned on January 21 and February 12, 2010. She attended on April 21, 2010 for her annual physical examination:

As part of this visit, her car accident injuries were reassessed. She was complaining of daily headaches, pain and stiffness in the neck radiating across the shoulders, at times severe, often aggravated by bright lights and loud noises. Her lower back was doing reasonably well at this point and she was continuing to attend a physiotherapist approximately 2 times per week.

**67**  Dr. Stanwood provided a second report dated October 4, 2013. In January 2014, he noted that the plaintiff had restricted range of motion in some fields.

**68**  The plaintiff was also assessed by a physiatrist. Dr. MacKean first conducted an assessment on December 9, 2010, one year after the Accident. In her first report dated March 30, 2012, Dr. MacKean advised that her impression at the time of her initial assessment was that the plaintiff had sustained a Grade II whiplash-associated disorder of the cervical spine and upper back, as well as mechanical low back pain in the lumbar spine and sacroiliac joint regions. Dr. MacKean referred the plaintiff to physiotherapy and recommended an ergonomic workplace assessment.

**69**  More recently, Dr. J. Arthur, an orthopaedic surgeon, had an opportunity to examine the plaintiff on behalf of the defendants. In his report dated May 24, 2012, Dr. Arthur noted that, in his opinion, the plaintiff sustained soft tissue injuries involving her neck and back. These injuries were, he says, reasonably related to the Accident:

... She has somewhat reduced range of motion of the neck consistent with a neck complaint but certainly no neurological findings. These complaints, in my opinion, are best described as soft tissue in nature and are reasonably related to the motor vehicle accident in question.

**70**  Dr. MacKean's second report dated July 18, 2013, relates to an examination of the plaintiff on the same day. She wrote at page 5:

With regards to the injuries sustained in the motor vehicle accident she is most likely close to the point of maximal medical improvement as it has been over three to [sic] half years following the date of the motor vehicle accident. It is likely she will have ongoing chronic pain involving the neck and upper back and lower back region with occasional headaches.

...

I would recommend that [she] have continued access to physiotherapy ... twice a month as she has been doing.

...

I would strongly recommend that she continue with her regular gym program and she should have a gym pass so that she can continue with that.

**VI.** **FINDINGS OF FACT**

**71**  I find as a fact that although the plaintiff continued to work immediately after the Accident, she did so with a considerable amount of pain. In this regard, I accept not only the evidence of the plaintiff, but also that of her estranged husband and her friend since childhood, Katlin Griffiths. I find that after the Accident, after work, instead of partying and doing the things that she enjoyed before, she was confined to her home or bed. I accept the evidence of her estranged husband when he said that he decided to leave the plaintiff because he did not want to have to care for her, as he did for his mother, for the rest of her life.

**72**  I also find as a fact that as a result of the Accident, the plaintiff suffered PTSD. I rely on Dr. Reeves' evidence in this regard. Dr. Reeves has been the plaintiff's treating psychologist with respect to Accident-related PTSD and driving anxiety since June 8, 2012. She confirmed on the stand that the plaintiff's Accident-related PTSD has been the sole focus of her treatment.

**73**  I accept Dr. Reeves' testimony that there has been considerable improvement in the plaintiff's Accident-related PTSD. In her report dated August 7, 2013, Dr. Reeves states: "On August 6, 2013, Ms. Kristiansen and I agreed that she no longer needs to see me to work on PTSD. She said that she will continue to use the strategies and is hopeful her anxiety symptoms will continue to decrease."

**74**  As further evidence of improved psychological functioning, Dr. O'Breasail, one of the plaintiff's psychiatrists, confirmed that while the plaintiff "has suffered from Posttraumatic Stress Disorder and Major Depressive Disorder, [these] are largely in remission" as of July 9, 2013.

**Psychological Crash of September 5, 2011**

**75**  There is much evidence that the constant pain finally got to the plaintiff. Nevertheless, she was stressed out at work due to long hours and training new staff.

**76**  At her attendance at the hospital on September 5, 2011, the plaintiff's mother was with her. She stated that before taking the plaintiff to the hospital, the plaintiff told her that she was in too much pain and just could not do it anymore.

**77**  When they went to the hospital that day, she was admitted and there was much discussion about stress and anxiety. However, one of the points that Dr. Ishkanian, the attending psychiatrist, noted under "History of Presenting Illness" was: "On further questioning she says that things have been much worse over the last two weeks." He went on: "She says her sleep has been somewhat more broken up over the last two weeks, this may be secondary to pain and migraines."

**78**  The next day, September 6, 2011, physiotherapist Brian Woltz from Langford Physiotherapy, who had treated the plaintiff approximately four times in August 2011, found that her symptoms were much worse.

**79**  The plaintiff was asked in cross-examination about her application for short-term disability benefits submitted to Great-West Life. Under "Claim Information", it stated: "If the disability is due to accident, give date accident occurred: Year: N/A". In answering that question, the plaintiff said that she did not attribute the depression and anxiety to the Accident, but that it was from pain from the Accident. She said it had nothing to do with stressors at work since there was nothing to be depressed about.

**80**  The date of that Great-West Life "Claim Information" document is September 27, 2011. Dr. Stanwood attended on Ms. Kristiansen that same day. In his report of February 20, 2012, he wrote: "September 27, Shantel presented for reassessment and continued to complain of fatigue and tiredness. She looked absolutely exhausted in the office. Her concentration was poor however she remained non-suicidal."

**81**  In the subsequent telephone record with Great-West Life from October 11, 2011, the plaintiff spoke about the fact that she had been in a motor vehicle accident in 2009. She was asked: "What are some of your stressors?" She answered: "Work". When asked "Anything in particular about work"? She replied: "Problem with staff, high turnover, has to cover any missed shifts if people aren't there."

**82**  Soon after the plaintiff's "breakdown" on September 5, 2011, Great-West Life referred the plaintiff to Dr. J. Wooder, a psychiatrist. Dr. Wooder evaluated the plaintiff for the first time on November 25, 2011, for the purpose of an independent medical examination. Dr. Wooder subsequently started treating the plaintiff on January 27, 2012. Dr. Wooder diagnosed traumatic brain injury and a concussive disorder.

**83**  However, in his report dated October 31, 2012, Dr. D. Cameron, the plaintiff's neurologist, stated:

1. Following my neurological examination of Ms. Shantel Dawn Kristiansen and following my review of the medical records and clinical documents, it is my opinion that Ms. Kristiansen suffered soft tissue and musculoskeletal injuries affecting her neck and lower back sustained at the time of the motor vehicle accident of December 4, 2009.

...

1. ... I therefore disagree with Dr. Wooder regarding the diagnosis of a mild traumatic brain injury or concussion, and the diagnosis of post traumatic brain injury syndrome or post concussion syndrome.

**84**  Dr. A. O'Breasail similarly disagrees with Dr. Wooder. In his report dated July 29, 2013, he stated: "In the course of the accident she did not appear to experience a concussion or traumatic brain injury."

**85**  Dr. B. Tessler, a neurologist retained by the defendants, has prepared a report dated February 27, 2013. In it, he expresses his opinion that "[t]here is no indication that the patient sustained a head injury or a brain injury."

**86**  Dr. Stanwood testified that the trip to the emergency room on September 5, 2011, after which the plaintiff did not go back to work until trial (with the exception of her failed graduated return outlined below), was precipitated around pain and coping with work and life stressors relating to her injuries.

**87**  In cross-examination, Dr. Stanwood said that he referenced Dr. Wooder's report regarding depression and a bipolar disorder triggered by the Accident. He said he used that information and made his own conclusions. Dr. Stanwood said the plaintiff's depression in September 2011 was triggered by the Accident. The available information including his own notes caused him to say that.

**Additional Stressors on the Plaintiff**

**88**  The plaintiff's pre-Accident history is an unfortunate one and includes: physical and emotional abuse by her father as a young girl; multiple bladder surgeries at a young age; blood clots in her left leg and abdomen, leading to a fasciotomy and skin graft; her father's recent separation from his male partner; the deaths of three of her grandparents; the institutionalization of her sister; stress from a supervisor at work; and financial debt.

**89**  Following the Accident, the plaintiff's stress levels were further challenged by: chest pain and shortness of breath, resulting in her hospitalization on December 28, 2009; gastric bypass surgery on or about November 7, 2011; permanent separation from her husband, Colin Kristiansen, in January 2013; a sexual assault in February 2013; and taking over custody of her niece in April 2013.

**90**  The plaintiff returned to work on October 7, 2013, but, for a variety of reasons, this graduated return to work failed on December 24, 2013.

**VII.** **CAUSATION**

**Legal Principles**

**91**  A very succinct summary of the law of causation was stated by Madam Justice Dardi in *Smith v. Moshrefzadeh*, [*2012 BCSC 1458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S269-00000-00&context=) at para. 59. Listing the leading cases, she said:

The primary test to be applied in determining causation is commonly articulated as the "*but for*" test: a defendant will be fully liable for the harm suffered by a plaintiff, even if other causal factors were at play, so long as the plaintiff establishes a "substantial connection" between the injuries and the defendant's ***negligence*** beyond the *de minimus* range: *Farrant v. Latkin* [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) (B.C.C.A), 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=); *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=); *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=).

**Analysis**

**92**  Applying the law to the facts of this case, I have no difficulty finding that the pain that the plaintiff experienced was a direct result of the Accident. I also find that the PTSD suffered by the plaintiff was also caused by the Accident.

**93**  However, I agree with the defendants' submission that the evidence presented at trial suggests the Accident was not the cause of the plaintiff's psychological complaints or cognitive deficits, which presented for the first time on September 5, 2011.

**94**  It is not disputed that the plaintiff continued to work on a full-time basis from December 4, 2009 to September 5, 2011, a period of 21 months. During that period, on December 19, 2010, the plaintiff was promoted to Branch Manager.

**95**  The testimony of Brandi Vaincourt, the plaintiff's former manager, confirmed that Cash Store Financial is not an organization that promotes staff who are not performing. According to the plaintiff's testimony at trial, the promotion gave rise to additional stressors, including greater responsibility, staffing issues, and longer hours. On direct examination, the plaintiff advised that the new location was "exceptionally busy" and that she worked "long hours". On cross-examination, she confirmed she had been working 13-hour days "for about all of August and July [2011] mostly".

**96**  The plaintiff continued to work as Branch Manager on a full-time basis until September 5, 2011. It was at that time that she was admitted to the Emergency Department at Royal Jubilee Hospital.

**97**  Although the plaintiff had been attending her family doctor and a physiotherapist regularly during this period, there is no reference in the records to any psychological symptoms or cognitive deficits.

**98**  In particular, Dr. Stanwood acknowledged on cross-examination that his notes contain no notations with respect to psychological complaints between December 4, 2009 and September 5, 2011.

**99**  Apart from that, it appears the plaintiff's primary complaints when admitted to the hospital on September 5, 2011, were of workplace and other stress.

**100**  The plaintiff was seen at Royal Jubilee Hospital by Dr. R. Ishkanian, a psychiatrist. As summarized in his consultation report dated September 5, 2011, he noted that the plaintiff was vague about her reasons for being in the hospital, but stated that she "has multiple medical problems and is very stressed out at work."

**101**  Dr. Ishkanian's impression was that the plaintiff had experienced a "two week history of increasing feelings of sadness and anxiety, she is overwhelmed by multiple areas of her life, including work and financial concerns. However, she has remained quite functional and is working full-time."

**102**  The plaintiff did not return to work after September 5, 2011. Rather, she applied for disability benefits through Great-West Life.

**103**  On September 15, 2011, Dr. Stanwood completed a Great-West Life form called an Attending Physician's Initial Statement. On the form, Dr. Stanwood confirmed the primary diagnosis of "Depression - Adjustment Disorder", and stated that, in his opinion, the plaintiff's condition first prevented her from working on September 5, 2011, again, 21 months after the Accident.

**104**  On September 27, 2011, a Great-West Life Notice of Claim form was completed by Ms. Kristiansen. It stated:

1. What is the nature of your condition? Depression & Anxiety
2. If disability is due to an accident, give date accident occurred:

Year NA Month \_\_ Day \_\_

**105**  As noted above, the plaintiff was subsequently referred by Great-West Life to Dr. Wooder, who assessed the plaintiff for the first time approximately two years after the Accident. Dr. Wooder then began treating the plaintiff on January 27, 2012.

**106**  At the request of plaintiff's counsel, Dr. Wooder prepared a report dated May 2, 2012, in which he made a number of diagnoses, including:

1. Cognitive Disorder Not Otherwise Specified/post-concussional disorder;
2. Post Traumatic Stress Disorder;
3. Obsessive Compulsive Disorder;
4. Major Depressive Disorder possibly most likely part of Bipolar Mood Disorder;
5. Panic Attacks; and
6. Possibly Organic Personality Change due to a Medical Condition (traumatic brain injury)

**107**  It appears that the plaintiff's bipolar disorder was the reason she stopped working after September 5, 2011. On cross-examination, Dr. Wooder revealed the following:

A: Okay. So what - in my letter to Great West Life, the reason for her going off work in September was it sounded to me, based on the history that I obtained from her, that she had had a brief manic or hypomanic episode followed by a severe depressive episode, and that why she went off work.

And contrary to - and I have made - and in fact, in my report I stated that I do not believe that the motor vehicle accident most likely had anything to do with her developing a bipolar illness...

I've seen her for a length of time and she's given me at least three distinct episodes that would clearly satisfy the diagnosis of a hypomanic or a manic episode. Apparently there's a family history of it. I'm fairly confident of that diagnosis and that is why I believe she went off work.

Q: Because of the bipolar?

A: That is my belief. That is my understanding. I'm not saying there were no other factors going on with her. I'm not saying she did not have difficulties in that period of time. My understanding is that she did, but that is my understanding of why she went off work at that particular time and it had nothing to do with the accident.

[Emphasis added.]

**108**  It also appears that pain was not the reason the plaintiff stopped working on September 5, 2011. On re-direct examination, Dr. Wooder stated the following:

A: I'm certainly not saying she did not have pain during the years following the accident ... And it's not my area of expertise ...

I'm referring - I'm looking at my notes, my handwritten notes that I took on November 25th, 2011, and she did not say that pain was the issue for her going off work. I know this is not what you might want to hear, not maybe what anybody wants to hear, but I have to give you an accurate representation.

[Emphasis added.]

**109**  I agree with the defendants' submission that it appears there were other, more likely reasons for the "breakdown" the plaintiff experienced on September 5, 2011, such as increased responsibility, work-related stresses, and long hours that came with the Branch Manager position. Further, there is a complete lack of a temporal connection between the Accident and the onset of the plaintiff's psychological symptoms.

**110**  Accordingly, I find that the plaintiff's psychological complaints were not caused by the Accident on December 4, 2009.

**VIII.** **REMOTENESS**

**Legal Principles**

**111**  Remoteness will bar a plaintiff's recovery even when factual causation is made out under the "but for" test. 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=) at para. 3, McLachlin C.J.C, writing for the Court, set out the requirements for a successful action in ***negligence***:

[3] A successful action in ***negligence*** requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of ***negligence*** in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's ***negligence***. In other words, his damage is too remote to allow recovery.

**112**  In *Mustapha*, the plaintiff suffered serious psychological injury as a result of seeing dead insects in bottles of water supplied by the defendant. The Court disallowed his claim in ***negligence*** because, although caused in fact by the ***negligence*** of the defendant, the injury was not caused in law by the defendant; it was too remote to be recoverable.

**113**  Remoteness was also discussed in *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=). The Court of Appeal discussed reasonable foreseeability and said:

[24] At para. 12 of *Mustapha*, Chief Justice McLachlin restated that the basic principle in the remoteness inquiry is that "it is the foresight of the reasonable man which alone can determine responsibility" (referring to *The Wagon Mound (No. 1), Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co*., [1961] A.C. 388 (P.C.) at 424). In para. 13, she succinctly clarified the scope of remoteness, stating:

... Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendan[t] ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).

[25] I read this as stating that if something is possible from a practical, factual perspective, it is foreseeable, but it is not reasonably foreseeable at law. To be recoverable, damages must be not only foreseeable theoretically, but also must not be too remote, that is, they must be reasonably foreseeable (*Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [*[1991] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6045-00000-00&context=), [*84 D.L.R. (4th) 291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6045-00000-00&context=)).

[26] In the determination of reasonable foreseeability and the remoteness inquiry, the Chief Justice in *Mustapha* reiterated that the central question is whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (quoting A. Linden and B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont: LexisNexis Butterworths, 2006). She continued in para. 16:

... 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. [Italic emphasis in original.]

[27] It also is clear from the judgment that reasonable foreseeability is determined at the time of the tort (at para. 19).

[Underline emphasis added.]

**114**  The plaintiff must show that her injuries were a reasonably foreseeable consequence of the defendants' negligent actions. In *Smith v. Both*, [*2013 BCSC 1995*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3WT-00000-00&context=), the court put it this way:

[96] The plaintiff must also satisfy the Court on a balance of probabilities that her injuries were a reasonably foreseeable consequence of the defendant's negligent actions. To demonstrate that the injuries she suffered are not too remote to be viewed as legally caused by the defendant's ***negligence***, Ms. Smith must show that it was foreseeable that a person of ordinary fortitude would suffer the injuries she did: *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=) at paras. 12, 18.

**Analysis**

**115**  The plaintiff has to show, on a balance of probabilities, that her psychological difficulties were a reasonably foreseeable consequence of the defendants' negligent actions.

**116**  In my view, the plaintiff's psychological injuries were simply not reasonably foreseeable. That is, it was not reasonably foreseeable by the defendants, at the time of the tort, that the plaintiff would suffer the mental injuries she now attributes to the Accident.

**117**  I agree with the defendants' submission that damages for the plaintiff's psychological complaints or cognitive deficits which presented for the first time on September 5, 2011, are too remote in law to be recoverable in any event.

**IX.** **DAMAGES**

**Non-Pecuniary Damages**

**118**  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., writing for the majority, outlined the factors to be considered when assessing non-pecuniary damages:

[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=)).

**119**  Counsel for the defendants submits courts have long confirmed that caution should be applied when complaints of pain persist for long periods of time extending beyond the normal or usual recovery. However, in *Lehtonen v. Johnston*, [*2009 BCSC 1364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B202-00000-00&context=), it was also noted that the same caution should be applied when a plaintiff develops new, different, unusual, and more serious subjective complaints, long after the event said to be the cause of those complaints:

[94] As Chief Justice McEachern stated in *Price v. Kostryba*, [*[1982] B.C.J. No. 1518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=):

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.

[95] I might add that the same caution must be exercised when a plaintiff's recovery not only deviates significantly from the normal course of recovery, but where a plaintiff develops new, different, unusual and more serious subjective complaints long after the event said to be the cause of those complaints.

[96] In saying this, I have not concluded that Ms. Lehtonen has fabricated these symptoms. I accept that she subjectively perceives these things to be true. I do not consider her perception of these symptoms to be reliable, however. I consider it more probable than not that they are subjective physical manifestations of a complex interplay of emotional, physical and psychological factors unrelated to the motor vehicle accident. ...

**120**  In support of her claim for non-pecuniary damages, the plaintiff referred me to the following authorities: *Bains v. Brar*, [*2013 BCSC 1828*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23H0-00000-00&context=); *Ahadi v. Valdez*, [*2013 BCSC 714*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-2087-00000-00&context=); *Han v. Chahal*, [*2013 BCSC 1575*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B2G2-00000-00&context=); *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=); *Shapiro v. Dailey*, [*2010 BCSC 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-222V-00000-00&context=); *Marois v. Pelech*, [*2009 BCCA 286*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0GS-00000-00&context=); *Hutchings v. Dow*, [*2006 BCSC 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1YM-00000-00&context=); and *Alden v. Spooner*, [*2002 BCCA 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60KK-00000-00&context=).

**121**  The defendants referred me to the following cases in support of a general damages award of $50,000 to $60,000: *Schweighardt v. Palamara*, [*2003 BCSC 1149*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-2099-00000-00&context=); *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=); and *Wahl v. Sidhu*, [*2010 BCSC 1466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B302-00000-00&context=).

**122**  Non-pecuniary or general 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 and reasonable to both parties. 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.

**123**  After referring to the guidelines in *Stapley v. Hejslet* and applying the law to the facts of this case, I award the plaintiff the sum of $140,000.00 for non-pecuniary damages.

**Past Wage Loss**

**124**  Counsel for the plaintiff confirmed in his opening remarks that the plaintiff is not seeking past wage loss for the period from the date of the Accident to September 5, 2011.

**125**  I agree with the defendants' submission that the plaintiff is not entitled to past wage loss from September 5, 2011 to the date of trial. As noted by Dr. Wooder during cross-examination, the reason the plaintiff went off work on September 5, 2011, was due to a bipolar disorder which was not caused by the Accident. Further, Dr. Wooder noted that pain was not mentioned by the plaintiff as a reason why she went off work at that time.

**Loss of Future Earning Capacity**

**126**  A claim for loss of future earning capacity is not based on a balance of probabilities, rather, the issue is whether there is a real and substantial possibility of the loss occurring. 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=), the Court of Appeal confirmed the following with respect to a claim for loss of income earning capacity:

[32] A plaintiff must always prove ... 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*, [*[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=). 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*, [*[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=), an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Underline emphasis in original.]

**127**  In light of the consensus with respect to traumatic brain injury and concussion, and with respect to her PTSD and major depressive disorder being in remission, the nature of the plaintiff's ongoing disability is unclear.

**128**  I find that there is no substantial possibility of a future event leading to an income loss as a result of the Accident of December 4, 2009. Accordingly, the plaintiff is not entitled to an award for future wage loss or loss of earning capacity.

**Cost of Future Care**

**129**  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=), the court indicated that an award under this head of damages should only be made for items or services that the plaintiff has used in the past or is likely to use in the future:

[73] ... The defendant cites *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.) for the proposition that future care costs must be objectively based on medical justification and reasonableness.

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally *Krangle*). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see *Courdin* at para. 35), or for items or services that it is unlikely he will use in the future. ...

**130**  The applicable principles were also described in *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 paras. 163-64:

[163] An award for the cost of future care is notional and imprecise in nature: *Strachan (Guardian ad Litem of) v. Reynolds*, [*2006 BCSC 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23RN-00000-00&context=). The court must consider evidence regarding what care is likely in the injured person's best interest and calculate its present cost, with appropriate adjustment for contingencies in all of the circumstances of the case: *Courdin v. Meyers*, [*2005 BCCA 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S184-00000-00&context=).

[164] In making an award for future care costs the court must take into account both what is medically required and what expenses the plaintiff will likely incur. ...

**131**  The quantification of future care costs was discussed by the Supreme Court of Canada in *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:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

**132**  Further, in *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=), the Court of Appeal reminded us that common sense should inform damages awards under this head:

[13] Ms. Katalinic drew our attention to the Court's comments 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=), where Johnston J. said this about claims for damages for future care costs:

[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.

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.

**133**  Barbara Phillips, physiotherapist and rehabilitation specialist, prepared a report dated October 15, 2013. In it, she made recommendations for physical therapy, psychological treatment, and the cost of medications. She made recommendations for workplace accommodations in her previous report dated April 30, 2012.

**134**  I agree with the defendants that the proposed future care costs relating to the plaintiff's psychological complaints, i.e. medication and counselling, are not recoverable. However, a modest award for some ongoing physical therapy and workplace accommodations as proposed is appropriate.

**135**  I award the following amounts for the plaintiff's cost of future care:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Height adjustable monitor riser: | $50.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Keyboard tray: | $374.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Ergonomic office chair: | $666.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Light-weight remote headset: | $451.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Recreation centre membership |  |  |
|  | for 3 years | $1,000.00 |  |

**136**  Bearing in mind that the award for costs of future care must be moderate and fair to both parties, I assess damages for cost of future care in the total amount of $2,500.

**Loss of Housekeeping Capacity**

**137**  It has been accepted that loss of housekeeping capacity is a separate head of damages: *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=) at para. 63. It is the loss of an asset which an individual had prior to an accident and no longer has.

**138**  In *Jones v. Davenport*, [*2008 BCSC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20F6-00000-00&context=) at para. 92, the court summarized the test for loss of housekeeping capacity as follows:

[92] ... I infer from the authorities that a plaintiff must establish a real and substantial possibility that she will continue in the future to be unable to perform all of her usual and necessary household work. It would also need to be shown that the work that she will not be able to do, will require her to pay someone else to do, or will require others to do it for her gratuitously.

[Emphasis added.]

**139**  Ms. Phillips prepared a report in relation to the plaintiff's housekeeping capacity dated September 13, 2013. In it, she made recommendations for weekly and seasonal housecleaning for the remainder of the plaintiff's life:

Weekly, to age 75: $61,495

Seasonal, to age 75: $11,826

**140**  The defendants submit that no award should be made for loss of housekeeping capacity.

**141**  In assessing damages under this head, I have taken into account the difficulty the plaintiff has had, and may continue to have in the future, in performing her housekeeping duties. I conclude that the plaintiff has suffered some loss of housekeeping capacity. She will be forced to incur expenses in the future as a result. I award $23,000 for loss of housekeeping capacity.

**Special Damages**

**142**  An injured person is entitled to recover reasonable out-of-pocket expenses incurred as a result of an accident in order to restore the claimant to the position he or she would have been in had the accident not occurred: *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.) at para. 170.

**143**  The defendants submit the plaintiff is entitled to reasonable and appropriate out-of-pocket expenses for treatment of her physical injuries.

**144**  The plaintiff submits a total of $19,753.77 for special damages, broken down as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Prescriptions: | $931.11 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Miscellaneous expenses: | $895.94 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Psychotherapy for PTSD: | $1,595.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Physiotherapy: | $16,331.72 |  |

The plaintiff drew my attention to the fact that some of the physiotherapy costs were paid, while others were incurred and are still owed under a direction to pay.

**145**  The total amount of $19,753.77 will be awarded.

**IX.** **CONCLUSION**

**146**  To summarize, I award:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $140,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care: | $ 2,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of housekeeping capacity: | $ 23,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages: | $ 19,753.77 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL: | $185,253.77 |  |

**147**  I also order interest to be paid to the plaintiff pursuant to the *Court Order Interest Act*. This is to include prejudgment interest on the award of special damages: *Thibeault v. MacGregor*, [*2013 BCSC 808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20FV-00000-00&context=) at paras. 134-135; and *Jones v. Davenport* at para. 106.

**148**  The plaintiff is entitled to her costs of this action.

S.R. ROMILLY J.

**End of Document**

[***Low v. Albas, 2013 BREG para. 50,730***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-JJV1-JB2B-S04R-00000-00&context=)

British Columbia Real Estate Law Guide

British Columbia Supreme Court

Before: Steeves J

Decision: October 21, 2013.

Docket No. 83429

***British Columbia Real Estate Law Guide*  > *Cases* > *2010s* > *2013***

**2013 BREG para. 50,730** | [*[2013] B.C.J. No. 2298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23PD-00000-00&context=) | [*2013 BCSC 1916*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23PD-00000-00&context=)

David Low and 1188 Management Ltd. Plaintiffs v. Charles Albas and Albas Law Corporation Defendants

See commentary at [*BREG para. 1348*](https://advance.lexis.com/api/document?collection=analytical-materials-ca&id=urn:contentItem:5MF8-MMJ1-DYFH-X0GT-00000-00&context=).

**Case Summary**

**Professional duties and liabilities — Solicitors' *negligence* — Assessment of damages — Mitigation — Plaintiff investor, along with co-investor, lent funds to defendant solicitor's client to refinance outstanding balance on first mortgage — Co-investor initiated refinancing arrangement of second mortgage that included refinancing outstanding balance on first mortgage — Plaintiff took 1/5 interest in second mortgage refinance — Defendant discharged first mortgage, but second mortgage was not registered — Borrower defaulted, and outstanding balance as of October 2013 was $106,194 — Plaintiff brought action to recover damages from defendant — Application was allowed, in part — Had second mortgage been registered, plaintiff would have been paid out in 2004 when borrower replaced existing registered mortgages — Defendant's failure to ensure second mortgage was registered resulted in loss — Plaintiff became aware in July 2004 of issue with mortgage, but failed to make inquiries until commencing action in 2009 — Plaintiff failed to mitigate, so was only entitled to damages accumulated to December 2004.**

|  |
| --- |
| **Facts:** The plaintiff was a chartered accountant who used his corporation, the plaintiff numbered company, to invest in second mortgages. The plaintiff acted with co-investors, including Murray Garneau ("Garneau"). In 2000, Garneau and the plaintiff were involved in a transaction related to a second mortgage totaling $80,000. The plaintiff lent half of the mortgage amount. The defendant lawyer, Charles Albus ("Albus"), acted for the mortgagees on the transaction. The mortgage was registered in December 2000. By March 2003, the outstanding balance owing to the plaintiff was $12,500. In January 2003, Garneau negotiated a new mortgage of $62,500 with a 21 per cent interest rate on the property that was subject to the 2000 mortgage. The plaintiff took a 1/5 interest in the 2003 mortgage. The 2003 mortgage effectively resulted in a refinancing of the outstanding amount of the 2000 mortgage. Albus was retained by, and received all instructions from, Garneau, and the plaintiff only dealt with Garneau. Albus discharged the 2000 mortgage, but the borrower's lawyer did not register the 2003 mortgage, as he had agreed to do. The borrower ceased making payments on the 2003 mortgage in November 2003. As of October 2013, the balance owing on the mortgage was $106,194. The plaintiff commenced an action in 2009, seeking damages in ***negligence*** resulting from Albus's failure to ensure that the 2000 mortgage had been properly registered. Albus admitted he owed the plaintiff a duty of care, and that he had breached that duty of care, but claimed his conduct did not cause the plaintiff any damage or loss.  HELD: The action was allowed, in part.  The Court noted that the evidence showed that the borrower and guarantor under the 2003 mortgage had obtained a new loan and lender in 2004 to replace all existing mortgages on the property. As a result, all outstanding loans were paid from the new loan, with the exception of the 2003 mortgage, which was not discovered because it had not been registered. Accordingly, the Court found, the plaintiffs would have been paid out in 2004, but, since the mortgage had not been registered, they suffered a loss.  The Court next considered whether the plaintiffs could have mitigated their losses. Citing case law, the Court stated that, where there is an allegation of failure to mitigate, the burden of proof lies on the defendant to prove mitigation was possible, and that the plaintiff failed to take reasonable efforts to mitigate, without being required to take all possible steps to mitigate. The evidence showed that from the mortgage due date of January 2004, the plaintiffs took no steps until July 2004, at which time they obtained a copy of an unregistered, unsigned Form B respecting the 2003 mortgage. After July 2004, the plaintiffs waited until 2009 to take further action. The Court found that it was clear in July 2004, through examination of the Form B, that there was an issue with the mortgage. At that point, the plaintiffs could have made further inquiries and attempted to resolve the issue. Accordingly, the Court concluded that it was unreasonable for the plaintiffs to claim losses past December 2004, at which point the principal and interest due were $16,865. The Court ordered a damages award of $16,865. |

**Counsel**

M.R. Dirk for the plaintiffs; K.A. Murray for the defendants.

**Reasons for Judgment**

|  |
| --- |
| **J. STEEVES J.** |

**Introduction**

**1**  The plaintiffs seek damages in ***negligence*** against the defendants as a result of a mortgage that was not registered.

**2**  In 2000 the defendants prepared and registered a mortgage in the amount of $40,000 in favour of the plaintiffs (being half of the total amount of the mortgage; the "2000 mortgage"). This mortgage defaulted leaving an unpaid balance. There are no issues about the 2000 mortgage.

**3**  A new mortgage was prepared in 2003 (the "2003 mortgage") on a portion of the property of the first mortgage. The plaintiff 1188 Management Limited ("1188 Ltd.") was to take a 1/5 interest in the $62,500 total amount of the 2003 mortgage as a way to refinance the balance owing on the 2000 mortgage. The 2003 mortgage was prepared but never registered (but the 2000 mortgage was discharged). The 2003 mortgage is the mortgage that is the subject of this litigation; principal and interest remain owing to the plaintiff.

**4**  The plaintiffs seek exemplary, punitive and special damages as well as interest and special costs on the basis of ***negligence***, breach of contract and/or breach of trust. According to the plaintiffs, damages were $106,194.74, as of October 1, 2013.

**5**  The defendants admit that they owed the plaintiff David Low a duty to not discharge the 2000 mortgage prior to confirming registration of the 2003 mortgage in favor of the plaintiff 1188 Ltd. They also admit they owed 1188 Ltd. a duty of care to confirm registration of a mortgage in favor of 1188 Ltd. (and others) on certain properties owned by the borrower. Further, the defendants admit that they breached these duties and they admit that their conduct fell below the applicable standard of care for a solicitor in the circumstances.

**6**  The defendants do not admit that their conduct caused or contributed to any damage or loss to the plaintiffs. In the alternative, if there are damages, the defendants rely on the plaintiffs' duty to mitigate as well as contributory ***negligence***. The defendants say that any damages the defendants are entitled to on the mortgage ended in May 2004 and amount to $14,928.03.

**Background**

**7**  The plaintiff David Low is a chartered accountant working and residing in Kelowna, British Columbia. For a number of years he has used three corporate entities to make investments. One of these entities is 1188 Ltd. Mr. Low testified that he typically invests in second mortgages of small amounts, for a short duration and at a relatively high interest rate. Most of these mortgages involved lending money to people who had difficulty obtaining regular financing. They involved higher risk than other investments but with the prospect of a higher return.

**8**  Mr. Low worked with some co-investors including Murray Garneau. Mr. Garneau, apart from being a co-investor, was a mortgage broker and he also managed many of the investments of the plaintiffs. He would obtain information about potential investments, research their viability, prepare information about the investments and make proposals to potential investors such as Mr. Low to accept or reject. Mr. Low testified that he participated in about 40 investments over the last few years, primarily involving second mortgages and Mr. Garneau. Mr. Low testified that he kept the documents provided by Mr. Garneau for many of these investments but he agreed he did not do that in the subject transactions.

**9**  Some of the mortgage investments over the last few years defaulted and required refinancing or forfeiture. Mr. Garneau managed those situations although Mr. Low would refer the actual forfeitures to his solicitor. Usually some action would be taken after one year of a default because most people paid within one year. Other than those situations, he has not been involved in a court action such as the subject case before.

**10**  The defendant Charles Albas is a barrister and solicitor licensed to practice in the Province of British Columbia. The defendant Albas Law Corporation was incorporated under the laws of British Columbia by Mr. Albas. Mr. Albas works and resides in Penticton, British Columbia and his law corporation maintains an office in that city.

**11**  As part of his law practice and prior to the circumstances of this litigation, Mr. Albas was involved in mortgage transactions, which made up about 20 percent of his practice. He sometimes worked with Mr. Garneau. At one time in the chronology of events relevant to this litigation, Mr. Albas was in the office of another law firm and about March 2000 he opened his own practice. He had a paralegal property conveyancer that he relied on but she left for other employment about December 2000. He was without a paralegal for seven or eight months. As explained below, Mr. Albas relies on the absence of that person to explain the error that is the subject of this litigation.

**12**  Mr. Albas testified that he met Mr. Garneau socially at first and then he acted for him on some real estate transactions. These amounted to about three loans with the first being in 2000. The transaction for the 2000 mortgage would have been the largest. Mr. Albas was not sure in his evidence but he thought he may have acted for Mr. Garneau in a foreclosure after the events in this case.

**13**  According to Mr. Albas he always received his instructions from Mr. Garneau. He described Mr. Garneau as the "quarterback" and himself as the "mechanic." For example, with regards to the 2000 mortgage, Mr. Garneau "handled this", according to the evidence of Mr. Albas. Mr. Albas testified that he was the solicitor for Mr. Garneau in the mortgages at issue in this case and Mr. Garneau was acting as the agent for investors such as the plaintiff Mr. Low.

**14**  Mr. Garneau died in November 2008.

**The 2000 and 2003 mortgages**

**15**  In late 2000 Mr. Garneau prepared materials for the 2000 mortgage with regards to a property in Mission B.C. and proposed it to Mr. Low as well as Kalvan Gill, with Janbar Enterprises Limited, and Mission Chip Loading (also owned or controlled by Mr. Gill).

**16**  This was a second mortgage totaling $80,000. Mr. Low agreed to lend half of this amount. The defendants were the solicitors for this transaction and Mr. Low paid $40,000 in trust to the legal firm where the defendant worked at the time. The other investors paid the second $40,000 and it was registered with the land title office on December 14, 2000. The principal was $80,000, the interest rate was 14% and the balance due date was June 15, 2001.

**17**  There is no issue in this litigation as to the registration of the 2000 mortgage. The plaintiffs do raise concerns that the defendants did not bill the plaintiffs for any legal work on the 2000 mortgage nor did the defendants advise the plaintiffs that they were acting for other parties in that transaction.

**18**  Five monthly payments were received by Mr. Low on the 2000 mortgage and then there were no payments for about four months. A large lump sum payment was made in December 2001 and then there was a longer period of default into March 2003. The balance outstanding (interest and principal) as of March 1, 2003 was $12,500.

**19**  In December 2002 and January 2003 Mr. Garneau, with some other investors, negotiated a new mortgage on a portion of the property that was subject to the 2000 mortgage. This was the 2003 mortgage. It was for a total of $62,500 at an interest rate of 21% and it was due on January 1, 2004. The idea was to pay down the 2000 mortgage in the amount of $80,000 and the plaintiffs would have essentially a refinancing of the outstanding amount from the 2000 mortgage of $12,500. Ultimately, on March 6, 2003, Mr. Low received a payment of $33,130 as part of an agreement that included refinancing a new mortgage in the amount of $12,500. This $12,500 was his contribution to the 2003 mortgage.

**20**  Mr. Low testified that the terms of the 2003 mortgage were agreeable to him. In his evidence he said he believed it was a first mortgage but he also accepted that the title was heavily encumbered with other charges and judgments. He also agreed the information he had about the 2003 mortgage was what was in the documents in his possession. Mr. Low only dealt with Mr. Garneau who had full authority to conclude the transaction and make any necessary collections. Mr. Low also agreed that he did not retain the defendants and all of his instructions were to Mr. Garneau. He relied on Mr. Garneau to contact the defendants. Mr. Albas testified that he also only dealt with Mr. Garneau.

**21**  The defendants began a correspondence with a solicitor in Abbotsford who represented the borrower. In January and February 2003, Mr. Albas and the solicitor in Abbotsford discussed the registration of the 2003 mortgage and the discharge of the 2000 mortgage. On February 4, 2003 Mr. Albas wrote to the solicitor in Abbotsford as follows:

...

We also confirm it is in order for you to register the mortgage in the principal sum of $62,500.00 in the form expressly approved by our client.

*We also undertake to discharge mortgage number BP2997345* [the 2000 mortgage] as registered against the four lots as set forth in your letter of February 4th, 2003.

...

[Emphasis added]

**22**  On February 4, 2003 two of the investors signed the 2003 mortgage documents. This was done in the presence of the solicitor in Abbotsford and a copy was faxed to the defendants. The plaintiff Mr. Low and others signed a release of the 2000 mortgage. Mr. Albas testified that Mr. Low signed the Form C (dated March 6, 2003) in his and Mr. Garneau's presence and in Mr. Albas' office. The defendants took legal fees of $1,500 from the funds received from the Abbotsford solicitor. The plaintiffs submit that they should have been told of this fee.

**23**  The 2000 mortgage was discharged (by Mr. Albas) but the 2003 mortgage was not registered (by the Abbotsford solicitor). Mr. Albas testified that after the discharge of the 2000 mortgage he was not called by anyone about it, including Mr. Garneau.

**24**  Mr. Albas testified about why the 2003 mortgage was not registered. He said that his paralegal had left and no one checked the documents. As well, he did not notice the lack of registration until he was contacted by counsel for the plaintiff in 2012 and no one had contacted him about the registration until that time. He said he "did [his] share but [the Abbotsford solicitor] did not do his share." He also did not know about the $12,500 loan secured by Mr. Low. He could remember no further dealings with Mr. Garneau except he may have done a foreclosure for him after the 2003 mortgage.

**25**  There were two payments by the borrower on the 2003 mortgage, in March and November 2003. After November 2003 there were no payments.

**Events after the 2003 mortgage**

**26**  In early 2004, Mr. Low attempted to obtain documents about the 2003 mortgage from Mr. Garneau. He agreed in his evidence that his file on the 2003 mortgage was deficient, he did not have the documents he typically had, he wanted to get paid and he was looking for documents. He also agreed that he contacted Mr. Garneau but not Mr. Albas then or after Mr. Garneau died in November 2008

**27**  Mr. Garneau sent Mr. Low an 11 page fax on January 21, 2004. Only the fax cover sheet was entered in evidence and Mr. Low could not recall what the 11 pages were that were attached to the fax. On July 23, 2004 Mr. Low sent a fax note to Mr. Garneau acknowledging that the arrangements to discharge the 2000 mortgage were "sufficient to bring the original payments up to date to the end of February. At that time the principal outstanding was reduced to $12,500." Mr. Low also advised Mr. Garneau that he had only received five payments to date on the 2003 mortgage and, in order to bring him up to date, 12 payments and an "extra monitoring fee" were requested.

**28**  The evidence also included a copy of a fax cover sheet with a handwritten date, "26 July", presumably in 2004. It was from Mr. Garneau to "Wendy" in Mr. Albas' office and it referenced "Jan Bar Mtge". It said, "This is documents [sic] David Low has. I still seem to be missing something. Please have Charlie [a person in Mr. Albas' office] peruse, if we are missing any Mortgage documents, please obtain." In his evidence Mr. Albas said that Wendy was his secretary but did not recall this document ever having been brought to his attention. Of course, Mr. Garneau is not available to testify as to his recollection.

**29**  Mr. Low received an incomplete Form B with respect to the 2003 mortgage. In his evidence he said he could not specifically remember when he received it but he took from a fax date on the document that it was July 26, 2004. In the 5(a) section of the form, "Principal Amount", there is a handwritten "62-500" and a schedule to the document describes 1188 Ltd. as the lender of a 1/5 interest. Mr. Low could not recall in his evidence whether he had seen a handwritten principal amount or an unsigned Form B in other loans he had been involved with. He agreed that the Form B he received did not have a registration number or stamp from the Land Title Office. He said he did not look for the stamp. He knew from other transactions that registered Form B documents had a Land Title Office stamp on them.

**30**  The evidence also included a handwritten note regarding a telephone call from Mr. Garneau and dated April 24, 2007. Mr. Albas confirmed that the writing was from his office but he had no other memory of it. The note references "RSP mtge - $80,000". It says, "Need copies of documents. Charlie [the name of a person in Mr. Albas' office] - are these under Irvine Schick?" On the same page as the memo are copies of two message notes about telephone calls from Mr. Garneau, on April 25 and 26, 2007. None of the witnesses, including Mr. Albas, could explain the context or particulars of this document.

**31**  In March 2009 inquiries were made by counsel for the plaintiffs about the 2003 mortgage. There were difficulties obtaining the relevant documents but ultimately the plaintiffs were given documents by the defendants and they discovered that the 2003 mortgage had not been registered. Mr. Low testified that the reason no inquiries were made about the 2003 mortgage until 2009 was that he relied on Mr. Garneau to manage the transaction including any collections. During his illness Mr. Garneau was sick for a period of time and he could not do any work. He died in November 2008.

**32**  Mr. Low also testified that there was no reason to believe the 2003 mortgage was not registered. Mr. Low agreed that the Form B for the 2003 mortgage he obtained in 2003 did not show that the mortgage was registered but he was not looking for that information at the time. He agreed that the 2003 mortgage was a security instrument but not a registered security instrument. Mr. Low knew that, before his death in November 2008, Mr. Garneau was sick and he (Mr. Low) expected to be the executor of Mr. Garneau's estate. Mr. Low suggested in his evidence that as executor he could have access to information about the 2003 mortgage. In the end someone else was the executor. Mr. Low also testified that during this time he had no reason to believe that the 2003 mortgage was not registered.

**33**  One of the people contacted by counsel for the plaintiff in efforts to obtain information was Kalvan Gill. He is the principal of Janbar Enterprises Ltd., one of the borrowers on the 2003 mortgage. In a letter dated April 13, 2012, Mr. Gill said that he had paid off the loan arranged by Mr. Garneau. Mr. Gill paid $292,310.35 in total to Mr. Garneau to pay off loans and he testified that "I continued to help him financially." In a second letter, dated May 1, 2012, Mr. Gill declined to provide any more information because "this is feeling more like harassment than anything else."

**34**  Mr. Gill testified under a subpoena. He denied that he failed to pay the loan covered by the 2003 mortgage. He did not know whether Mr. Garneau owed him money and he did not care because Mr. Garneau was deceased and he was a good friend of Mr. Gill's. Mr. Gill had virtually no memory of the details of the 2003 mortgage. For example, he could not say whether the Abbotsford solicitor, named as the person making the application for the loan on behalf of Janbar Enterprises Ltd., represented him on the 2003 mortgage.

**35**  The plaintiffs commenced this action by way of a Writ of Summons filed June 5, 2009 and a Statement of Claim was filed on July 22, 2009. The other investors or participants in the 2003 mortgage (such as Mr. Gill and the solicitor in Abbotsford) are not named as parties. Mr. Low was asked in cross-examination whether he knew whether an action against the other people involved would be successful. He answered by saying that his counsel had tried to obtain information from them and he had been unsuccessful.

**36**  As of October 1, 2013, the amount owing on the 2003 mortgage was $106,194.74, as calculated by the plaintiff Mr. Low.

**Analysis**

**37**  The failure of the defendants to confirm the registration of the 2003 mortgage is the subject matter of the plaintiffs' claim in this action. They say it was the responsibility and duty of the defendants to confirm that the 2003 mortgage was registered. Further, it is submitted that there should not have been a discharge of the 2000 mortgage without the registration of the 2003 mortgage. Damages in the amount of $106,194.74 are sought.

**38**  It is a useful starting point to set out the admissions of the defendants as recorded in a letter dated August 6, 2013 from counsel for the defendants to counsel for the plaintiffs. The admissions of the defendants are as follows:

...

1. The Defendants owed the Plaintiff, David Low, a duty of care to not discharge a mortgage registered under No. BP299745 (of which the Plaintiff David Low had a partial interest) [the 2000 mortgage] prior to confirming registration of a mortgage in favour of the Plaintiff 1188 Management Ltd [the 2003 mortgage];
2. The Defendants admit they owed the Plaintiff,1188 Management limited ("1188"), a duty of care to confirm registration of a mortgage in favour of 1188 and others, in the principal amount of $62,500 (the Plaintiff 1188's partial interest being $12,500) on certain properties owned by the borrower, Janbar Enterprises Ltd., and
3. The Defendants admit they breached the above duties and admit by doing so, their conduct fell below the applicable standard of care for a solicitor in the circumstances.

The Defendants **do not** admit that their conduct, as admitted above, caused or contributed to any damage or loss to the Plaintiffs.

...

[Emphasis in original].

**39**  One aspect of the above admissions is the relationship that Mr. Albas had with the plaintiffs. He testified that he was the solicitor for Mr. Garneau and the evidence is that Mr. Albas' only contact with Mr. Low was when Mr. Albas took Mr. Low's signature on the release of the 2000 mortgage. Therefore, it appears that the defendants were solicitors for Mr. Garneau rather than the plaintiffs. Nonetheless, it is accepted by the defendants that Mr. Albas knew the plaintiffs were investors in the 2003 mortgage. Further, as a matter of ***negligence*** (rather than as matter of solicitor-client relationship), the defendants accept it was foreseeable to Mr. Albas that his actions would have affected the interests of the plaintiffs.

**Some factual issues**

**40**  It is not in dispute that the 2003 mortgage was not registered in 2003 and nor has it been registered since then. As well, it is not in dispute that no actions were taken on the 2003 mortgage by the plaintiffs until their counsel commenced inquiries in March 2009. This action commenced in June 2009. There is no issue of any expired limitation period.

**41**  There is some dispute about when the parties knew the 2003 mortgage was not registered. The plaintiffs claim they did not know this until they received documents from the defendants in mid-2009. I will discuss this further below.

**42**  The matter of when the defendants knew that the 2003 mortgage was not registered is also at issue. The plaintiffs submit that the defendants knew in 2003, at the time of the discharge of the 2000 mortgage, that the 2003 mortgage had not been registered. However, that view does not accord with the evidence. Mr. Albas testified that he did not know about the lack of registration until he was asked by counsel for the plaintiffs in 2009 for copies of his file. He testified that it was at that time that he discovered the lack of registration and he was not pressed on this in cross-examination.

**43**  This conclusion does not absolve the defendants. The evidence is that the solicitor in Abbotsford had the primary duty to do the actual registration. For reasons that are unexplained, he is not a party to this action. In any event, the defendants were under a duty of care to inspect the documents received from the Abbotsford solicitor to confirm the latter's undertaking to register the 2003 mortgage. That inspection was not done and, as admitted, the defendants owed the plaintiffs a duty of care to confirm registration of the mortgage. They breached that duty.

**44**  The result of the above admissions and conclusions is that this case is essentially one of deciding if damages are payable to the plaintiff and, if so, the amount.

**45**  According to the defendants the plaintiffs have suffered no loss as a result of the failure to register the 2003 mortgage. In the alternative, if there was loss to the plaintiffs, reasonable steps were available to them in March 2004 to mitigate that loss. The defendants rely on an analysis of the charges on title for the property that was the security for the 2003 mortgage, on mitigation and on contributory ***negligence***. On the other hand the plaintiffs claim damages have been accumulating since April 2003 and, as of October 1, 2013, the damages were $106,194.74.

**46**  I will consider those issues in turn.

**Have the plaintiffs suffered any loss?**

**47**  The defendants urge me to find that the plaintiffs had the security of the loan underlying the 2003 mortgage and the fact that it was not registered makes little or no difference. That is, it is submitted that the plaintiffs had essentially the same security with the unregistered instrument that they would have had if the 2003 mortgage been registered. Mr. Low agreed in his evidence that the 2003 mortgage was a security instrument but not a registered security instrument. The logic of this submission is that, according to the defendants, the plaintiffs have suffered no loss.

**48**  The facts that assist in resolving this issue start with the 2003 mortgage being signed by Mr. Gill as borrower and guarantor (personally and on behalf of Janbar Enterprises Ltd.) on February 4, 2003. The principal was $62,500, interest was at 21% and the due date was January 1, 2004. The security was four lots in Mission B.C. and the lenders were the plaintiff 1188 Ltd. for a 1/5 interest and a company controlled by Mr. Garneau with a 4/5 interest.

**49**  Mr. Gill testified that, in 2003, properties owned by his company Janbar Industries Ltd., were subject to a number of encumbrances. One of the lenders was starting foreclosure proceedings and further financing was required. Ultimately a new loan with a new lender was obtained to replace all of the previous mortgages. Mr. Gill testified that this new lender did a thorough review of his finances over two days before approving the new loan. The arrangements with the new lender concluded in May 2004.

**50**  One result of the new loan was that any outstanding loans involving Mr. Gill's finances on this property were paid out by means of the loan from the new lender. The one exception to this was the 2003 mortgage, apparently because it was not registered and not discovered. This is significant because, if the 2003 mortgage had been registered, it would have been discovered as part of the review by Mr. Gill's new lender. Significantly, it would have been paid out to the plaintiffs in May 2004 as part of the consolidation of the encumbrances on the property.

**51**  Therefore, the plaintiffs did incur damages as a result of the 2003 mortgage not being registered. If it had been registered it would have been paid out in May 2004. It follows that I disagree with the defendants that the plaintiffs had the same security with the 2003 mortgage, whether it was registered or not.

**52**  I will proceed next to consider the amount of those damages.

**Mitigation**

**53**  The broad facts as they relate to mitigation are that the 2003 mortgage was signed on February 4, 2003 and the balance was due on January 1, 2004. The plaintiff 1188 Ltd. was a lender (as was Mr. Garneau's company). Only five of 12 payments were made on the mortgage, the last being in November 2003. There were some attempts by the plaintiffs in 2004 to get information about the 2003 mortgage from Mr. Garneau. The first time there were any inquiries by the plaintiffs directly to the defendants about the 2003 mortgage was in March 2009.

**54**  According to Mr. Low's calculations the amount due and owing to him in January 2004 (the due date) was $13,734.12. He has kept a running balance sheet showing interest accruing each month since March 2003, ultimately resulting in the amount due on October 1, 2013 of $106,194.74. As above, the plaintiffs seek damages in that latter amount. The logic of this position is that the plaintiffs say there was no duty on them to mitigate their damages and reasonable steps to do so were not available to them.

**55**  Turning to the case law, generally a plaintiff will not be able to recover those losses which he could have avoided by taking reasonable steps and the plaintiff has a duty to mitigate those losses. Where there is an allegation of failure to mitigate, the burden of proof is on the defendant to prove that mitigation was possible and the plaintiff failed to make reasonable efforts to mitigate (*Southcott Estates Inc. v. Toronto Catholic District School Board*, [*2012 SCC 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X219-00000-00&context=) at para. 24 citing *British Columbia v. Canadian Forest Products Ltd.,* [*2004 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B11G-00000-00&context=), at para. 176; *Red Deer College v. Michaels,* [*[1976] 2 S.C.R. 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24MJ-00000-00&context=)).

**56**  This principle has been in place for some time as demonstrated by the following from an older case:

In the words of James L.J. in *Dunkirk Colliery Co. v. Lever,* 9 Ch. D. 20 at p. 25: "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."

Cockburn v. Trusts and Guarantee Co. [*(1917), 55 S.C.R. 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F956-S1C7-00000-00&context=) at p.267 citing British Westinghouse Electric Co. v. Underground Electric Railways Co., [1912] A.C. 673 at pp. 689-690 ; see also Southcott Estates Inc., at para. 23.

**57**  A plaintiff is not expected to take all possible steps to mitigate damage (*Asamera Oil Corp. v. Sea Oil & General Corp.*, [*[1979] 1 S.C.R. 633*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-254W-00000-00&context=) at p. 649).

**58**  In the subject case, the defendants point to the consolidation of Mr. Gill's debts in March 2004 and submit that, if the 2003 mortgage had been registered, it would have been paid out at that time. The amount of interest and principal owed to the plaintiffs in March 2004 was $14,458.46. That is, according to the defendants, the plaintiffs' losses would have ended that day. Assuming this is an issue of mitigation, the evidence is that the plaintiffs did not know about the consolidation of Mr. Gill's debts in March 2004.

**59**  Nonetheless, I do accept that it is a fair question to ask what was done by the plaintiffs from the due date of January 1, 2004 for the 2003 mortgage to March 2009.

**60**  Mr. Low asked Mr. Garneau for documents in January 2004, after the 2003 mortgage due date of January 1, 2004. It is not clear what documents were received but the January 21, 2004 fax cover sheet says 11 pages were sent to Mr. Low by Mr. Garneau on that day. Then, on July 23, 2004, about six months later, Mr. Low asked Mr. Garneau for the payments that were not made under the 2003 mortgage. There were no comments about collection or about the need for further documents.

**61**  Presumably, there was more discussion between Mr. Low and Mr. Garneau because the latter wrote to Mr. Albas on July 26, 2004 asking for any missing documents. The unsigned and unregistered Form B, with the figure of "62-500" handwritten in, was probably provided by Mr. Garneau to Mr. Low on July 26, 2004. It is not clear whether Mr. Garneau obtained this document from his own records or Mr. Albas. There are the notes of telephone calls from Mr. Garneau in April 2007 but no witness could explain their meaning or significance.

**62**  The result is that the plaintiffs did nothing from January 21, 2004 to July 23, 2004, a period of six months. At the end of that period they had a copy of the unsigned and unregistered Form B. Then there is a period of almost five years, until March 2009 (when counsel for the plaintiffs commenced his correspondence with the defendants) when nothing was done. In the meantime the plaintiffs have been tracking interest and principal and they submit that damages in the amount of $106,194.74 should be paid because of the defendants' ***negligence***.

**63**  Mr. Low explained in his evidence that he relied on Mr. Garneau to do the collection work on all of the mortgages they were involved in, including the 2003 mortgage. Mr. Garneau was ill and then died in November 2008. Mr. Low expected to be executor of Mr. Garneau's estate but it turned out someone else was appointed. According to Mr. Low, if he had been executor it would have provided him with the information he needed. Assuming that is correct, it does not explain why nothing was done for the periods in question.

**64**  Specifically, there was no action on the part of the plaintiffs' *vis-à-vis* the defendants until almost five years later, in March 2009, when their counsel began inquiries of Mr. Albas. Were there reasonable steps the plaintiffs could have taken before March 2009 to mitigate their losses?

**65**  I return to the Form B received by Mr. Low on July 26, 2004. Significantly, it was unsigned, it had the purchase amount written by hand and it had no land title office stamp. Mr. Low had some experience with previous mortgages and he knew this was not a registered mortgage.

**66**  I conclude that, as of July 26, 2004, it was clear by means of a simple reading of the Form B received by Mr. Low on that date that there were problems with the 2003 mortgage. On its face the problems were the lack of signatures, the purchase amount was unreliably recorded by handwriting and it did not have the land title stamp office representing that it had been registered. In the end it turned out that only the registration was a problem. But certainly a Form B with the significant deficiencies of the one received by Mr. Low on July 26, 2004 should have, to a reasonable person, raised concerns if not warning bells. Significantly, inquiries at that time would have revealed that the mortgage was not registered.

**67**  I find that on July 26, 2004 the plaintiffs had available to them reasonable steps to mitigate their loss. These could have included making serious inquiries of the defendants as they eventually did in 2009. I also conclude that a period of time would have been necessary to enable the plaintiffs to make those inquiries and consider the results. I conclude that a period of four months is appropriate and, therefore, I find that as of December 1, 2004, it was no longer reasonable for the plaintiffs to be accruing losses. According to the calculations of Mr. Low the amount of principal and interest due on that date was $16,865.90. The defendants do not challenge that calculation and I fix damages in that amount.

**68**  I find that by July 26, 2004, the plaintiffs should have been aware that they had suffered a loss since, by that date, a plain reading of the Form B of that date clearly indicated the fact the mortgage was not registered. As of this date, they should have taken steps to mitigate that loss, such as making serious inquiries of the defendants as they eventually did in 2009. I find that if the plaintiffs had taken appropriate and reasonable steps as of that date, within four months the matter could have been resolved. According, I find that as of December 1, 2004 it was no longer reasonable for the plaintiffs to claim further damages. According to the calculations of Mr. Low the amount of principal and interest due on that date was $16,865.90. The defendants do not challenge that calculation and I fix damages in that amount.

**69**  With respect to contributory ***negligence*** I conclude that the plaintiffs were not contributorily negligent in the issue giving rise to this litigation, that is, by not confirming the registration of 2003 mortgage.

**70**  This is a mixed result and neither party is entitled to costs against the other.

J. STEEVES J.

**End of Document**

[***Morris v. Moddejonge, [2004] B.C.J. No. 178***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3BV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

Powers J.

Heard: January 15, 2004.

Judgment: February 3, 2004.

Kamloops Registry No. 31530

**[2004] B.C.J. No. 178** | 2004 BCSC 138 | 128 A.C.W.S. (3d) 903

Between Colin Morris, plaintiff, and Jan Arthur Gerrard Moddejonge and Gail Insko, defendants

(24 paras.)

**Counsel**

E.C. Hughes, for the plaintiff. N.J. Tuytel, for the defendants.

|  |
| --- |
| **POWERS J.** |

**1**   The plaintiff was riding his bicycle at approximately 10:00 p.m. in the evening on April 22, 2000. He did not have a light on his bicycle. The defendant, Moddejonge, was driving an automobile belonging to his mother, Insko. He was driving it with her consent. Moddejonge did not see the plaintiff on his bicycle, and took a shortcut, driving on the wrong side of the road in his attempts to get to a video rental store. When he made a left turn into the mall where the video rental business was located, he turned into the path of the plaintiff's bicycle. The plaintiff collided with the vehicle being driven by Moddejonge and was seriously injured. The plaintiff has no recollection of the events leading up to the accident.

**2**  Moddejonge pled guilty in Provincial Court to driving without due care and attention.

**3**  The plaintiff has commenced these proceedings seeking damages for the injuries suffered in the accident. The statement of defence denies all of the allegations in the statement of claim, and states that the injuries, losses or damages sustained by the plaintiff were caused solely by, or in the alternative, were contributed to by the fault and ***negligence*** of the plaintiff. To a large extent, the statement of defence is a proforma defence.

**4**  The matter is set for trial with a judge and jury on March 8, 2004. The plaintiff brings on an application pursuant to Rule 18A for a summary trial on the issue of liability only.

**5**  The defendants oppose that application, saying that the matter of liability and quantum should both be determined at the jury trial presently scheduled. The defendants argue that it would be unfair for me to determine the division of liability based on the affidavit evidence that is available. The defendants argue that the onus is on the plaintiff to prove that the defendant was 100% liable, and that they have not done so.

**6**  The defendants argue that the plaintiff has submitted very little evidence about how the accident occurred, other than that from the defendant's examination for discovery, and a statement made by the defendant, Moddejonge, to a police officer shortly after the accident. The defendants say that there are other witnesses available, including some eye witnesses, and evidence should be made available with regard to the distances, sightlines and lighting at the time of the accident.

**7**  The defendants have provided little of that evidence, although they have had ample opportunity to acquire it if they wish. The damages in this accident are significant. Both parties agree that the plaintiff has suffered a head injury that has impacted his life to a significant degree. This is clearly a major claim from the defendants' perspective. During submissions, the defendants' position was that because the onus was on the plaintiff, they were not obliged to disclose their case during this 18A application. The defendants argue that the evidence at trial may be different than that on the affidavits presently before me.

**8**  The defendants say that it is a matter of first principles that the onus is on the plaintiff to prove that the defendant was 100% liable for the accident, and for the injuries sustained by the plaintiff. The defendants did not cite any authority for that proposition. The plaintiff was surprised by that submission, and did not have any authority to support their position that the onus was on the defendants to prove contributory ***negligence***.

**9**  The position of the defendants is in conflict with the position stated by our Court of Appeal in Leischuer v. West Kootney Power and Light Co., [*[1986] 3 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3DV-00000-00&context=) at p. 112:

Lastly, it must be emphasised that the onus was on the defendant to prove contributory ***negligence*** on a balance of probabilities.

**10**  The defendant was clearly negligent in driving his car on the wrong side of the road simply to avoid taking a longer route to get to his destination. The real question is whether I can, or should, decide the issue of contributory ***negligence*** of the plaintiff on the material before me, or whether that should be left with the jury.

**11**  The defendants argue that:

1. the decision under Rule 18A on the issue of liability will not contribute to the efficiency of the litigation. This may simply create two appeals rather than one. The trial date is very close, and the matter should be allowed to proceed to trial. With regard to this aspect of the case I would point out, however, that the plaintiff did file a notice of motion in September of 2003 and had the matter scheduled for November of 2003. They adjourned the application, at the request of the defendants, to allow the parties to attempt to mediate the dispute. Those efforts were unsuccessful. The plaintiff should hardly be penalized for its cooperation.
2. I will be unable to find the facts necessary to resolve the issue based on the affidavit material before me. The real issue is whether there is enough evidence to determine the issue of contributory ***negligence***, even if there is no real conflict in the evidence.
3. it would be unjust to determine the matter on the affidavits because:
4. they have no opportunity to cross-examine the plaintiff before the trier of fact. I do note they have conducted examinations for discovery;
5. other witnesses are available, and their evidence may be enlightening as to what occurred immediately prior to the accident, and what the plaintiff's conduct was;
6. there is no evidence as to distances, estimates of speed or sightlines with regard to the location of the accident.

**12**  With regard to (b) and (c), the defendants have had an opportunity to provide that evidence if they wish. I have been given no specifics as to what evidence they think they can lead at trial, and what difference it might make in the case. I am assuming that they have taken this approach based on, what I view, as their misunderstanding as to the onus of proof with regard to the issue of contributory ***negligence***.

**13**  This is a serious case with significant damages, and a lot at stake for both the plaintiff and the defendants. The seriousness of the injuries and the amount involved are matters to be considered, although it does not preclude a decision pursuant to 18A. See Lee (Committee of) v. Chan, [*[1997] B.C.J. No. 514*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21KJ-00000-00&context=) B.C.S.C. The court pointed out that the amount involved is a factor to take into consideration in determining whether it would be unjust to give judgment under 18A. That alone is not a reason to decline to decide the issue. ([paragraph] 32)

**14**  The evidence that is available to me is that the plaintiff was riding his bicycle down Pacific Way in the right hand lane, next to the curb. He is an avid cyclist and his bicycle was in good working order; he had no problems with his brakes. He had reflective stickers on the centre of his helmet, and the side and back of his shoes, but did not have a light on his bicycle. The accident occurred approximately 10:00 p.m. at night on April 22, 2000. There is no specific evidence as to the lighting, but the sun would have set by that time. There is no evidence of the amount of artificial lighting. Due to the injuries he sustained in the accident, the plaintiff has no recollection of the accident itself.

**15**  The defendant wished to go to a video store in a mall located next to Pacific Way. The defendant was turning left off of Hillside Drive on to Pacific Way, and realized that a concrete divider would prevent him from turning from his proper lane into the mall itself. The defendant did not see any lights coming. Pacific Way rises slightly from the defendant's position, and he may not have had a clear line of sight to determine whether somebody was coming or not. The defendant decided that he would take a chance and drive up the wrong side of the road in order to make a quick entrance into the mall. When the defendant made his left turn into the mall, one of his passengers told him to look out for the bike. The defendant did not see the plaintiff until the plaintiff struck the windshield of the car. Clearly, the defendant was involved in a dangerous and unexpected manoeuvre.

**16**  The plaintiff referred to the decision Adams v. Dias, [*[1968] S.C.R. 931*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22VH-00000-00&context=) (S.C.C.) for the proposition that the plaintiff did not have to anticipate, and keep on the lookout for an unusual and unexpected violation. In that case, a police officer was driving on the wrong side of the road and struck the plaintiff's car. The plaintiff's car had stalled in an intersection, but was in its own lane at the time of the impact. The plaintiff also referred to Haase v. Pedro [*(1970), 21 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G0S7-00000-00&context=) (C.A.). The plaintiff in that case had lost control of his vehicle and slid into the oncoming lane, striking the defendant's car. The plaintiff was alleging that the defendant should have taken steps to avoid the collision. The Court of Appeal found that the defendant was not required to be specifically prepared for action in an unforeseen emergency, but only where the possibility of danger emerging is reasonably apparent, that special precautions must be taken.

**17**  The defendants referred to a number of decisions in which liability had been apportioned in collisions between motor vehicles and bicycles. In Braun v. Lauze, [*[1987] B.C.J. No. 61*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7G6-62FT-00000-00&context=), the court found the plaintiff 90% liable when the defendant crossed a double-line on a curve, hitting the plaintiff who was riding his bicycle. The plaintiff did not have a light. The accident occurred at approximately 10:45 p.m. in August. The court found that had the bicycle been properly equipped in exhibiting a light, the defendant might have observed the bicycle and taken steps to avoid the collision. The court did find that the plaintiff's ***negligence*** in riding without a headlight was a much less blameworthy act than the defendant's actions of driving across the double-line. Liability was apportioned 10% against the plaintiff and 90% against the defendant.

**18**  In the decision Hersh v. Stinson, [*[1992] B.C.J. No. 1428*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M19J-00000-00&context=), liability was apportioned at 50% against each party. The plaintiff riding his bicycle struck the defendant's vehicle. The defendant was making a left turn. Neither party saw the other before the collision.

**19**  In the decision Simms (Guardian ad litem of) v. Anderson, [*[1994] B.C.J. No. 839*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M18B-00000-00&context=), the plaintiff was riding his bicycle on the wrong side of the road. The defendant entered the intersection without seeing the plaintiff's bicycle. The accident occurred at night, and the bicycle was not equipped with a light. The plaintiff was found 50% liable.

**20**  The defendants argue that this accident arose from an imminently foreseeable event, that is, a vehicle turning left into a shopping mall into the path of the cyclist. That description misstates the facts. The fact is that the defendant was driving in the wrong lane, and at a location where it would not be reasonable to expect an oncoming vehicle to turn into the path of the plaintiff. The road is divided to prevent left turning vehicles at that location.

**21**  The question, however, is what, if any, opportunity did the plaintiff have to foresee the danger that the defendant had created, and to take steps to avoid it. The question is also the extent to which the plaintiff's failure to exhibit a light contributed to the accident. These matters do require more evidence than is presently before me. The plaintiff has clearly shown that the defendant is liable for the accident. The onus is now on the defendant to demonstrate the extent to which the plaintiff may have contributed to the accident. On the limited evidence I have before me, this case appears to be very similar to the Braun decision, where the cyclist was found to be 10% liable, but unfortunately I find that I am unable to resolve the issue of the plaintiff's contributory ***negligence*** on the evidence presently before me.

**22**  I should say, however, that this is not a case which would result in litigation by slices, as described in the case Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd., [*[2002] B.C.J. No. 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=), [*2002 BCCA 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=). Nor is it similar to the decision Coast Foundation Society (1974) Ltd. v. John Currie Architect Inc., [*[2003] B.C.J. No. 2749*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TS-00000-00&context=), [*2003 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TS-00000-00&context=), in which the decision under Rule 18A would not have eliminated the issue of liability, or involvement of the party who had brought on the application.

**23**  I find that in all of the circumstances, it would be unjust to determine the issue of the plaintiff's contributory ***negligence*** pursuant to Rule 18A. The amount of damages involved is significant. There is a substantial amount of evidence which is not available which could have been presented by the plaintiff or the defendant. I have concluded that I should not determine the issue of the plaintiff's contributory ***negligence***, against the defendant, simply on the basis of the burden of proof without more.

**24**  It is possible that the matter could have been resolved by way of an 18A application, had there been more evidence presented and if the defendant had properly understood the burden of proof which lay upon it. Although the plaintiff's application is dismissed, the plaintiff will have its costs of this application in any event of the cause.

POWERS J.

**End of Document**

[***Parragh v. Eagle Ridge Hospital and Health Care Centre, [2008] B.C.J. No. 1836***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3B3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G. Barrow J. (In Chambers)

Heard: August 14-15, 2008.

Judgment: September 26, 2008.

Dockets: S064534 and S064535

Registry: Vancouver

**[2008] B.C.J. No. 1836** | 2008 BCSC 1299 | 170 A.C.W.S. (3d) 729

Between Michael Parragh, Plaintiff, and Eagle Ridge Hospital and Health Care Centre, Royal Columbian Hospital, Fraser Health Authority, Dr. Norman Peter Blair, Dr. Robert Maxwell Street, Dr. J. Peck, Dr. David James MacLennan, Nurse C. Tsang, Nurse A. Epperson, Nurse M. Colderon, C.R. Bard, Inc., Bard Canada, Inc., Davol, Inc., Defendants And between Herminigildo Dualan Jr., Plaintiff, and Eagle Ridge Hospital and Health Care Centre, Royal Columbian Hospital, Fraser Health Authority, Dr. Norman Peter Blair, Dr. Robert Maxwell Street, Dr. J. Peck, Dr. David James MacLennan, Nurse C. Tsang, Nurse A. Epperson, Nurse M. Colderon, C.R. Bard, Inc., Bard Canada, Inc., Davol, Inc., Defendants

(87 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Actions by patients against nurses and hospital for *negligence* which led to the contracting of a bacteria dismissed — Plaintiffs argued there was a lapse in sterilization procedures — The plaintiffs did not prove that the defendants were in breach of the standard of care.**

|  |
| --- |
| Actions by patients against nurses and hospital. The plaintiffs argued that they contracted an invasive bacterial infection during their stay in the hospital and that infection gave rise to necrotizing fasciitis. They argued that it was through a negligent lapse in the sterilization procedures in the operating room or by the nurses in their preparation for surgery or by others elsewhere in the hospital that the disease was allowed to colonize in them. The defendants applied to have the actions dismissed under Rule 18A. The plaintiffs opposed the defendants' summary trial application and argued that the matter was not suitable for resolution in that context. The defendants have also applied to strike the jury notice.  HELD: Actions dismissed.  The matter was suitable for summary proceedings as all of the issues as between the parties were before the court and they could be resolved appropriately and justly in this context. The plaintiffs did not prove that the defendants were in breach of the standard of care required of them. |

**Statutes, Regulations and Rules Cited:**

B.C. Supreme Court Rules, B.C. Reg. 221/90, Rule 18A, Rule 28

Evidence Act, [*RSBC 1996, CHAPTER 124, s. 51*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5R0N-PVC1-F60C-X0VP-00000-00&context=)(1), s. 51(2)

**Counsel**

Counsel for the Plaintiffs: R. Josephson and J.A. Wener.

Counsel for the Defendants, Eagle Ridge Hospital and Health Care Centre, Royal Columbian Hospital, Fraser Health Authority, C. Tsang, A. Epperson and M. Calderon: C.L. Woods, Q.C. and S.E. Grubb.

**Reasons for Judgment**

|  |
| --- |
| **G. BARROW J.** |

**Overview**

**1**  The plaintiffs in these actions contracted necrotizing fasciitis shortly after undergoing day surgery at the Eagle Ridge Hospital and Health Center [the "hospital"] in March 2005. In separate actions, they have sued the hospital, the doctors who were involved in their care, some of the operating room nurses, and the manufacturers of the mesh used in their surgeries, alleging ***negligence***. Although they have both also sued the Royal Columbian Hospital, there is no evidence of ***negligence*** as against that institution. The actions against the doctors and the manufacturers of the mesh have been dismissed by consent. The only remaining defendants are the nurses and the hospital.

**2**  The plaintiffs both underwent surgery to repair hernias. Those hernias were repaired with the installation of mesh manufactured by the defendant, C.B. Bard Inc., and its related companies.

**3**  The defendants in both actions have applied to have them dismissed under Rule 18A. The applications were heard on August 14 and 15, 2008. The matter is set to go to trial before a jury for nine or ten days commencing on October 14, 2008. The actions are to be tried separately but are to proceed one after the other.

**4**  The plaintiffs oppose the defendants' summary trial application, arguing that the matter is not suitable for resolution in this context. In the event that it is, they argue that they have proven their case.

**5**  In a separate application heard at the same time, the defendants have applied to strike the jury notice. Those applications are also opposed.

**6**  The essence of the plaintiffs' cases is that they contracted an invasive bacterial infection during their stay in the hospital and that infection gave rise to necrotizing fasciitis, a relatively rare but aggressive and virulent disease that is often fatal. They maintain that they contracted the disease either from the operating room personnel, from the operating room itself, or perhaps, but less likely, from elsewhere in the hospital. They argue that it was through a negligent lapse in the sterilization procedures in the operating room or by the nurses in their preparation for surgery or by others elsewhere in the hospital that the disease was allowed to colonize in them.

**7**  Before turning to the specific issues raised by the applications, I will address the factual background, much of which is not in dispute. I will then turn to the question of the suitability of the matter for resolution by summary trial and finally address the merits of the claims.

**The Facts**

**8**  The plaintiff, Mr. Dualan, was 39 years old when he attended the hospital for the repair of an inguinal hernia on March 2, 2005. Dr. Blair performed the surgery. The surgery itself was uneventful. Mr. Dualan was discharged later that day but became ill almost immediately. He developed a fever the next day and, on March 4, 2005, went to the emergency department of the Burnaby General Hospital. He was complaining of pain in the area of the incision. He was transferred to the Royal Columbian Hospital where he was diagnosed with an invasive Group A Streptococcal infection.

**9**  The plaintiff, Mr. Parragh, was 25 years old when he too attended the Eagle Ridge Hospital for the surgical repair of an umbilical hernia on March 2, 2005. His surgery was similarly uneventful. He too was discharged later that day and, over the course of the next several days, became increasingly sick. He was experiencing pain in the area of his incision and on March 6, 2005, went to the emergency department of the hospital. He was transferred to the Royal Columbian Hospital where he too was diagnosed with invasive Group A Streptococcal infection.

**10**  Both plaintiffs very nearly died as a result of contracting the disease. Both have undergone several operations and have had extensive skin grafting which has left them disfigured.

**11**  The plaintiffs were operated on in the same operating room by the same surgeon, Dr. Blair; the same assisting surgeon, Dr. Peck; and were administered anaesthetic by the same anesthesiologist, Dr. MacLennan. There were seven surgeries in that operating room that day: Mr. Dualan's was the fourth, and Mr. Parragh's was the sixth. The surgeries on both plaintiffs took about an hour. They were taken from the operating room to the post-anesthesia recovery room and then to the surgical daycare ward. Mr. Dualan, whose surgery ended just before 1 p.m., was discharged home at about 2:15 p.m. Mr. Parragh, whose surgery ended shortly after 3 p.m., was discharged home later that day. Neither plaintiff had a dressing change following the surgery and before being discharged from the hospital.

**12**  Three of the five operating room nurses involved in the surgeries are named as defendants. They are Nurse Tsang, Nurse Epperson and Nurse Calderon. The other two were Nurse MacDonald and Nurse Liu. They are not named defendants.

**13**  Group A Streptococcus is a common human bacterium and pathogen. Carriers of the bacterium can be asymptomatic. It gives rise to disease when it is allowed to colonize in a part of the human body that is ordinarily sterile, such as an open wound. Strep throat is one of the more benign diseases that it causes. It also causes much more serious and virulent infections, including scarlet fever, toxic shock syndrome and necrotizing fasciitis, which is sometimes called "flesh eating disease". Group A Streptococcus has a very limited ability to survive outside a human host, although that ability extends to days, as opposed to some shorter time frame. It is thus rarely transmitted by contact with inanimate objects. By far the most common manner of transmission is through contact with another person who is carrying the bacterium. The most common ways it is transmitted from person to person are through skin to skin contact or by the droplets expelled through coughing. Necrotizing fasciitis is, thankfully, a relatively rare disease. The empirical evidence suggests there are between 90 and 200 cases per year in Canada.

**14**  The plaintiffs have tendered expert evidence from Dr. Romney, a medical microbiologist, who was initially retained by the manufacturers of the mesh used to repair their hernias. The foregoing summary of the nature of Group A Streptococcus and its transmission is taken from his report. The defendants do not take issue with his qualifications or his opinions. He reviewed the clinical records associated with the care of the plaintiffs and the manner in which the mesh was sterilized prior to being opened in the operating room. He concluded that it was "exceedingly unlikely" that the mesh was contaminated with Group A Streptococcus prior to it being opened in the operating room. He concluded that while the mesh was the focus of the infection or, as he put it, "the centre of the morbid process", it was not the cause of it. The source of the bacterium was, in his opinion, likely a member of the surgical team who was infected with the organism. The central aspect of his opinion for purposes of this application is found at p. 5 of his report of June 6, 2008, where he wrote:

... In my opinion, the cause of the infection was likely due to (1) carriage of the *Streptococcus pyogenes* by a member of the surgical team (either "scrubbed" or "unscrubbed"), followed by (2) a lapse in aseptic technique and contamination of the surgical field or surgical wound, and (3) the subsequent colonization of the hernia mesh and the eventual development of a surgical site infection.

**15**  Subsequent to the preparation of his report, he conducted further research into the medical literature and expressed the opinion that:

Humans are the reservoir for [Group A Streptococcus]. Theoretically, individuals other than the members of the surgical team may have harboured [Group A Streptococcus] and served as the reservoir for the post-operative [Group A Streptococcus] infections. According to a report in the New England Journal of Medicine, an OR technician who worked in operating rooms before surgical procedures were performed was implicated in an outbreak of 20 post-operative surgical site infections due to [Group A Streptococcus]. This technician carried [Group A Streptococcus] on a skin lesion on his scalp. Health care workers who spent time in adjacent operating rooms have also been implicated in the nosocomial [that is, hospital based] outbreaks of [Group A Streptococcus].

**16**  The plaintiffs retained Dr. Reiner, who is also a microbiologist. He has deposed that Group A Streptococcus infections at surgical sites are an "extremely rare occurrence". When it does occur it is "almost always" as a result of human-to-human contact. In his opinion, the acquisition by the plaintiffs of the bacterium:

... was undoubtedly linked to transmission of Group A Streptococcus from either a colonized health care worker, operating room attendant, member of the cleaning staff or patient who entered the same operating room either shortly before or during the Plaintiff[s'] surgery.

**17**  Once the outbreak of Group A Streptococcus was discovered in these cases, all of the doctors and nurses who were in the operating room during either surgery were tested to determine if they were carriers of Group A Streptococcus. All tested negative. In addition, the operating room itself was swabbed, and when those swabs were analyzed, they were similarly negative for the presence of Group A Streptococcus. Finally, the booking clerk, the surgical daycare ward nurses, and the cleaning staff were tested and they too proved negative for the bacterium.

**18**  I pause here to note that while these tests proved negative, there is an issue as to the accuracy and sensitivity of those tests which I will deal with later.

**19**  It is as against this background that the issues fall to be decided.

**The Issues**

**20**  As noted, the plaintiffs' claims against the nurses and the hospital are in ***negligence***. In order to establish liability, the plaintiffs must prove on a balance of probabilities three things: the existence of a duty of care, a breach of the standard of care, and loss or damage causally connected to the breach. The first matter is not in issue; the second two are. The defendants argue that the evidence establishes that they were not in breach of the standard of care the law requires of them, and even if they were, they argue that the plaintiffs have not proven that their injuries were caused by that breach.

**Suitability for Resolution by Summary Trial**

**21**  The plaintiffs argue that this matter is not suitable for resolution under Rule 18A. In support of that position, they point to a number of specific matters and to some more general issues.

**22**  The relevant portions of Rule 18A are found in subrules (8) and (11) which provide in part as follows:

1. On an application heard before or at the same time as the hearing of an application under subrule (1), the court may
2. adjourn the application under subrule (1), or
3. dismiss the application under subrule (1) on the ground that
4. the issues raised by the application under subrule (1) are not suitable for disposition under this rule,

...

1. On the hearing of an application under subrule (1), 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,

**23**  The plaintiffs argue that the matter is not suitable for resolution under Rule 18A for three reasons. The first is that the issues are said to be unsuitable within the meaning of subrule 18A(8)(b)(i) because it is simply too complicated and the materials too voluminous. The second is that the facts necessary to decide the matter cannot be found as a result of conflicts in the evidence. The third is that it would be unjust to do so.

**24**  In terms of the first issue, the plaintiffs point to ***Chu v. Chen*** [*(2002), 22 C.P.C. (5th) 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2VY-00000-00&context=) (BCSC) [***Chen***], a decision of Bouck J. That case involved voluminous materials and a host of parties, including third parties, all with different but in some cases overlapping and interdependent claims. Bouck J. reviewed the historical and policy reasons for the enactment of the rule. Ultimately, he concluded that the matter was simply too complex and the issues too numerous to permit a just resolution under the rule. While the matter at hand is not without complexity and the materials are voluminous, it does not follow on the authority of ***Chen*** that it is unsuitable for resolution under the rule. Rather, what is necessary is an examination of the issues and the evidence relating to them, followed by a determination of whether it would be unjust to resolve them in this context.

**25**  As to the ability to find the necessary facts, the plaintiffs' position rests upon two propositions. The first relates to the plaintiffs' desire to conduct further discovery, both oral discovery of some employees of the hospital and Rule 28 examinations of those who are beyond the reach of the oral discovery rights. The second is that there is said to be a conflict in the evidence that cannot be resolved. I will deal with each of these matters separately.

**26**  A desire to conduct further discovery is not a basis for declining to deal with a matter under Rule 18A (see ***Anglo Canadian Shipping Co. v. P.P.W., Local 8***, [*[1988] B.C.J. No. 1380*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2P3-00000-00&context=), [*27 B.C.L.R. (2d) 378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2P3-00000-00&context=) (C.A.)). It may be a basis for an adjournment, but it is not a basis for refusing to deal with the matter under the rule. Although no adjournment was sought by the plaintiffs, I will deal with the issue because it does arise and may be relevant to the question of whether it is unjust to decide the matter.

**27**  The desire to conduct further discovery arises in the following circumstances. On August 4, 2008, the plaintiffs learned that the hospital had tested six further individuals for the presence of Group A Streptococcus. The identity or existence of these individuals was not known to the plaintiffs prior to this. There is no suggestion that this was through want of trying; rather it is, in part, because of the provisions of s. 51 of the ***Evidence Act***, *R.S.B.C. 1996, c. 124*, subsection (2) of which provides, in part, as follows:

A witness in a legal proceeding, whether a party to it or not:

1. must not be asked nor be permitted to answer, in the course of the legal proceeding, a question concerning a proceeding before a committee, and
2. must not be asked to produce nor be permitted to produce in the course of the legal proceeding a record that was used in the course of or arose out of the study, investigation, evaluation, or program carried on by a committee, if the record ... was submitted to or compiled or made for the committee at the direction or request of a committee.

**28**  The hospital established a committee within the meaning of s. 51(1), and in the course of that committee's investigation, six individuals were tested for Group A Streptococcus, but their identity was not disclosed to the plaintiffs until recently.

**29**  The defendants argue that this late discovery is of no moment. The six individuals all tested negative for the presence of Group A Streptococcus, and thus discovering them or examining them under Rule 28 cannot advance the plaintiffs' cases.

**30**  Because of the view that I take on the issue of causation, and which I will explain later, I am not persuaded that this recent discovery is of no consequence for that reason. I am, however, satisfied that it is of no consequence for other reasons which I will also address later.

**31**  The second issue raised by the plaintiffs is the asserted inability to find the facts necessary to resolve the matter in a summary trial. This is said to arise from a conflict in the evidence relating to the testing that was carried out on the medical and other personnel for the presence of Group A Streptococcus. Dr. Grant is a microbiologist. She has provided an opinion on the efficacy and accuracy of the testing for the presence of Group A Streptococcus. She notes that there are various methods for testing for the presence of Group A Streptococcus. She reviewed the results in this case as reported by Dr. Purych, who oversaw the testing. She was unable to determine the actual testing protocol that Dr. Purych used, but as a general proposition, it is her uncontroverted opinion that no testing is 100 percent accurate. There is between a 5 and 10 percent chance that Group A Streptococcus was or may have been present in a subject but not identified through testing. There are other qualifications that apply to the test results which I will deal with later. All that need be noted now, however, is the foregoing.

**32**  The defendants concede, for purposes of these applications, that the testing is not 100 percent reliable. They concede that there is a margin of error of the order that Dr. Grant identifies. Given this concession, there is no conflict in the evidence, and thus it cannot be a basis for declining to deal with the matter in a summary trial.

**33**  As to the third issue, the plaintiffs assert that if the matter is resolved under the rule, they will be deprived of their right to "have their day in court". This right includes, they argue, the opportunity to adduce viva voce evidence, to cross examine witnesses for the defendants, to introduce extensive expert evidence, and to argue the complicated questions of causation and liability. In addition, they argue that because of the provisions of s. 51 of the ***Evidence Act***, they have been denied access to the results of an internal inquiry the hospital carried out as a result of the outbreak of the Group A Streptococcus infections and that this adds to the injustice of dealing with the matter in this context.

**34**  As to the latter issue, I make two observations. The first is that the provisions of s. 51 of the ***Evidence Act*** will operate in the same way whether the matter is dealt with under Rule 18A or at a traditional trial. The second is that, although from the plaintiffs' perspective the legislative protection afforded to the results of the hospital's inquiry may appear unjust, it is not unjust in the sense the notion is understood in this context. The legislature has made a determination as to how the competing interests at play when a hospital, with a view to improving medical or hospital care, undertakes an investigation into that care, are to be treated. In ***Sinclair v. March***, [*[2000] B.C.J. No. 1676*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22S0-00000-00&context=), [*2000 BCCA 459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22S0-00000-00&context=), Donald J.A. expressed the matter as follows at para. 26:

It can be seen from this analysis that the Legislature intended to protect this area of hospital activity by preventing access by litigants. Rather than striking a balance of interests, the Legislature made a clear choice in favour of one interest, hospital confidentiality. In the course of deciding an issue under s. 51 a court should give the language of the enactment its full force and effect with the object in mind: s. 8, ***Interpretation Act***, *R.S.B.C. 1996, c. 238*. This was the approach taken by Mr. Justice Low in ***Cole v. St. Paul's Hospital*** (21 August 1998), Vancouver Registry No. C963888 (BCSC) ...

It is not unjust to deal with a matter in accordance with the law of this province, and thus I am not persuaded that this is a basis for declining to deal with these actions under Rule 18A.

**35**  As to the former matters, none are a basis to decline to resolve a matter under the rule. A summary trial is a trial. It is, for both parties, "their day in court". The parties, and in particular the plaintiffs, have the opportunity to adduce evidence and they have done so. They have the opportunity to cross-examine the witnesses of the other side. The plaintiffs in this case could have applied to cross-examine the defendants' witnesses on their affidavits. They have chosen not to do so, although many of them have been examined for discovery. They have the opportunity to introduce expert evidence and they have done so. Finally, they have the opportunity to argue the legal issues and they have done that. I am not persuaded that these are reasons not to decide the matter under the rule.

**36**  Finally, the plaintiffs argue that because there are issues of apportionment of liability between the hospital and the nurses, it is not appropriate to deal with only one defendant or group of defendants because of the potential of embarrassing the trial judge should the case as against the remaining defendant or group of defendants be left to a conventional trial. Support for this proposition is to be found in ***Kaba v. Cambridge Western Leaseholds Ltd.*** [*(1997), 43 B.C.L.R. (3d) 80*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24BB-00000-00&context=) (C.A.). I agree that when there are overlapping issues as between two or more defendants or as between some defendants and the plaintiff or plaintiffs, it will usually be desirable to deal with those issues together. On the other hand, if all of the issues between all of the parties are before the court, and are otherwise amenable to resolution in a summary trial, the fact there are multiple parties and overlapping issues is not a bar to resolving the matters. All of the issues as between the parties are before the court in this case, and for the reasons already given and those which follow, I am satisfied that they can be resolved appropriately and justly in this context.

**The Merits**

**37**  Before turning to the case as against the specific defendants, some findings of fact that arise from the evidence are in order. I am satisfied on a balance of probabilities, based on the evidence of Dr. Romney and to a lesser extent that of Dr. Reiner, that the plaintiffs were colonized with the disease at the site of their surgical incision. That is Dr. Romney's opinion and that opinion is not controverted. The fact that they were colonized in the hospital cannot and is not seriously contested given the locus of their infections and the fact that the hospital is the only place they both were in the days just prior to being diagnosed. Further, I am satisfied that they were colonized with the disease while in the operating room. They did not have a dressing change before leaving the hospital, and they had different surgical daycare nurses.

**38**  Further, I am satisfied that the bacterium was transferred to the plaintiffs by a person. While that is not invariably the case, I am satisfied that on a balance of probabilities that is what happened with these plaintiffs. Dr. Romney's opinion is that this is the likely method of transmission, and Dr. Reiner is of the opinion that it is "almost always" the method. Thus, the possible sources are the doctors, the operating room nurses and possibly, but less likely, a member of the cleaning staff who was in the operating room prior to the surgeries.

**39**  It follows from the foregoing that if there was ***negligence*** on the part of the hospital, it flows from its vicarious responsibility for the nursing staff in the operating room or the cleaning staff responsible for the operating room. The ***negligence*** alleged against the nurses is the same in both actions, and it is that they failed to provide adequate sterilization, failed to adequately sterilize the Bard Mesh used in the surgeries, and failed to ensure a germ-free environment in the operating room. The ***negligence*** alleged against the hospital rests on similar allegations but extends to the nurses who were in the operating room but are not named defendants and the cleaning staff.

1. **Have the plaintiffs proven a breach of the standard of care?**

**40**  To appreciate this issue, as it relates to the nurses, it is necessary to understand the functions preformed by the various nurses involved.

**41**  In an operating room, nurses are designated as either circulating or scrub nurses. Circulating nurses do not work in the immediate vicinity, or sterile field, of the operation and are subject to less stringent sterilization protocols. Scrub nurses, on the other hand, do work in the sterile field and are subject to a higher sterilization protocol.

**42**  Generally, circulating nurses are responsible for setting up the operating room and assisting the anesthesiologist. Setting up the operating room involves ensuring the necessary supplies for the operation are present and sterile. In addition, it involves gowning and setting up the tables; examining the packages of instruments and materials that will be used during the operation to ensure the integrity of the packaging. They assist the anaesthesiologist with intubating the patient, and then they take the patient to the operating room. Once in the operating room, they call for the surgeon. If there is more than one circulating nurse, they share these tasks.

**43**  Scrub nurses have different duties, although there is some overlap in their functions and those of circulating nurses. They are responsible for checking the plastic and paper drapes to be used to gown the instrument table and drape the patient during the surgery for tears or rips. They then set out the instruments. Next, they assist the surgeon and assistant surgeon to gown and glove. Once that is completed, the scrub nurse hands the surgeon the drape to be placed on the patient around the area that is to be incised. He or she then assists in the surgery under the direction of the surgeon.

**44**  There were five nurses involved in the surgery of both Mr. Parragh and Mr. Dualan. All five have provided affidavit evidence and all have been examined for discovery. The scrub nurse during Mr. Dualan's surgery was Nurse Tsang. There were two circulating nurses: Nurse Liu and Nurse Calderon. The scrub nurse during Mr. Parragh's surgery was Nurse MacDonald. There were three circulating nurses: Nurse Tsang, Nurse Epperson and Nurse Calderon. It is not clear why certain nurses are named as defendants and others are not. Two of the three named defendant nurses were present for both surgeries but the third, Nurse Epperson, was only present for Mr. Parragh's surgery.

**45**  In terms of the affidavit evidence, all of the nurses have deposed that they have no personal recollection of the surgeries in issue. Nurses Calderon, Epperson, Lui and Tsang, who were employees of the hospital, base their evidence on their knowledge of "the usual and standard practices" at the hospital. Nurse MacDonald, who was completing the practicum portion of her studies at the British Columbia Institute of Technology leading to certification as a scrub nurse, bases her evidence not on the usual practice at the hospital, but rather on "the standard and usual practices" taught at B.C.I.T. In addition, they have all deposed that they base their evidence on their "usual and invariable practices" and by an examination of the hospital records.

**46**  The sterilization procedure they follow once they arrive at the hospital is the same, with one minor variation, whether they are circulating or scrub nurses. All of them have deposed that upon arrival at the hospital, they put boot covers over their shoes, put on an operating room cap, and wash their hands. They do this in the change room. All of them, except Nurse MacDonald, change into their work shoes in the changing room; Nurse MacDonald's affidavit evidence is silent on whether she changes into her work shoes at the hospital or simply wears them to work.

**47**  Nurse Calderon, who was a circulating nurse during both operations, has deposed that after changing into her work clothes and before leaving the change room, she washes her hands. Before entering the operating room, she "always" puts on a surgical mask and washes her hands again with soap. She rinses them and dries them using paper towel by the sink which is just outside the door to the operating room. If she assists with intubating the patient, she wears gloves. In the operating room itself, she wears gloves only to protect herself from the patient's bodily fluids, or if required to pick up sponges or instruments that may fall to the floor. She also wears eye goggles to protect herself from splashes. If she gets anything on her hands during surgery, she washes them. Once the surgery is completed and she removes her gloves, she washes her hands again to remove the powdery residue left by them.

**48**  On examination for discovery, she said that she learned of the outbreak of the disease from the news shortly after the surgery, and while she tried to recall the events, she was not told the identity of the patients and because she assists in many operations, she could not recall any specific one, especially, I infer, one that proceeded uneventfully at the time.

**49**  Nurses Liu and Epperson acted only as circulating nurses on the day in question. Nurse Epperson's affidavit evidence on the practice she follows prior to entering the operating room is as follows:

As a circulating nurse, I would wash my hands prior to escorting the patient into the operating room or prior to assisting with the operating room set up. I would wash my hands with soap and warm, running water with vigorous friction for one or two minutes. I would dry my hands with paper towel beside the sink outside the operating room. I would put a mask on prior to entering the operating room. As a circulating nurse, I would not be part of the sterile surgical team and as such would not complete a surgical scrub ...

As a circulating nurse, I would generally not be wearing gloves. I would wear gloves if there was a chance of coming into contact with body fluid ... I always wear gloves when assisting the anaesthesiologist. I would also wear gloves if I was retrieving sponges or instruments that had fallen on the floor.

**50**  Nurse Epperson gave evidence on her examination for discovery that she had no recollection of the surgeries on either of the patients. She, too, first learned of the outbreak shortly after it was diagnosed. She said that she has sneezed or coughed while in the operating room and has observed other nurses doing so as well.

**51**  Nurse Liu was employed as a relief operating room nurse on March 2, 2005. Relief nurses are generally circulating nurses as opposed to scrub nurses, and that is the job Nurse Lui performed during Mr. Dualan's surgery. She has deposed that she changes in the change room where she puts on shoe covers and a hair cover. She washes her hands with soap and water for about a minute. She then proceeds to the door of the operating room, outside of which she rinses her hands and dries them with the paper towel provided for that purpose. Once inside the operating room, she only wears gloves if she comes in contact with anything that may contain bodily fluids from the patient. As a circulating nurse, she does not enter the sterile core of the operating room. She spent four minutes in the operating room during Mr. Dualan's surgery, and when she left, Nurse Calderon assumed circulating nurse responsibilities. Portions of her examination for discovery evidence have been led by the plaintiffs, although they deal only with the cleaning staff and her observations of the work they do. I will address that later.

**52**  The two scrub nurses were Nurse MacDonald and Nurse Tsang.

**53**  Nurse MacDonald has deposed that as a scrub nurse and after leaving the change room, she goes to the operating room but, before entering, would wash her hands and put on a mask. She then prepares the operating room by setting up the instruments and ensuring that the packaging in which the supplies necessary for the operation are contained are intact. After doing that, she leaves the operating room and performs a surgical scrub. Doing a "scrub" involves opening a scrub brush package and using the nail cleaner in it to clean under the nails. She then cleans all the surfaces of her hands and up each arm to the mid-forearm, and then up to the elbows. This process takes between five and seven minutes. She then holds her hands up, with her arms bent at the elbows, and backs into the operating room where she dries her hands on a sterile towel in the room. She then puts on a surgical gown without putting her arms through the cuffs. With the gown partially on, she puts on a sterile glove using the cuff of the gown to hold it. Then she puts that hand through the cuff on her gown and using the same process gloves her other hand and completes putting on the gown. She then puts on another set of gloves, thus double gloving her hands, after which a circulating nurse ties her gown at the neck and on the inside and she ties the outer ties.

**54**  She has deposed that after donning her attire and performing her scrub, she examines the plastic and paper surgical drapes for the presence of tears. She then sets out the surgical instruments and assists the surgeon and the surgical assistant to gown and glove.

**55**  Nurse Tsang has provided two affidavits, one in relation to her duties as a circulating nurse during Mr. Parragh's surgery, and the other in relation to her duties as the scrub nurse during Mr. Dualan's surgery. In relation to what she did as a circulating nurse, she has deposed as follows:

When I arrive at the hospital, I change into my operating room attire. I change into my work shoes and put shoe covers over my shoes. I put on an operating room cap. I wash my hands prior to leaving the change room with general detergent.

...

Prior to entering the operating room, I always put on a surgical mask and wash my hands. As a circulating nurse, I would wash my hands with general detergent and running water and rinse them under the water. I would dry my hands with paper towel beside the sink outside the operating room. I would not perform a surgical scrub as I was not part of the sterile surgical team ...

...

As a circulating nurse, I would wear gloves to protect myself from contact with a patient's blood and bodily fluids. I wear gloves every time I assist with intubation. After removing my gloves, I either leave the operating room to wash my hands or I use Manorapid or Isogel (alcohol sanitizing gel) to clean my hands in the operating room.

**56**  As to what she does when acting as a scrub nurse, she has deposed that she changes in the same manner as when she is a circulating nurse. As to what else she does, she has deposed as follows:

As a scrub nurse, I would put on protective eye glasses and a surgical mask. I would do a one-minute scrub with general detergent soap and running water. I would wash up to my elbows with soap and would use a nail pick under my fingernails. I then dry my hands with paper towel. I then use Manorapid, which is an alcohol-based srub [detergent] (antimicrobial agent). I rub the Manorapid in a circular motion between my fingers and clean my fingernails on both hands. I rub the remaining Manorapid on both my hands until it dries. I take another handful of Manorapid and rub up both my forearms until it dries. I then take one last handful of Manorapid and rub my hands before entering the operating room, and allowing my hands to air dry.

I hold my hands in an upwards position. I back into the operating room and wait until my hands are completely dry before gowning and gloving. The circulating nurse opens the gown and glove packages. I put on a vinyl glove liner and then I put on my gown. I use the closed method to put on my gloves and ensure that my hands do not penetrate through the cuffs of the gown. I pick up a sterile glove and put it on my hand through the cuff using the cuff edge to hold it and repeat for the other side. The circulating nurse ties the neck and the inside tie of the gown on my back and I would tie the outside tie.

After gowning and gloving, I would proceed to check the plastic surgical drapes to make sure there are no tears in them. I would set out the instruments required for the surgery. I would check the integrity of the table and would check the sterility indicator as well. The sterility indicator is a chemical indicator in the set that proves the sterility of the instruments. I would count the sponges and the instruments with the circulating nurse.

**57**  In her examination for discovery, Nurse Tsang was asked about whether she ever came to work when she was sick. She said she did not. She said that if she had symptoms of illness, she would not go to work. She conceded, as she must, that she could have an infection which was asymptomatic and still be at work.

**58**  There is both a tension and a gap in the evidence relating to the standard of care expected of nurses in an operating room. I will explain those matters below. There is, however, no conflict in the evidence because the only evidence as to the required standard of care is from Nurse Wynne.

**59**  Nurse Wynne has been a registered nurse since 1977. She has both a bachelors and masters degree in nursing. She received a diploma in operating room nursing from St. Paul's Hospital in 1984 and was certified in perioperative nursing in 1995, the first year such certification was offered by the Canadian Nurses Association. She has long experience in operating room nursing and has taught the course leading to perioperative certification and evaluated those who seek certification.

**60**  She reviewed excerpts from the Fraser Health Infection Control Manual dealing with eyewear; gloves; gowns; masks; hand washing; handling sharp objects; infection control; waste management; spills of blood and other bodily fluids; prosthesis handling; aseptic technique practice; scrubbing, gowning and gloving practice; draping practice; and surgical site preparation practice.

**61**  According to Nurse Wynne, the Operating Room Nurses Association of Canada publishes a document entitled "Recommended Standards, Guidelines, and Position Statements for Registered Nursing Practice". Hospitals commonly adopt these standards as their own, particularly as they relate to basic matters such as aseptic technique. In her opinion, all of the nurses involved in the care of the plaintiffs while in the operating room followed the applicable standards for scrubbing, gowning, gloving, handling prostheses, and establishing and maintaining a sterile field in the operating room. Further, in her opinion, they were all appropriately attired for working in the operating room. She notes that hand washing is not addressed in the recommended standards referred to above but that it is addressed in the Fraser Health Authority's infectious control manual, and the nurses washed their hands in accordance with that manual. There is no evidence that either the standards recommended by the registered nurses, or those adopted by the Fraser Health Authority, are in any way wanting.

**62**  The gap in the evidence on the standard of care relates to whether, if the appropriate procedures are followed, it is possible for a patient to be colonized with Group A Streptococcus. Nurse Wynne does not, and perhaps cannot, address that issue. While this might analytically be addressed in relation to causation, I note it now because it is convenient to do so. The fact that it remains an open question does not lead to the conclusion that the defendants have not proved compliance with the standard of care. It is not for the defendants to prove or disprove the proposition. That burden rests on the plaintiffs, and there is no reason to conclude simply because this is a medical malpractice case that it ought to shift to the defendants.

**63**  The tension in the evidence relating to the standard of care arises from the juxtaposition of the evidence of Dr. Romney and that of Nurse Wynne. Dr. Romney's opinion is that the plaintiffs were colonized with the bacterium by a member of the surgical team as a result of a lapse in aseptic technique by one of the team. Dr. Romney is not, as the defendants point out, a nurse and he is not qualified to offer an opinion on whether the aseptic technique followed by the nurses met the standard of care expected of them. I cannot conclude that a lapse in aseptic technique is the same as a breach of the standard of care. The evidence as to the applicable standard of care simply does not permit that conclusion.

**64**  Before leaving this issue, I will comment on a further basis upon which the plaintiffs argue that a breach of the standard of care has been proven. Although not referred to as such by them, the defendants have characterized it as *res ipsa loquitur*, and I think that is an accurate characterization. It is a doctrine that has been applied to prove both a breach of the standard of care and, less commonly, causation. Although the doctrine itself is "expired" (per Major J. in ***Fontaine v. British Columbia (Official Administrator)*** [*(1997), 156 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=) (SCC) at p. 585), circumstantial evidence of a breach of the standard of care may still be sufficient to prove such a breach. A breach of the applicable standard of care may be inferred from the fact of the loss or damage when, among other things, it can be concluded that the loss or damage would not have happened but for such a breach. Put another way, if common experience is such that the conclusion can, not must, be drawn, then a trier of fact may infer a breach of the standard of care. This is not a case in which common experience allows for the drawing of that conclusion. The inference I am invited to draw is that if the nurses met the standard of care expected of them, the plaintiffs would not have contracted the disease. While it is tempting to draw that inference, common experience certainly does not dictate that result. I simply do not know, on a balance of probabilities or any other test, whether that is so.

**65**  I return now to the recently disclosed six individuals that the plaintiffs point to as a basis for not dealing with this matter in the context of an 18A application. They are Nurse Green, who completed the surgical daycare admission record for Mr. Parragh; Nurse Diane Beadle, who performed the same task in relation to Mr. Dualan; Ms. Minty, who was the patient registration clerk; and three housekeeping staff members, Ms. Zvicer, Mr. Buckley, and Ms. Wlodarczuk.

**66**  I accept that the plaintiffs did not know of the identity of these individuals until very recently. Because of the conclusion I have reached regarding where and how the plaintiffs contracted their diseases, that is, in the operating room and at the site of their surgical incisions, I do not consider that examining the patient registration clerk, who dealt with them before they went into surgery, can advance the case. As for Nurses Beadle and Green, they only dealt with the plaintiffs after surgery and neither dealt with both of them. I am unable to appreciate how examining them would advance the plaintiffs' cases.

**67**  That leaves for consideration the three members of the housekeeping staff. Although the identity of the specific housekeeping staff may not have been known until recently, if the plaintiffs wished to advance a claim against the hospital on the basis of a breach of the standard of care expected in relation to the cleaning and sterilizing of the operating room, it is for them to prove the standard of care and a breach of it. It must have been apparent some time ago that someone was responsible for cleaning the operating room even if the identity of those persons was not known. The fact that their identity was unknown does not prevent the plaintiffs from proving the standard of care expected of operating room cleaning staff. They have not done that and I am unable to conclude as a matter of common experience what it is or should be. Nor am I able to conclude, whatever that standard may be, that it was breached. As with the operating room nurses, I do not know whether following whatever standard of care the cleaning staff may be subject to, that transmission of Group A Streptococcus is impossible or so highly unlikely that it leads to the conclusion on a balance of probabilities that it was breached.

**68**  It follows that I am not satisfied that the plaintiffs have proven the named defendant nurses or the hospital were in breach of the applicable standard of care.

1. **Have the plaintiffs proven causation?**

**69**  Although the conclusion I have reached in relation to the standard of care is sufficient to dispose of these cases, I will comment on the issue of causation because substantial argument was devoted to it. It is a live issue in this case both in its factual and legal sense.

**70**  As to the law, the Supreme Court of Canada has addressed the issue several times recently. The leading case, in the context of medical malpractice, is ***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=) [***Snell***], where Sopinka J. discussed the issue. In 1996, Major J. dealt with the issue more generally 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=). Finally, in ***Resurfice 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=); [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) [***Resurfice***], McLachlin C.J. considered the question. These cases identify two tests or ways in which a defendant may be said to have caused a plaintiff's injuries: the first is the "but for" test, and the second is the material contribution test. As to the former, McLachlin C.J. said this in ***Resurfice*** at paras. 21 to 23:

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 ...

This fundamental rule has never been displaced and remains the primary test for causation in ***negligence*** actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he 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" ...

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.

**71**  McLachlin C.J. said this about the material contribution test at paras. 24 and 25:

However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

First, it must be impossible for the plaintiff to prove that the defendant's ***negligence*** caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

**72**  In ***Resurfice***, the trial judge applied the "but for" test and dismissed the claim. The Court of Appeal overturned that decision on the basis that where there is more than one possible cause of a plaintiff's injury, the material contribution test must be applied. The Supreme Court of Canada disagreed and restored the trial judge's decision.

**73**  ***Snell*** was a medical malpractice case. There Sopinka J. began his analysis by noting the two board principles which govern the allocation of the burden of proof as it relates to causation. The first is that the party asserting cause (usually the plaintiff) has the burden of proving it; the second is that "... where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it ..." (at para. 16 - quoting from 9 ***Wigmore on Evidence*** (Chadbourn rev. 1981), s. 2486 at p. 292).

**74**  Sopinka J. noted at paragraph 18 the importance of the second of these principles in medical malpractice cases when he wrote:

Proof of causation in medical malpractice cases is often difficult for the patient. The physician is usually in a better position to know the cause of the injury than the patient. On the basis of the second basic principle referred to above, there is an argument that the burden of proof should be allocated to the defendant. In some jurisdictions, this has occurred to an extent by operation of the principle of res ipsa loquitur ...

**75**  The issue of the burden of proof in relation to causation, and to a lesser extent the test for causation, had become uncertain in the years leading up to ***Snell***, in part, because of an English case, ***McGhee v. National Coal Board***, [1973] 1 W.L.R. 1 (H.L.), and cases which followed or purported to apply it. The effect of these decisions was to alter the burden or manner of proof of causation such that the plaintiff simply had to "prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation" (para. 26). Sopinka J. rejected both of these alternatives and reaffirmed the traditional test and burden of proof relating to causation; save that if he were satisfied that defendants who have a substantial connection to a plaintiff's injury were escaping liability on the basis of the application of the traditional approach, he would not hesitate to adopt one or the other of the alternatives.

**76**  Sopinka J. made two further observations about causation. First, he noted at paragraph 29 that causation need not be determined with scientific precision, in part, because science, and particularly medical science, is not precise. Second, in those medical malpractice cases where the evidence or facts relating to causation lie peculiarly with the defendant, then "very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary" (at para. 30).

**77**  Before turning to the arguments in the matter at hand, it bears repeating that in both approaches to causation, a breach of the applicable standard of care is a necessary prerequisite. In what follows, I will assume there was a breach of that standard.

**78**  The plaintiffs argue that this case is precisely the kind of case Sopinka J. had in mind in making the observations just noted. They argue first that for two patients to contract the same rare disease, in which the only thing they have in common is having undergone an operation in the same operating room, gives rise to the inference that they contracted the disease during their respective operations. They argue that on the application of common sense, an inference of causation should be drawn.

**79**  The defendant nurses argue that causation has not been proven by positive evidence. Further, they argue that the drawing of an inference of causation, as contemplated by Sopinka J. in the passage from ***Snell*** noted above, is something that may be done only in the absence of evidence to the contrary, and here there is evidence to the contrary, inasmuch as the defendant nurses were tested and those tests were negative for the presence of the bacterium.

**80**  The argument proceeds as follows and is said to be determinative regardless of whether the "but for" test or the material contribution test is applied. If the nurses were negligent in the manner in which they prepared themselves for the surgery or during the surgeries, there is no evidence upon which it can be concluded that their ***negligence*** was causally related to the plaintiffs contracting the disease. In other words it cannot be concluded that but for the defendant nurses' ***negligence***, the plaintiffs would not have contracted the disease. This, it is argued, is because the nurses all tested negative for the presence of Group A Streptococcus.

**81**  As already noted, those tests are not 100 percent accurate even under optimal conditions. Further, the accuracy or sensitivity of the tests diminishes as the time between the possible transmission and the test lengthens. In addition, if those tested took a course of antibiotics prior to being tested that too may compromise the results.

**82**  As to the latter qualification or limitation on the tests, there is no evidence that any of the nurses took a course of antibiotics between the surgeries and when they were tested. I recognize that this is a matter within their knowledge, but it is something they could have been asked on examination for discovery or under a Rule 28 examination, and thus it is not the kind of thing that should give rise to an inference of causation. Thus, while there is no doubt that the testing may be less reliable if the subject of the test took a course of antibiotics in the period between possible transmission and the time of testing, that is not a qualification that has been proved to apply in these cases.

**83**  As to the passage of time between the testing and the possible transmission of the infection, swabs were collected from the nurses on various dates. Nurse Tsang provided swabs that were tested on March 7th and 10th; Nurse Calderon provided swabs that were tested on March 8th and 10th; Nurse Liu provided swabs that were tested on March 7th; Nurse Epperson provided swabs that were tested on March 8th and 10th; and Nurse MacDonald provided swabs that were tested on March 7th. In addition, the surgical daycare nurses were tested. Nurse Beadle was the daycare nurse looking after Mr. Dualan, and Nurse Green was the daycare nurse attending to Mr. Parragh. They, too, were tested and the results were negative for the presence of Group A Streptococcus. Finally, some 12 different areas in the operating room were swabbed and all of those areas tested negative for Group A Streptococcus. Those tests were done on March 18th. Thus, the nurses were all first tested within six days of the surgeries. Two provided additional swabs eight days after the surgery. The tests on the various surfaces of the equipment and furnishings in the operating room were done some 16 days after the surgeries, but because I am satisfied that the disease was transmitted from person to person, that is of no consequence.

**84**  The evidence of Dr. Grant is that a delay of even five or six days can affect the accuracy of the test results. The degree to which that is so is not in evidence.

**85**  The fact is, however, that the plaintiffs contracted the disease while in the operating room. Although everyone involved tested negative for the presence of the bacterium, one of them must have been a carrier and that person's test results simply fell within the margin of error Dr. Grant described. Viewed from this perspective, the case is similar to ***Cook v. Lewis***, [*[1951] S.C.R. 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=) [***Cook***]. There two hunters fired simultaneously at a third hunter, the plaintiff. It could not be determined which of the two shots struck the plaintiff. The court held that given that both were in breach of the standard of care, the plaintiff ought not to be denied compensation simply because it was impossible to establish which defendant had actually fired the shot that ultimately struck the plaintiff. Here, if I am correct in my conclusion that one of the operating room personnel was a carrier of the Group A Streptococcus that infected the plaintiffs, and it is impossible to determine who it was, a similar result would follow. The distinction between the matter at hand and the situation in ***Cook*** is that, in that case, a breach of the standard of care was proven. Here it has not been. Thus, while I am satisfied that the plaintiffs cannot succeed, I do not reach that conclusion on the basis of a failure to prove causation.

**Conclusion**

**86**  I am satisfied that it is appropriate to deal with this matter under Rule 18A. I am not satisfied that the plaintiffs have proven the defendants were in breach of the standard of care required of them. In the result, both cases are dismissed and it is unnecessary to deal with the application to strike the jury notice.

**87**  The plaintiffs indicated that in the event these matters were dismissed, they wished to address the issue of costs. I will, therefore, make no order in that regard now. If the issue cannot be resolved by consent, I will hear from the parties at a time arranged by the trial coordinator, and I will hear it by telephone if it cannot be conveniently scheduled at a time when I am scheduled to be sitting in Vancouver.

G. BARROW J.

**End of Document**

[***Peters v. Ortner, [2013] B.C.J. No. 2241***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23KN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W.J. Harris J.

Heard: July 15-19, 2013.

Judgment: October 10, 2013.

Docket: M112769

Registry: Vancouver

**[2013] B.C.J. No. 2241** | [*2013 BCSC 1861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1FG-00000-00&context=)

Between Laverne Charles Peters, Plaintiff, and Lisa Marlena Ortner and Enterprise Rent-A-Car Canada Ltd., Defendants

(153 paras.)

**Counsel**

Counsel for the Plaintiff: S.T. Cope.

Counsel for the Defendants: J.W. Marquardt.

**Reasons for Judgment**

|  |
| --- |
| **W.J. HARRIS J.** |

**Introduction**

**1**  The plaintiff, Laverne Peters, claims damages for injuries arising out of a motor vehicle accident (the "MVA"). He seeks compensation for non-pecuniary loss, loss due to impaired past and future earning capacity, future care costs, and special damages, as well as costs. At the time of the MVA Mr. Peters was 53 years of age and living in Abbotsford, British Columbia.

**2**  Liability for the MVA is not in dispute. However, the extent of the plaintiff's injuries and the amount of damages is in dispute.

**The MVA**

**3**  The MVA occurred on June 25, 2009. The defendant, Lisa Ortner, rear-ended Mr. Peters' vehicle. Ms. Ortner was driving a car she had rented from the defendant, Enterprise Rent-a-Car Canada Ltd.

**4**  Mr. Peters' car was stopped at the time of the collision. Mr. Peters was waiting to turn left at the T-intersection of Sunnyside and Old Yale Road in the City of Abbotsford, BC. Before he could turn, the vehicle driven by Ms. Ortner, which was travelling in the same direction as Mr. Peters, collided into the back of Mr. Peters' vehicle, pushing his vehicle into the intersection. The collision caused considerable damage to the rear of Mr. Peters' vehicle, a 1998 Volvo, and the front of the 2009 Pontiac driven by Ms. Ortner.

**5**  Mr. Peters was wearing a lap and shoulder restraining device at the time of the collision.

**6**  Mr. Peters testified that immediately after impact he could feel his vertebrae popping in sequence; his head hurt; he had neck and shoulder pain; his lower arms were numb; his legs and feet were sore; and he felt dazed. While he was briefly seen by an ambulance attendant at the scene of the MVA, he did not go to the hospital. His brother drove him home. He went to work the next day, although he took time to go to his family physician and his chiropractor. He had a severe headache over the weekend immediately following the MVA.

**Injuries to Mr. Peters**

**7**  At trial, Mr. Peters claimed the following physical injuries resulting from the MVA:

1. headaches, ranging in severity and frequency;
2. neck pain;
3. shoulder pain, particularly in his right shoulder;
4. bruising and stiffness in his knees;
5. numbness and tingling in his hands; and
6. soreness in his chest.

**8**  Mr. Peters acknowledged that the frequency and intensity of the headaches has reduced significantly since the MVA. He said he initially experienced debilitating headaches more than once a month. He described them at a level of 10 out of 10. He said the headaches were often brought on by stress or physical exertion. The severe headaches gradually reduced and he found a combination of medication as well as stress management and chiropractic adjustments helpful. However, he continued to experience headaches, which he described at a level of 3 or 4 out of 10 on almost a daily basis, until the summer of 2012. He said that he still has level 4 headaches once a week or less, which are controlled by over the counter medication. He said that, although he had previously had stress and sinus headaches for which he received treatment, these headaches were different.

**9**  Mr. Peters testified that the MVA caused injury to his neck. He said his neck continues to be tight, like "a guitar string". He said his neck pain varies in intensity but is "never zero". The pain flares up with physical exertion. He, therefore, avoids heavy lifting and changes the position of his neck and head as a means of avoiding neck pain.

**10**  Mr. Peters also testified that the MVA caused injury to his shoulders. He said he had pain in both shoulders following the accident, with the pain in the left shoulder resolving itself within 18 months. He said the pain in the right shoulder continues. He described it as feeling like having a finger nail pressing into his shoulder, and the feeling worsens with strenuous physical activity. He testified that he has noticed no improvement in his right shoulder since the MVA, although he has learned to avoid activities which aggravate it.

**11**  Mr. Peters said the stiffness in his knees and ankles resolved itself in less than two months after the MVA.

**12**  With regard to the soreness in his chest, Mr. Peters attributed this to the seat belt he was wearing at the time of the collision. He said it caused no bruising and resolved itself shortly after the MVA

**13**  Mr. Peters also described experiencing numbness and severe tingling in his hands, and particularly in his fingers, following the MVA. These sensations largely resolved in about a year, although there is some numbness and tingling in his fingers which persists. It has not affected his grip strength or use of his hands.

**14**  Mr. Peters testified that following the accident, he had difficulty getting to sleep and staying asleep because of the pain in his neck and right shoulder. He said that his habit was to sleep on his right side, which would exacerbate the pain in his shoulder and neck. He said that he was getting less than 5 hours of sleep, and that this continued until 2011 when he received therapeutic treatment from a psychologist, Dr. Bubber, regarding sleep routines and relaxation techniques. At this time, he also began taking a combination of over the counter pain medications which he found to be effective.

**15**  In addition to the physical injuries, Mr. Peters testified to the effects of the MVA on his work and his personal life.

**16**  At the time of the MVA, Mr. Peters was employed as the corporate comptroller for North West Rubber Ltd. (the "company"), where he had worked since 2003. He had become a fully qualified certified general accountant while employed at the company. Previously he had been employed in management and technology related positions. Mr. Peters also had a consulting business with his wife, which generated additional income.

**17**  Mr. Peters testified that within two months of the MVA, he started to experience what he described as "numeric dyslexia". He began to make errors in his accounting work because he could not discern the difference between numbers. Specifically, he incorrectly entered numbers on spread sheets and had difficulty identifying numeric errors. He first noticed this in his consulting work for Jordair Compressors Inc. and, as a consequence, he testified that he declined to perform certain analytical work which he had done for this company in the past.

**18**  He said he subsequently noticed similar errors occurring in his accounting work for North West Rubber Ltd. As a consequence of errors he made from time to time, he testified he had to correct and re-issue various financial statements and reports. Although Mr. Peters was able to continue to do his job, he became increasingly frustrated and embarrassed by the errors he was making. He could not understand why he was making errors that he had not made in the past. To avoid making such errors, he testified he spent considerable time double checking his work and re-assigned some of his accounting work to others.

**19**  Mr. Peters also testified that, while he has always had a quick temper, since the MVA, he has become more irritable at work, resulting in, on one occasion, an angry "blow up" with a bank employee. He was reprimanded by the company for this. He said that, with the help of Dr. Bubber, he has learned to employ strategies to control his emotions at work.

**20**  Mr. Peters said that, because of the errors he attributed to "numeric dyslexia" and the anger issue, he felt he could not press the company for the ownership share he believed he otherwise would have received. He was concerned he could lose his job due to the "deficiencies" in his performance.

**21**  Although Mr. Peters did not lose his job due to errors he had made since the MVA, just prior to the commencement of the trial he was given notice that his employment with the company would be coming to an end. The chief executive officer ("CEO") of the company, Leighton Friesen, testified that the company decided that it required a chief financial officer ("CFO"), rather than a comptroller, in light of the changing needs and continued growth of the business. Mr. Friesen was not confident that Mr. Peters had the level of financial expertise and team management skills to carry the company forward in a period of anticipated rapid expansion. Mr. Peters agreed to continue for a number of months to assist in the transition.

**22**  Given his knowledge and experience, Mr. Peters testified he should be employed as a chief financial officer earning between $140,000 and $160,000. However, because of his "numeric dyslexia", he now considers himself "damaged goods", with an earning potential he estimates as between $75,000 and $85,000. Mr. Peters also testified that he has had to turn away consulting work as he became "cognitively drained" after 2010. He estimates this loss due to the MVA as between $2,500 and $4,000 a year.

**23**  Mr. Peters is a very "handy" individual. He testified as to his extensive involvement in home renovation projects, yard work, and vehicle maintenance. Since the MVA, he still does this work, including heavy work such as jack hammering, but he now has to be careful in how he does this work so as to avoid headaches and neck pain. It generally takes him much longer to complete the work and, on occasion, he has had to have others do work he would have otherwise have done himself.

**24**  Mr. Peters also testified that the injuries he sustained in the MVA affected his leisure activities. He felt he could not do the "aggressive" water skiing he had done before the MVA because of his concern about his neck. He, therefore, sold the boat he owned with his brother and purchased a motorcycle. It has a custom seat and bar raisers which allow him to ride without stressing his neck. He said he regularly rides long distances, including a trip from Denver to Abbotsford.

**25**  Mr. Peters said that prior to the MVA he regularly exercised in his home gym three times a week and would run every day. Since the MVA he testified he has had to modify his exercise routines. He no longer uses his home gym and walks or hikes rather than runs. He does stretching exercises recommended by his physiotherapist.

**Linda Peters**

**26**  Ms. Peters also testified to the effect of her husband's injuries. Her evidence corroborated Mr. Peters' testimony about the immediate effect of the MVA and his inability to sleep well due to his shoulder pain.

**27**  She also testified to his complaints of headaches, fatigue, and irritability. She stated her husband previously would get angry at things but since the MVA, that anger has become more frequent and directed at her, which caused conflict between them.

**28**  Ms. Peters also gave evidence in relation to the changes which Mr. Peters has had to make in relation to yard work and home projects. She confirmed that Mr. Peters has had to give himself more time to do this work and that sometimes others have to help. She testified that while he still goes walking and hiking, he no longer water skis, which was an activity he loved.

**Medical Evidence**

**Dr. Chan**

**29**  Dr. Chan is Mr. Peters' family physician. Dr. Chan examined Mr. Peters the day after the collision, at which time Mr. Peters was complaining of soreness and pain in his right upper arm, anterior chest around the sternal area, neck, knee and calf. Approximately one month later, on July 23, 2009, Dr. Chan again saw Mr. Peters who then complained of a sore right shoulder and sore neck, some left hand soreness, and some tingling and numbness in his right hand.

**30**  In subsequent visits to Dr. Chan during the remainder of 2009 and 2010, Dr. Chan reported that Mr. Peters continued to complain of episodic right shoulder pain and neck pain, as well as throbbing migraine headaches. Dr. Chan's examination indicated Mr. Peters had a good range of motion in the lumbar and cervical spine. Dr. Chan prescribed muscle relaxants and migraine medication to alleviate Mr. Peters' shoulder and neck pain and his headaches. On May 3, 2010 Dr. Chan diagnosed a soft tissue injury with respect to the neck and upper back. He did not recommend any restrictions on Mr. Peters' activities at work or outside of work and believed at that time Mr. Peters' condition was improving.

**31**  However, when Dr. Chan saw Mr. Peters in 2011, Mr. Peters still complained of right shoulder pain, tightness in his neck, some numbness in his right lateral fingers, and tenderness in his left trapezius. Mr. Peters reported he had difficulty sleeping and was only getting about 5 hours of sleep per night.

**32**  During cross-examination Dr. Chan agreed that Mr. Peters had good range of motion in his neck and arms from the time he first examined him after the MVA through to 2013. He also agreed that the two neurologists who investigated Mr. Peters' complaints of numbness and tingling could find no neurological deficits.

**Dr. Gittens**

**33**  Dr. Gittens is a neurosurgeon who examined Mr. Peters at the request of his counsel in September of 2010. He also reviewed hospital records from July 27, 2009 to June 15, 2010; clinical records of Dr. Chan, Dr. Erickson (chiropractor) and Dr. Singh (neurologist); extracted employment records from the company and photographs of Mr. Peters' Volvo. His report is dated September 23, 2010. He was not called to give evidence at trial.

**34**  Dr. Gittens diagnosed Mr. Peters in relation to the MVA as follows:

1. Musculoskeletal or soft tissue injury to the neck with persistent left-sided symptoms.
2. Soft tissue injury to the shoulder girdles, left resolved and right persistent.
3. Contusion to the chest wall, resolved.
4. Contusions and soft tissue injury to the left knee and leg, resolved.

**35**  With respect to the ongoing soft tissue related injury in the left side of the neck and shoulder area, Dr. Gittens was of the opinion that "[it] could improve over the next year or so but the longer this persists the greater the likelihood of some ongoing chronic symptomatology." He said he was unable to detect any major neurological or significant structural abnormality that would reflect a major disability. Accordingly, he said Mr. Peters could continue with his current occupation and with his recreational endeavours, such as walking, cycling, swimming and some gym activities, with the exception of "aggressive waterskiing".

**36**  With respect to the neurological symptoms, Dr. Gittens said the exact cause for the neurological symptoms in Mr. Peters' hands and fingers is "unclear" but they are not severe and should not affect the use of his extremities. Dr. Gittens noted that Mr. Peters reported getting relief from stretching his fingers, which he was advised to continue to do.

**37**  Dr. Gittens was of the opinion that Mr. Peters' headaches "would have been precipitated by the soft tissue injury to his cervical area", although he noted that it was his understanding from Mr. Peters that Mr. Peters had not had any significant headaches in the previous month.

**38**  Dr. Gittens referred to Mr. Peters' concern that his memory is somewhat impaired and that he tends to mix up numbers and at times reports incorrect numbers or transposes digits. Dr. Gittens said he "could not demonstrate any significant memory impairment in cursory testing".

**Dr. Vaisler**

**39**  Dr. Vaisler is an orthopedic surgeon who was called by the plaintiff's counsel. He examined Mr. Peters on July 9, 2010. Dr. Vaisler also reviewed the hospital records and clinical records of Dr. Chan, Dr. Erickson, and Dr. Singh. Dr. Vaisler's report is dated September 3, 2010.

**40**  Based upon his examination and review of the medical information, Dr. Vaisler concluded that Mr. Peters "sustained a soft tissue injury to his neck, a probable labral tear of his right shoulder and probable mild right sided carpal tunnel syndrome as a result of the motor vehicle accident."

**41**  With respect to the neck pain associated with this type of injury, Dr. Vaisler stated that it generally takes two months to two years to settle and in the majority of cases the symptoms completely resolve. Dr. Vaisler emphasized the importance of exercise to alleviate the neck symptoms in his report (and in his testimony at trial):

He was continuing to complain of significant neck pain at the time of my seeing him, in spite of undergoing a few sessions of physiotherapy and a prolonged course of chiropractic treatments. He needs to be reassured that although his neck may hurt with being more active he is not doing himself harm. He should be carrying out a regular programme of neck strengthening and postural exercises on his own and it would be worthwhile for him to attend a repeat short course of physiotherapy to be sure he is doing them properly. It is unlikely that further passive modalities or treatment are going to be of benefit. He should be encouraged to be involved in a regular physical fitness routine such as swimming, Pilates or yoga and would be helped by obtaining an Obus Forme type back support to be used with prolonged sitting and driving.

**42**  In Dr. Vaisler's opinion, with these treatment recommendations, it was more likely than not that Mr. Peters' neck symptoms would improve over the next six to twelve months and it is unlikely that he was going to have any permanent significant pain or disability - although he may occasionally experience the "non-disabling posterior neck pain similar to what he was experiencing prior to the motor vehicle accident."

**43**  With respect to Mr. Peters' right shoulder pain, Dr. Vaisler said his symptoms were consistent with a torn glenoid labrum, although he did not entirely discount the possibility of a subacromial impingement. However, he agreed on cross examination that if Mr. Peters' had shoulder impingement it should have been evident immediately after the MVA. Dr. Vaisler recommended an MRI arthrogram of the right shoulder, anesthetic and steroid injections into the shoulder bursa, and arthroscopy as means of confirming the diagnosis and providing any treatment required.

**44**  Dr. Vaisler pointed out that if surgery were necessary in respect of a glenoid labral tear or subacromial impingement, there is an 85% to 95% success rate related with this surgery in relieving shoulder symptoms. In that regard, he noted the likelihood of Mr. Peters requiring surgery for subacromial impingement was small.

**45**  With respect to the sensory abnormalities in Mr. Peters' right hand, Dr. Vaisler said the diagnosis is "still uncertain" as he has symptoms suggestive of, but "not diagnostic of, carpal tunnel syndrome and the physical findings are equivocal for that diagnosis". In his opinion "it is a little more likely than not that [Mr. Peters] did sustain a contusion to his right palm against the steering wheel at the time of the motor vehicle accident, resulting in some swelling and thickening of the tissues about the carpal tunnel."

**46**  Dr. Vaisler made a number of recommendations to confirm the diagnosis and provide treatment, including the possibility of surgery and avoiding heavy labour for a 2-3 month period. In his opinion it was unlikely that Mr. Peters will have any permanent work disability resulting from the MVA, although there is a risk he may be permanently disabled from repetitive heavy lifting or heavy labour if his neck or right shoulder symptoms persist.

**Dr. Day**

**47**  Mr. Peters was also examined by Dr. Day at the request of counsel for the defendant. Dr. Day is an orthopedic surgeon. He reviewed the clinical records of Dr. Chan, Dr. Erickson, Dr. Singh, Dr. Vaisler, Dr. Schmidt, Dr. Gittens, Dr. Bubber, the hospital records of June 16, 2010 to July 27, 2011 and Medical Service Plan printouts. Dr. Day's report is dated March 5, 2013.

**48**  Dr. Day said his physical examination of Mr. Peters revealed discomfort on the rotation of the cervical spine to the right. He noted some discomfort on internal rotation of the right shoulders, slight tenderness over the right biceps tendon, and some weakness of the scapular stabilizing muscles. There was a full range of movement of the cervical spine and full range of motion of both shoulders.

**49**  Dr. Day confirmed the diagnosis of soft tissue injuries to the neck, shoulders, and lower extremities. In his opinion there is no indication for interventional treatment. Dr. Day testified that Mr. Peters' functioning would improve with conditioning and strengthening of his scapular stabilizers.

**50**  With respect to Mr. Peters' neck pain, Dr. Day noted that there is a history of pre-existing neck issues. He concluded that the neck pain should respond to physical therapy, but Mr. Peters may continue to have neck issues as he had prior to the MVA.

**Dr. Bubber**

**51**  Dr. Bubber is a psychologist who provided treatment to Mr. Peters on the recommendation of Dr. Schmidt. She saw Mr. Peters on four occasions from August 18, 2011 to November 30, 2011 in relation to his reports of irritability, pain, sleep difficulties, and cognitive struggles.

**52**  Dr. Bubber said she took a behavioural approach and worked with Mr. Peters to identify triggers and develop coping strategies, including relaxation techniques, sleep hygiene, and a review of medication with his physician.

**53**  Dr. Bubber said Mr. Peters reported that he was employing the recommended strategies. By the end of their sessions, Mr. Peters was sleeping 7 hours per night and was less irritable.

**54**  Dr. Bubber said that while she did not develop specific strategies to assist him with his errors in his job, he had developed his own system of checking his work to avoid errors. She testified Mr. Peters was bright enough to create some compensatory cognitive strategies.

**55**  As Mr. Peters' mood, sleep, and pain were relatively stable, treatment was ended.

**Dr. Schmidt**

**56**  Dr. Schmidt is a clinical psychologist retained by the plaintiff who conducted evaluations of Mr. Peters in 2011 and 2013. Dr. Schmidt reviewed the records of Dr. Bubber, Dr. Chan, Dr. Erickson, Dr. Gittens, Dr. Singh, the hospital records, the Medical Service Plan printouts, work error samples, and the examination for discovery transcript dated March 20, 2012. Dr. Schmidt also conducted a series of tests of Mr. Peters' cognitive, emotional, and behavioral functioning. Dr. Schmidt's reports are dated March 2, 2011 and February 18, 2013.

**57**  In his 2011 report, Dr. Schmidt said he found no evidence that the MVA had caused a traumatic brain injury, post-traumatic stress disorder, or a generalized mood or anxiety disorder. Rather, Dr. Schmidt found Mr. Peters shows "some emotional disruption, including generalized feelings of depression, anxiety, and irritability" and has "fears and preoccupations regarding his cognitive functioning". Dr. Schmidt reported that formal cognitive testing revealed intact functioning in most areas including "intact processing speed and ... no difficulty learning and retaining either verbal or visual information. Although Mr. Peters did show some weaknesses in sustained attention, his basic focussed attention was intact.

**58**  Dr. Schmidt's opinion was that the MVA left Mr. Peters with physical symptoms which interfered with his ability to do his job and initially accounted for his episodic failures of attention and/or memory. These failures caused Mr. Peters distress and emotional disruption, which increased his anxiety, creating a "vicious circle."

**59**  In his 2013 report, Dr. Schmidt confirmed that that he could not be certain as to the cause of Mr. Peters' cognitive problems and their relationship to the MVA. Nevertheless he reiterated his 2011 opinion that the episodic lapses of attention or perception were psychological in origin and related to the MVA:

In particular, the accident left Mr. Peters with pain and disturbed sleep. I view the sleep disturbance and pain problems as likely accounting for his early lapses of attention. However, it is my opinion that once the lapses started occurring they became self-generating, being triggered by the anxiety and fears arising from them. Simply put I believe that these episodes and his increasing awareness of them lead to increased levels of anxiety, outside of his awareness, and this anxiety in turn triggered more lapses.

**60**  Dr. Schmidt also said that Mr. Peters' episodes have not responded to treatment and occur without Mr. Peters' awareness. He recommended further psychological intervention although, because intervention had not been successful, he questioned whether it would be effective.

**61**  In cross-examination, Dr. Schmidt agreed that he based his conclusions regarding Mr. Peters' lapses of attention on what Mr. Peters' had told him. Dr. Schmidt also agreed Mr. Peters' emotional functioning on MMPI testing was within the normal range. He confirmed that Mr. Peters was very bright individual who would have the ability to compensate for any errors he was making at work.

**Dr. Erickson**

**62**  Dr. Erickson is a chiropractor who treated Mr. Peters both before and after the MVA. His report is dated November 20, 2011. There is no evidence that Dr. Erickson reviewed the reports of the medical specialists referred to above.

**63**  Dr. Erickson first saw Mr. Peters in 2001 for neck pain and headaches. Dr. Erickson provided chiropractic treatment to Mr. Peters on a regular basis for a period of 8 years prior to the MVA for "mild soreness or irritation". Following the MVA, Dr. Erickson provided chiropractic upper cervical adjustments.

**64**  He diagnosed Mr. Peters with cervical whiplash, chiropractic atlas-cervical-occiput subluxation, spinal postural decompensation, cervical strain-sprain, anteriorlisthesis of cervical 2 over 3, and tearing of the interdiscal structures of cervical 2-3. Under cross-examination Dr. Erickson agreed that virtually 100% of his patients have chiropractic altlas-cervical-occiput subluxation.

**65**  Dr. Erickson described Mr. Peters' reports of ongoing symptoms including headaches, right shoulder pain, and neck pain, resulting in irritability and difficulties sleeping and concentrating. Dr. Erickson was of the opinion that Mr. Peters' headaches have been a major contributor to his problems. Dr. Erickson noted that the headaches have reduced in severity from intense to low grade.

**66**  Dr. Erickson recommended continued adjustments for several years. He also recommended that Mr. Peters' right shoulder and sleep difficulties be referred to medical specialists for treatment and medication. His prognosis for Mr. Peters was very guarded, although under cross-examination he admitted that Mr. Peters was "getting better".

**Daniel Boss**

**67**  Mr. Boss is a physiotherapist. He saw Mr. Peters once on January 21, 2011 and again on April 29, 2013.

**68**  On examination, Mr. Boss found restrictions in Mr. Peters' range of motion in his neck and shoulder. He recommended that Mr. Peters use a resistance exercise band daily to strengthen between his shoulders.

**69**  Upon examination two years later, Mr. Boss said that there continued to be restrictions in Mr. Peters' upper neck and shoulder, with the C1-2 vertebrae being hyper mobile.

**70**  On cross-examination, Mr. Boss said that while he would normally schedule a series of physiotherapy appointments to determine if the patient is improving and doing the exercises properly, he did not do so in this case out of respect for Dr. Erickson who prefers that no other therapists provide treatment while he is working on the patient.

**The Parties Positions**

**71**  The plaintiff claims that the MVA substantially affected his professional and personal life. In addition to the physical injuries he suffered as a result of the MVA, he claims that he has experienced collateral effects including headaches, anxiety and irritability, and "numeric dyslexia". He contends that he is now "damaged goods", "less capable" and "less marketable" than he was before the MVA. While he continued to work after the MVA, he contends that he did not receive the increases in compensation he would otherwise have received and, now that his position with his current employer is coming to an end, he will not be able to attain a position as a chief financial officer, with the higher salary paid for such positions.

**72**  The defendants agree that the plaintiff suffered injury as a result of the MVA. However, the defendants dispute the extent of the damages claimed. In particular, the defendants submit that the plaintiff's claim for past and future loss of income should not be accepted - his episodic "failures of attention and/or memory" are simply normal human failings and his emotional outbursts are reflective of a long standing personality frailty. The defendants also submit that the plaintiff has failed to mitigate his losses by not following the advice of his physicians regarding an active exercise program directed to strengthening his shoulder and neck.

**Credibility and Reliability of Evidence**

**73**  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=) 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=), as follows:

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).

**74**  In this case, the defendants say that the plaintiff was generally honest and attempting to do his best in giving evidence but that, occasionally, his self-interest interfered with the reliability of his evidence.

**75**  I accept that the plaintiff was generally truthful and was trying to accurately recall experiences over a period of years. On the whole, I found his evidence to be forthright, consistent, and believable.

**Causation**

**76**  The plaintiff must show on a balance of probabilities that the defendants' ***negligence*** caused or materially contributed to his injury. The defendants' ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. As McLachlin, C.J.C. stated 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 full 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.

**77**  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.

**78**  At the end of the day the plaintiff is entitled to be placed in the position he or she would have been if not for the defendant's ***negligence***, no better or worse. The tortfeasor must take his or her victim as he or she finds them, even if the plaintiff's injuries are more severe than they would be for a "normal" person. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway: *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. 32-35.

**79**  Applying these principles to this case, I must determine whether the MVA caused the plaintiff's injuries and, if they did, whether there were pre-existing conditions which would have detrimentally affected the plaintiff in the future, regardless of the defendants' ***negligence***.

**1. Neck Pain**

**80**  Mr. Peters had experienced neck pain prior to the MVA and had received chiropractic treatment over a number of years, both to alleviate the pain and as a preventative measure.

**81**  Despite this pre-existing condition, there is no dispute on the medical evidence that Mr. Peters sustained a soft issue injury to his neck as a result of the MVA. I accept that the soft tissue injury caused significant pain and discomfort for Mr. Peters in the months immediately following the MVA. In particular, the neck pain contributed to his inability to sleep and irritability.

**82**  Although the intensity of the neck pain gradually diminished over time since the MVA, I accept Mr. Peters' evidence that he continues to experience some tightness in his neck, which he has learned to avoid but not eliminate by exercising care in how he positions his neck when engaged in activities requiring physical exertion.

**2. Shoulder Pain**

**83**  The medical evidence also supports a finding that Mr. Peters suffered soft tissue injury to his shoulders as a result of the MVA. Although there is no definitive diagnosis with respect to Mr. Peters' continued complaints of pain in the right shoulder, Dr. Vaisler's opinion is that it is likely due to a torn glenoid labrum. I accept that Mr. Peters continues to experience a persistent pain in his right shoulder. It is not disabling pain and Mr. Peters has learned to avoid activities which aggravate it.

**3. Headaches**

**84**  Mr. Peters acknowledges that he had headaches prior to the MVA. Nevertheless, his account of severe headaches immediately following the MVA and decreasing in intensity over time is supported in the reports of the medical professionals and his spouse. I find that the MVA caused an increase in the frequency and intensity of his headaches and that by 2012 they had diminished to their pre-injury level.

**4. Impaired Mood**

**85**  I accept the evidence of Mr. Peters and his spouse that the pain associated with his neck and shoulder injury caused Mr. Peters to be irritable and emotional for the period immediately following the MVA.

**86**  However, I do not accept the defendants' contention that there is a causal connection between the defendants' ***negligence*** and Mr. Peters having conflicts at work. Mr. Peters admitted to having a quick temper and his immediate superior at the company, Mr. Friesen, testified that he had spoken to Mr. Peters about his need to improve the manner in which he deals with people before the MVA. This is reflected in the performance evaluations over the years. As counsel for the defendants noted, the incident in which Mr. Peters "blew up" at a bank employee occurred 3 years after the MVA, at a time when his pain had largely subsided.

**5. Impaired Sleep**

**87**  I accept the evidence of Mr. Peters and his spouse that his sleep was disrupted for a significant period due to the neck and shoulder pain associated with the MVA. On the basis of the evidence of Dr. Bubber and Mr. Peters, I find that this situation resolved by the end of his sessions with her in 2011.

**6. Numbness and Tingling in Hands**

**88**  The medical evidence of Dr. Vaisler suggests that the numbness and tingling in Mr. Peters' hands may have resulted from his gripping the steering wheel at the time of the MVA. While I accept the medical evidence supports this condition is a result of the MVA, I find the injury to be relatively minor and note that Mr. Peters reports he can alleviate the symptoms by opening and closing his hands.

**7. Soreness in Chest and Bruising/Stiffness in Knees**

**89**  The evidence supports the seat belt caused minor soreness in the area of his chest and bruising and stiffness in his knees which was resolved within a few weeks of the MVA.

**8. Psychological Injury**

**90**  The most contentious issue of causation is with respect to Mr. Peters' claim of "numeric dyslexia". Before considering this claim, I believe it is important to observe it was not asserted that Mr. Peters was diagnosed with a form of dyslexia, as that condition is normally understood and defined by psychologists or medical professionals. Rather it was Mr. Peters' own characterization of his condition based upon the type of mistakes he was making in his accounting work.

**91**  It is also important to observe there was no psychological/medical evidence of any brain injury, concussion or major psychological disorder caused by the MVA. Further, Dr. Schmidt confirmed that Mr. Peters did not suffer from post-traumatic stress disorder or a generalized mood or anxiety disorder and that, based upon the psychological tests conducted, Mr. Peters' cognitive functioning remained intact.

**92**  The issue remains whether the defendants' ***negligence*** caused some form of injury affecting Mr. Peters' ability to function in his work and daily life.

**93**  Counsel for the defendants contend that the examples of "numeric dyslexia" which Mr. Peters provided are few in comparison to the large number of financial transactions for which he was responsible. Additionally, he notes that Mr. Peters was not criticized by his superiors for such errors. Counsel contends that, in any event, the type of errors Mr. Peters made were the type of errors we all make from time to time.

**94**  I agree with counsel for the defendants' that it may not be uncommon to make errors of this type, however, I accept Mr. Peters' evidence that he genuinely believed he was making errors he had not made before. In that regard, Mr. Peters presented himself in court as an intelligent man who holds himself to a high standard and prides himself for his accounting skills and facility with numeric computation. I believe Mr. Peters felt he was making more errors than he had before the MVA and this caused him considerable distress, to the point that it undermined his confidence in his abilities. Even if the number of errors was relatively small when viewed objectively, he was unable to determine why he was making mistakes and unable to easily identify the mistakes.

**95**  I accept the opinion of Dr. Schmidt that it is more probable than not that the origin of Mr. Peters' failures of attention or perception are psychological in nature and caused by the sleep disturbance and pain problems he experienced as a result of the MVA, and that once the lapses started occurring they became "self-generating", being triggered by the anxiety and fears arising from them. Applying the "but for" test, I conclude that but for the MVA, Mr. Peters would not have experienced the heightened anxiety and loss of confidence about his capacity to perform his work as a comptroller.

**96**  That said, I do not accept the plaintiff's contention that the consequence of this psychological condition is so severe that Mr. Peters is now "damaged goods". In that regard, it is significant that Mr. Peters continued to function as the company's comptroller for four years after the MVA. In the evaluations conducted since the MVA, he was not criticized by the CEO for the type of errors he identified. Indeed, Mr. Friesen did not criticize Mr. Peters' financial reporting or accounting.

**Damages**

**Non-Pecuniary Damages**

**97**  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.

**98**  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=)).

**99**  I note that the assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her 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.

**100**  The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *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.) by McEachern C.J.S.C., as he then was (recently quoted with approval in *Edmondson v. Payer*, [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=) at para. 2). In referring to an earlier decision at paras. 5-7, he said:

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, 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.

***Position of the Parties***

**101**  Counsel for Mr. Peters submits that the non-pecuniary damages, including an amount for loss of handyman and loss of insurability, should be $125,000.

**102**  Counsel's submission is based upon Mr. Peters' lengthy recovery period since the MVA, in which he experienced pain in his neck and right shoulder, headaches, anger, irritability, and difficulties with sleep. Counsel asserts that anxiety and frustration which resulted from the MVA were further exacerbated by the "numeric dyslexia". The MVA had consequences for core aspects of Mr. Peters' daily living, both at work and at home. While Mr. Peters learned to manage his pain over time, this should not discount his entitlement to non-pecuniary damages.

**103**  In support of his submission, counsel relies on *Stapley*, where a 58 year old heavy duty mechanic received $275,000 in an jury award for non-pecuniary damages for chronic neck and back pain, constant headaches and numbness in his fingers and arm, which was reduced on appeal to $175,000; *Zen v. Readhead*, [*2011 BCSC 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33X-00000-00&context=), where a 45 year old businessman, who suffered soft tissue injuries, chronic headaches, chronic mechanical pain, tinnitus, hearing loss, and an adjustment disorder was awarded $110,000 in non-pecuniary damages; *Baxter v. Morrison*, [*2012 BCSC 1214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2C1-00000-00&context=), where a 52 year old truck driver received $100,000 in non-pecuniary damages for shoulder, arm and neck pain requiring surgery to remove a disc; and *Williamson v. Suna*, [*2009 BCSC 576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M26V-00000-00&context=), where a 38 year old military officer received $115,000 in non-pecuniary damages for a mild traumatic brain injury and ongoing difficulties with memory, concentration, irritability, and headaches, even though he did not miss work and was promoted.

**104**  Counsel for Mr. Peters also seeks an amount for loss of insurability arising from Mr. Peters having to incur the higher premiums associated with long term disability plans for "entrepreneurial enterprises", relying in this regard on *Nicholls v. B.C. Cancer Agency*, [*[1999] B.C.J. No. 1475*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4P1-00000-00&context=), where the plaintiff was awarded $5,000 for the potential loss of long term disability benefits.

**105**  Counsel also seeks an amount for loss of capacity to do certain handyman work around the home, relying on the evidence that it takes Mr. Peters longer to carry out his work around the home and, with respect to some of the heavier work, he now requires assistance. In support of Mr. Peters' entitlement to be compensated for this loss, he refers to *Tung v. Allen*, [*2008 BCSC 666*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2HN-00000-00&context=), where the plaintiff was awarded $5,000 in damages because housekeeping would take her longer and would be more difficult for her; *Ufimzeff v. Brown*, [*2008 BCSC 1188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M3BD-00000-00&context=), where the cost for housekeeping assistance was included in the award for non-pecuniary damages; and *Davidson v. Patten*, [*2004 ABQB 681*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-F5DR-22X4-00000-00&context=), where the court awarded $20,000 for loss of housekeeping capacity.

**106**  The defendants do not dispute the plaintiff's entitlement to non-pecuniary damages but submit that the amount of damages should be in the range of $45,000. Counsel for the defendants relies on *Demidas v. Poinen*, [*2012 BCSC 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62D0-00000-00&context=), where a 53 year old drywaller with persistent neck, right shoulder and low back pain as well as headaches and sleep disturbance was awarded $45,000 in non-pecuniary damages; *Jorgensen v. Coonce*, [*2013 BCSC 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M38Y-00000-00&context=) where a 42 year old plaintiff was awarded $60,000 in non-pecuniary damages in circumstances where a soft tissue injury to his right shoulder developed into a chronic pain syndrome which significantly interfered with his work and personal activities as well as his relationship with his children.

**107**  With respect to Mr. Peters' claim for damages for loss associated with handyman work, counsel for the defendants says that any award for this loss should be included in non-pecuniary damages.

***Discussion***

**108**  I have found that Mr. Peters suffered soft tissue injuries to his shoulder and neck, which caused him pain and discomfort that in turn resulted in headaches, loss of sleep, and deterioration in his mood. Mr. Peters became more irritable and emotional after the accident.

**109**  It is to Mr. Peters' credit that he continued to go to work immediately following the accident and that he continued to seek out ways to adjust his activities to minimize the pain symptoms in the years since the MVA. Although the more severe pain diminished over time and his headaches, impaired sleep, and mood disruption have resolved to pre-injury levels, his shoulder pain and neck pain have persisted.

**110**  While the pain is now at a low level and is non-disabling, it is not inconsequential. Mr. Peters has had to adjust his activities around the house to avoid pain and headaches. Some of the yard work takes him longer and some tasks have fallen to his wife or others. Similarly, with respect to his home renovation projects and car repairs, he has had to adapt how he carries out these tasks to avoid hurting his neck or shoulder.

**111**  I note that he has not avoided all strenuous activities and has carried out activities such as jack hammering and a motor cycle trip from Colorado to British Columbia. In my view, the fact that he undertook these activities does not mean he no longer has pain in his neck and shoulder. Rather, his willingness to undertake such strenuous activities indicates that the pain is manageable. Mr. Peters has been largely successful in managing his remaining pain symptoms.

**112**  Mr. Peters and his wife gave evidence that, as a result of the MVA, he had to sell his boat and could no longer engage in water skiing as he and his family had enjoyed in the past. While I note that the medical advice he received shortly after the MVA only advised against "aggressive water skiing", I accept that Mr. Peters felt that he could no longer safely water ski given the strain it could cause to his neck and shoulder. That said, I agree with counsel for the defendants that the change in Mr. Peters recreational activities were likely also affected by the change of his family dynamic resulting from his children growing up and leaving the family home. The last child moved out of the family home in 2010, and he sold his boat in 2011.

**113**  In considering the authorities referred to me and taking into account all of the circumstances, I assess the plaintiff's non-pecuniary damages at $80,000, which amount includes an amount for loss of capacity to do physically demanding yard work. There was insufficient evidence to award an amount for loss of insurability.

***Duty to Mitigate***

**114**  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=).

**115**  *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, sets out the test for failure to mitigate by not pursuing recommended treatment:

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.

**116**  The onus of establishing a failure to act reasonably is on the defendants: *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=).

**117**  The defendants submit that any award for damages should be reduced by 15% to reflect Mr. Peters' failure to follow the recommendations of Dr. Vaisler and Dr. Gittens to pursue a course of active rehabilitation. Counsel for the defendants argues that the reduction in the damage award for failure to mitigate is supported by *Tayler v. Loney*, [*2009 BCSC 742*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2K4-00000-00&context=), in which the Court reduced a non-pecuniary damage award by 15% for the plaintiff's failure to follow the advice of the medical experts to engage in active physical therapy.

**118**  In considering whether Mr. Peters acted reasonably, I note that Dr. Vaisler's recommendation that Mr. Peters receive physiotherapy and exercise for his neck and shoulders was contained in his 2010 report. Mr. Peters' evidence, which is corroborated by his physiotherapist, Dan Boss, is that he did attend physiotherapy in 2011 and again in 2013. Mr. Peters testified that he completed the strengthening exercises that Mr. Boss recommended on a regular basis. Mr. Peters also testified that he did exercises recommended by his chiropractor, Dr. Erickson.

**119**  With respect to Dr. Gittens, although the defendants asserted that he recommended that Mr. Peters "remain as active as possible" and "exercise in the gym", Dr. Gittens' report does not contain a specific recommendation for an active rehabilitation program. Rather, Dr. Gittens stated he did not anticipate the need for any ongoing rehabilitation and expressed the opinion that Mr. Peters "could" continue with his recreational activities, other than aggressive water skiing, including walking, cycling, swimming, and some gym activities.

**120**  While a more intensive physiotherapy program may have been beneficial, based upon Mr. Peters' positive experience with chiropractic treatment for neck pain and headaches in the past, I find it was not unreasonable for Mr. Peters to believe this form of treatment would be effective. In that regard, he attended the chiropractor for treatment regularly, initially once a week and then every two weeks. He testified the treatment appeared to be working, as he needed fewer adjustments.

**121**  Furthermore, Mr. Peters did not rely on chiropractic treatment exclusively. As noted above, he did the exercises recommended by the physiotherapist and he remained physically active. He continued to do most of the yard work, car repair and home renovation projects, albeit at a slower pace, as well as walking, hiking, and camping.

**122**  I conclude that this is not a case where the plaintiff could be said to have "eschewed recommended treatment" and the defendants have not proved that the Mr. Peters' "damages would have been reduced" had he participated in a more intensive rehabilitation program: *Chiu*.

**Past Income Loss**

**123**  A damages award for loss of earning capacity, whether in the past or for the future, represents compensation for a pecuniary loss. Accordingly, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the accident-related 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=); *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=); *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=).

**124**  In this case, the plaintiff contends that he would have asked for an increase in his salary and shares in the company but did not do so because he feared he would lose his job given the mistakes he was making in his reports and his conflicts at work, which he believed were related to the MVA.

**125**  In my view, the plaintiff's claim under this head assumes that he would otherwise, but for the MVA, have received a salary increase and a share position in the company. This is not supported on the evidence.

**126**  After the MVA, Mr. Peters continued to be paid his normal salary, which also included a bonus based on a percentage of the company's profits - with one-half based on the company's assessment of his performance and one-half paid irrespective of performance. Mr. Peters continued to receive mainly positive evaluations and, according to Mr. Peters' evidence was paid a bonus comparable to the other employees who were entitled to receive bonuses.

**127**  While Mr. Peters may have considered that he should have been better compensated for duties he was performing and that he should have received shares in the business, he had no entitlement to such improvements in his compensation. There is no evidence that other employees received increases during the period in question and I find it unlikely that Mr. Peters would have been promoted to a more senior position in the company given Mr. Friesen's concerns about his conflict management skills. Further, the two individuals who received a share position had more senior roles in the company.

**128**  With respect to income from consulting, the plaintiff claims that he had to turn away consulting work because of the effects of the MVA, which left him "cognitively drained". However, the plaintiff's evidence does not persuade me that this was the case. The evidence adduced under cross-examination shows his income from consulting was declining even prior to the MVA. While Mr. Peters testified he turned away work with Jordair in 2009, the only invoice which is in evidence refers to work completed in 2010. Further, the invoices from Peak Oilfields do not show a decline in his consulting income since the MVA.

**129**  In my view, the downward trend in his consulting work was consistent with Mr. Peters' evidence that he worked long hours at the company in a period of expansion which required him to travel to plants in Ontario and Colorado. His full time work responsibilities with the company and his other community work, which included volunteer work with his church and running for re-election for a contested position on the Waterworks Board, limited the time Mr. Peters would have had to engage in consulting.

**130**  Accordingly, I decline to award damages for past income loss.

**Future Income Loss**

**131**  The principles governing loss of future earning capacity were summarized by Mr. Justice Walker in *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=) at paras. 114-118:

For an award under this head of damages to be made, Ms. Ruscheinski must demonstrate a "substantial possibility that lost capacity will result in pecuniary loss": *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. 4, 7, 21, 31, and 32, [*317 D.L.R. (4th) 729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=); *Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=) at para. 17, [*64 B.C.L.R. (4th) 152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=). A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation:  *Perren* at para. 30.

If the plaintiff discharges the burden of proof, then he or she may prove quantification of that loss by an earnings approach or by a capital asset approach: *Perren* at para. 32; *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 para. 76, [*55 C.C.L.T. (3d) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=).

Garson J.A. wrote in *Perren* at para. 11 that where the loss cannot be measured in a pecuniary way, "the correct approach [is] to consider the factors described by Finch J., as he then was, 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=). In *Brown*, he said at para. 8:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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.

In para. 12 of *Perren*, Garson J.A. said:

These cases, *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=), *Brown, and Kwei,* [*[1991] B.C.J. No. 3344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30K-00000-00&context=), illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. 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=), the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, through proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.

A useful summary of the principles governing the determination and measure of an entitlement of an award for loss of income earning capacity is set out at para. 32 in *Perren*:

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*, [*[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.* 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 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.

**132**  In this case, it is agreed that, should I award damages under this head, the appropriate means of assessment is the "capital asset approach".

***Position of the parties***

**133**  Counsel for the plaintiff claims that Mr. Peters has become "damaged goods" as a result of the MVA. Counsel does not assert that Mr. Peters lost his employment with the company because of his injury and recognizes that there were other reasons why that decision was made. Nevertheless, counsel submits that, as a result of the MVA, Mr. Peters has been rendered less capable, less marketable and less able to take advantages of opportunities or compete in competitive labour market. He asserts, had it not been for the accident, Mr. Peters would have been in the position of chief financial officer.

**134**  Counsel for the defendants takes issue with the plaintiff's characterization of Mr. Peters being "damaged goods". He submits that the plaintiff has suffered no loss of earning capacity as a result of the MVA. He contends that Mr. Peters' concerns about "numeric dyslexia" are wholly unfounded and that it has not been established that, in the future, Mr. Peters would be paid any more than he was paid at the company.

***Discussion***

**135**  The question I must consider is whether there is a substantial possibility of future income loss. There are two aspects of Mr. Peters' injuries: physical and psychological.

**136**  I find that the medical evidence in respect of Mr. Peters' physical injury to his neck and shoulder does not support the existence of a physical disability that would significantly affect his future employment as an accountant or in corporate finance.

**137**  With respect to the psychological effect of the MVA, I have found it is more probable than not, based upon the evidence of Mr. Peters and the opinion of Dr. Schmidt, that Mr. Peters continues to experience considerable anxiety over his failures of attention or perception in carrying out accounting related functions and that these perceived "failings" have become "self-generating". His anxiety has undermined his self-confidence and his sense of his ability to be successful in the field of accounting and corporate finance. As Mr. Peters will shortly be looking for alternate employment and must "sell" himself to prospective employers, I find there is a real and substantial possibility that his future earnings will be affected for a period of time. Applying the considerations from *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=), I am satisfied that he has become less valuable to himself as a person capable of earning income from all types of employment, and his ability to take advantage of job opportunities which would otherwise be open to him has been diminished.

**138**  However, I am not persuaded that the plaintiff has proven this psychological condition is permanent or will have a severe effect on his earning capacity. At the time of trial Mr. Peters had had only limited psychological treatment for his "dyslexia-related" anxiety and Dr. Bubber testified that the four therapy sessions with Mr. Peters did not focus on developing strategies to assist Mr. Peters with his failures of attention or perception. Further, she and Dr. Schmidt agreed that he was clever enough to be able to develop such compensatory strategies on his own. Mr. Peters confirmed in his evidence that he used various strategies at work to avoid mistakes, which allowed him to continue to function as the company's comptroller.

**139**  While I believe that Mr. Peters continues to struggle with anxiety related to this issue, I find it is more likely than not that, with further psychological intervention, he will be able to manage his anxiety and fully regain his self-confidence in his ability to earn an income appropriate for a person with his experience within a period of one to two years. Although Dr. Schmidt was cautious about Mr. Peters' prognosis, Mr. Peters has not yet had the benefit of an extended course of psychological intervention.

**140**  I am satisfied that the plaintiff has discharged the burden of proof of establishing entitlement to damages for loss of future earning capacity. However, I am also mindful that there are other factors that may negatively affect Mr. Peters' future income which are unrelated to the defendants' ***negligence***. Based upon all of the evidence, I award Mr. Peters $50,000 for future income loss.

**Costs of Future Care**

**141**  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 in so far as that is possible. 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 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 v. Beazley*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=); *Gignac v. Rozylo*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=).

**142**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina*; *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

**143**  Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages 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 or 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, 68-70.

**144**  The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *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. 253.

**145**  An assessment of damages for cost of future care is not a precise accounting exercise: *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.

**146**  The plaintiff claims $5,000 for future psychological and chiropractic care. As counsel for the plaintiff noted, the need for chiropractic services is no longer recommended by a physician. I find, therefore, it is a not justified as medically necessary. Mr. Peters may, of course, decide to continue chiropractic treatments on the same basis as he did prior to the MVA.

**147**  As noted above, a course of psychological intervention was recommended for Mr. Peters by Dr. Schmidt. I, therefore, accept that the cost of psychological treatment is recommended and reasonable in the circumstances. I assess the costs of future care at $3,000.

**Special Damages**

**148**  It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses 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 para. 78.

**149**  The plaintiff claims $10,730 in expenses related to psychological therapy; physiotherapy, chiropractic therapy, prescriptions, MRIs, and travel for medical appointments. The defendants did not object to the expenses claimed.

**150**  As Mr. Peters' visits to the chiropractor following the MVA were initially recommended by his family physician, I find these and the other claimed expenses to be reasonable. I award $10,730 for special damages.

**Conclusion**

**151**  In summary, the total damages assessed amount to $143,730:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages |  |  |
|  | (including an amount for |  |  |
|  | loss of handyman capacity): | $80,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future Income Loss | $50,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Costs of Future Care | $ 3,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $10,730 |  |

**152**  The plaintiff is entitled to judgment for that amount, together with interest.

**153**  The plaintiff is entitled to recover his costs at Scale B.

W.J. HARRIS J.

**End of Document**

[***Redmile v. Beaulieu, [2019] B.C.J. No. 1755***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5X40-GCJ1-JNCK-22VW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D.C. MacDonald J.

Heard: March 4-7, 11-12, 14, 2019.

Judgment: September 17, 2019.

Docket: M169426

Registry: Vancouver

**[2019] B.C.J. No. 1755** | [*2019 BCSC 1571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5YC6-MPH1-FGJR-2379-00000-00&context=)

Between Michael William Redmile, Plaintiff, and Raymond David Beaulieu, Deceased, Defendant

(162 paras.)

**Counsel**

Counsel for the Plaintiff: J.L. Harbut, A. Leoni.

Counsel for the Defendant: S.N. Baldwin.

**Reasons for Judgment**

|  |
| --- |
| **D.C. MacDONALD J.** |

**Introduction**

**1**  On December 5, 2014, the plaintiff, Mr. Michael Redmile, was involved in a "T-bone" motor vehicle accident in which he sustained myofascial injuries to his back and neck. He also developed carpal tunnel syndrome. Tragically, the defendant, Mr. Raymond Beaulieu, sustained fatal injuries. Mr. Redmile witnessed the last moments of Mr. Beaulieu's life, which was extremely traumatic for him.

**2**  Mr. Redmile was 43 years old at the time of the accident.

**3**  Mr. Redmile was off work for three months after the accident and developed severe emotional symptoms. He continues to suffer from physical injuries including pain in his neck, upper back, lower back, and shoulders and numbness in both hands. However, his most serious injury is that he developed post-traumatic stress disorder ("PTSD").

**4**  The defendant has admitted liability. There is no significant divergence in the medical evidence with respect to the nature of Mr. Redmile's physical injuries. The most contested issues are the seriousness of Mr. Redmile's psychological injuries and his prognosis.

**5**  Flowing from these issues is the extent to which Mr. Redmile has suffered a loss of future earning capacity. The plaintiff argues that Mr. Redmile should be awarded $950,000 for loss of future earning capacity. The defendant argues that with treatment for his PTSD, there is no reason to assume that Mr. Redmile will have future periods of unemployment caused by the motor vehicle accident.

**Issues**

**6**  The following are the specific issues in this case:

1. What is the nature and extent of Mr. Redmile's physical injuries?
2. To what extent is Mr. Redmile cognitively and psychologically compromised due to his PTSD?
3. What is Mr. Redmile's long-term medical prognosis and what is the prospect for any improvement of his condition?
4. How are Mr. Redmile's injuries expected to impact his future earning capacity?
5. Did Mr. Redmile fail to mitigate his damages?
6. What are Mr. Redmile's costs of future care?
7. What special damages is Mr. Redmile entitled to?

**Lay Witnesses**

**7**  The following is a summary of the evidence of each lay witness who testified at trial. I set out their evidence in a general way, but leave certain details for discussion under the issues I address. Although I do not detail all aspects of the evidence, I have considered the totality of the evidence in reaching my conclusions.

**8**  Most of the evidence is uncontroversial. Where there is a dispute regarding the facts, I will so indicate.

**Michael Redmile**

**9**  The plaintiff, Mr. Redmile, is 49 years old. He lives in Quesnel, B.C. with his wife, Cindy Redmile, and their two daughters, Carson and Addison.

**10**  Mr. Redmile was raised in Summerland, B.C. He had a good childhood and many friends. He was active in sports and loved to play hockey. He did not do well academically. Mr. Redmile struggled in school, particularly with reading. Despite his challenges, he finished high school.

**11**  Mr. Redmile's father ran an automotive dealership. His mother died of cancer at age 51, when Mr. Redmile was 23 years old. The death was difficult for Mr. Redmile. Afterwards, he experienced a brief period of anxiety.

**12**  Mr. Redmile suffered other notable traumas in his youth, including a difficult relationship breakup for which he briefly sought counselling. He broke his femur in a serious motor vehicle accident in his 20s. He also witnessed the death of his best friend's father at his bachelor party.

**13**  Apart from a few short stints in other occupations, Mr. Redmile testified that he has always worked in the automotive industry. He started by washing cars and worked his way up to the position of general manager of a car dealership. He worked for Regency Chrysler in both Hundred Mile House and Quesnel. He had worked with Regency Chrysler for approximately 17 years at the time of the motor vehicle accident.

**14**  Mr. Redmile met his wife, Cindy, while he was working in Hundred Mile House. She worked for an insurance company that did business with the Regency Chrysler dealership. Ms. Redmile grew up in Quesnel.

**15**  On the day of the motor vehicle accident, December 5, 2014, Mr. Redmile was driving home from work in Quesnel at approximately 12:45 p.m. He was on his way home to check on his daughter, who was home sick from school. He was driving alone in his Dodge 3500 diesel pickup.

**16**  Mr. Redmile has a vivid recollection of the accident. He was heading south on Highway 97. Another vehicle was in the lane on his right and he was driving in the left hand lane. A third vehicle pulled out from a stop sign. The vehicle missed the vehicle to Mr. Redmile's right. Unfortunately, Mr. Redmile could not stop in time and hit the third vehicle.

**17**  Mr. Redmile did not lose consciousness, but he was stunned after the impact. He felt that he was totally "out of it" for a few minutes. He was sitting in his vehicle, watching emergency workers get the other driver out of the third vehicle and then apply CPR to him. He heard one of the ambulance crew say that the driver was not going to make it. He heard other people at the scene saying the injured person was Ray. Mr. Redmile testified that the name Ray has stuck with him over the years.

**18**  The driver of the other vehicle did not survive the accident. Mr. Redmile's new truck was badly damaged and was written off. After a visit to the hospital, Mr. and Ms. Redmile returned home. Mr. Redmile does not remember much of what happened over the next few days. He does recall that the RCMP came to the house that evening to take a statement from him.

**19**  Mr. Redmile testified that he sustained a number of physical injuries in the accident including back, neck, and shoulder pain and pain at the back of his knees. He developed carpal tunnel syndrome. He also suffered from headaches and would sometimes vomit. He attended massage therapy and physiotherapy for those complaints.

**20**  Mr. Redmile stated that he found it difficult to leave the house and took three months off work following the accident.

**21**  Mr. Redmile testified that he began to have anxiety after the accident. This was eventually diagnosed as PTSD.

**22**  Mr. Redmile's employer did not pay him any sick leave benefits when he was off work. After three months, Mr. Redmile returned to work. He was not ready to return to work, but felt he had no choice as he needed to provide for his family.

**23**  It took time for Mr. Redmile to get back into his regular exercise routine. Today, he continues to have tightness in his hamstrings, pain in his neck, low back, and shoulders, and tingling in his hands. He also has headaches. He takes two Tylenol daily to help with his pain.

**24**  Back at work, Mr. Redmile was frustrated, especially because Regency Chrysler had not paid him anything during his three months of convalescence. He felt he did not receive the support he should have after 17 years of service.

**25**  As a result, Mr. Redmile spoke to Ms. Redmile about looking for another job. Within five months he left Regency Chrysler to work at Quesnel Toyota. He has done well in his new position. He turned an unsuccessful dealership into a successful business. However, Mr. Redmile finds this work demanding. He works at least 50 hours per week and runs the day-to-day operations of the dealership. There are constant issues for him to manage, ranging from customer complaints, financial issues, and human resources problems. He finds it overwhelming that people always come to him with their problems.

**26**  Part of the deal for Mr. Redmile going to Quesnel Toyota was that his wife, Ms. Redmile, be hired as the finance manager. Although the owner was reluctant, he eventually agreed to do so. Mr. Redmile testified that he needs Ms. Redmile at the dealership to assist him when he becomes anxious, irritable, and occasionally aggressive in his interactions with other staff. Mr. Redmile testified that he has conflicts with employees and he overreacts.

**27**  Mr. Redmile testified that his work is not fun anymore; it is exhausting and there is no thrill. It is not like before. It is "like hell" having to go to work with a fake smile on his face. He is burned out. Mr. Redmile testified that today he feels detached.

**28**  Mr. Redmile finds that at times he needs to hide out in the park near the dealership. He walks there and it helps him de-stress. He gives himself a pep talk so that he can push through.

**29**  Mr. Redmile briefly tried an antidepressant medication prescribed to him by Dr. Lubbe. He did not continue taking the medication as he did not like the side effects.

**30**  At the referral of the family doctor, Dr. Stals, Mr. Redmile commenced seeing Dr. Agboji, a psychiatrist, for PTSD. He saw Dr. Agboji for almost three years, attending approximately 20 sessions with him.

**31**  Dr. Agboji prescribed Risperidone, an anti-psychotic medication. When Mr. Redmile attempted to fill the prescription, the pharmacist warned him that the drug was not appropriate as he did not have bipolar disorder. Accordingly, Mr. Redmile did not take that medication.

**32**  Mr. Redmile agreed in cross-examination that he was prescribed various medications but he did not like how they made him feel. They made him lightheaded and seemed to bring on more anxiety. He only took them for a few days.

**33**  Mr. Redmile testified that part of the reason he did not continue taking the medications that were prescribed to him is that he has an addictive personality. He testified that he drank a lot in the past with his buddies.

**34**  Mr. Redmile still has pain in his neck, low back, and shoulders, headaches, and tingling in his hands.

**Cindy Redmile**

**35**  Cindy Redmile testified for the plaintiff. She made a number of observations regarding Mr. Redmile pre- and post-accident. Her testimony was largely consistent with that of Mr. Redmile, although she occasionally had more insight into his post-accident behaviour.

**36**  Ms. Redmile described her husband pre-accident as very charming, outgoing, charismatic, rational, thoughtful, kind, and "a sweetheart".

**37**  They were married on October 8, 2004. They have two children, Carson, age 13, and Addison, age 11. They moved to Quesnel in 2014, where the children are involved in various activities.

**38**  At the time of the accident, Mr. Redmile was working as a general manager at Regency Chrysler in Quesnel. Mr. Redmile had worked at Regency Chrysler for 17 years. He worked approximately 50 hours per week, although it could fluctuate. He ran the dealership including parts and services, sales, financing, and leasing. He ensured everything ran smoothly. If there were customer complaints, he dealt with them. If employees wanted a raise, it went through Mr. Redmile. It was his job to resolve issues, including human resources problems.

**39**  Ms. Redmile testified that pre-accident, Mr. Redmile would come home from work between five and six in the evening. He and the family would have dinner, play games, walk the dogs, and hang out as a regular family.

**40**  Ms. Redmile testified that Mr. Redmile enjoyed his work and did not complain. He would deal with work problems in a calm and matter of fact manner and resolve issues. He had no physical limitations.

**41**  Prior to the accident, the Redmiles would regularly go to Summerland and visit with friends. Mr. Redmile would be the social instigator.

**42**  Ms. Redmile testified that as a couple they had many friends and people were constantly over at their house. They often went out for dinner, socialized with coworkers, and entertained friends from out of town. They had bonfires at their place in the summer and people would stay the night if they were drinking. Mr. Redmile was the life of the party. He liked to cook and would make appetizers. He always wanted to have a good time. He was happy-go-lucky and easy-going.

**43**  On the weekends, the Redmiles would go for a hike or go to the lake. They have a cabin on Canim Lake about 40 minutes outside of Hundred Mile House. They can only use it in the summer. They spent a lot of time there on the weekends and when the children were out of school. They went swimming, boating, tubing, fishing, and just generally hung out by the beach.

**44**  Ms. Redmile mostly stayed at home since they had children, although she filled in as finance manager at Regency Chrysler when another employee was away. At the time of the accident, she had a canine therapy business. This business was not lucrative.

**45**  Prior to the motor vehicle accident, the couple shared the household duties, although Ms. Redmile did more outdoor work as she likes to garden. According to Ms. Redmile, Mr. Redmile was a great dad. He was involved with the children, relaxed, patient, and liked to do outdoor activities with his daughters such as kick a soccer ball and play badminton.

**46**  On the day of the motor vehicle accident, Ms. Redmile received a phone call from Mr. Redmile at the accident scene. He said to her, "I don't know if there are kids in the van". He was "talking funny". Ms. Redmile came to the scene of the accident and was directed to an ambulance where Mr. Redmile was being checked over by the paramedics. He was very concerned that there might have been children in the vehicle that he hit. He was "white as a ghost" and seemed in shock. He was taken by ambulance to the hospital.

**47**  Ms. Redmile met Mr. Redmile at the hospital. A victim services person was present. Mr. Redmile was checked over. His immediate complaints involved pain in his neck, shoulders, and low back and numbness in both hands. He was released at about 4 o'clock that afternoon.

**48**  In the three months following the collision, Mr. Redmile was very withdrawn and quiet. Mr. Redmile also began to have anxiety.

**49**  Ms. Redmile testified that Mr. Redmile did not talk about the accident and she did not pry. He would watch a lot of TV; he busied himself with cleaning and laundry. He became obsessive about cleaning. According to Ms. Redmile, Mr. Redmile would go on cleaning "rampages" after the accident. He became agitated when one of his daughters' room was messy. He began "nagging and nitpicking her, badgering her about these things that are not clean in her room." He also became irritable and was easily angered. Often this was directed at her and to a lesser extent at the girls. Ms. Redmile testified that he is not the same person he used to be. His anxiety and stress was eventually diagnosed as PTSD.

**50**  Ms. Redmile testified that Mr. Redmile was not ready to go back to work after three months. He was not coping, he had anxiety, and he did not want to be around people.

**51**  Upon his return to work, Mr. Redmile was frustrated, especially because Regency Chrysler had not paid him anything during his three months off work. He was disappointed that he did not receive the support he should have received after 17 years of service.

**52**  As a result, Mr. Redmile spoke to her about looking for another job. Within five months he left Regency Chrysler to work at Quesnel Toyota. He has done well in his new position, however, he finds this work very difficult. There are constant demands on him and issues for him to manage. These range from customer complaints to financial issues and human resources problems.

**53**  Ms. Redmile testified that Mr. Redmile needs her at the dealership to assist him when he becomes anxious, irritable, and occasionally aggressive in his interactions with other staff. He has had several inappropriate outbursts including a "profanity-laced" shouting match with the service manager in the public showroom. Ms. Redmile helps him calm down.

**54**  Ms. Redmile testified that 80% of her job is handling Mr. Redmile. Mr. Redmile does not have boundaries regarding her position and constantly needs her for support. He also brings workplace issues home, to rehash them, whereas Ms. Redmile would prefer to keep home and work separate. Ms. Redmile testified that work issues spill over at home every day. Mr. Redmile finds it difficult to let things go.

**55**  Ms. Redmile testified that Mr. Redmile does not like work. She testified that he will come into her office in an agitated state and she has to calm him down. Ms. Redmile has adopted procedures to help calm him down.

**56**  Ms. Redmile testified that since the accident, Mr. Redmile has withdrawn from her. They do not connect like they used to, he does not ask her questions, he is there but not there. Their intimacy has suffered. He does not want to socialize with friends either. He just wants to stay at home.

**57**  Mr. Redmile likes to cook. Unfortunately, post-accident, he cannot handle other people in the kitchen. If someone comes in while he is there, he will leave. He is obsessive about checking locks and the stove and ensuring that everything is secure.

**58**  Ms. Redmile testified that Mr. Redmile is "an obsessive worrier. He's constantly worried, especially when myself and or the children leave the house or we go on a trip without him. He imagines the worst-case scenario." He also gets road rage easily.

**59**  Ms. Redmile was careful to say that Mr. Redmile has good days and bad days. On good days things can seem quite normal. On bad days he is very irritable and has outbursts. She testified that Mr. Redmile is not the same man that she married.

**Mike Sherwood**

**60**  Mike Sherwood, a pilot with Air Canada, testified for the plaintiff. He has been Mr. Redmile's best friend basically since birth, as their fathers were best friends. He testified that before the accident, Mr. Redmile was extremely social. Their families would vacation together. As they got older, he and Mr. Redmile frequently had dinner when Mr. Redmile was in Vancouver on business. Mr. Sherwood described his friend before the accident as having a good relationship with his wife and as a man who enjoyed his work. He received lots of accolades from the owner of the dealership. "He was a man of the community; everyone knows him." Life was going well for him.

**61**  Mr. Sherwood testified that since the accident, there has been much less contact between himself and Mr. Redmile. Mr. Redmile is very different and he is not someone with whom Mr. Sherwood can now share his problems. Mr. Redmile cannot handle listening to other people's problems due to his emotional issues. Last year, the yearly trip to the cabin was cancelled by Mr. Redmile, which was unusual. Mr. Redmile said "Cindy and I are at the max - we can't see people." Mr. Sherwood is very worried about Mr. Redmile.

**Darren Wright**

**62**  Darren Wright has been a friend of Mr. Redmile since childhood. He confirmed that before the accident, Mr. Redmile was "happy, spiritual, and confident". Mr. Redmile would make the effort to come to Summerland once a year and spend time with their group of friends. Mr. Redmile would invite Mr. Wright and his family to their cabin at Canim Lake.

**63**  After the accident, Mr. Wright reported that Mr. Redmile is detached. He feels the friendship is "one-sided", with Mr. Wright making all the effort. Mr. Redmile is more withdrawn; he is not the same person he knew before. He is not making his usual visits to Summerland.

**Expert Opinions**

**64**  The following is a summary of the evidence of the expert witnesses whose reports were filed as exhibits and who testified at the trial. I set out their evidence in a general way but leave a number of details for discussion under the issues I address. In reaching my conclusions, I have considered the totality of the evidence.

**Dr. Marc Boyle**

**65**  Dr. Marc Boyle, an orthopaedic surgeon, confirmed that as a result of the accident, Mr. Redmile sustained myofascial strains of the cervical spine and lumbar spine. These are soft tissue injuries to the ligaments, tendons, and muscles. In his report, he stated that "a negative prognostic factor is the persistence of his symptoms." In testimony, he agreed that psychological factors are a negative prognostic factor, but he stated he would defer to an expert in mental health to comment on the relationship between psychological factors and prognosis for physical recovery.

**66**  Dr. Boyle opined that Mr. Redmile's hand symptoms could have been caused by compression of the carpal tunnels as he braced his hands on the steering wheel at the time of impact. He diagnosed him with carpal tunnel syndrome.

**Dr. Gillian Simonett**

**67**  Dr. Gillian Simonett, a physiatrist, testified for the plaintiff. She opined that Mr. Redmile suffers from myofascial neck and upper back pain, headaches, and mechanical low back pain. His presentation was consistent with myofascial pain. She opined that these injuries are more likely than not caused by the motor vehicle accident.

**68**  In her examination of Mr. Redmile, she found his cognitive functioning was lower than expected. She believed he might benefit from a neuro-psychological assessment.

**Dr. Shaohua Lu**

**69**  Dr. Shaohua Lu, a psychiatrist, testified for the plaintiff. Dr. Lu assessed Mr. Redmile on March 12, 2018. In addition to his clinical interview, he conducted a PCL-5 Questionnaire and also conducted an interview with Ms. Redmile.

**70**  Dr. Lu states in his March 25, 2018 report:

Mr. Redmile fully meets the DSM-5 diagnostic criteria for Posttraumatic Stress Disorder (PTSD). His PTSD is directly related to the December 5, 2014 MVA in which he suffered physical pain and the collision caused the death of the other driver involved. According to DSM-5, the trigger of trauma can be an event that threatened serious injury or involved witnessing situations of life and death. Mr. Redmile experiences the 2014 MVA as a highly emotionally [sic] event. His recollection of feeling frozen and partially paralyzed during the aftermath of the accident is a common clinical manifestation of intense anxiety during a traumatic event. He reacted to the MVA with the fear and emotional reaction typical and characteristic of PTSD. The other driver's death is a permanent factor in his PTSD.

Mr. Redmile has early onset anxiety after the 2014 MVA. He initially had acute stress reaction. The persistence of anxiety related to the traumatic event caused him to develop PTSD. Mr. Redmile has the typical and characteristic clinical symptoms of PTSD. He reported persistent re-experiencing of the 2014 MVA. He has intrusive recollection of the 2014 MVA. He has flashbacks and fears related to the 2014 MVA. He describes recurrent anxiety and psychological distress that revolve around his experience of the MVA. The death of the other driver is a constant tangible factor in his PTSD.

...

Mr. Redmile's negative mood, loss of interest, self-blame, and emotional detachment are clinical markers of mild to moderately severe PTSD. His PTSD lasted for more than six months and is considered chronic. His PTSD has affected his ability to cope with internal and external stressors. His obsessive-compulsive behaviours are both a factor in reducing the severity of his anxiety but are also a symptom of his PTSD. Mr. Redmile's work ethic and personal motivation play a role in reducing the functional impacts of his PTSD. Based on the severity of his symptoms, he is doing more than anticipated based on his PTSD.

**71**  Dr. Lu testified that Mr. Redmile's present diagnosis of PTSD may change. If he experiences a new stressor at work, Dr. Lu would expect an abrupt deterioration of his PTSD.

**Dr. Stephen Wiseman**

**72**  Dr. Stephen Wiseman, a psychiatrist, testified for the defendant. He assessed Mr. Redmile on October 24, 2018. Dr. Wiseman's opinion was based entirely on a clinical interview and a document review.

**73**  Dr. Wiseman opined that due to past events in his life, Mr. Redmile was more vulnerable than most other individuals to developing psychiatric symptoms. He testified that pain and psychological factors are co-morbid. Dr. Wiseman confirmed that as a result of the accident, Mr. Redmile developed "full syndrome" PTSD.

**74**  Dr. Wiseman stated in his report: "Prior to the accident, Mr. Redmile appeared to be functioning in a stable and appropriate manner from a psychiatric perspective - and would have continued to do so for the foreseeable future but for the incident on December 5, 2014."

**75**  Dr. Wiseman opined that at present, Mr. Redmile's residual PTSD symptoms are mild. Mr. Redmile's risk for developing further PTSD symptoms is increased if he should ever be confronted with future traumatic events. However, he opined that "given his substantial improvement over time, excellent overall functioning, and only very mild residual PTSD symptoms, I do not foresee any situation in which his condition will cause appreciable workplace impairment or disability in the future."

**76**  In cross-examination, Dr. Wiseman was asked to review the testimony of Ms. Redmile regarding Mr. Redmile's work, his detachment from family and friends, and his road rage. He agreed that such information was relevant, but also described it as contradictory with the reports from Mr. Redmile. At the conclusion of the review of Ms. Redmile's evidence, Dr. Wiseman conceded that if her evidence is accurate, Mr. Redmile's "post-traumatic stress symptoms are more significant than I have concluded" in my report.

**77**  An expert's opinion is only as good as the relevant information on which it is based. Dr. Wiseman was a fair and unbiased witness. He acknowledged that his views might change with information he did not have.

**Credibility**

**78**  One of the leading authorities on credibility is *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=). Justice Dillon summarized the key elements 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 [their] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] 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. 152 (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).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd*. (1993), [*12 Alta. L.R. (3d) 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9321-FC1F-M53V-00000-00&context=) at para. 13 (Alta. Q.B.)).

**79**  The court cannot assess credibility solely on the demeanour of a witness. It must be assessed in accordance with the preponderance of the probabilities when reviewing the evidence as a whole: *Faryna v. Chorny* (1951), [*[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.).

**Analysis**

**80**  Mr. Redmile led evidence from a variety of individuals to support his claim for damages for injuries suffered. Although I must take into account Mr. Redmile's potential self-interest in the outcome of the litigation, I found nothing in the evidence to suggest that he was anything but truthful. Overall, his evidence was credible and reliable during direct and cross-examination. While his psychological complaints are largely subjective, they were supported by the medical evidence and corroborated by his wife and friends.

**81**  The one troubling piece of Mr. Redmile's testimony was his lack of truthfulness in his reports to his treating psychiatrist. Counsel for the plaintiff agreed that Mr. Redmile gave incorrect information to Dr. Agboji, but argued that this did not affect the credibility of Mr. Redmile. Mr. Redmile was forthcoming at trial that he had given Dr. Agboji this incorrect information.

**82**  In *Zylstra v. Hughes*, [1999] CanLII 5149 (B.C.S.C.), Justice McKinnon made the following comments regarding discrepancies and incorrect information given by the plaintiff to her caregivers:

[51] The defendants attack the credibility of the plaintiff. They point to examples of discrepancies between her testimony at trial and discovery, her failure to advise medical personnel about historical events they contend are significant and inaccurate descriptions of events given by her to caregivers.

[52] I accept that some discrepancies arose and there was some evidence of both a failure to record and incorrect information given. These discrepancies did not affect my conclusion that Mrs. Burton was an honest witness. I believe that she did her best to recall events as accurately as possible and her description of suffering is completely believable.

**83**  I do not find that Mr. Redmile giving inaccurate information to Dr. Agboji affects his overall credibility. Although he gave incorrect information to Dr. Agboji, he was straightforward in his testimony regarding his strategy and the reasons for it. He provided inaccurate information to Dr. Agboji so that he would no longer need to continue with counselling. While not affecting his credibility, the inaccurate reporting is problematic for two reasons. First, it may have caused Dr. Agboji's advice to be inaccurate. Second, his comments were relied upon by medical experts in this litigation.

**84**  Despite this one area of concern, overall Mr. Redmile was a credible and straightforward witness.

**Causation**

**85**  Mr. Redmile must establish a causal connection between the defendant's ***negligence*** and his injuries. He bears the onus of proving that the defendant's ***negligence*** was the cause of his current symptoms: *Warkentin v*. *Riggs*, [*2010 BCSC 1706*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4GT-00000-00&context=) at para. 107.

**86**  The generally accepted test for causation is the "but for" test. The plaintiff bears the onus of proving, on a balance of probabilities, that but for the defendant's negligent act or omission, the injury would not have occurred: *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*] and *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=). Causation is made out if the injury would not have occurred without the defendant's ***negligence***: *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 para. 8.

**87**  Mr. Redmile is not required to prove that the defendant's ***negligence*** was the sole cause of his injuries. This was articulated by the Supreme Court of Canada in *Athey*:

[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. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". 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***.

**88**  If the defendant caused or contributed to the injury in a material way (i.e., beyond the *de minimis* range), the defendant is liable: *Chappell v. Loyie*, [*2016 BCSC 1722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KT4-DY51-JW5H-X0HM-00000-00&context=) at para. 5.

**89**  When a plaintiff makes a claim for a psychological injury, there is no requirement that they provide evidence of a specific psychiatric diagnosis before damages are awarded: *Saadati v*. *Moorhead*, [*2017 SCC 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PVF-9W91-JP4G-63P6-00000-00&context=) at para. 31 [*Saadati*]; and *Riley v. Ritsco*, [*2018 BCCA 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TD3-N221-JC0G-637M-00000-00&context=).

**Analysis**

**90**  There is no significant disagreement among the various physicians who treated or examined the plaintiff about the nature of Mr. Redmile's various physical injuries. There were small differences of opinion regarding extent of his physical injuries.

**91**  The one dispute between the experts was whether the accident caused Mr. Redmile's hand numbness. I note that Mr. Redmile had no hand complaints of any sort before the accident. Mr. Redmile testified that he noticed hand problems on the day of the accident. The hospital notes on the day of the accident refer to "discomfort and numbness to the left palm. Small glass cuts right fingers".

**92**  Dr. Boyle testified that in light of the lack of previous hand complaints, the mechanism of injury and immediate complaints following the motor vehicle accident, it is more likely than not that the accident caused the development of hand symptoms. There is certainly a temporal relationship between the accident and the development of tingling in his hands. I accept that Mr. Redmile's hand numbness and tingling were caused by the motor vehicle accident.

**93**  In summary, I have little difficulty in finding that the evidence established that there is a causal link between the motor vehicle accident and Mr. Redmile's myofascial pain symptoms, hand symptoms, and headaches. Mr. Redmile was a healthy young man prior to the motor vehicle accident. He had no back, neck, or shoulder pain prior to the accident. Although he had some traumas in his youth, Mr. Redmile had no ongoing symptoms prior to the motor vehicle accident. Today, Mr. Redmile has chronic pain caused by the motor vehicle accident.

**94**  Dr. Simonett opined that there is some potential for improvement of Mr. Redmile's musculoskeletal pain with postural strengthening. Dr. Boyle came to a similar conclusion. I accept these opinions.

**95**  I am also persuaded that the motor vehicle accident was the cause of Mr. Redmile's PTSD. Prior to the accident, Mr. Redmile was a social person with a good relationship with his family. He enjoyed his work and it did not cause him undue stress. After the accident, all the lay witnesses testified that he became anxious, withdrawn, and irritable. He suffered trauma as a result of watching Mr. Beaulieu die in the accident. Over time, this developed into PTSD.

**96**  In terms of prognosis, Dr. Lu, a psychiatrist, testified as follows:

If Mr. Redmile has not made any substantive improvement since I last saw him, and if he is still able to continue to work to the same degree that he has been, if there has not been any significant disruption in his family, with medication and treatment I would anticipate Mr. Redmile to maintain his current level of function, albeit with some sacrifice in family and personal life. I do have worry that I previously expressed that in the face of additional demands and unforeseen disruptions he remains at risk. The treatment with medication and support may either reduce the risk, on one hand, or reduce the severity on which stressors he can tolerate.

**97**  Mr. Redmile testified that he hikes alone since the accident. Dr. Wiseman opined that hiking was evidence of lack of symptoms. However, there was evidence from Mr. Redmile that he would hike alone as a way to de-stress and get away from everything. He did not need to hike alone prior to the motor vehicle accident.

**98**  Dr. Lu testified that even with the best treatment, it is not possible to determine whether Mr. Redmile would have improved. The longer an individual has PTSD, the more likely it will linger, with or without treatment. At best, his prognosis is guarded. Therefore, even with treatment, Mr. Redmile remains vulnerable and any prospect of improvement is speculative at best.

**99**  In summary, the defendant's ***negligence*** contributed to Mr. Redmile's psychological injury in a material way. The motor vehicle caused Mr. Redmile's PTSD, which will likely continue to affect him in the future.

**Failure to Mitigate**

**100**  This Court laid out the mitigation principle in *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=):

[202] Once a plaintiff has established that the defendant is liable for causing his or her injuries, the burden of proof shifts to the defendant. To succeed on a mitigation defence, the defence must prove that the plaintiff acted unreasonably and reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question. Its answer depends on consideration of all of the surrounding circumstances: *Byron v. Larson*, [*2004 ABCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-F5DR-22XJ-00000-00&context=).

**101**  The defendant bears the onus of proof to establish that Mr. Redmile failed to take reasonable steps to reduce his damages: *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=) at para. 35, leave to appeal ref'd [*[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=). If that is established, the defendant bears the onus of establishing that the plaintiff's damages would have been reduced. As stated 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=):

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or 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. ...

**102**  In *Mullens v. Toor*, [*2016 BCSC 1645*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KP4-X8R1-JW09-M429-00000-00&context=), aff'd [*2017 BCCA 384*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PXJ-HY71-JFKM-62SG-00000-00&context=) [*Mullens*], Justice Verhoeven determined that a 29-year-old female sustained physical and psychological injuries as a result of a motor vehicle accident. In explaining the principles of mitigation, he stated:

[104] In determining the reasonableness of a refusal of medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [*[1985] 1 SCR 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=), [*1985 CanLII 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=) (SCC), at para. 31 (cited to CanLII).

**103**  At para. 116, Justice Verhoeven held that embarrassment about receiving treatment for a psychological injury was not a valid excuse. He found the plaintiff to be "highly educated and intelligent" (para. 123) and reduced non-pecuniary damages, as well as damages for past and future earning capacity, by 50%, due to the plaintiff's failure to accept medical treatment for her psychological condition.

**Analysis**

**104**  I must determine whether Mr. Redmile failed to mitigate his damages by not following the recommendations of the medical professionals from whom he sought treatment. The defendant argues that the plaintiff failed to mitigate his injuries and that his damages should be reduced accordingly. For example, Mr. Redmile was prescribed Escitalopram in January 2015, but discontinued taking the medication against his physician's advice. In July 2015, Mr. Redmile did not take Risperidone that was prescribed by Dr. Agboji.

**105**  The defendant argues that to compound Mr. Redmile's unreasonable response, Mr. Redmile testified that between March and July 2017, he advised Dr. Agboji that he was getting better, which was incorrect information. Further, Mr. Redmile refused to go for further counselling with Dr. Agboji after July 2017. He sought no treatment for his PTSD from any physician after terminating his sessions with Dr. Agboji.

**106**  Counsel for the plaintiff argued that Mr. Redmile did not act unreasonably. He tried prescription antidepressants but did not tolerate their side effects. Dr. Lu testified that this is not uncommon. Mr. Redmile declined to take Risperidone after consulting with his pharmacist, who recommended against using the medication. Dr. Lu testified that Benzodiazepines would not have been a good choice for Mr. Redmile and in his opinion, it was a good thing that Mr. Redmile did not take this type of medication.

**107**  I agree with the defendant that Mr. Redmile did not give antidepressants a fair try. I find that Mr. Redmile acted unreasonably in refusing to try antidepressants, for providing Dr. Agboji with incorrect information, and for withdrawing himself from counselling.

**108**  On the other hand, Mr. Redmile testified regarding his aversion to going to the psychiatric ward at the hospital. Dr. Wiseman opined that the stigma associated with mental health issues is a common barrier in preventing individuals from seeking treatment. Dr. Lu testified that avoidance is a component of PTSD and that the failure to take medication is extremely common. Further, Mr. Redmile did not like the side effects of the medications and was afraid to take some because he has an addictive personality. Unlike the plaintiff in *Mullens*, Mr. Redmile is not highly educated - he struggled academically.

**109**  I find that Mr. Redmile's damage awards should be reduced, but only by 15%, for his failure to mitigate his damages. This is for two reasons. First, avoidance is part of PTSD. Second, it is not clear to what extent (if at all) Mr. Redmile's PTSD would have improved with medication and continued counselling. I believe that 15% is a fair estimate of the extent to which his damages would have been reduced had he acted reasonably and accepted medical advice.

**Non-Pecuniary Damages**

**110**  Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *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 para. 188 [*Trites*]; and *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=), leave to appeal ref'd [*[2006] S.C.C.A. No. 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F361-M45M-00000-00&context=) [*Stapley*]. Non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases. However, each case depends on its own unique facts: *Trites* at paras. 188-189.

**111**  As set out in *Stapley* at para. 46, common factors that influence an award of non-pecuniary damages include:

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

**112**  In *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, Justice Dickson (as he then was) stated that an award for non-pecuniary damages does not depend only on the seriousness of the injury, it also depends on the seriousness of the individual's loss:

...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* at p. 284 of S.C.R.).

**113**  At 639-640, Dickson J. further held that awards for non-pecuniary loss should be moderate because they do not fulfill the function of compensation:

The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfill this function, should be moderate.

**114**  In assessing damages under this head, I must consider the intangible aspects of Mr. Redmile's life that had value to him prior to the motor vehicle accident and which have been diminished as a result of the accident.

**Analysis**

**115**  Counsel for the plaintiff argued that there can be little doubt that Mr. Redmile is a deeply broken man and both he and Ms. Redmile are suffering very much as a result. He argued that the following is a list of "things" that had real value to Mr. Redmile before the accident:

1. physical health and a body which was pain free;
2. a strong, loving relationship with his wife;
3. a strong, loving relationship with his children;
4. strong friendships and the ability and inclination to enjoy them;
5. secure well-paying employment which he enjoyed;
6. a strong sense of security, both for himself and his family;
7. a sense of pride regarding his career success and his ability to provide for his family;
8. energy;
9. optimism for the future;
10. well controlled emotions and temper; and
11. capacity to enjoy life.

**116**  I agree that the motor vehicle accident and the tragic death of the defendant had a significant impact on Mr. Redmile. Prior to the accident, Mr. Redmile was a charming, friendly, and social individual, who was the "life of the party." He and his wife enjoyed a good relationship and family life. Mr. Redmile was successful in his work and made a good income.

**117**  The motor vehicle accident occurred when Mr. Redmile was at the height of his career. He was physically and mentally strong. As a result of the accident, he now has chronic pain, headaches, and psychological issues such as anxiety, anger, detachment, and irritability. This culminated in Mr. Redmile developing PTSD.

**118**  After the accident, Mr. Redmile's job has never been the same. He describes it as "hell" and dreads going to work every day. In addition, he has few social engagements and rarely makes contact with his friends. However, he continues to enjoy playing hockey, cooking, hiking, and travelling with his family.

**119**  Counsel took me to a number of cases which addressed non-pecuniary damages in factual situations similar to that of Mr. Redmile. There are a number of comparable cases involving PTSD, or other significant psychological injuries, and chronic pain. I only mention a few but have taken them all into consideration when making my assessment of non-pecuniary damages.

**120**  In *Morena v. Dhillon*, [*2014 BCSC 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MR-00000-00&context=), a 47-year-old female plaintiff sustained injuries in a motor vehicle accident that included chronic pain, PTSD, and depression. She was partially disabled from housework and other physical activities. Justice Arnold-Bailey awarded the plaintiff non-pecuniary damages of $130,000.

**121**  In *Godbout v. Notter*, [*2018 BCSC 1043*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SNT-TNG1-JBT7-X266-00000-00&context=), the plaintiff sustained injuries in a motor vehicle accident including injuries to his left arm, shoulder, neck, and back. He also developed PTSD, vertigo, decreased sex drive, and vision problems. Justice Jenkins awarded $175,000 in non-pecuniary damages, although these damages were reduced by 10% for the plaintiff's failure to mitigate his damages.

**122**  In *Zawadzki v. Calimoso*, [*2011 BCSC 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2R4-00000-00&context=), the plaintiff sustained elbow injuries requiring surgeries, lower back pain, and headaches as a result of an accident. He also became anxious, depressed, and suffered from various personality changes. Justice Voith awarded $180,000 in non-pecuniary damages, although these damages were reduced by 20% for the plaintiff's failure to mitigate his damages.

**123**  The accident has had a major impact on Mr. Redmile's life. Although Mr. Redmile still spends time with his family, his psychological issues intrude on and significantly lessen his ability to enjoy life. He no longer likes going to work, finding it to be too much responsibility. Mr. Redmile has ongoing pain and suffers from PTSD. Mr. Redmile will have to live with pain, some limitations on his physical abilities, and most importantly, psychological issues, likely for the rest of his life. His loss is significant and has affected his family and his relationships with his friends.

**124**  In all these circumstances, I consider an appropriate award of non-pecuniary damages to be $180,000. This amount recognizes the plaintiff's ongoing pain, both physical and psychological. It also recognizes his diminished enjoyment of work and his social life, as well as the significant effect the accident has had on his relationship with his family.

**125**  This award is reduced by 15% for Mr. Redmile's failure to mitigate his damages.

**Earning Capacity**

**126**  Where the court is satisfied that the plaintiff suffered injuries due to the defendant's ***negligence***, the plaintiff is entitled to damages, both for the wage loss he or she suffered from the date of injury to the beginning of the trial and for the loss in future earning capacity due to his or her injuries.

**Past Wage Loss**

**127**  To determine compensation for past wage loss, I must consider the plaintiff's loss of earning capacity, "that is, a claim for the loss of the value of the work that the injured 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.

**128**  Mr. Redmile testified that he lost three months' salary after the motor vehicle accident. He was then working at Regency Chrysler, making $10,000 per month gross. He therefore has a past wage loss of $30,000. This award should not be reduced for any failure to mitigate because the mitigation issues arose after the first three months.

**129**  I leave it to the parties to determine the net value of Mr. Redmile's past wage loss.

**Loss of Future Earning Capacity**

**130**  In determining a claim for loss of future earning capacity, the court must consider two questions: *Hoy v. Williams*, [*2014 BCSC 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1SJ-00000-00&context=) at para. 153. First, has the plaintiff's earning capacity been impaired by his or her injuries? To answer this question in the affirmative, there must be sufficient evidence that there is a real and substantial possibility of future income loss. If so, what compensation should be awarded for the resulting financial harm that will accrue over time?

**131**  The Court of Appeal, 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*], re-affirmed the general principles set out in previous cases. Justice Garson, writing for a unanimous court, explained the principles as follows:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles 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=), and *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=). These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

...

[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.

**132**  The inherent difficulties of assessing awards for hypothetical events are well-known. The exercise has been described as "gazing into a crystal ball." In the end, it is the trial judge's sense of what is fair compensation. There is much more art than science in the process: *Shapiro v. Dailey*, [*2012 BCCA 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62B8-00000-00&context=) at para. 40.

**133**  In *Weber v. deBrouwer*, [*2012 BCSC 1039*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24SJ-00000-00&context=), Justice Greyell made the following comments in the context of a psychological injury:

[96] In my view, the facts establish a real and substantial possibility Mr. Weber has and will continue to suffer a loss of income as a result of the injuries sustained in the assault. As stated, he suffers the residual effects of post-traumatic stress disorder which will have a lasting effect on his ability to function in the future.

[97] Mr. Weber had a long work history in public works prior to his decision to resign from Harrison. Following his physical recovery from the injuries sustained in the assault, he quickly sought re-employment in that area. Due to his ongoing psychological symptoms his employability will be restricted in the future because of his inability to deal with confrontations and his anxiety in dealing with "any interpersonal confrontations."

**134**  In *Perren* at para. 32, the Court of Appeal explained that there are two possible approaches to assess loss of future earning capacity: the "earnings approach", as applied in *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=) (C.A.), and the "capital asset approach", as applied 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.) [*Golaiy*]. Both approaches are correct. The earnings approach is more useful when the loss is more easily measurable. The capital asset approach is more useful when the loss is not as easily measurable.

***Analysis***

**135**  The defendant argues that it is unlikely that Mr. Redmile will continue to ignore medical recommendations and continue with untreated PTSD. As a result, the defendant submits that there is no reason to believe Mr. Redmile will have future periods of unemployment caused by the motor vehicle accident.

**136**  As stated earlier, Dr. Lu testified that even with the best treatment, it is not possible to determine whether Mr. Redmile will improve. The longer an individual has had PTSD, the more likely it will linger, with or without treatment. At best, Mr. Redmile's prognosis is guarded.

**137**  In *Perren* at para. 32, Justice Garson held: "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." In *Hu v. Tan*, [*2016 BCSC 908*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JY7-RCM1-DXHD-G2RF-00000-00&context=), this Court accepted the plaintiff would have to retire early, despite not missing any work at the time of trial and despite working full-time for four years after the accident. I too do not punish Mr. Redmile for his stoicism and for his continuing to work despite his many issues following the motor vehicle accident.

**138**  The plaintiff argues that although Mr. Redmile has continued to work as a general manager at a car dealership since the accident, it is unlikely that he will be able to sustain this over the long term. His difficulties at work are caused by his psychological difficulties and the cognitive nature of his work. His work makes him anxious and irritable. This sometimes erupts into anger and confrontations with his coworkers.

**139**  Mr. Darren Benning testified for the plaintiff. He provided a report dated January 30, 2019, with future income loss multipliers to age 67. The actuarial multiplier is 15.168; the economic multiplier is 11.017.

**140**  Mr. Redmile earns approximately $160,000 per year. The plaintiff argues that if Mr. Redmile were to move back to sales so that he would have less responsibility, he would earn approximately $70,000 per year. Using the economic multiplier, this should result in an award of $990,527, to age 67.

**141**  But for the accident, I find that there was a strong likelihood that Mr. Redmile would have remained in the position of general manager to at least age 65, enjoying earnings consistent with his present earnings. I agree that Mr. Redmile is entitled to an award to reflect his loss of future earning capacity. However, I find the plaintiff's mathematical calculation too formulaic. I find that a capital asset approach is more appropriate because the loss is not easily measurable.

**142**  Applying the capital asset approach, I must consider the factors from *Golaiy*:

1. has Mr. Redmile been rendered less capable overall from earning income from all types of employment;
2. is Mr. Redmile less marketable or attractive as an employee to potential employers;
3. has Mr. Redmile lost the ability to take advantage of all job opportunities which might otherwise have been open to him; and
4. is Mr. Redmile less valuable to himself as a person capable of earning income in a competitive labour market?

**143**  Mr. Redmile is currently able to work, but he has PTSD which makes his future employment less certain. His psychological issues will restrict his employment options into the foreseeable future and have rendered him less capable to earn future income.

**144**  Mr. Redmile's economic future is far more precarious than it was prior to the motor vehicle accident. He is unable to perform at his former level. Mr. Redmile will be unable to continue in his current position without relying on the goodwill of his wife as well as the company in understanding his difficulties. If his support systems get disrupted, there is a real and substantial possibility that Mr. Redmile will be unable to continue in his current position. His reliance on his wife in the workplace make him less marketable than he was prior to the motor vehicle accident.

**145**  Mr. Redmile is the manager and should be setting the tone and example in his workplace, yet he has had issues controlling his anger. Given his special role, he could be terminated for this conduct. Alternatively, he may have to retire early or find employment with less responsibility.

**146**  Mr. Redmile only has a high school education. His reading difficulties will reduce his ability to retrain for another occupation outside of auto sales management if he cannot sustain his current employment. He also has trouble concentrating and needs the support of Ms. Redmile to continue working. Ms. Redmile is unlikely to obtain employment wherever Mr. Redmile is hired. Mr. Redmile has lost the ability to take advantage of the same types of job opportunities that he had access prior to the motor vehicle accident.

**147**  Lastly, Mr. Redmile no longer enjoys work and worries about his ability to provide for his family due to his PTSD. He is less valuable to himself as a person able to compete in the labour market.

**148**  I find that there is a real and substantial prospect that Mr. Redmile's future earning capacity has been diminished. I am satisfied that Mr. Redmile meets all four of the *Golaiy* factors.

**149**  In considering all future possibilities, and giving weight to each possibility according to the likelihood of them occurring, I find that an award of $425,000 is a fair and appropriate award for loss of future earning capacity. Again, the award is reduced by 15% for Mr. Redmile's lack for mitigation.

**Cost of Future Care**

**150**  A plaintiff is entitled to compensation for costs of future care for the harm caused by the defendant's ***negligence***. These costs are based on what is reasonably necessary to restore the plaintiff to his or her pre-accident condition and to preserve and promote the plaintiff's physical and mental health: *Gignac v. Rozylo*, [*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, citing *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.).

**151**  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 241-242, former Chief Justice Dickson explained the rationale behind cost of future care awards:

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

**152**  The standard of proof to establish a claim for future cost of care is the same as for any future pecuniary loss, "substantial possibility". All that has to be established is a real and substantial risk of pecuniary loss: *Athey* at para. 27.

**153**  The plaintiff seeks an award of $85,919 for cost of future care based on the following recommendations regarding Mr. Redmile's future care:

1. Dr. Simonett recommended treatment with a Kinesiologist to review Mr. Redmile's current exercise regime and to make further recommendations to improve his posture and general fitness.
2. Dr. Simonett recommended a neuropsychological assessment.
3. Both psychiatrists recommended psychological treatment in the form of cognitive behavioural therapy.
4. Dr. Lu recommended family therapy.
5. Dr. Lu recommended that Mr. Redmile try medications such as Trazodone or Aripiprazole.
6. Dr. Simonett recommended yoga.
7. Dr. Boyle recommended anti-inflammatory medications.

**154**  The plaintiff claims:

1. Family therapy would be a one-time cost. Based on 10 sessions, $1,000 is claimed.
2. Ongoing costs for Aripiprazole would be approximately $1,800 per year.
3. Psychotherapy of 6 sessions per year at a cost of approximately $900 per year.
4. Physiotherapy of 12 sessions per year at a cost of $600 per year, to assist with Mr. Redmile's myofascial pain symptoms.
5. Tylenol of approximately $240 per year.

**155**  The total ongoing costs are $3,540 yearly. Using a normal life expectancy for Mr. Redmile of 33.1 years to age 82.1, the plaintiff calculates that the net present value is $84,919. With ongoing and one-time costs, the total is estimated to be $85,919.

**156**  I note that there was no cost of future care report or expert to assist me. I find the above costs to be fairly high. The defendant accepts that Mr. Redmile is entitled to future care costs to see a Kinesiologist for core strengthening, to fill an ongoing prescription for Aripiprazole for a limited amount of time, and 10 sessions of counselling. However, the defendant argues for a much lower award.

**157**  In my view, some therapies may be so helpful, they can be discontinued. Others may be unhelpful and therefore will not be pursued in the long-term. Physiotherapy is often used at the outset of an injury but is not continued over the long-term. Taking these positive and negative contingencies into account, I believe $55,000 is a fair and reasonable award for the costs of future care.

**158**  Again, this award is reduced by 15% for Mr. Redmile's lack of mitigation.

**Special Damages**

**159**  The plaintiff agrees that the $1,233.18 claimed for mileage is abandoned. Accordingly, the parties agree that special damages in the amount of $3,372.77 should be awarded.

**160**  I award $3,372.77 in special damages. I decline to reduce this award for the lack of mitigation.

**Conclusion**

**161**  I find that Mr. Redmile is entitled to the following damages:

1. $180,000 in non-pecuniary damages, reduced by 15% ($153,000);
2. $30,000 in past wage loss;
3. $425,000 in loss of future earning capacity, reduced by 15% ($361,250);
4. $55,000 in costs of future care, reduced by 15% ($46,750); and
5. $3,372.77 in special damages.

**162**  I award ordinary costs, unless either party files an application to determine costs within 45 days of this judgment.

D.C. MacDONALD J.

**End of Document**

[***Roberts & Baker v. Kemp, [2005] B.C.J. No. 1928***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1D0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

District Registrar Blok

Oral judgment: August 3, 2005.

Released: September 7, 2005.

Vancouver Registry No. L011130

**[2005] B.C.J. No. 1928** | 2005 BCSC 1244 | 142 A.C.W.S. (3d) 187

Between Roberts & Baker, solicitors, and Dr. Brenlee Kemp, client

(16 paras.)

**Case Summary**

**Civil procedure — Applications and motions — Conduct of hearing — Adjournments — Legal profession — Barristers and solicitors — Liability — Tort law — *Negligence*.**

|  |
| --- |
| Application by Roberts and Baker to reset the hearing of an application for review. Roberts and Baker were lawyers who represented Kemp in an action eight years prior. Six years after the action, a review of the file was to take place before the court. Kemp requested an adjournment on the grounds that she filed a ***negligence*** action against Roberts and Baker. Kemp cited difficulty in retaining a lawyer and her mother's ill health as reasons for the delay in bringing the action. The review hearing was adjourned. Eighteen months later, Kemp's ***negligence*** action had not progressed and Roberts and Baker applied to reset the review hearing. Kemp claimed she was unable to pursue the action because of difficulties with her lawyer, her depression and her mother's ill health.  HELD: Application allowed.  The delay in prosecuting the ***negligence*** action was unreasonable and prejudiced Roberts and Baker. The time frames in this matter were of serious concern. Roberts and Baker ceased representing Kemp eight years prior to the application. The prejudice caused by the delay outweighed the rule that deference ought to be given to the ***negligence*** action. |

**Statutes, Regulations and Rules Cited:**

Legal Profession Act,

**Counsel**

Counsel for the Solicitors: L.J. Muir

Counsel for the Client: G. Turriff, Q.C.

|  |
| --- |
| **DISTRICT REGISTRAR BLOK (orally)** |

**1**   I find it convenient to give reasons now. These reasons will not be as comprehensive as the submissions deserve or that the detailed facts perhaps warrant, but I think it convenient that I give you my decision in this matter now and the brief reasons for that decision.

**2**  On June 29th this year, the solicitors brought an application to have this Legal Profession Act matter reset for a hearing. That application proceeded, but as a result of a request by counsel for the client, the matter was adjourned and has been re-heard today.

**3**  This application stems or flows from proceedings which took place on November 17th, 2003, before me. On that day, which was the first day of a scheduled five day review, counsel for the client applied to adjourn the review in view of the fact that the client had recently filed a Supreme Court action alleging professional ***negligence*** against the solicitors.

**4**  It was submitted by the solicitors at that time that this eleventh hour filing amounted to an abuse of process and ought not to be endorsed or accepted by the Court by allowing the application for an adjournment.

**5**  In reply to the allegations of delay, the client said that she had had problems engaging counsel, that she had always intended to sue but was awaiting the resolution of the outstanding tort proceedings and that she had had some urgent matters to attend to because of her elderly mother's health.

**6**  In reasons given that day, I allowed the adjournment application but gave leave to the solicitors to apply to have the matter reset. I put it this way:

If the client falters in the progression of the solicitors' ***negligence*** action without good reason, the solicitors will have leave to have a further pre-hearing conference at any time to bring that to the attention of the registrar, and to ask leave that the review hearing be re-set.

**7**  A great deal of detail has been provided to me that gives full context to the history of these matters prior to November 17, 2003, and the progress, if it can be called that, of the ***negligence*** action after November 17, 2003.

**8**  Suffice it to say that the progress in the ***negligence*** action has been woefully short of any progress that I expected would have taken place when I made the order I did on November 17, 2003.

**9**  The reasons given for this lack of progress are largely the same as those given for the lateness of the adjournment application on November 17, 2003. In other words, the client, some 21 months after that adjournment application, states that she is still engaged in the search for counsel to represent her in the ***negligence*** action, and there are references to her again having difficulties due to concerns relating to her mother's health and welfare.

**10**  A third reason was given on that earlier occasion that certain of the client's psychological difficulties, depression in particular, left her psychologically unable to deal with matters. I did not hear, this time, that this was another reason for the delay, but in any event, two of the three reasons given earlier were again repeated before me today.

**11**  The general rule that a Legal Profession Act review will be allowed to await the outcome of a ***negligence*** action that may be brought against the solicitor is a rule of common sense and is a general rule only. At a certain point, unreasonable delay in the prosecution of a ***negligence*** action will create undue prejudice, and in my view, make it such that the usual rule ought not to apply.

**12**  The time frames that are evident in this matter are of very serious concern. Mr. Roberts' representation of Dr. Kemp was for a trial that took place in May, June, and December 1997. His representation of Dr. Kemp concluded six years ago. The last payment by the client other than by order was in August 1997. An advance ordered by Master Barber in 2002 was made for payment of outstanding disbursements.

**13**  I think it is long past the time when the prejudice to the solicitors arising from this delay outweighs the usual rule of deference to the ***negligence*** action.

**14**  Thus it is abundantly clear to me that this matter ought to be set formally for the hearing that was tentatively arranged for February 2006. I think it unnecessary for me to declare that date to be peremptory. The reasons I have given will speak for themselves.

**15**  Given my history and familiarity with this matter, I think it appropriate to declare myself seized of any pre-hearing applications that might be made. Those conclude my reasons.

[Submissions on Costs]

**16**  THE REGISTRAR: It seems clear to me that there was something in it for both sides today. Costs will be in the cause.

DISTRICT REGISTRAR BLOK

**End of Document**

[***Turner v. Dionne, [2017] B.C.J. No. 2134***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PVD-SNH1-JX8W-M2R6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.J. Adair J.

Heard: February 27-28, March 1-3, 6-10,

13-14, 16-17 and 22-24, 2017.

Judgment: October 25, 2017.

Docket: M116475

Registry: Vancouver

**[2017] B.C.J. No. 2134** | [*2017 BCSC 1905*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RT9-Y8R1-DXWW-2171-00000-00&context=)

Between Erika Turner, Plaintiff, and Elias Edgar Dionne, Defendant

(380 paras.)

**Counsel**

Counsel for the Plaintiff: Brian Brooke, Jeffrey J. Nieuwenburg.

Counsel for the Defendant: David G. Perry, Chelsea E. Dubeau.

**Table of Contents**

1. Introduction
2. Liability
3. The Accident
4. Analysis and findings on liability
5. Damages
6. Ms. Turner's pre-accident background
7. Immediately after the accident
8. Life after the Accident
9. The Medical Experts

(i) Physical medicine and rehabilitation, family medicine and occupational medicine

A. Dr. Nairn Stewart

B. Dr. Amanda West

C. Dr. Daniel R. Gouws

1. The Psychiatrists

A. Dr. Jeanette Smith

B. Dr. Stephen A. Kline

1. Radiology and neuroradiology

A. Dr. Jason Clement

B. Dr. Douglas Graeb

1. Neurology, neurosurgery and orthopaedic surgery

A. Dr. Philip Teal

B. Dr. Ian Turnbull

C. Dr. Shahid Gul

D. Dr. Anthony Preto

1. The neuropsychological assessment

(f) The functional capacity evaluations and occupational therapy assessment

1. Louise Craig
2. Rob Corcoran
3. The response reports
4. Tracy Witty
5. The vocational assessments
6. John Lawless
7. Dr. Colleen Quee Newell
8. Findings and conclusions about Ms. Turner's injuries
9. Non-pecuniary damages
10. Income loss to trial and loss of earning capacity
11. Applicable principles
12. Loss of income to the date of trial
13. Loss of future earning capacity
14. Cost of future care
15. Special damages
16. Summary and disposition

Appendix "A" - Assessments 109

**Reasons for Judgment**

|  |
| --- |
| **E.J. ADAIR J.** |

**1. Introduction**

**1**  In the summer of 2010, the plaintiff, Erika Turner, was 19. She was one course short of graduating from Grade 12. However, she had obtained a first-aid certificate and had completed training to work as a forest firefighter. She had ambitions of eventually becoming a nurse.

**2**  On July 28, 2010, in the early morning, Ms. Turner was a passenger in the front seat of a Honda Prelude that was being driven by her then boyfriend, Elias Dionne, the defendant. They were travelling northbound on Highway 6, between the towns of New Denver and Playmor Junction in the Kootenay region of B.C. The car went out of control nearing a corner, crossed the highway and came to rest in a ditch. There were no other vehicles involved.

**3**  Ms. Turner asserts that she sustained a number of injuries in the accident, including a mild traumatic brain injury, compression fractures of two thoracic vertebrae and extensive soft tissue injuries to the tissues around her spinal column. She says that a large sacral cyst was either ruptured as a result of the force involved in the accident, or traumatized to the extent that its course was altered dramatically, giving rise to periodic symptoms.

**4**  Ms. Turner says that, as a result of her injuries, she has been left with debilitating chronic back pain and severe psychological problems that render her essentially unable to work and have profoundly affected her life. She says that, because of her injuries and how she has been affected by them, she was unable to pursue her dream to become a registered nurse, which has been a devastating blow. She continues to take opioid-based medication prescribed for her by her physician, in an effort to manage her pain. Ms. Turner says that, based on the opinions from her medical experts, her prognosis is very poor. She seeks non-pecuniary damages for pain, suffering and loss of enjoyment of life, together with compensation for lost earning capacity (both past and future), cost of future care and special damages.

**5**  Liability remained in issue at trial. Ms. Turner says that, given the circumstances in which the accident occurred, and Mr. Dionne's admissions on his examination for discovery, the court must conclude that Mr. Dionne's ***negligence*** caused the accident. Although liability was not formally admitted, counsel for Mr. Dionne made no submissions concerning it in closing.

**6**  With respect to damages, Mr. Dionne acknowledges that Ms. Turner suffered injuries as a result of the accident and is entitled to compensation accordingly. However, Mr. Dionne says that the objective medical evidence shows, and the medical experts agree, that Ms. Turner was substantially recovered by 2013. He says that the difficulties Ms. Turner later encountered when she pursued a nursing degree were due to the demanding academic requirements of nursing, not a result of injuries suffered in the accident. Mr. Dionne says that Ms. Turner's subsequent serious problems, after dropping out of nursing, were also not caused by the accident or injuries sustained in the accident. Rather, these were caused by her anxiety and concern over loss of a career - nursing - for which she was unfortunately unsuited academically. In short, Mr. Dionne says that Ms. Turner has failed to show that her current, serious problems have been caused by the accident and injuries she suffered in the accident.

**7**  I will first deal with liability for the accident. In my opinion, there can be little doubt on the evidence that Mr. Dionne's ***negligence*** was the cause. Then, under the heading "Damages," I will turn to the main issues in the action: the nature and extent of the injuries suffered by Ms. Turner as a result of Mr. Dionne's ***negligence***, the consequences to Ms. Turner, and the compensation to which Ms. Turner is entitled.

**2. Liability**

1. **The Accident**

**8**  As Mr. Dionne recalled, he was approaching a gentle bend to the left, northbound on Highway 6, when one of the tires of his car hit gravel on the shoulder and he lost control. As he recalled, the rear-end of his car started moving counter-clockwise and he probably over-corrected. His car then crossed the centre line and he felt it flip. Mr. Dionne thought the car rolled twice. The car ended up on the driver's side in a ditch. He stated that Ms. Turner did nothing to cause the accident, and he confirmed that she was wearing her seatbelt (both lap and shoulder). Photographs show that the airbags deployed, and that the car sustained substantial damage. Mr. Dionne stated that he was not aware of any other explanation for the accident that did not involve driver error.

**9**  As Mr. Dionne recalled, when the car finally came to rest in the ditch, Ms. Turner appeared to him to be confused. He described her as much more disoriented than he was and not fully coherent.

**10**  Ms. Turner had little memory of the accident itself. She remembered moments before, and then events after. For example, she remembered that, before the accident, she was sitting in the passenger seat, looking down at her phone. Her next solid memory was that she was in the back of the car.

**11**  According to Mr. Dionne, help soon arrived, and he and Ms. Turner were pulled out of the Honda through the door on the passenger side. He recalled that he and Ms. Turner left the scene in an ambulance together, and that Ms. Turner continued to be disoriented and confused. They were taken to hospital in Nelson.

1. **Analysis and findings on liability**

**12**  As I noted above, although Mr. Dionne did not formally admit liability, his counsel, Mr. Perry, made no submissions on liability in closing argument.

**13**  Mr. Brooke, on behalf of Ms. Turner, submitted that, given the obvious fact that Mr. Dionne lost control of his vehicle, after which it left the roadway, the burden shifts to Mr. Dionne to provide an explanation for how the accident occurred that does not involve ***negligence*** or driver error on his part. However, Mr. Dionne was unable to do so. Rather, Mr. Dionne acknowledged that he had no other explanation for how the accident happened that did not involve driver error. He also acknowledged that Ms. Turner did nothing to cause the accident.

**14**  I agree with Mr. Brooke's submissions.

**15**  I find that, in failing to maintain control of his vehicle, Mr. Dionne failed to exercise reasonable care and was negligent. I find further that his ***negligence*** caused the accident, as a result of which Ms. Turner suffered injuries. Ms. Turner is therefore entitled to compensation for her injuries, loss and damages that have been caused by Mr. Dionne's ***negligence***.

**3. Damages**

**16**  In this section, I will first discuss Ms. Turner's pre-accident background and events immediately after the accident. I will then discuss Ms. Turner's life in the months and years after the accident. Next, I will discuss the evidence from the numerous experts, both medical and non-medical. I will then set out my findings and conclusions concerning Ms. Turner's injuries and the consequences of those injuries. Then, I will set out my conclusions concerning compensation to which Ms. Turner is entitled for the injuries, loss and damage caused to her as a result of the defendant's ***negligence***.

1. **Ms. Turner's pre-accident background**

**17**  Ms. Turner was born in November 1990 in Nelson, B.C. She has one sibling, her brother Jack Turner, who is about 18 months older. She and her brother grew up on a large rural property outside New Denver. Her parents divorced when she was about 14 or 15 years old, and Ms. Turner went to live mostly with her mother. Her mother had gone to university and been a school teacher, before becoming a full-time homemaker. Her father, Howard Turner, who graduated high school in Ontario, worked as a welder and mechanic. After the divorce, Mr. Turner continued to live outside New Denver with Jack Turner. Ms. Turner and Jack Turner attended different high schools after Grade 9.

**18**  As Ms. Turner recalled, after her parents' divorce, her mother spent increasing amounts of time in Ontario, leaving Ms. Turner on her own in New Denver. In 2008, Ms. Turner's mother moved permanently to a city just outside of Toronto, Ontario. Ms. Turner, her brother and their father remained in the Kootenay region of B.C.

**19**  At trial, when Ms. Turner was asked to tell the court "a little bit about" her father, she described him as "an amazing father," who worked hard and loved his family. When asked the same question about her mother, Ms. Turner described her as "energetic," and was somewhat at a loss for words. The contrast in how Ms. Turner described her parents at trial was striking. Several of the experts who assessed Ms. Turner in connection to this action, in particular in relation to her emotional and psychological functioning, commented on her difficult relationship with her mother. Although Ms. Turner went to live with her mother in late 2014, and lived with her for some time after that, her mother was not called as a witness at trial. On the other hand, both Howard Turner and Jack Turner testified at trial.

**20**  Ms. Turner attended elementary and high school in New Denver. As she recalled, she enjoyed school "to some extent." She explained that she felt different and looked different from her friends. While in elementary school, Ms. Turner was assessed as requiring learning assistance. She had an individual education plan and, for some time, she received assistance once or twice a week. As she recalled, she was easily distracted. She has always struggled with mathematics.

**21**  According to Ms. Turner, in high school, she focussed more on social things, and, as a result, neglected academics. In 2008, she completed Grade 12, but did not graduate because she had not successfully passed Mathematics 11. Her high school transcript showed that, in her last year, she did well in some subjects. For example, she received an A grade in beginner's Spanish, which she took at Selkirk College. On the other hand, her final grade in Biology 12 was 51% and C minus. The previous year, she had received 69% and a C plus in Biology 11.

**22**  While attending high school, Ms. Turner took a "FoodSafe" course, which allowed her to work in food preparation and serving. More importantly, in 2006, she attended sessions at Selkirk College titled "Exploration of Selkirk College." One of the sessions Ms. Turner chose was nursing. Ms. Turner explained that a family friend, Jacqueline Hanna, was a nurse, and Ms. Turner was seriously interested in pursuing nursing as a career.

**23**  As Ms. Hanna recalled, she visited the Turner family in the Kootenays when Ms. Turner was a little girl. According to Ms. Hanna, Ms. Turner asked her many questions about what she did and her job as a nurse. According to Ms. Hanna, when Ms. Turner was older, she and Ms. Turner spoke again about nursing, although Ms. Hanna was unable to recall whether this discussion was before or after the accident.

**24**  Once Ms. Turner left high school, she moved to Nelson, where she shared an apartment with her close friend Harmony Larstone. Her brother had also moved to Nelson, and he and Ms. Turner lived in the same apartment building. She got a job working part-time as a grocery store cashier. However, Ms. Turner explained that she did not particularly like the job, which she found dull. Ms. Turner wanted to get her high school diploma, but could not do that without passing Math 11. In September 2009, Ms. Turner enrolled in the Math 049 course at Selkirk College, which was part of the "Adult Basic Education" program. However, she found the course difficult and struggled. She withdrew from the program. In January 2010, Ms. Turner again enrolled in Math 049. However, she again withdrew without completing the course.

**25**  In April 2010, Ms. Turner enrolled in a two-week first-aid course that was offered by Selkirk College. She completed that successfully and obtained an Occupational First Aid certificate, level 3. By this time, she had quit her job at the grocery store, and her plan was to train for work as a forest firefighter, which she did. The training was hard and physical, but Ms. Turner completed it successfully. Her plans at the time were to make money working as a forest firefighter, and then return to school to upgrade her education with the goal of being admitted to a nursing program.

**26**  However, before she was called out to work as a firefighter, Ms. Turner was injured in the accident.

1. **Immediately after the accident**

**27**  Ms. Turner has some memory of events on her arrival at the hospital in Nelson after the accident. She remembers being in the trauma room, that her heart was beating very fast and that she did not know what was going on. She remembers a doctor telling her that she had to get her heart rate down, and to take a deep breath. She remembers having her clothes cut off and being hooked up to machines. Ms. Turner remembers going to Trail for a CT scan, although she could not remember how long she was there. She came back to Nelson and was admitted to hospital, where she stayed for the next several hours.

**28**  As soon as Jack Turner heard about the accident, he went to the hospital. As he recalled, when he saw Ms. Turner, she was sleeping. Her face was badly bruised and discoloured. As he recalled, when Ms. Turner woke up, it was hard to talk to her. He described her as being "very out of it," and unable to carry on a conversation. It was hard for him to see his sister like that, and he said that he felt afraid for her.

**29**  However, Ms. Turner decided that she did not want to remain in hospital and asked to be discharged later in the day. As Ms. Turner recalls now, she asked to be discharged because she did not really have a grasp of what had happened. She was discharged from hospital later in the day on July 28, 2010. Ms. Larstone contacted Ms. Turner's mother in Ontario, and she came to B.C. to help look after Ms. Turner.

**30**  According to Mr. Dionne, after Ms. Turner was released from hospital, she came to stay with him at his parents' home, and was there for about a week. He recalled that Ms. Turner was sick, unable to eat and disoriented. Her face and eyes were swollen. She complained of terrible headaches and was nauseous and vomiting. He recalled that she was in worse shape than he was.

**31**  According to Ms. Turner, in the days after the accident, both eyes were purple and swollen, and her right eye was almost swollen shut. She had a bruise from her lip to her chin, and bruises over most of her body. The top right of her face and head were swollen and numb, and, according to Ms. Turner, a section of her head was still numb as of trial. She described the first two days after the accident as "not unbearable." However, everything then became worse and worse. As she recalled, she felt extreme pain and pressure in her head. It was hard for her to sit or stand up, and she was unable to look at light because of the intense pain it caused her. She said that she had never experienced anything like that before. As she recalled, she was unable to take a deep breath because of injuries to her sternum and rib. She had pain in her left shoulder and scapula area, in her neck and in her mid and low back. As Ms. Turner recalled, the pain radiated down, with a constant throb, going into her legs. Her headaches became worse.

**32**  As Ms. Turner recalled, while at Mr. Dionne's, she spent the majority of her time in the basement, with the windows covered. She was unable to read or watch television. When she tried to talk to people, she could not follow what they were saying. She was vomiting frequently. When her symptoms became really bad, she thought she was dying. As she recalled, she went to the hospital emergency department three times because her symptoms were getting worse and worse. On one of those visits, she was given morphine.

**33**  After a week or so at Mr. Dionne's, Ms. Turner left to stay with Ms. Larstone.

1. **Life after the Accident**

**34**  About a month after the accident, Ms. Turner finally saw her family doctor, Dr. Burkholder, in relation to the injuries she sustained in the accident. Ms. Turner explained the delay was because of the distance and travel time (about 90 minutes one way) from Nelson. Moreover, in the weeks after the accident, she was still suffering from the effects of her head injury, which also made travel, especially during the day, difficult. According to Ms. Turner, she was managing her pain symptoms with over-the-counter medications, which, however, she did not find effective. In early September 2010, Ms. Turner was sent for an MRI scan in Vancouver. At that time, wedge compression fractures to her T11 and T12 vertebrae were identified.

**35**  According to Ms. Turner, in the two months after the accident, and as the pressure in her head decreased and she was able to walk, she had significantly more pain in her mid and lower back. As she recalled, if she was sitting or standing for too long, she would also get shooting pain down her left side and into her leg.

**36**  According to Mr. Dionne, over the next several months, he and Ms. Turner saw one another often. As he recalled, she seemed to be in pain, although her mental state seemed to improve back to normal. As of the fall of 2010, Ms. Turner was unable to go on walks or hikes.

**37**  In September 2010, Ms. Turner made a sudden decision to enroll in a course given in Castlegar to become a care aide, because a friend had enrolled in the course. According to Ms. Turner, when she signed up for the course, she was in a state of denial about her circumstances, and simply wanted to do what her friends were doing. She described herself as feeling anxious about the possibility of failing.

**38**  The care-aide course was taught by Veronica Miklenic, a registered nurse with several decades of experience working in B.C., Saskatchewan and Ontario, and also in the United States. The course was six months long, beginning in September. The first three months were in the classroom, usually five days a week from about 8:30 a.m. to 4:00 p.m. This was then followed by a three-month practicum in a long-term care facility in Trail. The practicum involved a mix of theory and clinical work.

**39**  Ms. Miklenic recalled that her initial impression of Ms. Turner was that she was articulate, well-spoken and very motivated. Ms. Miklenic recalled discussing her work as a nurse with Ms. Turner, and that nursing was something Ms. Turner appeared passionate about.

**40**  However, Ms. Miklenic's initial impression changed over the following months. As Ms. Miklenic recalled, in the classroom, she noticed that Ms. Turner did not seem able to focus, and that information would have to be repeated for her because Ms. Turner struggled to remember it. As Ms. Miklenic recalled, Ms. Turner had difficulty in particular with medical terminology, and when Ms. Turner had to validate and apply the terminology, she could not. Both Ms. Turner and Ms. Miklenic described accommodations that Ms. Miklenic made for Ms. Turner in the classroom. Ms. Miklenic brought in a special chair for Ms. Turner after noticing Ms. Turner shifting and trying to get comfortable in the regular classroom chair. However, even with the special chair, Ms. Miklenic continued to notice Ms. Turner moving and shifting position. As Ms. Miklenic recalled, during the morning classroom session, Ms. Turner was very alert, answered quickly and communicated with the other students. However, in the afternoon, Ms. Miklenic noticed what she described as a lack of focus, and that Ms. Turner was no longer contributing and not really present in the class. As Ms. Miklenic recalled, she provided a fair amount of special assistance to Ms. Turner, both before and after class.

**41**  Ms. Turner was able to complete the classroom portion of the care-aide course. However, she was unable to complete the practicum. According to Ms. Turner, she found the physical demands excruciatingly painful. As Ms. Miklenic recalled, Ms. Turner struggled even to make up a bed, and she was unable to lift, transfer or move patients. The ability to perform such tasks was basic to the work of a care-aide. In Ms. Miklenic's view, Ms. Turner was failing to meet the basic requirements.

**42**  Ms. Turner and Ms. Miklenic discussed the situation. The decision was made that Ms. Turner should withdraw from the practicum, and attempt it later. According to Ms. Turner, she was very upset at this outcome, and found it hard to come to terms with the decision. Ms. Miklenic also recalled that Ms. Turner was extremely emotional and weeping.

**43**  According to Ms. Turner, she then fell into a deep depression.

**44**  The first part of 2011 was a hard time for Ms. Turner.

**45**  Ms. Turner started working with Tom Grant, an occupational therapist. In the spring, she again attempted to complete the practicum portion of the care-aide course. However, according to Ms. Turner, as a result of her constant pain symptoms, she was again unsuccessful. This made her feel like a failure, and she described feeling like she was on an emotional roller coaster. She began taking narcotics prescribed for her by Dr. Burkholder, in an effort to control or at least manage her pain symptoms, and found they provided some relief. She recalls talking with Dr. Burkholder about opioid medications in general, and the dangers of dependency.

**46**  In early 2011, Ms. Turner moved out of the apartment she had been sharing with Ms. Larstone and moved in with Mr. Dionne in Crescent Valley. They lived together for most of 2011. However, Ms. Turner described their relationship as "very toxic" and unsupportive. It was not a happy time for either of them. Eventually, Ms. Turner moved back to Nelson to live with her brother and two other roommates.

**47**  As time went on in 2011, Ms. Turner reported to others that she had started to read self-help books, and that these were helping her to find a sense of purpose in her life. She began physiotherapy.

**48**  In August 2011, Ms. Turner had an independent medical assessment done by Dr. Jeanette Smith, a forensic psychiatrist. In September 2011, an independent medical assessment of Ms. Turner was done by Dr. Nairn Stewart, a physiatrist. I will discuss these in more detail later in these Reasons.

**49**  In January 2012, Ms. Turner enrolled again enrolled in Math 049, as part of the Adult Basic Education program at Selkirk College. She was living in Nelson, and had to commute to Castlegar. She drove herself. She successfully completed the course with a B minus grade. Ms. Turner enrolled in more high school level courses in the term beginning at the end of April 2012, including courses in biology, chemistry and math. She completed the biology courses, receiving a B minus grade in each. She received a partial credit for one of the chemistry courses and withdrew from the other. Ms. Turner received a C grade for one of the math courses and a partial credit for the other.

**50**  According to Ms. Turner, she had always had problems with math and sciences. Moreover, she found it difficult going to school, where, as she recalled, she had to spend much of the time in stationary positions. She continued to have painful symptoms in her back, for which she was taking prescribed medication. According to Ms. Turner, when she went home after school, she was exhausted and she would have to lie down to replenish her energy.

**51**  In September 2012, Ms. Turner began first year of an "Associate of Science" program at Selkirk College. This was still considered part of college preparation, rather than a university degree-level program. Ms. Turner registered with Disability Services at Selkirk College for the fall term, and was provided with accommodation (taped lectures, extra time on exams and an alternate chair). She received a C minus in her Biology 164 course, and a C in her Chemistry 050 course. Her grades in the non-science courses were better.

**52**  Ms. Turner continued her studies in the term beginning January 2013. She had moved to Castlegar from Nelson, thus eliminating her commute. She again took Chemistry 050, and this time received a B minus. She received grades of B plus in her other, non-science courses. For that term, Ms. Turner again had academic accommodations through Disability Services, specifically, extra time on exams and a quiet room to write exams. However, she described this period as a very difficult one, that put a great deal of stress on her physically and mentally. According to Ms. Turner, sitting in class increased her pain level, and lowered her ability to absorb information. As a result, she found it harder to study. According to Ms. Turner, she was distracted by her back pain, and with increased pain came anxiety. She was worried that her grades would suffer. She described the pain leading to anxiety and then her mind shutting down as a cycle.

**53**  However, more significantly, Ms. Turner had applied and been accepted into the nursing program at Selkirk, beginning in the fall of 2013. This was a major, positive development in her life. According to Ms. Turner, at this time, although she had challenges and knew the program required certain stamina and skills, she was feeling very hopeful and motivated. She was continuing with physiotherapy. She had stopped taking the narcotics Percocet (oxycodone combined with acetaminophen) and oxyneo, and Dr. Burkholder had prescribed the medication tramadol (which Ms. Turner understood was less habit-forming and safer) for pain relief. According to Ms. Turner, she wanted to give herself the best chance of success once she started the nursing program, although she was quite anxious about how the program would go.

**54**  As Ms. Turner recalled, she needed a doctor's note to be cleared to proceed with the nursing program. This was not correct. However, according to Ms. Turner, her belief that she needed to be "cleared," and her desire to start the nursing program, affected how she presented herself to Dr. Burkholder and during the assessments she had in May 2013 with Dr. Stewart and Dr. Smith. According to Ms. Turner, in those interactions, she was trying to be as optimistic about her symptoms as she could be and "may" have downplayed how she was feeling. She wanted to do everything she could to show that she was competent and could perform in the nursing program.

**55**  On cross-examination, in response to the proposition that, by 2013, she was in fact showing quite a bit of improvement in her symptoms, compared with the period after the accident, Ms. Turner said:

A Appearing is a good word to use.

Q Well, I'm not sure what you mean by that answer.

A In the months leading up to my starting the nursing program I knew I had a lot of -- a lot going against me in terms of my physical abilities, in terms of what specialists and doctors might say about me starting the nursing program. So in that time, the months leading up to it, the spring, summer, I tried to be as optimistic as I possibly could because the nursing program was what essentially kept me going, the idea of being able to try that, and . . .

Q And your anxiety and depression, your emotional problems had also improved -- improved quite a bit in 2013?

A I was feeling optimistic. I was feeling hopeful that maybe I could pull it off.

Q And you've given this explanation -- I've heard it in your examination in chief as well that you were masking your symptoms because you wanted your medical people to support you going to school.

A I wouldn't use the word "mask."

Q Well, I asked you if you had improved, if your back pain -- let's be specific, your back pain had improved in 2013 compared to the period immediately after the accident. And you said it seemed to or words to that effect. So you're saying you weren't forthright with your medical treating people in 2013?

A I'm saying that the specialists and doctors that I saw approaching the nursing program, I emotionally felt very optimistic, and when I was talking about my back pain and talking about my issues I may have downplayed it.

Q Well, did you downplay it?

A Yes. I can say I did downplay how much pain I was in.

Q So you weren't fully forthcoming with how you were feeling in 2013 with your treating physician?

A I felt like I needed to get into the nursing program and I was very afraid that I was going to be told that I wouldn't -- that I wasn't going to be able to at least try.

**56**  According to Ms. Turner, in 2013 (and before starting the nursing program), she was still struggling with chronic pain and anxiety. But she had hope, and her hope helped her deal with her anxiety and depression. When asked about the results of the assessment done by Dr. Stewart in May, Ms. Turner explained that, because she was feeling hopeful and was in a good place, she was better able to cope with her pain.

**57**  In June 2013, Ms. Turner began work at the Evergreen Natural Foods Cafe in Crescent Valley, preparing and serving food. This was her first paid employment since before the accident, and she was working about 25 hours per week. According to Ms. Turner, she found it extremely difficult while working there to manage her symptoms, both at work and outside of work. She did not find tramadol effective for pain relief, and, beginning in June, Dr. Burkholder again began prescribing oxycodone. According to Ms. Turner, her employment ended very abruptly in August 2013. However, the reason was not any accident-related symptoms, but severe pain in Ms. Turner's wrists.

**58**  Ms. Turner described herself as ecstatic to finally start the nursing program at Selkirk in September. However, as Ms. Turner recalled, she was also fearful about how she was going to balance everything, including her pain symptoms. In the first month, she studied hard, and loved the course material, the classes and her instructors. However, according to Ms. Turner, she was also struggling physically and cognitively, and with anxiety. According to Ms. Turner, to manage her pain and anxiety, she talked to Dr. Burkholder and asked him to increase the dose of Percocet prescribed for her. However, she recalls that he was reluctant to do this. As Ms. Turner recalled, during the first few months of her nursing program, she was taking more and more medication to get through her days, and she felt that she could not manage her pain with the medication Dr. Burkholder had prescribed. As Ms. Turner recalled, she felt helpless. She was in a nursing program that she had wanted to do her whole life, and she was willing to do what she thought she needed to do to get through the term. According to Ms. Turner, she knew someone who (she said) had had an injury similar to hers, and, when she approached this person, he gave her oxycodone. She went to him more than once for the drug. However, according to Ms. Turner, the drugs enabled her to study, get a good night's sleep and do well in her courses.

**59**  Her exams went very well and she got good grades in her first semester. One of Ms. Turner's courses was Biology 164. She had taken that course in 2012 and received a C minus. This time, she received a B. She again had some academic accommodations through Disability Services, specifically extra time on exams (time doubled) and a quiet room to write exams.

**60**  In early 2014, at the request of Ms. Turner's legal counsel, and after a gap of almost two years, Mr. Grant again became involved with Ms. Turner. Mr. Grant described his role at this time as providing support for Ms. Turner in engaging in her current goals, and sustaining her involvement in the nursing program. Ms. Turner successfully completed her courses in the January to May 2014 term. She received a B in Biology 165, and Grades of A minus and A in the two graded nursing courses she took. Her instructor for two of her nursing courses, including a practice group of eight students, was Rob Tanner.

**61**  Mr. Tanner has been a full-time instructor in the nursing program at Selkirk for about ten years. Before beginning his nursing degree, Mr. Tanner was a millworker for about 14 years in Williams Lake. After completing his nursing degree, Mr. Tanner practiced for several years as a registered nurse, before joining the faculty at Selkirk.

**62**  Mr. Tanner explained that in the practice group, the instructor and the students generally go to various sites and facilities to do aspects of health assessments. Towards the end of the course, the group spends time in a residential care facility. There, the students follow a care aide and become familiarized with the practice setting, in preparation for the students to go into their practicum at the end of the Spring term.

**63**  Mr. Tanner explained that, in the practice group, he would interact a fair amount with the students, since part of his job in that setting is to assess the students in the nursing practice and in terms of how well a student is meeting her nursing competencies, and to identify any concerns. In terms of his impression of Ms. Turner, he did not recall anything that was remarkable. Mr. Tanner remembered her being quiet and reserved. As he recalled, Ms. Turner was "upfront" about her concerns and pain issues. However, as Mr. Tanner recalled, outwardly, there was no sign that Ms. Turner was struggling any more than any other student dealing with a fairly complex curriculum. Mr. Tanner said that nursing can be a taxing profession, both physically and emotionally. He described the demands on students in first year as minimal compared to what they will face later on. As far as Mr. Tanner recalled, Ms. Turner never complained, and she would have to be pressed a few times before she would admit to having some pain or that she was struggling. However, Mr. Tanner did not have any concerns about whether Ms. Turner would be able to continue in the program.

**64**  The four-week practicum for Ms. Turner's group of eight students began in May 2014. The instructor for the group was Lindsay Hewson. The practicum was at Talarico Place, a residential long-term and complex care facility in Castlegar. The students' hours were Monday through Thursday, from 7:00 a.m. to 2:00 p.m. At the end of the day, the group would then meet with Ms. Hewson for an hour or so to discuss what had happened during the day. As Ms. Hewson described, as the instructor, she was supporting the students with what they had learned in the previous eight months and in implementing the skills that would allow each of them to be certified as a care aide at the end of the course.

**65**  As Ms. Turner recalled, before the practicum began, she had a separate meeting with the Selkirk disability coordinator, the first-year facilitator for the nursing program and Ms. Hewson to discuss accommodation for her during the practicum. As Ms. Turner recalled, she did this because she wanted to give herself the best chance to succeed. Accommodations were provided for Ms. Turner, including ergonomic seating for feeding patients, breaks every two hours, and use of an over-bed table for writing.

**66**  According to Ms. Turner, her practicum turned into a very difficult and painful experience. The days were long, with the meeting at the end. She was responsible for everything her patient needed. As Ms. Turner recalled, Ms. Hewson helped her by giving her things to do while seated, and by not having her deal with patients with mobility issues. However, as Ms. Turner recalled, she was taking more and more medication to get through the days: oxyneo, Percocet, and oxycodone from her "friend." According to Ms. Turner, she barely completed the practicum.

**67**  Ms. Hewson recalled that, at the beginning of the practicum, Ms. Turner was keen to be involved, and hopeful and excited to make it through the course. However, according to Ms. Hewson, that changed as the practicum progressed. As Ms. Hewson recalled, about two weeks in, Ms. Turner seemed to withdraw and did not appear to be as engaged. She was not as involved in the end-of-day conferences. Ms. Hewson recalled asking Ms. Turner what was going on, and that Ms. Turner told her she was in pain. This was despite the accommodations that had been made for her. Ms. Hewson added that she did not think Ms. Turner wanted to talk about being in pain, or stand out or be different; rather, she just wanted to do a good job. Although Ms. Turner was progressing in the practicum, she was not as engaged as Ms. Hewson had hoped she would be. Her impression was that, as the practicum went on, Ms. Turner seemed to be a bit foggy, which she was not at the beginning. As Ms. Hewson recalled, she tried to encourage Ms. Turner to try and work through the pain, but to Ms. Hewson, it seemed like Ms. Turner was so consumed by it that she was not fully present. Ms. Hewson's impression was that, going forward, it would be a challenge for Ms. Turner to get through an 8-hour nursing shift.

**68**  Nevertheless, Ms. Turner successfully passed the practicum and successfully completed her first year in the nursing program. As a result, she also became registered as a Health Care Assistant (i.e., a care aide).

**69**  Ms. Turner did not work during the summer of 2014. It is unclear how, generally, she was spending her time before she started her second year in nursing in September.

**70**  In the latter part of August 2014, Ms. Turner attended several assessments in Vancouver, in connection with this action. On August 20, 2014, she had an independent medical assessment with Dr. Daniel Gouws, a medical doctor and expert in occupational medicine. On August 25, 2014, Ms. Turner began a functional capacity evaluation with Louise Craig. However, the evaluation had to be terminated early because of Ms. Turner's pain symptoms. Then, on August 28, 2014, Ms. Turner was assessed by Dr. Carole Bishop, a neuropsychologist.

**71**  In September, Ms. Turner began her second year of the nursing program.

**72**  As Ms. Turner recalled, the set-up of the program was different in second year. Instead of the practicum coming at the end of the year (as it had in her first year), now it was part of the weekly studies. According to Ms. Turner, once she started second year, she had shifts in the hospital Monday and Tuesday every week. There were then classes and labs. Every week, she was expected to learn a new skill in the lab, and then implement the skill in the hospital setting. On the weekends, she had to study. She felt that there was no down time, and the expectations were very different compared with first year. This was consistent with what Mr. Tanner described. Ms. Turner felt overwhelmed and like she could not catch her breath.

**73**  According to Ms. Turner, her pain symptoms were aggravated by her hospital shifts. They also made it impossible for her to study, so she was having problems with her course work. As she recalled, she spoke to a disability co-ordinator at Selkirk and to the facilitator of the second year program to try and work things out. Although she was using medication prescribed for her by Dr. Burkholder, she was also getting oxycodone from her "friend." According to Ms. Turner, she came to a point where she felt she could not continue, and she had a breakdown. She explained:

My pain was obviously chronic, but it was at a level that was uncontrollable with medication from my doctor and from my acquaintance. My anxiety was uncontrolled. I felt very -- it was very scary to think that I may have to withdraw from this program that -- you know, my hopes -- and the enthusiasm I felt in first year of okay, maybe I can do this to now the reality when second year happened and it was coming -- becoming more and more evident that I was not going to succeed.

**74**  Ms. Turner withdrew from the nursing program. She described withdrawing as earth-shattering, extremely traumatic, and very, very devastating. She fell into a depression and at times felt suicidal. She explained that when she was in the nursing program, she felt a sense of security, because it was where she had felt she was supposed to be. When that was gone, she could not see herself going anywhere. As she described it, she felt stuck in a broken body, with pain "24/7" and anxiety. She felt it was unbearable.

**75**  When Ms. Turner left the nursing program, she was living with her brother. In his evidence, Jack Turner commented that Ms. Turner had been proud of her achievement in being accepted for the program. While they were living together, and during Ms. Turner's practicum at the end of first year, Jack Turner recalled that she spent quite a bit of time in bed and her mood seemed lower. She seemed withdrawn. His evidence was consistent with Ms. Hewson's. Jack Turner described Ms. Turner as being devastated by having to drop out of the nursing program, and that she spent much time in her bedroom.

**76**  Ms. Turner remained in Castlegar for another two months. According to Ms. Turner, she saw her only option as moving to live with her mother in Ajax, Ontario. That is what Ms. Turner did.

**77**  Before moving to Ontario, Ms. Turner was in touch with Mr. Grant, who attempted to arrange counselling for her. She told him that she had withdrawn from the nursing program. Ms. Turner saw Dr. Bill Nelems, a pain specialist, who, according to Ms. Turner, recommended spinal injections. On October 20, 2014, she saw John Lawless for a vocational assessment. Ms. Craig's functional capacity evaluation of Ms. Turner, which had been terminated in late August, was completed on October 31, 2014. Ms. Turner saw Dr. Smith on November 10, 2014 for a further independent medical assessment.

**78**  According to Ms. Turner, the move to Ontario changed little. She described herself as being in "a very dark place." As she recalled, she had "incredible anxiety" and deep depression. She felt isolated and unable to socialize. According to Ms. Turner, the understanding she had with her mother was that she would be staying with her for about six months.

**79**  In late 2014, support and case management services provided by Source Rehabilitation ("Source") were arranged for Ms. Turner by Mr. Grant. Mr. Grant had maintained contact with Ms. Turner after her move from B.C. He remained very concerned for her well-being, and that included concern she would overdose on her medication. He informed Source of his concerns, and that, as a crucial part of Ms. Turner's treatment, her medication needed to be closely monitored.

**80**  Source assembled a team for Ms. Turner. One of the members of the team was Noha George.

**81**  Ms. George has a Master's degree in Social Work from the University of Toronto. She has worked as a counsellor (both in hospital settings, and private practice) for about 10 years. She has provided counselling services for Ms. Turner since March 2015. Ms. George explained that she had weekly meetings with Ms. Turner, unless Ms. Turner was unable to meet because of pain or fatigue. They met in Ms. Turner's home, and she was the primary person from the Source team working with Ms. Turner. Ms. George described herself as having her "finger on the pulse" of the ups and downs in Ms. Turner's life, and her role as being to provide emotional and psychological support to maintain Ms. Turner's quality of life. Ms. Turner communicated to at least one person (Dr. Smith) that Ms. George was the best counsellor Ms. Turner had ever worked with.

**82**  In late 2014, Ms. Turner also found a new family doctor, Dr. Amanda West.

**83**  In December 2014, Ms. Turner met Senen Sayen, and shortly thereafter they began a romantic relationship.

**84**  Mr. Sayen is a project engineer and team leader with Bruce Power, located east of Toronto. As of trial, he was 37. During the week, he lives in Port Elgin, Ontario, so that he can be close to work. On weekends, he is at the family home in Ajax, where his parents and younger brother also live. Although he and Ms. Turner are no longer romantically involved, he described their relationship as "very close friends," and Ms. Turner moved into Mr. Sayen's family home in Ajax in late October 2016. She was living there as of trial.

**85**  According to Mr. Sayen, in the year prior to meeting Ms. Turner, he had been in a long-term relationship, which Mr. Sayen had expected to lead to marriage. However, that relationship had ended, and Mr. Sayen described himself as not being in a good place when he and Ms. Turner met. As Mr. Sayen recalled, when he met Ms. Turner, she helped him to develop into a different, happier person. He described Ms. Turner when he first met her as simple, direct, sweet and caring, and someone he could be comfortable around. He described Ms. Turner as a very good listener, who provided him with support and very good advice.

**86**  As Mr. Sayen recalled, during their first meeting, Ms. Turner told him about the accident. According to Mr. Sayen, after about two weeks, he began noticing problems. As he recalled, although Ms. Turner would tell him she was not in pain, he could see that she was. He recalled that the first time they went out to a restaurant together, Ms. Turner fell asleep. Because of Ms. Turner's back pain, they were limited in the activities they could do together. As their relationship progressed, Mr. Sayen began noticing more problems. For example, at times Ms. Turner would be very emotional, and sometimes she just disappeared for a couple of weeks. He recalled an occasion where he received a phone call from Ms. Turner at about 2:00 a.m. At the time, Ms. Turner was living with her mother, and Mr. Sayen went there to pick her up and bring her to his house. He described Ms. Turner as looking like "a zombie, a disaster," and that Ms. Turner appeared to be having a panic attack. As he recalled, it took him about three hours to get Ms. Turner back to normal, and he had to miss work as a result. He recalled two other occasions when Ms. Turner was like this. Eventually, Mr. Sayen decided that he and Ms. Turner could not continue as a couple. They have, however, been able to continue their relationship as friends.

**87**  Otherwise, in 2015, despite the supports put in place, according to Ms. Turner, her life and circumstances did not improve. Although she was taking the narcotics prescribed for her, and her general activity level was low, her pain symptoms persisted. Other medication did little to alleviate her anxiety, depression and poor sleep. She was not working, and worried about finding a way to support herself. She had no goals.

**88**  In early 2016, with the help of Ms. George, another member of the Source team, Melanie Craig, and another member who (Ms. Turner understood) was a vocational specialist, Ms. Turner began looking for suitable employment. The idea was to try and identify something that would give Ms. Turner a good chance at success - something that was not too taxing physically and that would allow her to move around during the workday. As far as Ms. Turner was concerned, she was looking for part-time work; she did not feel capable of working full-time. Ms. Turner described herself as feeling excited about the prospect of working. She received help putting together a resume and doing mock interviews.

**89**  Ms. Turner was successful in being hired to work in a chiropractic clinic. However, according to Ms. Turner, four days after being hired, she was fired, something that Ms. Turner attributed to her employer learning about Ms. Turner's physical limitations. Being fired was a new feeling for Ms. Turner, and it felt bad. It also scared her because she did not know what her future was going to look like. She took some time to re-group.

**90**  Despite that unfortunate set-back, in March 2016, Ms. Turner was successful in finding employment, again at a chiropractic clinic, Progressive Family Wellness ("Progressive") working for Dr. Gary Luepann. According to Ms. Turner, she accepted the position believing it to be part-time. Her perception was that, after she was hired, other staff left, resulting in an ever-increasing workload and work-hours for her. However, Ms. Turner is simply mistaken about the position being part-time, and that she would only be expected to work the hours that the clinic was open. It is difficult to understand how such a mistake could have been made, given the support and case management Ms. Turner was receiving from Source. The position at Progressive was always full-time, and the work hours did not unexpectedly increase after Ms. Turner was hired. However, Ms. Turner's perception of the situation and the demands being made of her was a source of stress and anxiety for her.

**91**  Ms. Turner had been hired as a chiropractic technician. She was trained to do assessments on patients, and to check their posture and range of motion. She helped with x-rays. According to Ms. Turner, her job also involved a considerable amount of educating patients (for example, teaching people how to use a home care kit). However, after a brief period, she found that her own symptoms skyrocketed.

**92**  According to Mr. Sayen, he noticed that Ms. Turner appeared to be very fatigued once she started working at Progressive. There were many times when he wanted to go out, but Ms. Turner was not able to. As he recalled, she had trouble staying awake, and wanted to go to sleep at 9:00 p.m. Although he would otherwise have gone out with friends, he stayed home. As Mr. Sayen recalled, he wanted to take Ms. Turner on a vacation but dealing with Ms. Turner's medications, painful back and anxiety made it too difficult. Mr. Sayen described Ms. Turner as being exhausted. But some days she would wake up at 4:30 a.m.

**93**  Ms. Turner was seeing Dr. West once a month, and, as she recalled, she talked to Dr. West about how to manage her symptoms. As Dr. West recalled, she had to increase Ms. Turner's medication for pain and anxiety. According to Ms. Turner, she required the medication to maintain her work schedule, and she said that being in pain and having anxiety was extremely exhausting. Along with her other prescribed medications for pain, anxiety and sleep, Ms. Turner was taking caffeine tablets to stay awake and multiple Gravol pills at night to try and sleep.

**94**  Ms. Turner worked at Progressive until early August 2016, when she resigned. According to Ms. Turner, the last few weeks she was there, she felt "like a zombie." As she recalled, in the job, she found many similarities to nursing, and she liked that. However, in addition to the worsening of Ms. Turner's physical and emotional symptoms, and the lack of success in managing them, there was a conflict with another employee. Ms. Turner typed out a resignation letter addressed to Dr. Luepann, giving the "toxic environment" and the conflict with the other employee as her reasons for leaving, and giving two weeks' notice. According to Ms. Turner, the real reason was the symptoms she experienced from working. She had been told by Dr. West that she was not fit for work, and encouraged by others (including Ms. George) to stop. However, she decided that, based on her experience being fired earlier in the year, she did not want to disclose her real reason to Dr. Luepann. She also wanted to avoid the possibility that Dr. Luepann would offer to accommodate her, because she already felt she was at her breaking point and needed to leave.

**95**  As Dr. Luepann recalled, when Ms. Turner first started at Progressive, she did well. However, things then started to deteriorate. He noticed Ms. Turner had a lot of errors inputting information, and her focus and concentration seemed to wane. He described the office as a busy one, and, as he recalled, Ms. Turner had a hard time keeping up. He could tell from Ms. Turner's posture sitting at the computer that she was not comfortable, although as he recalled, Ms. Turner did not complain. As Dr. Luepann recalled, during team meetings, he noticed that Ms. Turner would blank out, nod and almost fall asleep, although with patients she was fine. According to Dr. Luepann, when Ms. Turner first joined the office, he did not know about her medical issues, and, initially, Ms. Turner did not want to tell him.

**96**  As Ms. Turner recalled, resigning from Progressive felt like nursing all over again. She felt devastated, like a failure and disappointed in herself.

**97**  Mr. Sayen was concerned about her, and was worried that she was not safe where she was living. When he visited Ms. Turner, she was somewhat dishevelled, and the house was messy. It occurred to him that Ms. Turner could live with him and his family in Ajax, where there were other people around and she could have a more normal life. That was arranged.

**98**  According to Ms. Turner, in the months after leaving Progressive, she found it hard to do much of anything, although she said that in the few months immediately before the trial began she was beginning to feel somewhat better.

**99**  In October 2016, Ms. Turner came to Vancouver and was assessed again by Dr. Stewart and Dr. Smith.

**100**  The following week, back in Ontario, Ms. Turner saw Dr. Neely Bakshi, a psychiatrist, on referral from Dr. West. Dr. Bakshi explained that the purpose of the consultation was to make an assessment and provide recommendations for Ms. Turner's mental health, including treatment recommendations. Dr. Bakshi noted that Ms. Turner's affect was fairly blunted and of limited range - no positive or negative emotions. Dr. Bakshi considered that Ms. Turner was aware of both her symptoms and her need for help. Dr. Bakshi explained that the treatments for the diagnoses he reached (major depressive disorder, panic disorder, possible agoraphobia and generalized anxiety disorder) are a combination of medications, therapies and social groups, and a large percentage of people get better. However, some are resistant to treatment. He explained that a co-morbidity - for example, pain and depression - make treatment more difficult. He explained further that cognitive behavioural therapy is a standard treatment for depression. It would depend on the patient whether he would recommend its continuation. Among other things, he would want to know what are the patient and the therapist working on, and what are the goals of the therapy.

**101**  Dr. Bakshi made some recommendations concerning medications for Dr. West to consider. Although he understood that Ms. Turner had therapy once a week (which he recommended she continue), he then focussed his recommendations on psycho-social intervention and a day treatment program - "Bridges" - available at an area hospital. He was prepared to make a referral for Ms. Turner to the Bridges program, if Ms. Turner was interested. He explained that the Bridges program was a therapeutic group program, four to five days a week for a month, where the participants learn skills to manage mental illness. The participants benefit from both the content of the program, and also the regular meetings. He expressed concern about Ms. Turner's use of Gravol to help her sleep. That was not an appropriate treatment for sleep problems, and he cautioned Ms. Turner against its use for that purpose.

**102**  In November 2016, Ms. Turner attended the Allevio Pain Management Clinic, based on a referral Dr. West had made for her earlier in the year, and was seen by a pain specialist there. Dr. West explained that she made the referral to the pain specialist because she wanted to decrease Ms. Turner's use of oxyneo and Percocet, and she was looking for options to see if that could be done. Dr. West explained that she had an "opioid contract" with Ms. Turner. She explained that many doctors who prescribe opioids use these sorts of contracts, whereby the patient agrees with the doctor that the patient will only receive medications from one doctor and only from one pharmacy, will not take other mood altering medications and will submit to urine testing.

**103**  According to Ms. Turner, her prescription for opioid pain medication was altered after she attended at the Allevio Clinic, and the medication meloxicam (an anti-inflammatory) was prescribed with the hope that it might reduce her use of opioids. She also began taking cyclobenzaprine. According to Ms. Turner, since she began taking these medications, she felt that she was not in so much pain. However, her use of opioids had not changed. The morning of the first day of trial, Ms. Turner had taken Percocet, oxyneo, meloxicam, cyclobenzaprine, Effexor (an anti-depressant) and clonazepam (for anxiety).

**104**  Ms. Turner has given some thought to returning to school, and perhaps, particularly because of the relationship she has developed with Ms. George, pursuing studies in social work. As she explained, she had thought for a long time about pursuing employment in that field. However, she concluded that, because of her own emotional issues and having to deal with pain, she would likely not be a productive or helpful counsellor. Ms. Turner explained that she could see herself working part-time, although she would have to find an employer who accepted her physical limitations. She would have to do some research and see what was available to her.

**105**  According to Howard Turner, when he visited with Ms. Turner in Ontario in the fall of 2016 and they went to the Royal Ontario Museum, she was unable to continue after looking at a few exhibits and had to rest. He worries about his daughter's future and about her ability to work.

**106**  As of trial, Ms. Turner was socially isolated. Apart from Mr. Sayen and his family, she did not appear to have any friends. Her activities, apart from the counselling sessions with Ms. George, were few.

1. **The Medical Experts**

**107**  Beginning in 2011, Ms. Turner was independently assessed by a number of experts (both medical and in other fields) whose reports were admitted into evidence at trial. A chronological summary of the assessments is found at Appendix "A."

**(i) Physical medicine and rehabilitation, family medicine and occupational medicine**

**A. Dr. Nairn Stewart**

**108**  Dr. Stewart is a medical doctor with a specialty in physical medicine and rehabilitation. Dr. Stewart was tendered by the plaintiff and qualified as an expert in physical medicine and rehabilitation, qualified to give opinion evidence respecting physical injuries sustained by Ms. Turner in the accident and matters relating to her rehabilitation.

**109**  Dr. Stewart carried out independent medical assessments of Ms. Turner on three occasions over five years: September 7, 2011 (a little over a year after the accident), May 15, 2013 and October 12, 2016. She prepared two reports, dated January 20, 2015 and November 12, 2016. The opinions expressed by Dr. Stewart in her January 2015 report were based on both her in-person assessments of Ms. Turner and a review of records, including records that post-dated Dr. Stewart's May 2013 assessment. These records included the imaging and radiology report done by Dr. Jason Clement in January 2013 (which I refer to in more detail below), Dr. Bishop's report, and the report of the functional capacity evaluation done by Ms. Craig.

**110**  As of September 2011, Ms. Turner had been attending physiotherapy for about two months. Among other things, Ms. Turner reported neck, mid and lower back pain, with constant pain in her low back. Sitting, standing, walking, driving and bending would all aggravate the low back pain. Ms. Turner also reported that the low back pain would sometimes radiate into her left buttock when she walked, and once or twice she had pain radiating into her left leg and at times experienced tingling in the big and second toes of both feet. However, Dr. Stewart noted that there was no disturbance of her bowel or bladder function.

**111**  Dr. Stewart described the general physical examination of Ms. Turner in September 2011 as "unremarkable."

**112**  Dr. Stewart concluded that, since (as of September 2011) it was only 13 months since the accident and Ms. Turner had only recently begun rehabilitation, it was too early to formulate an accurate prognosis.

**113**  According to Dr. Stewart, when she saw Ms. Turner in May 2013, Ms. Turner reported ongoing problems resulting from the accident, in particular with neck and low back pain. Ms. Turner also reported that she was continuing to have difficulty with memory and learning, although they had improved. According to Dr. Stewart, the general physical examination of Ms. Turner was, again, unremarkable.

**114**  In her January 2015 report, Dr. Stewart stated that, in her opinion, Ms. Turner sustained soft tissue injuries to her neck and back in the accident, and compression fractures of the T11 and T12 vertebrae. In Dr. Stewart's opinion, given that there was sufficient force in the accident to cause the spinal fractures, Ms. Turner's soft tissue injuries were likely severe. Dr. Stewart also diagnosed a concussion or mild traumatic brain injury sustained by Ms. Turner in the accident. In Dr. Stewart's opinion, Ms. Turner's prolonged period of "fuzziness" of memory lasting several weeks after the accident was not in keeping with the mild degree of trauma to her brain, and was likely an emotional reaction to her injuries.

**115**  Further, in Dr. Stewart's opinion, as a result of the accident, Ms. Turner developed emotional problems, including post-traumatic stress symptoms, anxiety with panic attacks and depression. Dr. Stewart noted that Ms. Turner's mood had improved significantly by May 2013. However, Dr. Stewart also noted (based on other opinions she had reviewed, including from Dr. Smith) that Ms. Turner was at increased risk for problems with anxiety and mood disturbance in the future because of her injuries, super-imposed on a possible pre-existing tendency to such problems.

**116**  In Dr. Stewart's opinion, as of May 2013, Ms. Turner had had appropriate rehabilitation for her injuries. Dr. Stewart noted that, with active rehabilitation, Ms. Turner had noticed improvement in her neck and back pain, and her headaches, upper and mid-back pain had resolved.

**117**  Dr. Stewart recommended that Ms. Turner do daily stretching exercises for her neck and back, and said that it would be advisable for Ms. Turner to continue a regular gym exercise program three times a week, indefinitely, for which she would need a gym pass. In Dr. Stewart's opinion, as of January 2015, there was no indication for any further formal rehabilitation for Ms. Turner's injuries. However, Dr. Stewart recommended that Ms. Turner have access to psychological counselling in the future because of the injuries sustained in the accident.

**118**  In terms of prognosis, in Dr. Stewart's opinion, it was likely that Ms. Turner would continue to experience neck and back pain, and emotional and cognitive difficulties that were present as of January 2015, into the future because of her injuries. In Dr. Stewart's opinion, it was likely that, because of her injuries, Ms. Turner would continue to require medications for pain, and possibly sleep, and might also require medications for anxiety and depression.

**119**  As of January 2015, Dr. Stewart expressed considerable pessimism about Ms. Turner's vocational future. She noted that having to drop out of the nursing program was likely to cause Ms. Turner's mood problems to worsen. In Dr. Stewart's opinion, given Ms. Turner's ongoing pain, cognitive and emotional difficulties arising from the accident, it was likely that, at best, Ms. Turner would be limited to part-time work in the future. However, Dr. Stewart cautioned that Ms. Turner's ability to work in any capacity in the future was uncertain.

**120**  Based on Dr. Stewart's assessment of Ms. Turner in October 2016, she re-affirmed the diagnoses expressed in her January 2015 report. The general physical examination was, again, unremarkable. However, Dr. Stewart noted that Ms. Turner's withdrawal from the nursing program and giving up on her long term goal of becoming a nurse had had an adverse effect on her mood, with an increase in Ms. Turner's anxiety and depression. The perceived failure at Progressive further contributed to Ms. Turner's anxiety, depression and concern about the future. In Dr. Stewart's opinion, Ms. Turner's overuse of medications in an effort to manage her pain, poor sleep and emotional difficulties was of significant concern:

She is at considerable risk of death from an overdose of prescription pain and other medications. It is appropriate that Ms. Turner has been referred to a Pain Clinic although she may require a period of a drug rehabilitation program before she is able to begin a pain management program.

**121**  Dr. Stewart agreed with Dr. Smith's suggestion that Ms. Turner be referred to a sleep disorders clinic. Dr. Stewart also recommended that Ms. Turner continue counselling, and pursue a regular exercise program, something that her psychological problems had interfered with.

**122**  Dr. Stewart was very pessimistic about Ms. Turner's vocational future. It remained Dr. Stewart's opinion that Ms. Turner would be limited to part-time, non-physically demanding work in the future. However, in Dr. Stewart's opinion, given Ms. Turner's ongoing physical symptoms, emotional difficulties and the length of time since the accident with only limited work trials, the likelihood of Ms. Turner returning to the workforce in any capacity in the future was "extremely guarded."

**B. Dr. Amanda West**

**123**  At the request of the defendant, Dr. West was qualified as an expert in family medicine. Her report dated October 11, 2016 does not comply with Rule 11-6. However, no objection was made on that basis, and the report was admitted into evidence as Ex. 9.

**124**  As I noted above, Dr. West became Ms. Turner's family doctor in December 2014, about four and a half years after the accident. Although Dr. West was asked to express her opinion concerning the injuries Ms. Turner sustained in the accident, Dr. West's opinion in that respect was based on her review of records, including Ms. Turner's medical file received when she became Dr. West's patient. In that light, I give greater weight to the opinion evidence in particular of Dr. Stewart with respect to diagnoses of Ms. Turner's physical injuries, and of Dr. Smith concerning Ms. Turner's non-physical injuries, both of whom have superior qualifications to Dr. West. In essence, Dr. West simply repeats opinions expressed by the other specialists, who examined Ms. Turner closer to the accident.

**125**  However, Dr. West's report (together with the October 2016 reports of Dr. Stewart and Dr. Smith) is of assistance in assessing Ms. Turner's current circumstances, and I give it considerable weight on that point. Dr. West's opinions were also informed by her regular contact with Ms. Turner as Ms. Turner's treating family doctor.

**126**  Dr. West notes that Ms. Turner's complaints of chronic pain have been treated with Percocet and oxyneo, and notes the other medications that have been prescribed to address Ms. Turner's anxiety, depression and insomnia. In her oral evidence, Dr. West was firm about exploring options to significantly reduce Ms. Turner's dependence on opioids. Dr. West notes that Ms. Turner:

currently has significant mood and anxiety issues which [affect] her ability to concentrate, sleep, and perform her independent activities of daily living. There are vast improvements that could be made in her quality of life if her psychiatric issues were better treated and her pain was better controlled. This is my opinion based on my interactions with Ms. Turner.

**127**  In Dr. West's opinion, full-time employment would be difficult for Ms. Turner in her present condition "due to high levels of pain and intermittent mood symptoms." Dr. West explained that:

The current recommended plan for Ms. Turner is to continue with oxyneo for long-acting pain control and Percocet for short-acting while awaiting consultation from a pain specialist.

**128**  In Dr. West's opinion, Ms. Turner has an anxiety disorder, likely panic disorder and generalized anxiety disorder, and may also have post-traumatic stress disorder. Dr. West also diagnosed Ms. Turner as suffering from major depressive disorder. Dr. West said further that Ms. Turner:

experiences chronic pain of the neck and back however, I am unable to say what is causing this pain to persist.

It is my opinion that her prognosis is guarded at this time due to the long-standing nature of her symptoms.

**C. Dr. Daniel R. Gouws**

**129**  Dr. Gouws is a medical doctor. He was tendered by the plaintiff and qualified as a physician with expertise in the field of occupational health, qualified to give opinion evidence concerning Ms. Turner's medical fitness for work. He carried out an independent assessment of Ms. Turner on August 20, 2014 and had a follow-up telephone discussion with her in April 2015. Dr. Gouws explained in his report that a functional physical examination (which was the nature of his examination of Ms. Turner) differs from a traditional physical examination in that "it aims to identify the individual's functional ability. It is not an attempt to establish a clinical diagnosis or therapeutic direction."

**130**  Among the symptoms Ms. Turner reported to Dr. Gouws in August 2014 were persistent neck pain, which was most problematic when she was at school or writing for extended periods, and back pain, including aching pain in her low back, stabbing pain into her buttocks (more on the left than the right) and occasional shooting pain in her legs.

**131**  In Dr. Gouws' opinion, Ms. Turner suffers from a chronic pain condition, with (among other things) widespread myofascial pain affecting the neck, upper shoulders and back. While he accepted the diagnosis of a traumatic brain injury with post-concussive symptoms following the accident, in Dr. Gouws' opinion, as of his examination of Ms. Turner, there were other factors that affected her concentration and cognitive abilities, including her chronic pain, anxiety and mood disorders, as well as side effects from medications. Dr. Gouws also noted "[e]motional comorbidities with ongoing depressive and anxiety symptoms requiring medication as well as ongoing sleep disturbances."

**132**  In Dr. Gouws' opinion, Ms. Turner's physical capacity continued to be significantly reduced, and her chronic pain limited her tolerance for prolonged physical activity, especially heavier physical activity or activities that required prolonged static body positioning. In his opinion, Ms. Turner would need to continue to modify her physical activities in order to attain "reasonable symptom control." In Dr. Gouws' opinion, as of August 2014, Ms. Turner did not meet the physical demands of "her aspired occupation as a nurse." Further, in Dr. Gouws' opinion, Ms. Turner did not have an overly negative perception of her own mental and physical abilities and was not overly fixated on her problems and limitations. There was a lack of cognitive distortions.

**133**  In Dr. Gouws' opinion (para. 101), in the long term, Ms. Turner:

would most likely have the best chance of finding sustainable work that allows her reasonable symptom control by choosing an occupation that requires less physical activity. Part-time work will most likely be more sustainable in the long run as well. The alternative of doing part-time work may impact her ability to advance her career.

**134**  In terms of a prognosis, Dr. Gouws said (para. 102):

Ms Turner is now more than four years post injury following [the accident]. She has not been able to recover to a point where she is able to perform the duties associated with her aspired occupation as a registered nurse and has been unable to continue her training, most likely due to the mismatch between her physical capacity and the physical demands of her work. When I assessed her, Ms. Turner continued to be reliant on pain medication (including narcotics) for symptom control, as well as taking (potentially addictive) anti-anxiety and antidepressant medications. It is my opinion that it is unlikely that she will become symptom-free. It is my opinion that she has been left with a permanent functional impairment as a result of the injuries that she sustained in the [accident].

**135**  Among Dr. Gouws' recommendations were specific recommendations concerning medication (at para. 105):

I would recommend Ms. Turner continue to follow up with her family physician regarding ongoing medical/medication management with the objective to eventually wean her off all her narcotic medication and benzodiazepines. . . .

**136**  In Dr. Gouws' opinion (para. 106) Ms. Turner would benefit from ongoing supervised exercise with a kinesiologist, in a rehabilitation setting, and it would be reasonable for her to have access to physiotherapy for symptom management, as long as she was also participating in active rehabilitation. In his opinion, Ms. Turner would also benefit from ongoing access to psychological counselling.

1. **The Psychiatrists**

**A. Dr. Jeanette Smith**

**137**  Dr. Smith is a medical doctor, a psychiatrist and a certified specialist in forensic psychiatry. Dr. Smith explained that forensic psychiatry is a sub-specialty of general psychiatry. Where a forensic psychiatrist has been asked to undertake an assessment, the purpose of the assessment is to provide an independent, objective opinion concerning an individual. This is in contrast to a treating psychiatrist, who is not impartial and whose focus is on treating and being an advocate for the patient. Dr. Smith explained that a forensic psychiatrist must strive for impartiality and objectivity. Dr. Smith was tendered by the plaintiff and qualified as an expert in forensic psychiatry, qualified to give opinion evidence regarding Ms. Turner's psychiatric issues relating to the accident and injuries suffered by Ms. Turner in the accident.

**138**  Dr. Smith carried out independent assessments of Ms. Turner on four occasions over five years. Her last assessment was in October 2016. I found Dr. Smith's evidence, both in her reports and her oral evidence, to be of great assistance - taken together with Ms. Turner's evidence - in understanding how the accident, and the injuries suffered in the accident, have affected Ms. Turner's life.

**139**  Dr. Smith's first assessment of Ms. Turner was done on August 15, 2011, when she met with Ms. Turner for two and a half hours. Dr. Smith explained that, as a forensic psychiatrist performing an assessment, her average interviews are between two and three hours. She explained that, at the interview, she needs to obtain a full history, build rapport with the person being assessed, and observe that individual - her affect, speech, and movements - with the object of obtaining an overall sense of who the person is.

**140**  Dr. Smith's first report, dated August 17, 2011, sets out a detailed history, which, in part, formed the basis for Dr. Smith's opinions and diagnoses. Dr. Smith noted, for example, Ms. Turner's last minute decision to pursue the care-aide course in September 2010, that she was by nature somewhat rebellious and had been reluctant to pursue medical treatment after the accident. However, this had gradually changed over the months before Dr. Smith's assessment, and Dr. Smith described Ms. Turner as being fully engaged, attending physiotherapy once a week and practicing the exercises daily. Dr. Smith described Ms. Turner as being:

unclear about her future career plans, not knowing whether her physical limitations will improve to a level that would enable her to complete the care aide course and perhaps even become a Registered Nurse. She does not have any alternative career plans and this is a source of uncertainty for her.

**141**  In Dr. Smith's opinion, Ms. Turner suffered a concussion in the accident. This diagnosis was consistent with the history of head trauma, followed by severe headache, photophobia, noise sensitivity, nausea, vomiting and cognitive difficulties.

**142**  Dr. Smith also diagnosed Ms. Turner's depressive symptoms (including low mood, insomnia, feelings of hopelessness and frustration, and cognitive difficulties) as consistent with adjustment disorder with depressed mood. Dr. Smith wrote [**bold** in original]:

These depressive symptoms which were most marked between March and May of 2011 appear to have flowed largely from feelings of frustration and loss following the accident of July 28th, 2010. Ms. Turner was unable to pursue her plan to work as a forest firefighter and then go travelling. . . . Even after she attempted to revise her work plan and commence the care aide course, her physical limitations twice prevented her from completing the practicum. In my opinion, it is likely that it was the sense of failure and frustration that was the major factor fueling her depressive symptoms. Ms. Turner may have had a pre-existing tendency to experience depressive symptoms at times of stress . . . . She may also have a genetic vulnerability to depression. . . . It is likely that her rather unrewarding relationship with her boyfriend has also played a role in the depressive symptoms but in my opinion, in the absence of the accident . . . and the resulting physical limitations, her life would have taken a very different trajectory and she would not have gone on to develop the **adjustment disorder with depressed mood**.

**143**  Further, in Dr. Smith's opinion, Ms. Turner's anxiety symptoms were consistent with generalized anxiety disorder, and the accident played a significant role in aggravating the disorder. Dr. Smith observed that the accident:

introduced a great deal of uncertainty into [Ms. Turner's] life, due to her inability to pursue her career plans and the way in which her injuries have removed her sense of control over her life. The uncertainty and lack of control are particularly unsettling for people who are prone to anxiety. Other facts that have likely contributed to her anxiety are her possible genetic vulnerability . . . and her rather difficult relationship with her boyfriend . . ..

**144**  In Dr. Smith's opinion, Ms. Turner had also developed a panic disorder without agoraphobia. Again, Dr. Smith noted that Ms. Turner was likely genetically vulnerable to panic disorder, and the difficult relationship with Mr. Dionne in 2011 was likely a factor.

However, the uncertainty and lack of control in her life introduced largely by the effect that her physical injuries have had on her functioning, have in my opinion also contributed significantly to the onset of the panic disorder and in the absence of these injuries, she may well have not gone on to develop the panic disorder at this point in her life. . . . It is therefore my opinion that the accident . . . was likely a significant factor in the causation of the panic disorder without agoraphobia.

**145**  In Dr. Smith's opinion, Ms. Turner had not developed post-traumatic stress disorder. Rather, the symptoms Ms. Turner described in relation to motor vehicle travel were consistent with the diagnosis of generalized anxiety disorder, and Ms. Turner's tendency to worry excessively and anticipate danger.

**146**  Dr. Smith also addressed Ms. Turner's cognitive symptoms, problems with concentration and memory, and whether those were related to the concussion. In Dr. Smith's opinion, deficits in attention, concentration and delayed recall, measured on testing, were possibly symptoms of post-concussion syndrome. However, in Dr. Smith's opinion, it was likely that continuing anxiety and (to a lesser degree) depression were contributing to the cognitive difficulties and were entirely responsible for them. In Dr. Smith's opinion, only once the depressive and anxiety symptoms were effectively treated would one be able to determine if there were any residual cognitive deficits that could be attributed to the concussion. However Dr. Smith noted that the natural course of post-concussive symptoms was for full recovery.

**147**  Dr. Smith deferred to physicians with expertise in physical medicine in respect of Ms. Turner's physical injuries. However, in her opinion, Ms. Turner's physical injuries played a major role in fueling her depressive and anxiety symptoms, and it was also likely that the depression and anxiety further impaired Ms. Turner's functioning "by sapping her energy and motivation as well as detracting significantly from her quality of life."

**148**  In terms of treatment, Dr. Smith recommended that Ms. Turner attend cognitive behaviour therapy with a registered psychologist, to improve her ability to manage her depressive, anxiety and pain symptoms. Dr. Smith anticipated that Ms. Turner would need in the region of ten to fifteen sessions. Dr. Smith noted that it appeared:

the uncertainty about her future career is one of the factors that is fueling Ms. Turner's anxiety. Her plan had been to pursue either physically demanding jobs . . . or a career in healthcare such as nursing. The uncertainty around her back pain and how this affects her physically, means that she cannot at this point commit herself to such career plans.

**149**  Dr. Smith next assessed Ms. Turner in May 2013, during the same week that Ms. Turner was seen for the second time by Dr. Stewart.

**150**  Dr. Smith described Ms. Turner as having continued to make good progress since August 2011. She had ended the relationship with Mr. Dionne and completed two semesters at Selkirk College. Ms. Turner reported having withdrawn from opiate painkilling medications (something also reported by Dr. Stewart), and Dr. Smith suspected that Ms. Turner's reported improved ability to study was a result of her no longer taking such drugs. Dr. Smith described Ms. Turner as appearing to be highly motivated to find employment, and recognizing that her emotional state was significantly better when she was busy and productive. Dr. Smith also noted Ms. Turner's report that she had enrolled in the nursing program at Selkirk College, with plans to start in September 2013.

**151**  Dr. Smith said [underlining added]:

With the help of psychological interventions and the reading of self-help books, Ms. Turner has learned to challenge negative thinking patterns and in my opinion this has been the most important element in the improvement she has experienced in her levels of pain, anxiety and depression. However although she appears to be trying very hard not to allow her pain to limit her in any way, it is ongoing and it remains to be seen whether she is able to cope with the physical demands of nursing, particularly as she has already had to quit a care aide's course because of the back pain.

**152**  Ms. Turner had not had any panic attacks since January 2012, and Dr. Smith noted that her depressive symptoms were largely in remission. Dr. Smith observed that, in general, Ms. Turner's mood "seems to be better when she is busy and productive and evidently attending school has had a positive impact on her mood." When Dr. Smith examined Ms. Turner in May 2013, there was no evidence of significant cognitive impairment, no evidence that she was experiencing any clinically significant post-traumatic stress disorder symptoms, and no evidence of any substance abuse or dependency.

**153**  However, Dr. Smith was cautious in her prognosis, and said [underlining added]:

1. In my opinion provided Ms. Turner is able to complete her RN training and find employment despite her ongoing pain, it is likely that she will generally be able to manage her depressive and anxiety symptoms. However, it is by no means certain that she will be able to complete the RN program given the physical demands that will be involved and if she cannot cope with these, it is my opinion very likely that she will experience a marked worsening of the depressive and anxiety symptoms.
2. Clearly having now experienced clinically significant and at times very prominent depressive and anxiety symptoms, it is my opinion that Ms. Turner remains very vulnerable to relapses of these conditions probably for the foreseeable future. Her depressive symptoms in particular can be highly incapacitating and it is quite likely that she will experience further and probably more severe depressive symptoms in the future. . . .

**154**  In her oral evidence, Dr. Smith explained that, when someone has intense pain, it is not unusual for this to trigger depression and anxiety. As the anxiety increases, there is an increase in muscle tension which aggravates the sensation of pain. Often the individual will then feel a loss of control, and fears that the pain will overwhelm her. As that happens, a vicious cycle develops. Moreover, when an individual becomes depressed, her perception of pain is heightened, and her ability to tolerate pain is lowered.

**155**  Dr. Smith next assessed Ms. Turner on November 10, 2014, about two months after Ms. Turner left the Selkirk nursing program. This was a turbulent and very unsettled time in Ms. Turner's life, which is reflected in the history Dr. Smith obtained. Dr. Smith's meeting with Ms. Turner was about 90 minutes long.

**156**  In Dr. Smith's opinion, as of November 2014, Ms. Turner continued to experience symptoms of generalized anxiety disorder, panic symptoms and depressive symptoms, and the symptoms continued to "wax and wane" in response to external stressors and ongoing pain. In Dr. Smith's opinion, any ongoing cognitive symptoms (for example, Ms. Turner's reports of poor attention and memory) were the result of factors such as persistent and at times severe pain, anxiety, depression, poor sleep, fatigue and the side effects of medications such as Percocet, oxyneo, clonazepam and cyclobenzaprine. In Dr. Smith's opinion, any symptoms of concussion suffered in the accident would have resolved within months of the accident, and would not explain any perceived ongoing cognitive deficits. Dr. Smith restated her opinion that Ms. Turner did not suffer from post-traumatic stress disorder.

**157**  Dr. Smith did not anticipate a significant improvement in Ms. Turner's depressive or anxiety symptoms, despite medication, until Ms. Turner had identified a career consistent with both her strengths and limitations. Dr. Smith said that, "At the present time she is feeling lost, disappointed and hopeless, and I believe she needs a realistic career goal in order to offer her hope." Dr. Smith strongly recommended vocational counselling, and sooner rather than later, since "the longer her current situation continues, the more despondent she will become."

**158**  In Dr. Smith's opinion, Ms. Turner required further cognitive behavioural therapy, but Dr. Smith recommended it take place once Ms. Turner was involved in vocational counselling. In the meantime, Dr. Smith encouraged Ms. Turner to begin with daily goal setting, aiming for achievable goals such as a 15 to 30 minute walk, a phone call with a friend and completing chores.

**159**  Dr. Smith did her final assessment of Ms. Turner on October 11, 2016, when she met with Ms. Turner for 90 minutes. Dr. Smith's October 17, 2016 report reviews some of the events in Ms. Turner's life since the 2015 assessment, including Ms. Turner's experience working at Progressive. Dr. Smith commented on Ms. Turner's use of medication, including Ms. Turner's report that she was taking 5 to 6 Gravol pills at night for sleep, something Ms. Turner reported using consistently for the past three years. When Dr. Smith saw Ms. Turner, Ms. Turner had not yet been assessed by Dr. Bakshi, although the referral was pending. Dr. Smith described Ms. Turner's affect as appearing "rather flat and low, compared to previous examinations." In Dr. Smith's view, Ms. Turner appeared to be insightful, and recognized the link between her anxiety, depression, stress, insomnia and pain. She reported using techniques such as progressive relaxation, distraction and pain-killing medications to manage her pain.

**160**  In terms of diagnoses, Dr. Smith stated that Ms. Turner continued to suffer from chronic pain in her lower and upper back. While Dr. Smith deferred to colleagues with expertise in physical medicine with respect to the cause, prognosis and treatment, Dr. Smith understood that the pain continued to be aggravated significantly by stress and anxiety. Dr. Smith commented that Ms. Turner's generalized anxiety levels remained very high. Dr. Smith commented that the combination of worry and difficulty relaxing caused Ms. Turner to suffer severe insomnia, even with sedative medications. Dr. Smith suspected that the significant mental and physical fatigue that Ms. Turner described was the result of her generalized anxiety, pain and insomnia. Dr. Smith was not sure that, since leaving her job at Progressive, Ms. Turner fulfilled all of the DSM-5 diagnostic criteria for major depression, but Dr. Smith was confident that Ms. Turner was experiencing a recurrence of clinically significant depressive symptoms.

**161**  In Dr. Smith's opinion, it was unlikely that, absent the accident, Ms. Turner would have developed the chronic pain, generalized anxiety disorder or the depressive disorder. Dr. Smith acknowledged additional stresses in Ms. Turner's life since the accident which had served to fuel the anxiety, depression and pain. However, in Dr. Smith's opinion, many of these stressors - e.g., being unable to complete her nursing degree or remain working - appeared to be related to the accident. It was also Dr. Smith's opinion that, absent the accident and the development of the generalized anxiety disorder, chronic pain and depression, Ms. Turner would have been able to cope with stress more effectively and not been so overwhelmed by it.

**162**  Dr. Smith noted that Ms. Turner did have times when she felt optimistic about her abilities, and, at such times, assessors would not consider that her physical or psychological symptoms were incapacitating. Dr. Smith noted the period prior to Ms. Turner beginning her nursing program in 2013 as one of those times. With respect to Ms. Turner's experience working at Progressive, Dr. Smith commented:

1. . . . [D]uring this time she experienced a marked worsening of her generalized anxiety as well as the chronic pain. I suspect that the stress of starting a new job and the physical demands of the work combined to make her more anxious. As the pain worsened, her worry about being able to control the pain would have increased, leading to an escalation in her pain, thereby setting up a vicious circle of anxiety and pain, both of which resulted in significant fatigue. . . . [S]he forced herself to continue working until the situation became untenable and she had to stop working. As noted above, there was subsequently a drop in her mood, which has further impaired her energy and motivation. This pattern is very reminiscent of her previous attempt to complete her nursing training. Unfortunately once she has experienced such a set back, her pain, anxiety and depressive symptoms all worsen and it becomes very difficult for her to motivate herself to start all over again. At this point she requires the support and guidance of her treatment team more than ever.
2. . . . [I]t is very likely that her ability to sustain concentration, to recall information and to make decisions is compromised by the combination of chronic pain, anxiety, lack of sleep, profound fatigue, depression and side effects of medications such as painkillers and antihistamines. . . . [I]t is my opinion that the combined effects of chronic pain, generalized anxiety, depression and medication side effects is to significantly impair Ms. Turner's ability to work in jobs in which she would be expected to sustain focus, to make decisions and to remember information. Furthermore, given her low tolerance of stress that results from the generalized anxiety disorder, it is unlikely that she would be able to cope with a job that involved deadlines, potential conflict or pressure of any kind.
3. In my opinion, Ms. Turner may have more success in attempting to work if she limits herself to a small number of hours per week in a job that is neither physically nor mentally demanding. Ideally she should be guided in her choice of work and monitored closely by her OT and vocational counsellor in order to ensure that she does not allow herself to take on too much and once again trigger the vicious cycle of worsening pain and anxiety that seems to invariably lead to perceived failure and then depression.

**163**  In terms of treatment recommendations, Dr. Smith expressed concern about Ms. Turner's use of Gravol. In Dr. Smith's opinion, the effects of high doses of Gravol and poor quality sleep would be to further impair Ms. Turner's baseline energy levels and cognitive function. Dr. Smith therefore recommended minimizing Ms. Turner's use of Gravol and re-introducing zopiclone and perhaps also referring her to a sleep specialist. Dr. Smith noted that, despite the narcotic pain medication Ms. Turner was taking, her pain remained poorly controlled. In Dr. Smith's opinion "it would clearly be reasonable" for Ms. Turner to attend a pain clinic to see if her pain could be better controlled, preferably using a multi-disciplinary approach.

**164**  With respect to a prognosis, it was Dr. Smith's opinion that the prognosis for significant improvement, given the number of years since the accident, was guarded at best.

**B. Dr. Stephen A. Kline**

**165**  Dr. Kline is a medical doctor with a speciality in psychiatry. At the request of counsel for the defendant, he carried out an independent medical assessment of Ms. Turner on July 11, 2013, and prepared a report dated July 15, 2013. Dr. Kline's report was admitted into evidence as an expert report. Dr. Kline did not testify at trial.

**166**  Dr. Kline described Ms. Turner as very matter of fact in providing a history, and that she was friendly, alert and co-operative throughout the interview (which lasted two and a quarter hours). He described her affect as euthymic. During the interview, Ms. Turner stated clearly that her major physical problem continued to be her back. She reported cognitive symptoms immediately after the accident, including a decrease in her concentration, attention and short-term memory. However, she reported that her concentration, attention and short-term memory had improved with time and with (among other things) the assistance of memory aids explained to her through occupational therapy. Ms. Turner reported that, overall, her cognitive function had improved, although it was not yet up to the pre-accident baseline.

**167**  Dr. Kline noted that, after the accident, Ms. Turner had a number of psychiatric issues, including depression, anxiety, post-traumatic stress and what she described as panic attacks.

**168**  Dr. Kline made the following diagnoses: anxiety symptoms but not the disorder (mild); panic symptoms but not the disorder (mild); adjustment disorder with depressed mood; mild alcohol abuse, and cocaine and ecstasy abuse in partial remission.

**169**  Dr. Kline also diagnosed chronic pain in Ms. Turner's back, and a concussion from the accident. He deferred to other experts with respect to whether or not further treatment was required for Ms. Turner's neck and lower back problems, and with respect to the prognosis for those matters.

**170**  Dr. Kline noted that Ms. Turner's pre-accident history and family history (on her mother's side) of anxiety may have made her more susceptible to issues of depression and anxiety following the accident. Following the accident, she had symptoms of depression and symptoms of anxiety, but not sufficient to make a diagnosis of either major depressive disorder or an anxiety disorder, in his opinion. She had symptoms of post-traumatic stress, but not nearly enough in Dr. Kline's opinion to diagnose a post-traumatic stress disorder. Mild panic attacks persisted, but were being relieved somewhat by minor tranquilizers.

**171**  In Dr. Kline's opinion, all of these psychiatric symptoms arose following the accident and were directly or indirectly connected to the accident. In his opinion, absent the accident, Ms. Turner may well have had some of the symptoms of depression and anxiety related to her relationship with Mr. Dionne in 2011, but most of the symptoms were related to the accident.

**172**  With respect to Ms. Turner's cognitive symptoms, Dr. Kline noted that, over time, her cognitive function had improved steadily. He wrote:

She has been seen by two different psychologists and tested extensively by one of them and [there] appears to be a consensus that she has a functional cognitive deficit rather than a traumatic brain injury resulting from the MVA of 2010. I concur. However, the symptoms of depression, anxiety, post traumatic stress and ongoing pain have all contributed to this functional cognitive deficit, which is slowly improving.

**173**  Dr. Kline recommended cognitive behavioural therapy for Ms. Turner's psychiatric symptoms and her cognitive deficits. In his opinion, that therapy "should help her further resolve her problems and very much improve her cognitive function." He recommended about 20-30 sessions, directed toward her symptoms of depression, anxiety, panic and post-traumatic stress. Dr. Kline also recommended ongoing occupational therapy to augment the cognitive behavioural therapy and "to help her adjust to ongoing life problems for another year."

**174**  Dr. Kline noted that Ms. Turner took her pain medication in response to pain, rather than anticipating it, and that those in charge of her physical wellbeing might want to suggest an alternate schedule.

**175**  In Dr. Kline's opinion [underlining added]:

Ms. Turner's prognosis for psychiatric and cognitive issues is very good. She is motivated to improve and it is likely that treatment of her psychiatric symptoms will greatly improve her functional cognitive deficit. Improved pain relief should also contribute to better functional cognitive performance.

**176**  In a report dated December 6, 2015, Dr. Smith commented on Dr. Kline's report, diagnoses and prognosis. Essentially, based on the assessments of Ms. Turner that had been done in 2013, Dr. Kline and Dr. Smith were in agreement, and the views expressed by Dr. Kline that are underlined above are also expressed by other experts who assessed Ms. Turner. However, as of December 2015, Dr. Smith considered both of their 2013 opinions to be out-of-date based on developments in Ms. Turner's life over the next several years.

**177**  There was no "improved pain relief" for Ms. Turner. Rather, once she started her first year of nursing, her pain symptoms contributed to a failing functional cognitive performance, and her psychiatric symptoms were untreated. The more cautious prognosis set out in Dr. Smith's May 2013 report (referred to above) turned out to be the more accurate one.

1. **Radiology and neuroradiology**

**A. Dr. Jason Clement**

**178**  Dr. Clement is a medical doctor and radiologist. He was tendered by the plaintiff and qualified as an expert in radiology, neuroimaging and human anatomy, qualified to give opinion evidence concerning the interpretation of the imaging studies of Ms. Turner taken July 28, 2010, September 3, 2010 and January 10, 2013. Dr. Clement did not examine or take a history from Ms. Turner.

**179**  With respect to the brain imaging done on July 28 and September 3, 2010, Dr. Clement agreed with the opinions expressed by Dr. Graeb (referred to below). Dr. Clement also agreed with Dr. Graeb concerning interpretation of the imaging of Ms. Turner's thoracic spine, and that this imaging showed compression fractures of the T11 and T12 vertebral bodies.

**180**  Dr. Clement was the "dictating radiologist" for the examinations of Ms. Turner's lumbar spine on September 3, 2010 and January 10, 2013. He explained that the first examination was remarkable for a large cerebrospinal fluid ("CSF") collection, or cystic lesion. The features of the lesion indicated that it was longstanding and pre-dated the accident. In Dr. Clement's opinion, at the level of the left L5/S1 neuroforamen, the fluid appeared to spill out of the neuroforaminal canal around the exiting L5 nerve root. In Dr. Clement's opinion, the upper portions of this fluid collection appeared to be unencapsulated and were likely secondary to recent cyst rupture.

**181**  Accordingly, in Dr. Clement's opinion, the trauma of the accident caused the cyst to rupture, which Dr. Clement explained, was a rare but recognized complication of CSF-containing cysts. Dr. Clement offered traumatic rupture of the cyst, and the consequent loss of CSF, as a possible cause of severe headaches that Ms. Turner reported immediately after the accident, secondary to intracranial hypotension. However, in his oral evidence, Dr. Clement acknowledged that a medical doctor who is a clinician (such as Dr. Stewart, Dr. Teal, Dr. Gul or others who assessed Ms. Turner), which he is not, would be better able to provide a diagnosis.

**182**  With respect to the imaging done in January 2013, Dr. Clement opined that the portion of the CSF collection that appeared to represent a typical CSF cyst was stable or only minimally larger in comparison to the imaging done in September 2010. However, in Dr. Clement's opinion, "the portions that were previously noted to be spilling into the left L5/S1 neuroforaminal canal appear dramatically different" than on the September 2010 imaging. In Dr. Clement's opinion, the fluid "in this location has increased in volume and now appears well defined."

**183**  Dr. Clement summarized his conclusions concerning his diagnosis of traumatic rupture of the cyst, caused by the accident:

The MRI examination of September 3, 2010 demonstrates a configuration of fluid above the level of the large (but otherwise typical) CSF cyst that is consistent with unencapsulated fluid. As would be expected if this were the case Ms. Turner had severe headaches in the days and weeks after her trauma with multiple ER visits. Her headaches were worse with a standing or upright position which is the clinical hallmark of low pressure headaches. On a follow-up MRI examination 28 months later the previously unencapsulated fluid now has an organized appearance and is larger in size . . .. Rupture of CSF containing cysts is rare and so the resulting complications are not well defined.

**B. Dr. Douglas Graeb**

**184**  Dr. Graeb is a medical doctor and radiologist with specialty training in neuroradiology. He was tendered by the defendant and qualified as an expert in radiology and neuroradiology, qualified to give opinion evidence concerning the medical imaging studies of Ms. Turner following the accident (specifically on July 28, 2010, September 3, 2010 and January 10, 2013). Like Dr. Clement, Dr. Graeb did not examine or take a history from Ms. Turner.

**185**  Dr. Graeb was first asked to provide his opinion, in his capacity as a neuroradiologist, concerning the injuries Ms. Turner sustained in the accident, based on his review of the imaging studies of Ms. Turner's brain taken on July 28, 2010 and September 3, 2010, and of her spine taken September 3, 2010. Dr. Graeb also reviewed the imaging reports.

**186**  With respect to the brain imaging studies, in Dr. Graeb's opinion, these did not demonstrate any evidence of traumatic brain injury. However, Dr. Graeb noted that this did not rule out the possibility of brain injury, as mild traumatic brain injury may be present with normal brain imaging studies.

**187**  With respect to the MRI of Ms. Turner's thoracic spine, Dr. Graeb noted the recent fractures of the T11 and T12 vertebral bodies. He described the factures as relatively mild in nature, and, in his opinion, they were not associated with compression of either spinal cord or nerve roots.

**188**  With respect to the September 2010 MRI of Ms. Turner's lumbosacral spine, Dr. Graeb saw no evidence of acute trauma in either the lumbar spine or sacrum. However, Dr. Graeb noted a "relatively large cystic structure" situated mainly in the sacral canal. In Dr. Graeb's opinion, the cyst had been present for many years. Dr. Graeb explained:

These cysts accumulate normal cerebrospinal fluid and enlarge very slowly. As they enlarge they can produce changes in the bone and compression of the nerve roots. Most such cysts are asymptomatic, but occasionally they produce symptoms due to nerve compression, and some can become symptomatic after trauma. Symptoms related to nerve compression would include pain and/or numbness in the leg(s) and/or pelvic region, depending on the affected level.

Whether the cyst in Ms. Turner is producing symptoms cannot be determined by examination of the images alone.

**189**  Based on the imaging studies, in Dr. Graeb's opinion, the fractures of the T11 and T12 vertebral bodies were a result of the accident. The brain imaging studies did not rule out mild traumatic brain injury. Moderate scalp swelling shown on the July 28 CT scan was caused by the accident. The cystic abnormalities in the sacral and lower lumbar regions were long standing and not the result of the accident. Whether they became symptomatic as a result of the accident could not be determined from the images alone.

**190**  Dr. Graeb was then asked to review the second MRI of Ms. Turner's lumbosacral spine performed in January 2013, together with the accompanying report prepared by Dr. Clement. He was asked whether he had any disagreement with Dr. Clement's report.

**191**  Based on his review of the MRI, Dr. Graeb concluded that the fractures at T11 and T12 had healed. According to Dr. Graeb the "large chronic cystic structure" could again be seen, filling and expanding the sacral canal, and extending from the mid-L5 level to the lower S3 level. He noted differences in size, compared with the 2010 image, and noted that the S1 nerve root is "mildly compressed as it exits the thecal sac on the 2013 study, whereas it was unaffected on the study from 2010." According to Dr. Graeb, the component of the cyst that extended outward into and lateral to the left L5-S1 intervertebral foramen had also enlarged (compared with 2010), and the left L5 nerve root was "mildly compressed" in the intervertebral foramen (compared with 2010).

**192**  In Dr. Graeb's opinion, components of the large cyst that could be compared between the 2010 and 2013 studies demonstrated "slight enlargement." In this respect, he disagreed with Dr. Clement. Dr. Graeb disagreed with Dr. Clement's classification of the cyst as an arachnoid cyst (rather than a Tarlov's or perineural cyst) because, in Dr. Graeb's opinion, the left L3 nerve root (for one) appeared to be "intimately involved with the cyst and incorporated into its wall." However, in Dr. Graeb's opinion, the classification of the cyst was not critical, since both types of cysts are "benign structures filled with cerebrospinal fluid, which may slowly enlarge over the years, and which may or may not become symptomatic."

**193**  Dr. Graeb disagreed with Dr. Clement's opinion that, based on the 2010 imaging study, there was unencapsulated fluid spilling out through the left L5 neural foraminal canal. In Dr. Graeb's opinion, this component of the cystic lesion had clearly defined, rounded margins on the 2010 study, and he was able to clearly identify a wall surrounding major portions of it. He explained that free fluid would be expected to have poorly defined margins that would not be rounded. In Dr. Graeb's opinion, this region of the cyst had "very clear margins" on the 2013 MRI, consistent with an encapsulated cystic lesion with intact walls. Dr. Graeb therefore disagreed with Dr. Clement's opinion and conclusion that the fluid-containing structure in relation to the left L5 nerve root was the result of "traumatic rupture of CSF containing cystic lesion."

**194**  Dr. Graeb explained:

This cystic lesion . . . is not necessarily symptomatic. If symptoms were present, these could include pain and/or numbness radiating into the leg(s) or perineal region on either side consistent with the left L5 nerve root, and either S1, S2 or S3 nerve roots. Leg weakness . . . might also be present.

**195**  Dr. Graeb said that he would defer to a neurosurgeon on the question whether the cyst was causing any symptoms.

**(iv) Neurology, neurosurgery and orthopaedic surgery**

**A. Dr. Philip Teal**

**196**  Dr. Teal is a medical doctor, and a specialist in neurology and emergency medicine. He was tendered by the plaintiff and qualified as an expert in neurology, qualified to give opinion evidence concerning neurological issues in relation to injuries Ms. Turner sustained in the accident.

**197**  Dr. Teal carried out an independent medical assessment of Ms. Turner on November 16, 2012, about 15 months after Ms. Turner first saw Dr. Stewart and Dr. Smith. The opinions in his report dated January 2, 2015 are based on his examination of Ms. Turner and documents that both pre-date and post-date (for example, Dr. Bishop's October 14, 2014 report) that examination. As of the assessment, Ms. Turner reported that back pain in her mid and low back was her number one problem. She also reported neck discomfort aggravated by sustained activities or postures, memory and cognitive issues, symptoms of anxiety and sleep disturbance.

**198**  In Dr. Teal's opinion, Ms. Turner sustained the following injuries in the accident: a mild traumatic brain injury; mild wedge compression fractures of the 11th and 12th thoracic vertebrae, with no evidence of neurological injury or spinal instability; soft tissue injuries to the face and head; a Grade 2 cervical strain or whiplash injury; and other soft tissue injuries.

**199**  In Dr. Teal's opinion, Ms. Turner had made a very good recovery from the mild traumatic brain injury. In his opinion, contributing factors to Ms. Turner's "persisting subjective cognitive symptoms" of forgetfulness, troubles with concentration and attention and mental fatigue, included the possibility of mild residual cognitive sequelae from the mild traumatic brain injury, and the effects of persistent pain, sleep disturbance and anxiety. The headaches Ms. Turner experienced following the accident were associated with the mild traumatic brain injury. At the time Dr. Teal saw Ms. Turner, the headaches had improved significantly and were no longer a major problem for her.

**200**  It was Dr. Teal's opinion that Ms. Turner was experiencing persisting back pain as a result of the compression fractures and the soft tissue injuries associated with the injury to her spine. In Dr. Teal's opinion, Ms. Turner did not have evidence of an unstable spine condition or any spinal cord or nerve root involvement. He noted that, typically, pain from mild compression fractures will subside over time. However, Ms. Turner had had persistent back pain arising as a result of both the bony and soft tissue injuries resulting from the accident. In Dr. Teal's opinion, the prognosis for complete resolution of Ms. Turner's back pain was guarded.

**201**  Dr. Teal recommended that Ms. Turner be followed by a physician with an interest in chronic pain or by a physiatrist with regard to her persisting back pain.

**202**  In Dr. Teal's opinion Ms. Turner's cervical strain was unlikely to result in any significant neurological deficit. Dr. Teal observed that Ms. Turner might continue to experience recurrent "bouts" of neck discomfort triggered by sustained positions or posture, and he noted that the symptoms might require some behavioural modification so that Ms. Turner could pursue education and career opportunities. Dr. Teal did not anticipate the need for ongoing physiotherapy or other treatments.

**203**  Dr. Teal deferred to psychiatric or neuropsychological assessment respecting Ms. Turner's symptoms of anxiety, panic attacks and mood disturbance.

**B. Dr. Ian Turnbull**

**204**  Dr. Turnbull is a medical doctor with a speciality in neurosurgery. He was tendered by the defendant and qualified as an expert in neurosurgery. Dr. Turnbull's opinions are set out in his main report dated February 14, 2013. He was not required for cross-examination at trial.

**205**  Dr. Turnbull assessed Ms. Turner on January 10, 2013. At that time, Ms. Turner reported low back pain after walking long distances or prolonged sitting, neck pain after prolonged sitting or leaning over books to study, and trouble remembering everything that came up in her schoolwork. She did not report any ongoing problems with headaches or dizziness.

**206**  On examination, Dr. Turnbull did not find any abnormalities when he examined Ms. Turner's cranial nerves, and no sensory abnormalities on physical examination. Among other things, he found that she had a "good range" of pain-free back and neck mobility, no limitation of straight-leg raising and no tenderness in the cervical paraspinal muscles.

**207**  Dr. Turnbull diagnosed Ms. Turner as having sustained a concussion in the accident. In his opinion, as January 2013, she no longer had any symptoms that he could relate to the concussion and he did not believe that she had evidence of a traumatic brain injury.

**208**  Dr. Turnbull also diagnosed Ms. Turner as having sustained compression fractures of the T11 and T12 vertebrae. In his opinion, there was no reason to think that the fractures would not heal in a completely normal way. However, in his opinion, the persistence of neck and back pain "can be related to soft tissue injuries that occurred at the time of the accident."

**209**  In Dr. Turnbull's opinion, it was "most probable" that Ms. Turner would make a complete recovery from the injuries she sustained in the accident. He did not believe that she had any cognitive difficulties that could be related to brain damage, given her history of mild-to-moderate concussion, "which usually resolves completely, without any residual effects."

**210**  In November 2015, Dr. Turnbull was asked to, and did, review a number of additional documents and reports, including Dr. Stewart's January 2015 report, Dr. Gouws April 2015 report, and Dr. Smith's August 2011, May 2013 and December 2014 reports. Dr. Turnbull advised that there was nothing in any of these additional documents or reports that would cause him to change the opinions he expressed in his February 2013 report.

**C. Dr. Shahid Gul**

**211**  Dr. Gul is a medical doctor with a speciality in neurosurgery. He was tendered by the plaintiff and qualified an expert in neurosurgery and radiology.

**212**  Dr. Gul carried out an independent medical assessment of Ms. Turner on January 27, 2016. The records provided to him included the imaging studies done on July 28, 2010 (CT of Ms. Turner's head), September 3, 2010 (MRI of Ms. Turner's brain and spine) and January 10, 2010 (MRI of Ms. Turner's lumbosacral spine), together with the radiologist's reports.

**213**  Ms. Turner's primary complaint on the day of the examination was pain in the lumbosacral region of her lower back, which she told Dr. Gul could extend into the upper lumbar regions. She reported no overall change in her lower back pain since 2010. Rather, she reported constant pain at about 3 out of 10 (with zero being no pain), that steadily increased to severe pain with activities such as prolonged standing or walking. Ms. Turner reported that she was no longer experiencing problematic neck pain or shoulder pain. The physical examination was unremarkable.

**214**  Dr. Gul confirmed the diagnosis of compression fractures to the T11 and T12 vertebral bodies, caused by the accident. In his opinion, Ms. Turner's fractures had healed satisfactorily without the need for surgical stabilization. He diagnosed Ms. Turner's lower back pain as secondary to a spine-associated musculo-skeletal injury, and in Dr. Gul's opinion the timing of the onset of the back pain in relation to the accident strongly suggested a causal association.

**215**  In Dr. Gul's opinion, Ms. Turner experienced symptoms consistent with concussion within a reasonably sort period of time after the accident. I note that, unlike Dr. Clement, he did not attribute Ms. Turner's symptoms to the accident causing the sacral cyst to burst. Dr. Gul deferred to a neuropsychologist concerning whether Ms. Turner had any ongoing symptoms in association with the concussion sustained in the accident.

**216**  With respect to the sacral spinal cyst shown on the imaging of Ms. Turner's lumbar spine, Dr. Gul said:

Spinal meningeal cysts are considered benign on the basis of histopathology and have the potential to very slowly enlarge with time. Although the vast majority of spinal cysts are asymptomatic, there are reports of some patients who develop symptoms attributable [to] irritation of an adjacent nerve root in the setting of large spinal meningeal cysts. Such symptoms for a sacral meningeal cyst could include lower extremity radicular pain or bladder dysfunction.

Although it is possible for CSF containing cysts to rupture as suggested by Dr. Clement, in my opinion, it is inherently difficult [to] ascertain when this may have happened for Ms. Turner on the basis of her imaging, particularly in the absence of MR imaging prior to the [accident] to suggest otherwise. . . .

. . . In my opinion, whether the cyst for Ms. Turner represents a Tarlov versus arachnoid cyst does not alter my opinion that the cyst in the sacrum is most likely a spinal meningeal cyst that is longstanding, asymptomatic and incidental, and does not require treatment at this time.

**217**  In his oral evidence, Dr. Gul confirmed his opinion that the cyst was asymptomatic. He was asked about a note made by Ms. Turner's family doctor in January 2011 about "occasional brief shooting pains in the left gluteal region." In his opinion, these symptoms were unrelated to the cyst. In his opinion, Ms. Turner's presentation was not in keeping with a cyst that was symptomatic.

**218**  Dr. Gul described there being "mild enlargement" of the cyst between the 2010 and 2013 MR scans. In his oral evidence, he explained that it can be very difficult to predict what may happen in the future. Dr. Gul explained that it did not necessarily follow that, if there were nerve involvement in the cyst, and the cyst was expanding, it would more likely cause pain. He explained that there can be quite large cysts with no symptoms. "Radiating pain" does not necessarily imply nerve root involvement, although it can. He recommended that, in the future, "any concerning symptomatic changes potentially attributable" to the cyst "should prompt repeat imaging to rule out progression."

**219**  With respect to a prognosis generally, Dr. Gul said:

In my experience, most spine-associated soft tissue injuries that come as a result of a motor vehicle accident heal within 24 months following the accident and any such pain that persists beyond this period of time is likely to remain as chronic pain. For Ms. Turner, she is well beyond this timeframe and, as such, it is more likely than not that she will be left with chronic lower back pain.

**D. Dr. Anthony Preto**

**220**  Dr. Preto is a medical doctor and (until December 31, 2016, when he retired) an orthopaedic surgeon. He was tendered by the defendant and qualified as an expert in orthopaedics, with a specialty in the lumbar spine, qualified to give opinion evidence concerning the musculo-skeletal injuries suffered by Ms. Turner in the accident. He was not tendered or qualified as an expert in either neurology or neurosurgery.

**221**  Dr. Preto carried out an independent medical assessment of Ms. Turner on August 25, 2015. In his report, Dr. Preto explained that he was confining his report to the lumbar spine, "having carefully reviewed Dr. Ian Turnbull's, Dr. Philip Teal's and Dr. Douglas Graeb's reports."

**222**  In Dr. Preto's opinion, as a result of the accident, Ms. Turner sustained soft tissue injury to the cervical, thoracic and lumbar spine, and a wedge compression fracture of the T11 and T12 vertebral bodies. In his opinion, the fractures were stable and healed without neurological deficit.

**223**  In the most controversial part of his report, Dr. Preto stated that, when he examined Ms. Turner on August 25, 2015:

her complaints were mainly related to the low back and lower extremities where there was a description consistent with complaints of neuropathic pain involving the lower lumbar nerve root to both extremities.

These complaints appear to be, upon review of the extensive documents provided, new.

I have done some literature review on the nature of sacral dural cysts . . ..

The neurological examination of the lower lumbar and sacral nerve roots remains normal. . . .

It is my opinion because of the above facts her complaints are caused by the sacral cysts and unrelated to the accident on July 28, 2010.

**224**  In Dr. Preto's opinion, as of the assessment, Ms. Turner was left with "a little soft tissue injury" in the thoracic and upper lumbar spine related to the compression fractures, and, in his opinion, Ms. Turner should be able to overcome these residual symptoms through active exercise.

1. **The neuropsychological assessment**

**225**  Dr. Carole Bishop is a neuropsychologist. She was tendered by the plaintiff and qualified as an expert in psychology, neuropsychology and rehabilitation psychology, qualified to give opinion evidence concerning Ms. Turner's neurocognitive, neurobehavioral and emotional functioning. Dr. Bishop carried out an independent assessment of Ms. Turner in late August 2014 (just before Ms. Turner was to start the second year of her nursing program), and had a follow-up interview with Ms. Turner on October 7, 2014 (after Ms. Turner left the program).

**226**  In Dr. Bishop's opinion, as a result of the accident, Ms. Turner sustained a mild traumatic brain injury. Based on the testing she administered, Dr. Bishop concluded that Ms. Turner's visuo-perceptual/spatial and visual-constructive skills are very impaired, and her non-dominant (left) hand fine motor co-ordination is impaired. In Dr. Bishop's opinion, the best explanation for those related deficits was an accident-related, mild traumatic brain injury right hemisphere brain compromise. Dr. Bishop therefore disagreed with others (for example, Dr. Kline) who expressed the opinion that Ms. Turner had only a functional cognitive deficit.

**227**  Dr. Bishop also concluded that Ms. Turner suffered significant psychological injuries as a result of the accident. These included severe anxiety, post-traumatic stress disorder and depression. Dr. Bishop concluded that, at the time of the assessment, Ms. Turner was clinically depressed, and her depression was complicated by chronic pain and anxiety. In Dr. Bishop's opinion, Ms. Turner had chronic pain in her neck and back related to the accident. That pain contributed to a psychological burden (i.e., anxiety, depression and persistent fatigue), which, in turn, probably had some effect on Ms. Turner's higher order memory and attention. Dr. Bishop commented further [underlining added]:

Ms. Turner's persistent physical and mental fatigue as described in this assessment is more likely than not to represent challenges over time. Pain is highly fatiguing: her pain is functionally limiting and from what I understand is not likely to spontaneously resolve to any significant degree. Depression is associated with fatigue as well, and in my opinion is currently operating in her presentation.

**228**  Dr. Bishop's prognosis was pessimistic. She strongly recommended that Ms. Turner be provided with further formal psychological intervention for her accident-related anxiety and depression, and strongly recommended skill-based learning to assist her to develop adaptive pain self-management. Dr. Bishop recommended a formal intervention program (cognitive-behavioural based), and expressed the view that Ms. Turner would require "a considerable period of psychological intervention (e.g., 12-20 sessions or more, with the opportunity thereafter for 'booster' sessions)." Dr. Bishop strongly agreed with a referral that had been made for Ms. Turner to a registered psychologist in Nelson. Dr. Bishop recommended that Ms. Turner avoid re-immersion in an undergraduate university program, and expressed the view that, until Ms. Turner's depression was much better managed, she should avoid starting any further career or college programs, although Dr. Bishop recommended career exploration. Dr. Bishop also recommended that case management and other services (such as those Mr. Grant had been providing) be extended at least until Ms. Turner was "well-integrated into a productive [endeavour] and depression is better resolved."

**229**  Dr. Bishop also recommended a physiatry consult and follow-up in relation to management of Ms. Turner's chronic pain, and commented [underlining added]:

This young woman is experiencing considerable pain. She has been on narcotic pain medications for almost four years. Evaluation and treatment recommendations by a treating Physiatrist is strongly recommended to provide direction for Ms. Turner with regard to her chronic pain situation. It is also strongly recommended that Ms. Turner's medical caregivers work with her to reduce her reliance on opioid pain medications.

**(f) The functional capacity evaluations and occupational therapy assessment**

**230**  Ms. Turner was assessed by two experts in functional capacity evaluation: Louise Craig (for Ms. Turner) and Rob Corcoran (for Mr. Dionne). Both Ms. Craig and Mr. Corcoran prepared reports and testified at trial (Mr. Corcoran by video deposition).

**231**  Ms. Turner was also assessed by an occupational therapist, Tracy Witty. Ms. Witty also prepared a report (including a section on cost of future care) and testified at trial.

1. **Louise Craig**

**232**  Ms. Craig completed an undergraduate degree in physiotherapy at the University of Manitoba and, since the late 1980s, she has been a member of the Canadian Physiotherapy Association and the Physiotherapy Association of British Columbia. She worked for a number of years as a physiotherapist and sports physiotherapist. In 1995, she became accredited to provide functional capacity evaluations and received certification as a functional capacity evaluator in 2003.

**233**  Ms. Craig began Ms. Turner's functional capacity evaluation assessment on August 25, 2014. However, according to Ms. Craig, Ms. Turner was unable to complete the evaluation that day because of pain. She was also emotionally distressed. The evaluation was therefore terminated, an unusual occurrence. Ms. Turner returned on October 31, 2014. However, Ms. Craig reported that, on that occasion, although Ms. Turner completed more of the test activities, she was again limited by pain, and testing was terminated after four hours.

**234**  In summarizing her conclusions and recommendations, Ms. Craig concluded that Ms. Turner did not meet the physical demands of an on-call forest firefighter, or a registered nurse. Ms. Craig concluded that Ms. Turner demonstrated limitations that reduced her ability to work at more physically demanding jobs. Occupations with light to low end of medium physical demands, although more in keeping with Ms. Turner's physical capacity (as of October 2014) would require accommodation allowing for frequent positional and task changes, regular stretching and proper ergonomics, to best manage symptom aggravation. In Ms. Craig's opinion, as such, "the scope of occupations once viable from a physical perspective for Ms. Turner is reduced leaving her with reduced competitive employability." Ms. Craig noted that, on both evaluation days, testing had to be terminated early.

**235**  Ms. Craig also noted:

1. Repetitive movement testing shows reduced speed of rapid reaching and walking over the course of the assessment, indicating reduced tolerance to test activities. Ms. Turner demonstrates reduction in cervical spine range of motion post-test indicating reduced tolerance to test activities.
2. Ms. Turner provided consistent effort with occasional instances of low physical effort during this evaluation in keeping with her reports of elevated and significant pain.
3. Ms. Turner does not appear to have reached maximum physical rehabilitation. She is deconditioned, shows poor core strength, reduced upper and lower body strength, and reduced cardiovascular fitness. Participation in a rehabilitation program is recommended. However, improved pain control and pain management will be essential to the success of any physical rehabilitation attempts. . . . It is suggested that participation in a residential multi-disciplinary pain program be considered. . . .
4. Once improved pain control is achieved, an individualized rehabilitation program guided by a physiotherapist or kinesiologist, in accordance with the following outline is recommended [Ms. Craig's recommendations include a 6-week individualized program, 5 days a week, 2-3 hours a day, with total program cost estimated at $1,950, plus a monthly gym or pool pass for maintenance and manual physiotherapy for 12-18 treatments, then 6-8 sessions per year longer term].

. . .

1. Ms. Turner's limitations/abilities are as follows: Ms. Turner demonstrated the capacity for occasional sitting, occasional standing, and shorter intervals of walking. She is able to climb stairs and balance on either leg. She exhibits normal range hand grip strength. She shows average fine manual dexterity (right, left, bilaterally) and above average medium manual dexterity. She is able to reach at all levels. She is able to assume all body positions . . .. She shows limited tolerance to sustained stooping. She demonstrates capacity for occasional lifting and carrying in the light to low medium strength demands category.
2. On August 25, 2014, Ms. Turner was emotional during the assessment. She was close to tears for much of the morning. She requested three breaks to lie down. . . . On October 31, 2014 she was less emotionally labile but continued to be distressed. . . . It is suggested that Ms. Turner seek counselling support . . . .

. . .

1. Ms. Turner does not require home help for regular household cleaning. She will need to pace herself or perform aggravating tasks for short intervals at a time thus extending the time to complete tasks. . . .
2. Ms. Turner will require assistance for heavier, seasonal cleaning . . .. Ms. Turner will require assistance for heavier or repetitive garden and yard care . . ..
3. **Rob Corcoran**

**236**  Mr. Corcoran is a graduate of the University of Toronto, Faculty of Medicine, School of Rehabilitation Sciences, in occupational therapy. He is currently registered as an occupational therapist with the College of Occupational Therapists of British Columbia, and a member of the Canadian Association of Occupational Therapists. He is also a certified work capacity evaluator and a certified functional capacity evaluator. Mr. Corcoran was tendered by the defendant and qualified as an expert in occupational therapy and functional capacity, qualified to give opinion evidence concerning Ms. Turner's functional abilities and limitations related to the accident.

**237**  Mr. Corcoran carried out a functional capacity evaluation of Ms. Turner on August 27, 2015 - about 12 months after the initial assessment by Ms. Craig. He was asked in particular to assess her functional capacity for nursing and for social work occupations.

**238**  In terms of functional prognoses, in Mr. Corcoran's opinion, Ms. Turner could improve her strength and activity endurance with commitment to regular exercise and routine, and implementation of active pain management strategies, including improved ergonomic awareness and task modifications. In Mr. Corcoran's opinion, Ms. Turner was physically deconditioned due to limited participation in structured routine and exercise, and she also presented with depressive symptoms that interfered with her functional performance. In Mr. Corcoran's opinion, Ms. Turner's function could improve with more effective management of her depressive symptoms.

**239**  In Mr. Corcoran's opinion, Ms. Turner had the capacity for most aspects of nursing. However, her ability to tolerate pain and the physical demands of the profession "will vary depending on her psycho-emotional health." In Mr. Corcoran's opinion, Ms. Turner did not possess the capacity for the full scope of nursing. On the other hand, in his view, Ms. Turner had the physical capacity for the full scope of social work occupations.

**240**  In Mr. Corcoran's opinion, Ms. Turner completed the functional capacity evaluation while providing reasonably high physical effort levels. Therefore, in his view, the evaluation results were representative of Ms. Turner's functional and physical capacities and limitations at the time of the evaluation. Mr. Corcoran noted that objective measures revealed that Ms. Turner provided reasonably accurate reports of limitation during testing, and the balance of measures showed Ms. Turner to be reasonably reliable with her pain and disability reports. Mr. Corcoran noted that Ms. Turner presented with "flat" affect and limited engagement in casual or formal conversation, although there was some improvement during the work simulation segment (in which Mr. Corcoran acted as the patient). Repeat test trials toward the end of the evaluation caused problems however, and at one point Ms. Turner left the testing room in tears. She returned after several minutes, apologetic and embarrassed. This was an example of what Mr. Corcoran described as Ms. Turner's psycho-emotional issues, and reduced tolerance for activities. With regard to sustained work tolerances generally, Mr. Corcoran stated that Ms. Turner could not tolerate the majority of repeat tests at the end of the day due to symptom exacerbation and psycho-emotional well-being.

**241**  Mr. Corcoran noted that Ms. Turner demonstrated below average proficiency for tasks with stringent fine motor demands, although she possessed normal abilities for tasks with moderate fine motor demands when compared to competitive work productivity standards and normative data.

**242**  Mr. Corcoran considered that Ms. Turner possessed a competitive capacity for occupations that predominantly required sitting, provided she minimized exposure to repetitive and sustained neck flexion posturing.

1. **The response reports**

**243**  Both Ms. Craig and Mr. Corcoran prepared response reports, commenting on and criticizing various aspects of the other's report. Although I have read these reports, I did not find them to be of much assistance. Ms. Craig's report in particular bordered on argument and advocacy. For example, to attack Mr. Corcoran's opinions, Ms. Craig was prepared to make assumptions about his experience working with nurses that were not true. In place of the critiques found in the response reports, it would have been more useful for me (and more consistent with the impartial role of the expert) to receive a response report that said something along the lines of: "I have read [the other expert's] report, and it does not change my opinion(s) for these reasons," and then briefly set out the reasons.

1. **Tracy Witty**

**244**  Tracy Witty is an occupational therapist and a certified life care planner. Since 2002, she has been registered as a member of what is now the College of Occupational Therapists of British Columbia, as well as a member of the Canadian Occupational Therapy Association and the World Federation of Occupational Therapists. Although she did not carry out the type of functional capacity evaluations of Ms. Turner done by Ms. Craig and Mr. Corcoran, Ms. Witty met with Ms. Turner in January 2015 in order to conduct an occupational therapy assessment in connection with providing an opinion of Ms. Turner's future care needs. Ms. Witty was tendered by the plaintiff and qualified as an expert in occupational therapy and life care planning, qualified to give opinion evidence in those areas and also concerning costs of future care.

**245**  I will discuss Ms. Witty's cost of future care assessment later in these reasons. At this point, I will review and summarize some of her conclusions and opinions concerning Ms. Turner's functioning as of January 2015.

**246**  Ms. Witty's assessment was done not long after Ms. Turner moved to Ontario, and she was living with her mother there. According to Ms. Witty's interview with Ms. Turner, Ms. Turner reported having limited household or financial responsibilities "while living in a supportive living environment with her mother," who was primarily responsible for performing housework. According to Ms. Witty, at that time, Ms. Turner identified her goals as to "get off" her medication, have her medication reviewed by a psychiatrist, attend the gym regularly, work with a rehabilitation team to make a "really good plan," and "definitely go back to school," although she expressed uncertainty about the type of school program.

**247**  In Ms. Witty's opinion, based on her assessment of Ms. Turner, she continued to demonstrate residual physical and emotional impairments affecting her ability to participate in her pre-injury activities. The primary impairments identified by Ms. Witty included: emotional functioning, pain and higher level cognitive functioning.

**248**  According to Ms. Witty, Ms. Turner did not exhibit any abnormal or exaggerated pain-related behaviour, but Ms. Witty noted that Ms. Turner put a cushion in her chair and took periodic breaks during the interview. Ms. Witty wrote:

1. . . . Based on review of her pain management strategies, she is primarily relying on passive strategies (those not requiring energy e.g. rest, medication and pacing) and she would benefit from resumption of an activation program. Due to her emotional impairments and rehabilitation history, she will likely require support to re-initiate an appropriate program until she gets a routine, consistent with the opinion of Dr. Gouws and Ms. Craig. If the opinion of Dr. Stewart is accepted, Ms. Turner does not require further rehabilitation services to commence a gym program and the cost of an ongoing gym pass is the only associated cost. If the opinion of Ms. Craig and Dr. Gouws is accepted, then Ms. Turner will benefit from periodic physiotherapy to manage her pain and the cost is provided.

**249**  Ms. Witty continued:

1. Based on a psychological screen, Ms. Turner is likely to be experiencing severe psychological distress which is consistent with her medical diagnosis, presentation and functional difficulties. Ms. Turner presented with a flat affect during the assessment and had difficulty identifying future goals. . . . It is recommended that Ms. Turner receive a psychological assessment to determine an accurate treatment plan; however based upon the standards of care for chronic pain, a course of Cognitive Behavioural Therapy is indicated which is time limited and typically 8 to 12 sessions.

. . .

1. Based on a functional assessment, Ms. Turner is independent with her self-care, transportation (having [travelled] from Ontario to Vancouver, B.C. and staying in a hotel, independently). . . . Currently, she does not require assistance with homemaking, home or yard maintenance due to the home environment. Instead, she requires case management services to structure a week of productive activity which includes homemaking tasks, exercise and direct activities towards a/vocational activities e.g. volunteering, school or part-time employment. A provision of 4 hours per month of case management is recommended for the next two to three years to enable a rehabilitation program structure to enable Ms. Turner to participate in an educational program and facilitate participation in vocational activity. . . .
2. Once participation in vocational activity has been established, it is anticipated case management services can be reduced to an average of 2 hours per month to reinforce use of pain management strategies, compensatory strategy systems and assist with planning and coordinating rehabilitative and support services as needed. At this time, Ms. Turner's medical prognosis for complete recovery is poor and she will likely require case management services as long as she is experiencing a combination of physical, cognitive and emotional impairments that are interfering with her drive, motivation and ability to participate in daily activities.
3. If in the future, Ms. Turner becomes employed full-time and responsible for maintaining a home, she would require assistance. . . .

. . .

1. Based on my activity analysis, e.g. comparing residual impairments to daily functioning, Ms. Turner's reported functional limitations are consistent with the combination of her medical diagnoses. Physically, she may be capable of increased participation in activities of daily living, but her emotional impairments are significantly impacting her initiation, confidence, and enjoyment of activities. Emotional impairments appear to be the primary barrier to independently [initiating] participation in more complex meal preparation, socialization, laundry, homemaking, exercise and leisure activities.

. . .

**250**  In her oral evidence, Ms. Witty commented further on the lack of benefit of passive pain management strategies for someone with chronic pain, and observed that such strategies can made chronic pain worse.

1. **The vocational assessments**

**251**  I had opinion evidence from two vocational rehabilitation consultants: John Lawless (on behalf of Ms. Turner) and Dr. Colleen Quee Newell (on behalf of Mr. Dionne). Both Mr. Lawless and Dr. Quee Newell were asked to assess Ms. Turner's pre- and post-accident vocational potential.

1. **John Lawless**

**252**  Mr. Lawless has a Master's degree in counselling psychology from McGill, and has been employed as a vocational consultant for over 15 years. He is a member of the Vocational Rehabilitation Association of Canada and the International Association of Rehabilitation Professionals. He was tendered and qualified as an expert in vocational consulting and vocational rehabilitation.

**253**  Mr. Lawless met with Ms. Turner on October 20, 2014 in connection with the preparation of his first report. At that time, Ms. Turner had recently withdrawn from the nursing program and was in the process of moving to Ontario. Mr. Lawless then interviewed Ms. Turner by telephone on November 21, 2016, for purposes of his second report. Mr. Lawless also prepared a third report, which is a "critique" of the expert report prepared by Dr. Quee Newell.

**254**  The task given to Mr. Lawless with respect to his first report was to provide an opinion concerning the career Ms. Turner might have had but for the injuries sustained in the accident, and an opinion concerning the employment prospects she has now. As Mr. Lawless explained, he based his opinions on information he received from Ms. Turner during his interview on October 20, 2014, certain documents (including documents from medical and other experts describing her disabilities as a result of the accident), and Ms. Turner's results from "brief vocational testing." With respect to testing, Mr. Lawless explained:

As Ms. Turner had already proven her better skills and abilities in her recent education and she had already been well tested by others, I did not administer to her a full vocational test battery. Rather I gave her just a pair of instruments to do with vocations interests and personality, the results from which follow.

**255**  With respect to Ms. Turner's pre-injury prospects, Mr. Lawless expressed the following opinion [underlining added]:

I could have foreseen her continuing to work as she had in the couple of years since high school, in entry-level retail and food services jobs. Given her good health and recent training, she also could have been called out for forest firefighting in the summers. Of course her real aspiration then was a professional career in healthcare. This direction was confirmed by results of the vocational testing, although there may have been some question of her potential for it. She was assessed with learning difficulties in school, and often had low and incomplete marks. Dr. Kay assessed Ms. Turner with "average" intellectual functioning overall, which strictly interpreted does not support undergraduate training for professional work like Nurses. Ms. Turner did obtain "High Average" scores on a psychoeducational assessment in 2002, although Dr. Kay felt that was anomalous. I am not qualified to interpret or dispute his findings, but it appears to me, and in light of my experience as a School Psychologist, that Ms. Turner was an underachiever at school. That is, her marks were beneath her abilities. Ms. Turner's marks varied between and within her subjects and terms. She did well sometimes and poorly in others, which is not the pattern I'd expect if she had a discrete learning difficulty. . . . Her pattern instead suggests personal and emotional disruption at school, which was supported by psychological information. This pattern continued for a time after finishing school . . .. It's notable though that after her accident, when she was experiencing the effects of pain and mood, she got a B on that [math] course in her third attempt and went on to earn at 3.03 academic average in the first year of her BN program . . .. This suggests to me that a better intellectual and academic potential existed all along. I still can't be sure she would have finished an undergraduate program, since she only did that first year, but I think it was possible. Had Ms. Turner pursued this program starting in 2011 or 2012, she'd be looking forward to graduation this spring or the next. If not she still could have completed somewhat less demanding two or three year Diploma programs for occupations in medical technology. That could have included ones like Medical Laboratory Technologists and Radiation Technologists. One-year Certificate programs for occupations like Medical Laboratory Technologists and Nurses Aides were possible then as well.

**256**  With respect to Ms. Turner's vocational options post-accident, Mr. Lawless expressed considerable pessimism. In his opinion, she was restricted from her hoped-for career in nursing and also from all other physically demanding occupations. Ms. Turner's cognitive and emotional issues would limit her educational attainment and make it harder to access more skilled occupations. In his view, Ms. Turner felt lost vocationally, and needed a longer term of in-depth vocational counselling.

**257**  Mr. Lawless observed that there are lighter, less physical duties available in nursing (such as nurse researchers in Gerontology), but they required more education to access. In Mr. Lawless' opinion, Ms. Turner never had that potential. More importantly, all specialities in nursing are accessed through general duty nurses, and Ms. Turner was restricted from that occupation because of the physical demands. In Mr. Lawless' opinion, and for the same reason, Ms. Turner was also restricted from working as a nurse aide, orderly and patient service assistant. He also doubted Ms. Turner's capacity to complete an undergraduate degree post-accident, and expressed the view that two-year diplomas and one-year certificates (including in paraprofessional occupations in medical technology) may also be in jeopardy.

**258**  Mr. Lawless observed that Ms. Turner might be suited to entry-level clerical occupations, although her limitations with pain, mood and memory would affect those prospects. She would need an employer prepared to accommodate her in terms of hours, physical setting and office equipment. Mr. Lawless expressed the concern that Ms. Turner's difficulties put her at greater risk of further unemployment and underemployment, given her work history, although her prospects would be improved if she were to continue her education.

**259**  When Mr. Lawless spoke to Ms. Turner in November 2016, Ms. Turner had been successful in obtaining employment at Progressive, but left her position in August 2016, in the circumstances described above. Mr. Lawless commented about his discussion with Ms. Turner about recommendations he had made in his first report concerning retraining in lighter occupations in the medical technology field. He reported that Ms. Turner told him that if she did that, then it would remind her every day, working in a hospital and like settings, that she could not be a nurse. He reported that Ms. Turner told him this would be a "lifetime of torture," and that she was not enthusiastic about the clerical occupations Mr. Lawless had mentioned either.

**260**  Mr. Lawless expressed even more concern and pessimism about Ms. Turner's employment prospects based on his discussion with her in November 2016, given that, since October 2014, she had worked only a few months and not pursued any further education or retraining.

**261**  Mr. Lawless' opinion regarding Ms. Turner's pre-accident vocational prospects remained unchanged from his first report. However, his opinion concerning her prospects post-accident and post-injury had changed. He observed that her struggles with pain while working at Progressive were "especially concerning," since physically that work was comparable to medical laboratory technologists, medical laboratory technicians or medical radiation technologists. While he felt that she would still be able to access all of the occupations he mentioned in his first report, with limitations, he observed that "it appears she is settling into a pattern of joblessness." He repeated his recommendation for a course of vocational counselling, "since it is [even] more important now that she develop firm career plans."

**262**  Mr. Lawless also prepared a report dated December 21, 2015, which, essentially, was a critique of Dr. Quee Newell's report. I found this report to suffer from similar problems to the critique report of Ms. Craig. Much of it was argument, and it included a further justification (although one had already been provided in his original report) for not administering more vocational tests to Ms. Turner in October 2014. Mr. Lawless' criticism that the documents made available to Dr. Quee Newell provided only a "thin foundation" for her opinions was unhelpful and argumentative. It was a point that could easily have been addressed through cross-examination of Dr. Quee Newell or in argument by counsel (or both).

**263**  Mr. Lawless repeated his conclusion from his first report that Ms. Turner was an underachiever, to explain her poor academic performance in high school. But that provided no explanation for Ms. Turner's continued struggle to pass Math 049 in 2009 and 2010, before the accident and when she had identified nursing as a career she wanted to pursue. Surely, Ms. Turner's performance at that stage cannot be explained on the basis that she was trying just to pass, and "underachieving."

1. **Dr. Colleen Quee Newell**

**264**  Dr. Quee Newell has a PhD in Counselling Psychology. She is qualified to practice as a registered clinical counsellor (accredited by the B.C. Association of Clinical Counsellors) and vocational rehabilitation consultant in B.C. She is a registered rehabilitation professional in good standing with the Vocational Rehabilitation Association of Canada. Her work as a vocational consultant includes vocational assessment, career and personal counselling, job search counselling, vocational test administration and interpretation, and labour market research. Dr. Quee Newell was tendered by the defendant and qualified as an expert in vocational consulting, qualified to give opinion evidence concerning Ms. Turner's vocational capacity and potential.

**265**  Dr. Quee Newell met with Ms. Turner on August 28, 2015 (the day after Mr. Corcoran's functional capacity evaluation), in Vancouver. Dr. Quee Newell explained that the assessment typically takes between four and five hours. As part of the assessment, Dr. Quee Newell interviewed Ms. Turner to obtain information on her background, education, work history, employment limitations and rehabilitation efforts. Dr. Quee Newell also had Ms. Turner complete a number of vocational tests, which Mr. Lawless (for the most part) did not do. By the time Dr. Quee Newell completed her first report dated October 13, 2015, she had a copy of Mr. Corcoran's functional capacity evaluation, which she reviewed and relied on to prepare her report.

**266**  With respect to the testing portion of the assessment, Dr. Quee Newell noted that Ms. Turner became increasingly emotionally distressed as the testing progressed, particularly when faced with challenging tasks. Dr. Quee Newell commented that it was likely that Ms. Turner's emotional distress had a negative impact on her test performance. However, in Dr. Quee Newell's opinion, Ms. Turner's pattern of scores was consistent with her pre- and post-accident educational activities. In Dr. Quee Newell's opinion, the gap between Ms. Turner's performance on the testing and what would be required to successfully complete the Bachelor of Science in Nursing degree program could not be accounted for by emotional or psychological distress.

**267**  In her vocational opinion, Dr. Quee Newell first addressed Ms. Turner's hypothetical vocational path, assuming the accident had not occurred. She noted that Ms. Turner's pre-accident educational history was notable for long-standing learning challenges, below average academic achievement and the lack of high school graduation status despite two attempts (in the Fall of 2009 and spring of 2010) to complete Math 049 since leaving high school. Dr. Quee Newell noted that, when examining the pre-injury vocational potential of a young person with limited pre-injury work experience, some of the predictive factors typically include parental and sibling educational attainment and career patterns, as well as the individual's pre-injury educational achievement. Dr. Quee Newell stated that she was uncertain whether, absent the accident, Ms. Turner would have pursued some level of post-secondary education, based on her pre-accident educational achievement, longstanding history of learning difficulties and the educational backgrounds of her parents and brother. In Dr. Quee Newell's opinion, based on those considerations, if Ms. Turner had pursued post-secondary education absent the accident, she most likely would have completed a short vocational program, up to one year in duration. In Dr. Quee Newell's opinion, Ms. Turner would not likely have been a strong candidate for an academically demanding technology diploma program or university undergraduate degree program. In that light, in Dr. Quee Newell's opinion, the earnings for high school graduates and college graduates in B.C. would be expected to reasonably describe Ms. Turner's earning potential absent the accident.

**268**  Dr. Quee Newell stated further that, based on Ms. Turner's vocational test results at the time of the assessment, her pre-accident educational history and her demonstrated difficulty achieving the BSN pre-requisite courses on a post-accident basis, and despite Ms. Turner's solid marks in the first year of the nursing program, she was not confident that Ms. Turner would have completed a BSN degree in the absence of the accident. In addition, based on Ms. Turner's pre-accident educational achievement, including her multiple attempts to complete Math 049, in Dr. Quee Newell's opinion, Ms. Turner would not have been a competitive applicant for BCIT's medical laboratory science diploma program or its radiation therapy B.Sc. degree program.

**269**  With respect to Ms. Turner's post-accident employment potential, and taking into account the results of Mr. Corcoran's functional capacity evaluation, Ms. Turner's residual symptoms (including her depressive symptoms) would serve to narrow the range of employment options compatible with her vocational profile, in Dr. Quee Newell's opinion. In Dr. Quee Newell's opinion, while the range of occupations compatible with Ms. Turner's residual symptoms was narrower than would have been the case but for the accident, she remained capable of competitive employment. Her ability to compete for employment compatible with her residual symptoms would be greater with further education, in Dr. Quee Newell's opinion.

**270**  Dr. Quee Newell agreed with Mr. Corcoran's treatment recommendations. However, she also encouraged Ms. Turner to re-enter the paid work force and begin the process of exploring different career and educational options. She noted that, from a vocational rehabilitation perspective, a return to paid employment can be a reasonable goal for individuals faced with chronic pain symptoms, and focussing one's attention on one's job duties can be a positive pain-management strategy. In Dr. Quee Newell's opinion, Ms. Turner would benefit from vocational rehabilitation counselling to make a well-informed career decision and develop a viable vocational plan.

**271**  After her initial report was delivered, Dr. Quee Newell was provided with additional documents for review and asked whether her original opinions changed based on review of the additional documents, including Dr. Gouws' report and Ms. Craig's functional capacity evaluation report dated November 3, 2014. Dr. Quee Newell prepared two further reports dated November 16, 2015 and December 22, 2016 stating that her review of the additional documents did not cause her to change the opinions in her October 13, 2015 report.

1. **Findings and conclusions about Ms. Turner's injuries**

**272**  There is no real dispute about most of the injuries suffered by Ms. Turner in the accident. Rather, the main dispute concerns whether any of those injuries, or the effects of any of those injuries, caused the serious downward spiral of Ms. Turner's life, especially after she left the Selkirk nursing program in September 2014, and are responsible for her current circumstances - in constant pain despite daily use of narcotics, unemployed (and perhaps unemployable), socially isolated and with serious psychological and emotional problems.

**273**  The legal principles applicable are conveniently summarized by Sewell J. in ***Shongu v. Jing***, [*2016 BCSC 901*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JXC-X5T1-F8SS-616V-00000-00&context=), at para. 64, where he writes:

[64] I do not think I can improve upon the summary of those legal principles set out by Voith J. in *Brewster v. Li*, [*2013 BCSC 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CN-00000-00&context=):

[79] The basic principle of tort law is that the defendant must put the plaintiff back in the position she would have been in had the defendant's tortious act not occurred (*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. 32). The corollary of this principle is that the defendant need not compensate the plaintiff for any loss not caused by his/her ***negligence*** or for "debilitating effects of [a] pre-existing condition which the plaintiff would have experienced anyway" (*Athey* at para. 35).

[80] Since the burden is on the plaintiff to prove causation, she must establish that the defendant's tortious act caused *both* an injury (*i.e*. her pain disorder and/or her depression) and a resulting loss (*e.g*. non-pecuniary loss or lost wages). "The former is concerned with establishing the existence of liability; the latter with the extent of that liability" (*Blackwater BCSC* at para. 363). In the case at hand, if the plaintiff cannot establish that one of her injuries was *caused* by the MVA, then she cannot recover from the defendant for the losses that flowed from that injury. Additionally, if the plaintiff cannot establish that the injury caused by the defendant, in turn, caused a certain loss, then she cannot recover from the defendant for that loss.

**274**  Ms. Turner must therefore establish the causal link between the accident, and her injuries and the losses she is claiming. In short, she must prove that but for the accident, she would not have suffered the losses.

**275**  Mr. Perry (on behalf of Mr. Dionne) submits that the objective medical evidence shows, and the medical experts agree, that Ms. Turner was substantially recovered by 2013. He submits the evidence shows that, between 2012 and 2014, Ms. Turner had resumed full time schooling, entered the nursing program at Selkirk and acquired a part-time summer job (in the summer of 2013). In that period, none of Ms. Turner's symptoms - whether physical or psychological - prevented her from completing two and a half years of university and working in the summer as a waitress.

**276**  Mr. Perry submits that the difficulties Ms. Turner encountered when she began her second year of the nursing program in September 2014 were unrelated to the accident or to any injuries she sustained in the accident. Rather, in Mr. Perry's submission, Ms. Turner's inability to complete the nursing program was due to the demanding academic requirements, and was consistent with Ms. Turner's pre-accident educational history. Mr. Perry says that the defendant agrees and accepts that Ms. Turner had a dramatic decline in her psychological condition after she resigned from the nursing program. However, in Mr. Perry's submission, the cause of her resignation cannot reasonably be laid at the feet of the accident, given her previous success (commencing within six weeks of the accident in the care aide course) in the classroom setting and four years of high function thereafter.

**277**  In Mr. Perry's submission, Ms. Turner's subsequent negative reaction, the increase in her pain, depression and anxiety, and the devastation of her life after withdrawing from the nursing program, are also unrelated to the accident. Rather, these problems were caused by the loss of what Ms. Turner believed to be her proper course in life - to be a nurse. However, this was a vocation for which Ms. Turner was unfortunately unsuited academically, and the loss of it was not causally related to the accident.

**278**  However, I do not accept the theory advanced by Mr. Perry.

**279**  In my opinion, the evidence - both from Ms. Turner and from Dr. Stewart and Dr. Smith in particular - discloses that during the period after the accident and when she was attending Selkirk, through to the beginning of her second term of the nursing program, Ms. Turner continued to experience significant pain symptoms, caused by the injuries she sustained in the accident, that affected her physically and contributed to her psychological symptoms of anxiety and depression. As of the end of her first year of nursing, her pain symptoms were chronic and seriously impeding Ms. Turner's ability to function both physically and mentally. That is what led to her withdrawal from the nursing program, and the subsequent devastation of her life. Those events came about as a consequence of the injuries Ms. Turner suffered in the accident.

**280**  I find that Ms. Turner was seriously injured in the accident. She sustained soft tissue injuries to her neck and back, and compression fractures of the T11 and T12 vertebrae. Given that there was sufficient force in the accident to cause the fractures, I conclude that Ms. Turner's soft tissue injuries to her spine, including her lumbar spine, were severe. This conclusion is supported by Dr. Stewart's opinion evidence, and by that of Dr. Teal.

**281**  I find that, in the accident, Ms. Turner also suffered a mild traumatic brain injury or concussion, bruising to her head, extensive facial bruising and injuries to her chest and other parts of her body, including her shoulder and neck area. In the weeks immediately after the accident, Ms. Turner suffered in particular from the effects of the concussion but also pain from her soft tissue injuries. The severity of her symptoms was such that she attended the local hospital emergency department. She felt as if she were dying. She was anxious and afraid.

**282**  I do not accept Dr. Clement's opinion that the accident caused Ms. Turner's sacral cyst to burst, and that this event (rather than her concussion) led to her severe headaches in the weeks after the accident. Dr. Clement is alone in expressing this opinion. I prefer, instead, to rely on the opinions of the clinicians (Dr. Stewart, Dr. Teal and Dr. Smith, for example), who attribute the symptoms on which Dr. Clement relied to arrive at his opinion to her concussion and other soft tissue injuries. The evidence of Dr. Gul, who was qualified as both an expert in neurosurgery and radiology, and is also a clinician, does not support Dr. Clement's opinion. Rather, Dr. Gul agrees with the diagnosis of concussion. The evidence of Dr. Graeb also does not support Dr. Clement.

**283**  In September 2010, Ms. Turner made the decision to enroll in the care-aide course taught by Ms. Miklenic. While the decision was impulsive (and ultimately counter-productive), I find that it illustrates Ms. Turner's early willingness - indeed eagerness - to participate in what Dr. Quee Newell described as vocational rehabilitation and attempt to move forward with her life. By this time, Ms. Turner's less severe injuries (her facial bruising, for example) were healing and her concussion symptoms were resolving. However, her vertebral fractures had not yet healed and she was continuing to experience painful symptoms in her neck and back, consistent with sustaining severe soft tissue injuries. The pain was fatiguing, distracting and, at times, debilitating. Ms. Miklenic's evidence of her observations of and interactions with Ms. Turner during the in-class portion of the care-aide course is consistent with and supports Ms. Turner's evidence concerning her situation. Her physical symptoms, including pain, did not allow Ms. Turner to complete the practicum portion of the course. These symptoms continued to be a barrier to completing the course on Ms. Turner's second attempt in 2011. I find this setback was directly related to the injuries - specifically to her back - that Ms. Turner sustained in the accident. I find that the fractures eventually healed, but Ms. Turner has been left with debilitating chronic pain in her lower back from the soft tissue injuries.

**284**  Moreover, I find that this setback, coupled with continued (now chronic) back pain, fueled Ms. Turner's depressive symptoms and her anxiety about her situation: whether she would recover physically and whether she would be able to pursue her career goals. It also illustrates the workings of the vicious cycle described by Dr. Smith and others (Ms. Craig, for example) that has plagued Ms. Turner from shortly after the accident through to trial. Indeed, Dr. Stewart attributed Ms. Turner's prolonged period of "fuzziness" of memory after the accident to an emotional reaction to her injuries. I accept that explanation.

**285**  I find that, by the time Dr. Smith assessed Ms. Turner in August 2011, Ms. Turner had developed significant psychiatric symptoms, as described by Dr. Smith: adjustment disorder with depressed mood, generalized anxiety disorder and a panic disorder, all of which were related to the injuries she suffered in the accident. Dr. Smith's conclusion that Ms. Turner's physical injuries played a major role in fueling her depressive and anxiety symptoms is consistent with Ms. Turner's description of her own feelings and experience at the time.

**286**  I find that, in general, Ms. Turner's cognitive difficulties - her problems with memory, focus and concentration, for example - are the result of her pain triggering anxiety, which in turn magnifies Ms. Turner's experience of pain and makes it very difficult for Ms. Turner to function. Depression and a feeling of failure often followed, as Dr. Smith observed. The pattern described by Dr. Smith was illustrated, for example, at Ms. Craig's first attempt at a functional capacity evaluation in August 2014. Ms. Turner's breakdown was triggered by pain, in particular back pain, which I find had been affecting her throughout her first year of nursing studies, in the face of a requirement to perform physically. The explanation for Ms. Turner's cognitive symptoms that is provided by the vicious cycle is also consistent with the general consensus from the medical experts that Ms. Turner recovered from her traumatic brain injury within a relatively short period after the accident.

**287**  In May 2011, Ms. Turner began being prescribed oxycodone for pain and an anti-anxiety medication. I find that those medications were prescribed to treat symptoms that Ms. Turner was continuing to experience resulting from the injuries she sustained in the accident. Except for a brief period in the spring of 2013 when she was prescribed a different narcotic, Ms. Turner has remained on oxycodone in different forms ever since.

**288**  I do not accept the opinion expressed by Dr. Preto to the effect that, as of 2015, Ms. Turner's chronic back pain had a different origin, one that was unrelated to the accident, namely the sacral cyst. Dr. Preto's theory is inconsistent with the evidence that Ms. Turner's painful low back symptoms have been persistent since she first attempted to complete the care-aide course practicum in 2010, and chronic thereafter. I reject his conclusion that Ms. Turner's complaints, when he assessed her, were "new." Dr. Preto's theory is not supported by the evidence of Dr. Gul, who (unlike Dr. Preto) was qualified as an expert in neurosurgery (as well as radiology). Dr. Gul described the cyst as asymptomatic. He explained that it did not necessarily follow that, if there were nerve involvement in the cyst (as Dr. Graeb identified) and the cyst was expanding, it would more likely cause pain, and "radiating pain" does not necessarily imply nerve root involvement. Dr. Preto's theory is not supported by Dr. Stewart's evidence. It is also not supported by Dr. Turnbull's evidence. Dr. Turnbull acknowledged that persistence of neck and back pain could be related to soft tissue injuries that occurred at the time of the accident. Contrary to Dr. Preto's opinion, I find that Ms. Turner's chronic, severe back pain is not related to the sacral cyst. Rather, it is the result of the soft tissue injuries she sustained in the accident.

**289**  Dr. Bishop assessed Ms. Turner at the end of August 2014, before Ms. Turner started her second year of nursing. In Dr. Bishop's opinion, Ms. Turner suffered significant psychological injuries as a result of the accident, including severe anxiety, depression and post-traumatic stress disorder. Dr. Bishop concluded that Ms. Turner's depression was complicated by chronic pain and anxiety. Although others (Dr. Smith, for example) did not accept a diagnosis of post-traumatic stress disorder, Dr. Bishop's other conclusions are supported by Dr. Smith's opinion evidence, by Ms. Craig's evidence concerning events at the first attempt at the functional capacity evaluation, and by Ms. Turner's evidence at trial, and I accept them.

**290**  The defendant placed considerable weight on Ms. Turner's statements to Dr. Stewart and Dr. Smith about her symptoms (or lack thereof) when she saw each of them in May 2013, as well as on Ms. Turner's answers given on her examination for discovery about how she was feeling at that time (that she was "okay, good"). This was in support of the defendant's argument that, by around this time, Ms. Turner had substantially recovered (including emotionally and psychologically) from the effects of her injuries, and her life was more or less back on track, and that it was her failure and inability to meet the increased academic demands of her nursing program in September 2014, for reasons unrelated to the accident, that have caused her subsequent decline.

**291**  I do not agree.

**292**  At trial, Ms. Turner described how she was feeling around May 2013 and explained the context for what she told Dr. Stewart and Dr. Smith. In my view, her description and explanation make sense. Although not without difficulty, and despite suffering significant pain symptoms, she had successfully completed her adult education and pre-nursing courses at Selkirk, and she had been accepted into the nursing program. Ms. Turner was therefore feeling much more optimistic about her situation. There were therefore good reasons for her to be less focussed on her pain, better able to cope with it and to be less anxious and discouraged. There was, therefore, also a good reason for Ms. Turner's functionality to improve, which Dr. Smith discusses in her May 2013 report. In addition, in her report, Dr. Quee Newell alludes to the value of being able to focus one's attention on job duties as a pain management strategy. In my opinion, those observations are consistent with, and support the credibility of, Ms. Turner's evidence about how she was feeling as of May 2013.

**293**  In short, I find that, as of the spring of 2013, Ms. Turner's pain symptoms - which were now chronic - especially in her lower back, had certainly not disappeared. Rather, they had become more tolerable for Ms. Turner because she had been able to achieve an important goal in her life and her outlook generally was much better. Dr. Kline also observed this. However, her situation was fragile. As Dr. Smith noted in the prognosis in her May 2013 report, if Ms. Turner was unable to cope with the physical demands involved in her nursing program, it was very likely she would experience a marked worsening in her depressive and anxiety symptoms. I find that, ultimately, that is what occurred. I find that Ms. Turner's inability to cope with the physical demands involved in her nursing program came as a result of the effects of injuries she sustained in the accident.

**294**  Ms. Turner successfully completed her course work for her first year of nursing. However she struggled at times, and felt the need to resort to obtaining narcotic medication from "a friend," when she felt what had already been prescribed for her was not enough to manage her pain and allow her keep up with her school work. Her practicum - which required physical effort - at the end of her first year was even more difficult. Ms. Hewson's evidence about what she observed during the practicum confirms Ms. Turner's evidence that she was struggling physically, and her pain symptoms were affecting her mental energy. Ms. Hewson thought it would be a challenge for Ms. Turner to get through an 8-hour nursing shift. Ms. Turner's pain symptoms, and their effects on her physically and emotionally, were a serious issue before Ms. Turner began her second year of nursing.

**295**  Although Ms. Turner passed her practicum, I find that, as a consequence of her continuing pain symptoms resulting from injuries (specifically to her back) sustained in the accident, and the associated emotional symptoms of anxiety, depression and fatigue, Ms. Turner's ability to successfully complete her nursing degree was very much in doubt as of the end of her first year. Dr. Gouws examined Ms. Turner in August 2014, and in his opinion, at that time, she did not meet the physical demands of nursing. In my opinion, this evidence, which I accept, is also inconsistent with the theory advanced by Mr. Perry.

**296**  The events in September 2014 confirmed what was foreshadowed at the end of the practicum. The weeks leading up to the start of Ms. Turner's second year of nursing were the opposite of what Ms. Turner required. Instead of having quiet time - perhaps with supportive family and friends - to rest and recuperate, and to gather her physical and mental strength to begin her second year, at the end of August, Ms. Turner was in Vancouver attending assessments for this case. After Ms. Turner's difficult experience with her practicum, the assessments presented many opportunities for her to focus on her pain, weaknesses and incapacities, and for her to become anxious and depressed about them. The nature of the instruction and learning once second year began was different and much more fast-paced than first year, which Mr. Tanner alluded to in his evidence. Physically and mentally, Ms. Turner was overwhelmed. The result was predictable, and, indeed, had been predicted by Dr. Smith in her May 2013 prognosis.

**297**  I find that, but for the injuries that Ms. Turner sustained in the accident, Ms. Turner would not have developed the chronic pain, generalized anxiety disorder and depressive disorder, and that, absent the accident and the development of the anxiety disorder, depression and chronic pain, Ms. Turner would have been able to cope with stress more effectively and not been so overwhelmed by it. I find, therefore, that, but for the injuries she sustained in the accident, Ms. Turner would not have withdrawn from the Selkirk nursing program in September 2014.

**298**  As the evidence of Mr. Lawless and Dr. Quee Newell demonstrates, it is difficult to predict whether, but for the accident, Ms. Turner would have been able, successfully, to have completed her nursing program and graduated with a nursing degree. A nursing degree is a necessary pre-requisite to pursue any of the less physically demanding aspects of nursing.

**299**  I have concluded that, but for the accident, it is possible Ms. Turner could have completed her degree, although (and for the reasons described by Dr. Quee Newell) I think there would have been a significant risk that she would not be able to manage the academic requirements despite being motivated. However, although I have little doubt that not being able to succeed at this goal would have been very disappointing for her, I do not think that the failure would have been as crushing for Ms. Turner as what she experienced following her withdrawal in September 2014. But for the accident, she would have remained in control of her own destiny, and not been in the position of having to cope with impaired physical abilities. The accident robbed her of the opportunity to fully test what she was capable of achieving.

**300**  Mr. Perry submits that Ms. Turner had historically demonstrated a pattern of quitting when faced with academically challenging work. He argues that Ms. Turner's leaving the nursing program at the beginning of second year was simply part of this pattern, and not a result of any injuries suffered in the accident.

**301**  I do not agree.

**302**  In my opinion, Ms. Turner's pre- and post-accident history at Selkirk shows motivation and a determination to pursue a goal, even when things are challenging. Ms. Turner's withdrawals or incomplete courses can be seen as strategic. Rather than have a failing grade (which could jeopardize her future plans) on her transcript, she preferred to withdraw and try again, which she did. After the accident, Ms. Turner was clearly motivated to engage in vocational rehabilitation, part of which involved upgrading her education. She did that despite how she was feeling physically. However, I find that, by September 2014, as a result of her chronic pain symptoms, and the associated anxiety and depression, Ms. Turner had depleted her resources and was unable to continue.

**303**  Since leaving B.C. and moving to Ontario, Ms. Turner's situation has worsened. Despite having access to support through Source and Ms. George, Ms. Turner's attempts at employment have been unsuccessful. Her pain symptoms led to the end of her employment at Progressive, and she was encouraged by Dr. West and Ms. George to stop working. Her attempts to manage the fatigue and sleeplessness associated with her chronic pain by self-medicating with Gravol were completely ineffective and dangerous. Her continued dependence on narcotics to manage her pain is also dangerous, and largely ineffective. She has not returned to school. Apart from Ms. George and Mr. Sayen and his family, she is socially isolated. Her anxiety and depression have worsened. Her days and her life are seriously lacking in purpose and direction. Her functional capacity for sustained employment is significantly impaired. Dr. Stewart, for example, described the likelihood of Ms. Turner returning to the workforce in any capacity as extremely guarded.

**304**  I find that Ms. Turner's current circumstances have come about as a consequence of the injuries she sustained in the accident. The prognosis is very guarded concerning whether and the extent to which those circumstances may improve in the future.

1. **Non-pecuniary damages**

**305**  It is well-established that the purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff). See ***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 paras. 45-46.

**306**  In Mr. Brooke's submission, an award of $250,000 is appropriate in Ms. Turner's case.

**307**  In support of Ms. Turner's position, Mr. Brooke cites the following cases:

***Cebula v. Smith***, [*2013 BCSC 1939*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23S9-00000-00&context=): plaintiff, 48 year old teacher and mother of two, dedicated and passionate about her work; prior to the accident, she was fit, active, involved in church and social activities; she suffered a broken ankle and broken neck (among other injuries), for which she required surgery; she was eventually able to return to work as a teacher after significant treatment and encouragement, but only had the energy for one day per week; she also suffered from post-traumatic stress disorder and anxiety with driving; the trial judge found that, as a result of the accident, the plaintiff's life changed permanently and dramatically, and that she would likely have significant functional and psychological limitations for the rest of her life; non-pecuniary damages of $150,000 awarded;

***Cumpf v. Barbuta***, [*2014 BCSC 1898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M49R-00000-00&context=): 48-year old plaintiff; trial judge found that, four and a half years after the accident, plaintiff continued to suffer from a chronic pain condition that significantly affected her in her day-to-day activities, that she remained disabled from performing many of the activities (other than light activities) which she performed at work and around the home, and that her medical condition significantly affected her emotionally and affected her family, marital and social relationships; non-pecuniary damages of $150,000 awarded;

***Jossy v. Johnson***, [*2016 BCSC 1023*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K0Y-G9P1-DYMS-61NN-00000-00&context=): plaintiff, 33 at the time of the accident, suffered severe injuries to her ankles in a motor vehicle accident; the injuries required several surgeries and were not fully healed at the time of trial; she also continued to suffer headaches, neck pain and back pain; her emotional state was negatively affected by the accident to the point where she was fearful driving in cars and found it hard to even leave the house most days; non-pecuniary damages of $180,000 awarded;

***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=): plaintiff, age 41 at the time of the accident and in good health, socially positive and active, with a wide circle of friends; he sustained soft tissue injuries to his neck, mid and lower back and a concussion, among other injuries; the court concluded the plaintiff's chronic pain condition, sleep disorder and various significant psychological disorders were caused by the accident, and had in turn given rise to a set of self-perceptions and disability convictions that significantly impaired the plaintiff's functionality, circumstances and prospects, and had fundamentally transformed him; the prognosis for improvement was generally negative; non-pecuniary damages assessed at $180,000;

***Felix v. Hearne***, [*2011 BCSC 1236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-625V-00000-00&context=): plaintiff, 44 at the time of the accident, suffered injuries to her left shoulder, wrist and ankle as well as persistent pain in her neck and back; she also suffered from depression and post-traumatic stress disorder; she took concrete steps towards rehabilitation; however, her life had changed markedly since the accident, and the court found that the combined effects of the physical and psychological injuries were devastating to her personal and vocational life; non-pecuniary damages assessed at $200,000; and

***Shongu v. Jing***, [*2016 BCSC 901*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JXC-X5T1-F8SS-616V-00000-00&context=): plaintiff, 39 as of trial; prior to the accident, he had problems with anxiety and post-traumatic stress disorder as a result of seeing war crimes in the Democratic Republic of the Congo; after the accident, he suffered chronic pain to his neck and back as well as a deteriorating psychological state; he continued to have symptoms of post-traumatic stress disorder, psychotic symptoms and agoraphobia and was unable to participate in rehab because of his fear of being touched; the trial judge found that the psychiatric symptoms exacerbated the physical condition; non-pecuniary damages of $200,000 awarded.

**308**  In Mr. Brooke's submission, most of these cases deal with plaintiffs who are a decade or more older than Ms. Turner. He submits that, given Ms. Turner's young age and unhappy future prospects, her situation ought to attract a higher award of general damages, and that $250,000 is a reasonable sum.

**309**  On the other hand, Mr. Perry submits that, if the court accepts the defendant's theory that Ms. Turner had substantially recovered by 2013, a reasonable award for non-pecuniary damages is in the range of between $75,000 and $100,000, citing, for example, ***Renaerts v. Renaerts***, [*2015 BCSC 1028*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GB3-MY31-JX3N-B2C8-00000-00&context=), ***Borecka v. Wilkins***, [*2017 BCSC 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MKR-T2S1-F27X-60XN-00000-00&context=), and ***McCarthy v. Davies***, [*2014 BCSC 1498*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R02-7JM1-F7G6-64V6-00000-00&context=). In the alternative, if the court accepts Ms. Turner's version of the facts, then, in Mr. Perry's submission (and citing ***Pololos***), an appropriate award for non-pecuniary damages would be $180,000. He says that the other cases on which Mr. Brooke relies can all be distinguished on the basis that Ms. Turner has not suffered more serious injuries than any of those plaintiffs, and when the factors described in ***Stapley*** are applied to the evidence in this case.

**310**  Although other cases are of some assistance in assessing an award of non-pecuniary damages, no two cases are the same. Each person who endures a debilitating injury is unique, and the nature of a plaintiff's injuries and their life circumstances will rarely be identical. See ***Schubert v. Knorr***, [*2008 BCSC 939*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M2X1-00000-00&context=), at para. 97.

**311**  I have rejected Mr. Perry's submission that Ms. Turner had substantially recovered by 2013. The cases I have found to be the most helpful in considering an appropriate award of non-pecuniary damages for Ms. Turner are ***Pololos, Cebula*** and ***Jossy***.

**312**  Ms. Turner sustained serious injuries in the accident. As a young person moving into adulthood, her life was seriously thrown off-track, although for several years she did her best to forge ahead with her plans and toward her goal. However, as a result of the injuries she suffered in the accident, she was left with debilitating chronic pain, together with an anxiety disorder and depression. Each of these conditions aggravates the others, creating a vicious cycle. Eventually, Ms. Turner was worn down and overwhelmed, and essentially gave up. As a result of her injuries, Ms. Turner's physical and emotional well-being have suffered significantly. The effects of her injuries affected her ability to pursue her dream of becoming a nurse, a dream she was forced to abandon. Her relationships have been seriously impaired, and she is socially isolated. She has become dependent on narcotic medication, and even with that, her pain is uncontrolled. Her enjoyment of life has been significantly diminished as compared to what it would have been but for the accident. The prognosis for improvement in her physical and psychiatric symptoms is very guarded. However, it is not hopeless. There is some prospect that, with appropriate treatment, Ms. Turner will be able to better manage both her pain symptoms and her psychiatric issues, and improve the quality of her life and her functionality.

**313**  I conclude therefore that an appropriate award for non-pecuniary damages in this case is $200,000.

1. **Income loss to trial and loss of earning capacity**
2. **Applicable principles**

**314**  Claims for both past and future loss of income capacity are subject to the same legal test. The plaintiff must demonstrate that the injuries suffered in the accident and the resulting symptoms have impaired her ability to earn income, and that there is a real and substantial possibility her diminished earning capacity has resulted or will result in a pecuniary loss. The onus is not a heavy one but must be met in order to justify a pecuniary award: 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 paras. 21, 32 and 33.

**315**  With reference to past loss of earning capacity, 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=), put the matter this way (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.

**316**  Thus, hypothetical events, including those in the past, are simply given weight according to their relative likelihood, and a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: see ***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. The plaintiff's loss is assessed on the basis of the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission: ***Athey***, at paras. 34-35. 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: see, for example, ***Steward v. Berezan***, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), at para. 17.

**317**  Although a claim for past loss of income is often characterized as a separate head of damages, it is a component of the loss of earning capacity, being a claim for the loss of the value of the work that the injured person was unable to perform because of the injury. In general, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings she would have received, in the past or the future, had the tort not been committed. See, for example, ***Crimeni v. Chandra***, [*2015 BCCA 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60RB-00000-00&context=), at para. 15.

**318**  The plaintiff may prove the amount of the past or future loss of earning capacity using an earnings approach or a "capital asset" approach: see ***Perren***, at para. 32. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured (as is the case here). Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies. The assessment is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable. See, for example, ***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. 70, and ***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 para. 36.

**319**  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.), at para. 8, the court described some of the considerations to take into account in making the assessment. These include whether:

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 her, had she not been injured; and
4. the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

**320**  Based on my conclusions above, I find that Ms. Turner has demonstrated that the injuries she suffered in the accident and the resulting symptoms have impaired and will impair her ability to earn income, and that there is a real and substantial possibility that her diminished earning capacity has resulted and will result in a pecuniary loss. She is therefore entitled to compensation for her loss. The main question concerns the extent of that loss.

**321**  To assist in the assessment of damages for loss of earning capacity, Ms. Turner tendered an expert report prepared by Darren Benning. Mr. Benning is an economist and was qualified to provide opinion evidence concerning present values for future income loss and also for cost of future care.

**(ii) Loss of income to the date of trial**

**322**  Mr. Brooke submits that Ms. Turner should be awarded the sum of $53,429.62 for loss of income to the date of trial. Mr. Brooke submits that this sum represents Ms. Turner's net loss, after deducting employment insurance premiums and income tax, and including Ms. Turner's earnings in 2016 from Progressive.

**323**  This sum is based on the assumptions that, but for the accident: (a) Ms. Turner would have sought full-time employment as a care-aide from July 1, 2011 until September 1, 2013, at which time she would have commenced full-time studies in a four-year Bachelor of Science in Nursing program (completing her studies as of July 1, 2017); and (b) Ms. Turner would have worked full-time as a care-aide during the summer months of the years 2014, 2015 and 2016. Mr. Benning was asked to calculate a loss based on these assumptions, and on the additional assumption that Ms. Turner did not suffer a loss of employment income prior to July 1, 2011. His calculations are set out at Tables 1 and 3 of his report. At trial, he adjusted the calculations to take into account Ms. Turner's earnings at Progressive in 2016. The sum of $53,429.62 is the result.

**324**  Mr. Brooke submits that the defendant did not challenge Mr. Benning's methodology. He argues essentially that, in that light, the assumptions Mr. Benning used should be accepted as reasonable (based on the evidence) and an award made accordingly.

**325**  On the other hand, Mr. Perry submits that within one year of the accident, Ms. Turner had returned to school full-time and continued to attend school through to September 2014. Therefore, in his submission, her period of disability with respect to her capacity to earn an income should be limited to one year, being the 12 months following the accident. However, I rejected the theory on which Mr. Perry's submission is premised.

**326**  Mr. Perry also noted that Mr. Benning agreed on cross-examination that if Ms. Turner was attending school between 2011 and 2013, she would not be working (at least not full-time). This point needs to be taken into account.

**327**  In addition, Mr. Perry submits that if I conclude Ms. Turner should be compensated for past income loss, then any amount awarded should be reduced because of a failure to mitigate. He submits that, on the evidence, Ms. Turner had the capability and the training (including, after completing her first year of nursing, certification as a care aide) to pursue alternative employment, but did not.

**328**  Ms. Turner talked about her plans before the accident. She said that she wanted to earn "a decent chunk of money" from forest firefighting and then begin the process to apply for the nursing program. However, before she could do that, she would have to pass the math course (which she had already attempted twice) that would allow her to graduate from high school, and upgrade her education to put herself in a position to be a candidate for admission to the nursing program. Before the accident, she had no plans to take training to be a care aide, and then work as a care aide for a couple of years before returning to school. An important assumption that Mr. Benning was given to prepare his calculations was not borne out in the evidence.

**329**  After leaving high school in 2009 (when she had already decided that she eventually wanted to pursue nursing as a career), Ms. Turner had both worked and gone to school. I think it likely that, but for the accident, Ms. Turner would have continued that pattern until she was ready to pursue a nursing degree full-time and had been admitted to the program. In September 2010, Ms. Turner enrolled in the care-aide course on an impulse, but also because a friend was enrolled, and Ms. Turner needed an income. I think it likely that, without the accident, she would have done the same thing. The difference would have been that, by the end of December 2010, she would have been able to be certified as a care aide, and work in that capacity.

**330**  However, I have concluded that, in the period before she was admitted to the nursing program, Ms. Turner would likely not have worked full-time as a care aide. Having the income was important, but upgrading her education was also important, and necessary as she worked toward her long-term goal. In that light, I have concluded that, but for the accident, Ms. Turner would have earned net after-tax income in the range of about half of the amounts in Mr. Benning's Table 3, or (using round numbers) $4,000 in 2011, $8,000 in 2012 and $5,000 in 2013. In my opinion, based on the evidence, it is reasonable to say that, but for the accident, Ms. Turner would have begun full-time studies in the nursing program in September 2013.

**331**  In my opinion, it is reasonable to assume (as Mr. Benning did) that, without the accident, and while she was in the nursing program, Ms. Turner would have worked during the summers as a care aide. Therefore, I have concluded that the amounts shown in Mr. Benning's Table 3 as the net-after income loss for 2014 ($9,136), 2015 ($9,465) and 2016 ($9,654) are reasonable, subject to this qualification.

**332**  In my view, based in particular on Dr. Quee Newell's evidence, it is not speculation to say that, even without the accident, Ms. Turner would not have been able to complete a nursing degree and graduate in 2017. Some consideration needs to be given to that possibility. Without a degree, Ms. Turner still had the training and qualification to work full-time as a care aide. Since inability to complete a nursing degree would have been a significant disappointment, Ms. Turner likely would have needed to take some time to regroup and consider her options. These could have included pursuing one of the diploma or certificate courses mentioned by Mr. Lawless and Dr. Quee Newell. However, this possibility would mean that, instead of entering the workforce full-time as a nurse in July 2017 (as Mr. Benning assumed), she would enter it earlier and with different qualifications. In that light, the income loss calculated by Mr. Benning, particularly for 2015 and 2016 would be too low, and should be adjusted upward to reflect the likelihood of this scenario, but for the accident.

**333**  Therefore, in my opinion (and taking into account Mr. Benning's calculation of net income in 2012 assuming full-time work as a care aide of $16,237), assessing Ms. Turner's net income loss in 2015 and 2016 (before deducting what she actually earned in 2016, and her residual earning capacity) at $15,000 (for 2015) and $20,000 (for 2016) is reasonable.

**334**  In 2016, Ms. Turner demonstrated that she had some capacity, and was able to work full-time for several months, earning about $9,100 net. How Ms. Turner was spending her time in 2015 is unclear, despite having whatever assistance the case management from Source provided. She earned no income. However, I conclude that she likely had the capacity to earn something, which (based on her 2016 earnings) I would fix at $5,000 net.

**335**  Taking all of those considerations into account, I assess Ms. Turner's net loss of earning capacity up to the trial at $47,000.

**(iii) Loss of future earning capacity**

**336**  With respect to loss of future earning capacity, Mr. Brooke submits that Ms. Turner's evidence, taken together with the lay and expert evidence, strongly supports the conclusion that, as a result of the injuries she suffered in the accident, Ms. Turner is disabled from all forms of full-time employment and has very limited residual employment capacity.

**337**  In Mr. Brooke's submission, it is reasonable to assume that, but for the accident, Ms. Turner would have been able successfully to have completed a Bachelor of Science in Nursing degree, and thereafter she would have pursued a career as a registered nurse, retiring at either age 60 or 65. In the calculations done by Mr. Benning, he was asked to make this assumption and assume further that, following the accident, Ms. Turner's residual earning capacity would allow her to earn 50% of the average earnings of a B.C. female with a college diploma, to either age 50 or 55. This resulted in future income loss calculations ranging from a low of about $1,350,000 to a high of about $1,530,000 (see Mr. Benning's Table 1). In Mr. Brooke's submission, based on at least some of the opinion evidence, the prognosis for Ms. Turner ever successfully returning to paid employment is guarded or extremely guarded. In that light, Mr. Benning's assumption concerning Ms. Turner's residual earning capacity is too optimistic and risks understating Ms. Turner's loss.

**338**  Accordingly, in Mr. Brooke's submission, $1,600,000 is a reasonable assessment of Ms. Turner's lost future earning capacity.

**339**  In Mr. Perry's submission, Mr. Benning's assumption that, but for the accident, Ms. Turner would have qualified and been able to work as a registered nurse is not supported in the evidence, having regard in particular to Dr. Quee Newell's evidence. Ms. Turner's academic shortcomings made it unlikely that she would have been able successfully to complete her nursing degree. In Mr. Perry's submission, rather than the without-accident income used by Mr. Benning in his Table 2, a more likely reflection of Ms. Turner's without-accident income is found in the employment earnings of the average B.C. female with a college diploma in Table 4. Mr. Benning testified that the cumulative present value to age 60 would be about $920,000, and to age 65 would be about $970,000. In Mr. Perry's submission, these figures would better represent Ms. Turner's without-accident income, instead of basing the calculation on a registered nurse's income. Based on these figures, the highest assessment of loss for Ms. Turner would be approximately $970,000 (compared with Mr. Brooke's figure of $1,600,000), assuming that she will never work again and the injuries sustained in the accident have left her with no residual earning capability.

**340**  In my opinion, the possibility that Ms. Turner would not successfully complete a nursing degree is a real and substantial possibility, and a significant negative contingency.

**341**  Dr. Quee Newell's opinion was that, pre-accident, Ms. Turner did not have the capability academically to successfully complete and graduate from the nursing program. Although Mr. Lawless disagreed with and criticized many aspects of Dr. Quee Newell's opinion, even he would only say that it was possible Ms. Turner could have completed the nursing program. This was based in large part on his opinion that, pre-accident, Ms. Turner was an underachiever academically, and that once she became a student at Selkirk, her good academic performance was more in keeping with her ability.

**342**  However, as I noted above, when Ms. Turner was attempting to pass Math 049 in 2009 and 2010, she had already decided she wanted to be a nurse and was working toward that goal. In those circumstances, there was no reason (unlike high school) for her to underachieve; rather, there was strong motivation for her to perform to her best ability. Despite that, she continued to struggle. Her demonstrated pre-accident weakness in math and sciences, in my opinion, created a real risk that she would not be able to complete the nursing program and graduate with a Bachelor of Science in Nursing (as Dr. Quee Newell concluded), despite having strong motivation to do so.

**343**  On the other hand, there is good reason to believe (despite the skepticism expressed by Dr. Quee Newell) that, but for the accident, Ms. Turner would have been able to successfully complete a college diploma program, either in one of the medical-related fields mentioned by Mr. Lawless in his report or in another program in an area of interest. The potential earnings for a B.C. woman with a college diploma have a fairly wide range (as the evidence of Mr. Lawless and Mr. Benning, for example, confirmed). Using the average, as Mr. Benning did in his report (Table 4), results in my view in a conservative estimate, and very likely significantly underestimates the potential earnings of a medical laboratory technician (for example), based on Mr. Lawless' evidence.

**344**  I have also not been persuaded that Ms. Turner effectively has no residual earning capacity. I say that despite the very pessimistic prognosis of Dr. Stewart, for example. However, Ms. Turner has never had effective treatment of the elements of the vicious cycle, and these contribute in very significant way to Ms. Turner's inability to function. Dr. Smith, based on her last assessment of Ms. Turner, felt there was potential for some improvement with treatment, although she cautioned that the potential for significant recovery is guarded at best. Dr. Smith recommended that Ms. Turner should choose work with help from an occupational therapist and vocational counsellor. Based on the evidence I heard at trial, I am unable to conclude that, up to this point, Ms. Turner has had such help. Vocational counselling has been strongly recommended for Ms. Turner by a number of the experts. However, if she has ever had it, I did not hear who provided it or what it consisted of. There is a therapeutic value in work, including (as Dr. Quee Newell pointed out) for people with chronic pain, where it can be a positive pain management strategy. Ms. Turner is a young person with talents and skills she should be encouraged to use. Although her future income earning capacity has, without doubt, been impaired significantly by the injuries she suffered in the accident, it would be wrong in my view to say she has no residual earning capacity.

**345**  Taking all of those considerations into account, in particular that using the average earnings of B.C. women with college diplomas (as Mr. Benning did) underestimates Ms. Turner's without-accident potential earnings and my conclusion that Ms. Turner has some residual earning capacity, I conclude that an award of $950,000 for loss of future earning capacity is fair and reasonable.

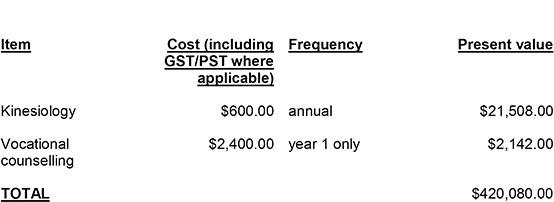
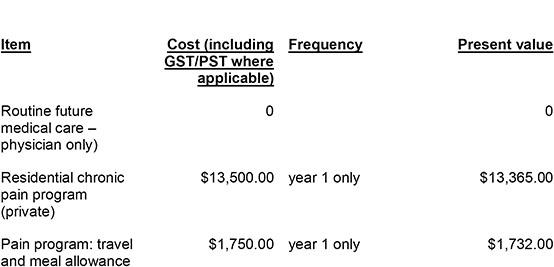
1. **Cost of future care**

**346**  The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the injured person to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff. See ***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.

**347**  In order for a plaintiff to successfully advance a cost of future care claim, it is not necessary that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional. See ***Gignac***, at para. 31 (citing ***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. 39). Since damages for cost of future care are a matter of prediction, they cannot be measured exactly: 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.

**348**  Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see ***Shongu***, at para. 210 (citing ***Lo v. Matsumoto***, [*2015 BCCA 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4Y6-00000-00&context=), at para. 20 and ***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. 68). In ***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=), the court observed (at para. 13) that "a little common sense should inform claims under this head, however much they may be recommended by experts in the field."

**349**  Ms. Turner says that she should be awarded $420,080 for costs of future care, based on the medical evidence, the summary of costs set out in Ms. Witty's report and the present value calculations set out in Table 2 of Mr. Benning's September 7, 2016 report, as follows:



**350**  In addition, Ms. Turner says with respect to subsequent courses of psychological counselling, that she should be awarded the sum of $271,640 to fund counselling once per week (estimated at $10,000 annually) from Ms. George or another comparable treatment provider, to age 65. In Mr. Brooke's submission, based on Ms. Turner's current level of counselling with Ms. George, this sum is appropriate.

**351**  Accordingly, the total claim presented by Ms. Turner for costs of future care is $691,720.

**352**  In Mr. Perry's submission, only future care costs of between $20,000 and $25,000 can be justified.

**353**  With respect to the "case management," Mr. Perry submits that the case management Ms. Turner has experienced appears to have done her more harm than good. After Mr. Grant ended his assistance in August 2011, Ms. Turner had no case management support until Mr. Grant became involved again in January 2014. In Mr. Perry's submission, the period of no case management - when Ms. Turner was running her own life - was a period of great success for her. She was doing well in school; she developed and pursued goals; her mood and outlook on life was much improved, and her physical symptoms also improved.

**354**  In Mr. Perry's submission, the resumption of case management by Source once Ms. Turner moved to Ontario appears to have been a disaster for her. She had only one brief spell of employment (at Progressive). Apart from that, she made no progress to engage in activities, enrol in school or move ahead with her life. In Mr. Perry's submission, the evidence does not support an amount for case management essentially for the remainder of Ms. Turner's adulthood.

**355**  With respect to the counselling provided by Ms. George, in Mr. Perry's submission it has been of no benefit to Ms. Turner. In Dr. Smith's opinion (for example), Ms. Turner's mood and psychological symptoms are treatable and can be improved with therapy. However, in Mr. Perry's submission, the counselling provided by Ms. George has been wholly ineffective (despite Ms. Turner's high opinion of Ms. George). It is not the type of therapy described and recommended for Ms. Turner by Dr. Bishop. Mr. Perry described Ms. George's role as being more like a paid friend than an effective therapist. In Mr. Perry's submission, Ms. George's evidence on cross-examination disparaging the role of a psychiatrist as "only to medicate," suggests that Ms. Turner is not getting adequate psychological therapy. There is no requirement for Ms. Turner to receive ongoing weekly counselling that is of no medical benefit to her.

**356**  However, Mr. Perry did not disagree that psychological counselling was an appropriate and necessary future care item for Ms. Turner. In his submission, the cost should be assessed at $5,000.

**357**  Mr. Perry points out that, with respect to medications, there is no provision for anti-depressant medication, although such medication has been recommended. In his submission, a reasonable allowance for such medication would be $10,000. On the other hand, there are strong recommendations to wean Ms. Turner off narcotics for pain, and those medications (Percocet and oxyneo) should not be included as items for future care long-term.

**358**  In Mr. Perry's submission, items such as homemaking, and house and yard maintenance have not been proven to be required. The cost of a gym membership is something everyone should be encouraged to incur as part of maintaining good health. It is not something that is required because of the accident. Kinesiology should also not be an ongoing expense. Dr. Stewart did not recommend ongoing, long-term physiotherapy. Moreover, in Mr. Perry's submission, the cost of a private, residential chronic pain program has not been justified, as there was no evidence about what the program might be, who runs it or where it is located.

**359**  On the other hand, in Mr. Perry's submission, the cost for vocational counselling appears to be too low, based (for example) on Dr. Quee Newell's evidence, and need for it. In Mr. Perry's submission, $10,000 would be a more reasonable amount. I agree.

**360**  I agree with Mr. Perry concerning the cost of a gym membership. This was a cost that Ms. Turner incurred before the accident, and a cost individuals who have never been involved a motor vehicle accident are encouraged to incur.

**361**  The costs for homemaking, home and yard maintenance and child care must be subject to a contingency deduction to reflect that they may never be incurred by Ms. Turner. As of trial, she had not required assistance with homemaking tasks, although both Ms. Craig and Ms. Witty indicated there may be some future need given Ms. Turner's functional limitations physically. Whether Ms. Turner will own a home and require home and yard maintenance is mostly speculative. Although Ms. Turner indicated a wish in the future to have children, whether that is likely to come to pass is unknown. In my opinion, a reasonable contingency deduction for all of those items is 50%.

**362**  I agree with Mr. Perry's observations concerning Percocet and oxycodone. Given the medical recommendations, to provide for costs long-term of these medications cannot be justified. I also agree that there should be provision for anti-depressant medication.

**363**  In my opinion, based on the medical evidence, in particular Dr. Stewart's opinion evidence, neither physiotherapy nor kinesiology can be justified as an ongoing expense. However, given that Ms. Turner is deconditioned, kinesiology can be justified as a one-time expense. In my opinion, the rehabilitation program and a short course thereafter of physiotherapy (6 to 8 sessions) can also be justified.

**364**  I share much of Mr. Perry's skepticism about the value to Ms. Turner of the case management she has had since moving to Ontario. Ms. Witty justified provision of case management on the basis that it was valuable to individuals with a brain injury and emotional impairments, to problem solve, and to co-ordinate and optimize care. However, as I have set out above, Ms. Turner does not have a permanent impairment from the concussion she suffered in the accident. Her cognitive symptoms are related to the vicious cycle, including fatigue and sleepiness associated with the parts of the cycle. Her emotional and psychological problems need to receive proper treatment. As Dr. West observed (and I agree), there are vast improvements that could be made in Ms. Turner's quality of life if her psychiatric issues were better treated and her pain better controlled. Instead of Ms. Turner exercising the skills she possessed, and that she demonstrated after the accident she possessed, to manage her own life, she has had other people telling her what to do and let her own skills and judgment wither. Instead of improving the quality of Ms. Turner's life, the case management, in my opinion, has diminished it and diminished Ms. Turner's confidence in her abilities to make her own decisions. In my view, Ms. Turner has become dependent on it to manage her life, much like she has become dependent on narcotics to try (ultimately unsuccessfully) to manage her pain.

**365**  I would not terminate the case management immediately. However, there is no justification for it long term. In my opinion, an appropriate award would be for case management for one further year only.

**366**  Although evidence about a particular, identified residential chronic pain program was thin at best, in my view, based on the evidence of Dr. Smith, Dr. Stewart, Dr. West (who made the referral to the Allevio Clinic) and Dr. Bakshi, this is treatment that would be of significant benefit to Ms. Turner. Given the lack of details about an actual clinic, there should be a significant contingency deduction for hotel and meals however.

**367**  I turn then to the claim for future costs of counselling. Appropriate counselling has been strongly recommended by Dr. Smith, Dr. Bishop and others. It is clearly necessary and justified to improve and maintain Ms. Turner's well-being. However, I can see no justification to provide for the expense of weekly counselling of the type that Ms. Turner has been receiving until Ms. Turner reaches age 65 - another 40 years or so. Not a single expert recommended it, and in my opinion it would be completely counterproductive to promoting Ms. Turner's rehabilitation. In my opinion, appropriate counselling is the type described by Dr. Smith and Dr. Bishop in their respective reports, provided by a licensed psychologist. Given that Ms. Turner's symptoms - those that are likely to improve with appropriate counselling - have become quite entrenched, a reasonable course of counselling should be provided for as a cost of future care. I award $25,000.

**368**  I therefore award cost of future items totalling $145,489, as follows:

|  |  |  |
| --- | --- | --- |
| **Item** | **Award** |  |

|  |  |  |
| --- | --- | --- |
| Residential chronic pain program | $14,000 |  |
| (private) - all inclusive |  |  |

|  |  |  |
| --- | --- | --- |
| Rehabilitation program (physiotherapist) | $1,930.00 |  |

|  |  |  |
| --- | --- | --- |
| Physiotherapy - 6 to 8 sessions | $720.00 |  |

|  |  |  |
| --- | --- | --- |
| Psychological counselling - initial | $3,267.00 |  |
| assessment |  |  |

|  |  |  |
| --- | --- | --- |
| Psychology counselling - subsequent | $25,000.00 |  |
| courses |  |  |

|  |  |  |
| --- | --- | --- |
| Case management - years 1-2 | $11,854.00 |  |

|  |  |  |
| --- | --- | --- |
| Clonazepam | $2,058.00 |  |

|  |  |  |
| --- | --- | --- |
| Anti-depressant medication | $10,000.00 |  |

|  |  |  |
| --- | --- | --- |
| Percocet (oxycodone) - year 1 only | $2,192.00 |  |

|  |  |  |
| --- | --- | --- |
| Oxyneo - year 1 only | $687.00 |  |

|  |  |  |
| --- | --- | --- |
| Zopiclone | $631.00 |  |

|  |  |  |
| --- | --- | --- |
| Homemaking | $44,000.00 |  |

|  |  |  |
| --- | --- | --- |
| Home and yard maintenance | $11,000.00 |  |

|  |  |  |
| --- | --- | --- |
| Childcare | $7,550.00 |  |

|  |  |  |
| --- | --- | --- |
| Kinesiology | $600.00 |  |

|  |  |  |
| --- | --- | --- |
| Vocational counselling | $10,000.00 |  |

|  |  |  |
| --- | --- | --- |
| **TOTAL** | $145,489.00 |  |

1. **Special damages**

**369**  Ms. Turner claims special damages in the sum of $87,678.82, the details of which are set out in Ex. 2. There is no dispute that the expenses were incurred. The dispute is about whether all of the expenses are recoverable as special damages.

**370**  Mr. Perry made only very brief submissions with respect to the special damages claimed. He submitted that if the court found that the amounts claimed were incurred as legitimate expenses, the defendant would pay for them. He identified the amounts claimed for case management provided by Source (about $14,000) and counselling provided by Ms. George (about $23,000) as the only areas of real concern (subject of course to his arguments on causation, which I have rejected). In Mr. Perry's submission, both those amounts were well in excess of what could be considered reasonable, considering the results (poor or ineffective at best) achieved.

**371**  Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as Saunders J. observed in ***Redl v. Sellin***, [*2013 BCSC 581*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2DS-00000-00&context=) (at para. 55), as with claims for the cost of future care, when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness.

**372**  I will start with the expenses claimed for Source.

**373**  I have reviewed a number of the Source invoices found at Tab 7 of Exhibit 2. No witness testified about what was described in the invoices, and the invoices are not admissible as evidence of the truth of facts stated in them. It appears that services were billed on an hourly rate basis, and presumably an individual service-provider was required to record her or his time. Based on my review, I did not locate time recorded that was less than two/tenths (.2) of an hour, or 12 minutes, regardless of the description of the service. That leaving a voice-mail message would in fact take 12 minutes seems doubtful. Travel time was recorded at what appears to be the hourly rate of $100 per hour. I do not know where the service provider was travelling, or for what purpose. Some of the documents show the description as "Brokerage, service." I did not have any explanation of what that means, or whether or how the costs shown are incorporated in the invoices.

**374**  However, Mr. Perry did not attack the charges on the basis of any of this. I have concluded in that light that it would be unfair to the plaintiff to concern myself further with such details, even though I might have preferred to hear from a witness about what was actually done. Rather, Mr. Perry's argument was essentially that the costs were not justified by the value provided, and in that sense, the costs were not reasonable.

**375**  I have concluded that Ms. Turner should not be penalized - by being deprived of compensation for these special damages - because the value to her is questionable. As a result of the injuries she suffered in the accident, she was placed in the position where she required the assistance that is generally provided by an occupational therapist to manage difficult and unexpected challenges in her life. On the other hand, I have concluded that some deduction is appropriate, and in that respect, I have had regard to the costing in Ms. Witty's report (as well as the duplication of Source's May 27, 2015 invoice for $1,217.83 in the summary of special damages). In place of the amount claimed for Source Rehabilitation, I award $10,000.00.

**376**  I turn then to the expenses claimed for Ms. George. The expenses claimed include Ms. George's travel time, at her hourly rate. Counselling was consistently recommended for Ms. Turner. On the evidence, Ms. Turner clearly thought extremely highly of Ms. George and valued the service Ms. George provided. Ms. Turner had worked with other counsellors before her move to Ontario, and rated Ms. George as superior. As reflected in Dr. Smith's final report, Ms. Turner spoke to Dr. Smith about the counselling she was receiving, and Dr. Smith did not comment negatively about it. Rather, Dr. Smith said that "Ms. Turner appears to be receiving appropriate psychological treatment from" Ms. George. I am therefore not prepared to deprive Ms. Turner of compensation for the expenses incurred in relation to the counselling provided by Ms. George, even though, objectively, the counselling appears to have produced little value.

**377**  The remaining expenses claimed (apart from the pre-accident Central Kootenay Nelson Facility Pass of $49.25) are recoverable as presented, as consistent with my findings concerning Ms. Turner's injuries in the accident. I will leave counsel to do the final calculation.

**4. Summary and disposition**

**378**  In summary, Ms. Turner is entitled to compensation for the injuries and loss and damages caused by the defendant's ***negligence***, and I award damages to her as follows:

1. non-pecuniary damages in the sum of $200,000;
2. loss of earning capacity to trial in the sum of $47,000 (net of taxes);
3. loss of future earning capacity in the sum of $950,000;
4. costs of future care in the sum of $145,489; and
5. special damages as set out above.

**379**  There will be pre-judgment interest in accordance with the ***Court Order Interest Act***, *R.S.B.C. 1996, c. 79*.

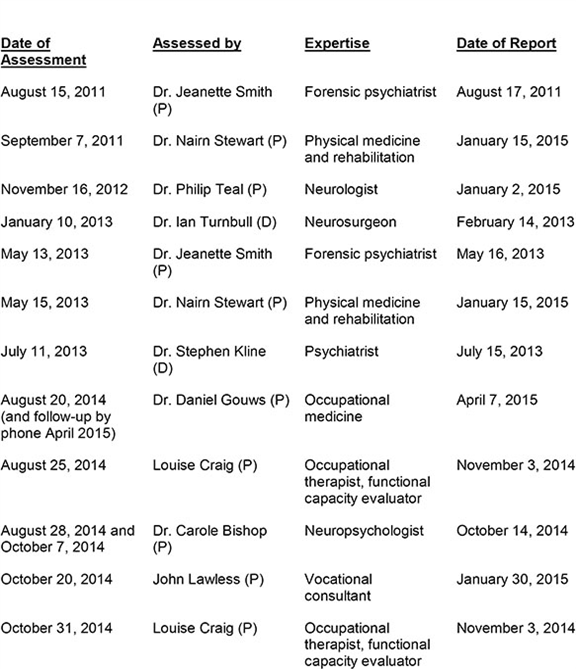
**380**  Subject to any submissions the parties may wish to make concerning costs, management fees and tax gross up, Ms. Turner is entitled to her costs on Scale B. If the parties wish to make further submissions, I direct that appropriate steps be taken within 30 days of the date of these Reasons to obtain a convenient hearing date from Scheduling.

E.J. ADAIR J.

\* \* \* \* \*

**Appendix "A" - Assessments**

**In addition to the reports prepared based on the assessments listed below, expert reports were also prepared by Dr. Clement (May 8, 2015) and Dr. Graeb (May 13, 2015), based on review of imaging and associated reports, and by Darren Benning concerning income loss and cost of future care multipliers. In the Table below, "P" identifies an expert tendered by the plaintiff, and "D" identifies an expert tendered by the defendant:**



**End of Document**

[***VSH Management Inc. v. Neufeld, [2002] B.C.J. No. 1673***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-24YF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Melnick J.

Heard: December 3 - 7, 10 - 14 and 27, 2001.

Judgment: May 17, 2002.

Vancouver Registry No. C985549

**[2002] B.C.J. No. 1673** | 2002 BCSC 755 | [2002] 9 W.W.R. 709 | 3 B.C.L.R. (4th) 331 | 2 R.P.R. (4th) 64 | 116 A.C.W.S. (3d) 305

Between VSH Management Inc. and John Binkley, plaintiffs, and Lonnie H. Neufeld and C. Geoffrey Burgess carrying on business as Burgess, Austin & Associates, and the said Burgess, Austin & Associates, defendants

(157 paras.)

**Case Summary**

**Torts — *Negligence* — Standard of care — Where special skill or competence required — Duty of care — Whether the defendant took reasonable care — Duty of care, particular relationships — Negligent words — What constitutes negligent advice — Preparation of financial information — Equity — Fiduciary or confidential relationships — What constitutes a fiduciary relationship.**

|  |
| --- |
| Action by VSH, purchaser of a hotel, and its principal, Binkley, against the appraiser, Neufeld, and his firm, for negligent misstatement and breach of fiduciary duty. Binkley was concerned that the hotel be able to generate sufficient income to cover the mortgage. All 39 suites were alleged to be rented, the large suites for $650 per month and the smaller ones for $400. Binkley carried out extensive due diligence but was concerned about the veracity of the income representations. He submitted a conditional offer of $1,338,000. Binkley retained Neufeld and indicated that he did not trust the income information he had received and wanted it confirmed. Binkley provided Neufeld with various documents, including the rent roll, which Neufeld accepted as accurate. Neufeld concluded that the levels of rent being charged were supportable and reasonable. The appraisal indicated that the hotel had a value of $1,440,000. The hotel relied on tenants who were on welfare and Binkley and VSH had trouble getting the government to pay $650 per month for two tenants in one room. Binkley was aware that strong management was essential to the proper operation of the hotel. When it failed, VSH was forced to sell the hotel for $1,090,000.  HELD: Action allowed and judgment of $238,800 granted.  Neufeld was retained by Binkley, not VSH, and there could be no fiduciary duty owed to VSH. The appraiser-client relationship did not impose a fiduciary duty. Neufeld and the appraiser owed Binkley a duty as purported experts in the field of real estate appraisal and Binkley relied on their skill to properly assess the hotel's value. The statement that the double rooms could be rented for $650 per month was inaccurate and misleading. Neufeld made no inquiries to verify the information and no disclosure of this fact despite Binkley's warning that he did not consider the rental information to be reliable. Neufeld was negligent in preparing the appraisal. Binkley reasonably relied on the appraisal and suffered loss from his reliance. Binkley and VSH failed to provide adequate management of the hotel and this contributed to their losses. However, absent the negligent misstatements, Binkley would have purchased the hotel for between $1,064,000 and $1,092,000 and the difference between this value and the purchase price was the appropriate measure of damages. |

**Counsel**

C.E. Hinkson, Q.C., and M.G. Thomas, for the plaintiffs. R.M. McLennan and K. Zimmer, for the defendants.

|  |
| --- |
| **MELNICK J.** |

INDEX

1. BACKGROUND
2. FIDUCIARY DUTY
3. The Law on Fiduciary Duties
4. Did the Defendants owe a Fiduciary Duty to Mr. Binkley
5. Was there an Undertaking?
6. Was there Reliance?
7. Are there Policy Reasons for imposing a Fiduciary Duty on an Appraiser?
8. NEGLIGENT MISSTATEMENT
9. Can Real Estate Appraisers be Liable for Negligent Misstatement?
10. The Test for Negligent Misstatement
11. What is the Duty of Care of Real Estate Appraisers?
12. What is the Standard of Care of Real Estate Appraisers?
13. Are the Defendants Liable for Negligent Misstatement?
14. Was there a Duty of Care?
15. Did the Defendants make False, Inaccurate or Misleading Statements?
16. Were the Appraisers Negligent in making their Report?
17. Was there Reasonable Reliance?
18. Was there Loss resulting from the Reliance?
19. Extent of Loss resulting from the Reliance
20. DAMAGES
21. Applicable Law
22. Calculation of Damages
23. COSTS

**1**  This is an action by the purchaser of a hotel and its principal against an appraiser, the firm with which the appraiser is associated, and the firm's partner that supervised the appraiser, claiming negligent misstatement and breach of fiduciary duty in connection with certain advice as to the value of the hotel. The plaintiffs claim that the advice was incorrect, that they relied on it to their detriment in deciding to proceed with the purchase of the hotel, and that, as a consequence of that purchase, they suffered damages.

**2**  The plaintiffs found their claim in breach of fiduciary duty and negligent misstatement.

1. BACKGROUND

**3**  Mr. John Binkley ("Mr. Binkley") is an American citizen who resides in San Antonio, Texas. Beginning in 1986, his work as a television producer frequently brought him and his family to Vancouver. Over the years, he had observed the urban development, or "gentrification", of the Yaletown and Gastown areas of Vancouver and similar parts of New York City. Commencing in 1994, he and his wife began to consider the purchase of a building in Vancouver in an area that would, hopefully, undergo a similar transformation.

**4**  During the summer of 1996, Mr. Binkley became aware of the Victory Square area in Vancouver. Encouraged by discussions with City of Vancouver planners with respect to anticipated (or at least hoped for) urban renewal in the immediate vicinity (such as the old Woodwards building) he pursued the idea of purchasing a building in that area. Through a realtor, he identified the Regal Place Hotel ("Regal Place") which was listed for sale through the agency of a Mr. John Sullivan ("Mr. Sullivan"). Regal Place is an older eight-story reinforced concrete building which was advertised as having 39 self-contained residential units and a ground floor retail tobacco shop. The vendors' asking price was $1,680,000.

**5**  To Mr. Binkley, the building appeared to have much to recommend it, particularly the fact that the upper six floors each contained rooms that included kitchen facilities and full bathrooms. On each of these six floors were also two small studio suites, each of which had a shower, toilet and basin, as well as a hot plate and small refrigerator. Thus, as Mr. Binkley discovered by making a number of inquiries, the rooms were more attractive than many comparable rooming houses or hotels, many of which did not provide individual private bathrooms or more than rudimentary cooking facilities as in the small suites in the Regal Place.

**6**  The building had been extensively renovated in 1984 at which time the electrical and plumbing services and internal partitioning and internal stairwells were replaced. It was Mr. Binkley's plan to eventually create a condominium for his family on an upper floor as well as upgrade the rooms in the building, eventually providing a certain amount of space for artists and so on. However, given that his target budget for purchasing the building was about $1,000,000, he knew that the building would have to generate sufficient income to cover the mortgage he would need to make the purchase as well as provide sufficient additional funds to finance the renovation program. Thus, the level of income that Regal Place was able to achieve was an important factor in his decision to purchase it.

**7**  The sales brochure for the hotel advised that all suites were rented on a monthly basis (other than four of the large units which were used as hostel accommodation with two bunk beds in each room rented at $10 each a night or $40 per room per night). Large suites were said to be rented for $650 a month while the smaller suites rented for $400 a month (except for three units at $360 and $380 a month). It was noted that "...most of the rents are paid by welfare cheques received from the provincial government". The small retail premises rented for $230 a month. Gross income was projected to be approximately $274,500 a year allowing for a vacancy rate of 3% on the suites and 25% on the hostel accommodation. Operating costs were stated to be about $102,500 a year.

**8**  The sales material noted that there existed an easement and indemnity agreement to the City of Vancouver with respect to two small encroachments of the building over city land for which an annual license fee of $30 was paid.

**9**  All of the information in the brochure was subject to a caveat that the statements in the brochure were based upon information furnished by the owners and/or sources the realtors considered reliable and which they believed to be correct. However, they stated that they assumed no responsibility with respect to that information. Prospective purchasers were cautioned to consult their counsel, accountant or other advisors.

**10**  Mr. Binkley carried out extensive due diligence. He found it difficult, however, to get what he regarded as reliable information from the vendor to back up the assertions in the sales brochure as to the income received for the rooms. A review of certain deposit slips appeared to reflect an occupancy rate of 160% of the building's capacity. Apparently, the vendor had other buildings and sometimes deposited the rental receipts from those buildings as part of the Regal Place deposit. Mr. Binkley also received information which caused him to be concerned that the vendor had been involved in certain criminal activities which might reflect on the validity of the stated income for the hotel. In short, he did not trust the figures provided in the sales brochure for the hotel's income.

**11**  To deal with that distrust, he sought out the advice of an appraiser to provide an independent opinion as to the value of the property. The firm of Burgess, Austin & Associates ("Burgess, Austin") was one of two firms of appraisers recommended to him by his own realtor. He thus contacted Mr. C. Geoffrey Burgess ("Mr. Burgess"), a partner in Burgess, Austin. Mr. Burgess in turn referred him to Mr. Lonnie H. Neufeld ("Mr. Neufeld"), an associate in the firm, who had experience in the appraisal of similar properties. Mr. Binkley noted that, while the appraisal was required by his bank, it was still required by him. He also engaged Mr. Gordon Spratt, an engineer, to advise him as to the condition of the building.

**12**  I note, however, that before contacting Burgess, Austin, Mr. Binkley, on December 20, 1996, had offered to purchase Regal Place for the sum of $1,338,000, subject to certain conditions. The offer was accepted on that date by the vendors. The conditions precedent included Mr. Binkley being able to undertake a review, to his sole satisfaction, of all financial statements provided by the vendors. A further condition was receipt of written confirmation that Mr. Binkley could obtain mortgage financing of not less than $900,000 on certain specified terms. The offer did not contain any condition specifically stating that Mr. Binkley required to be satisfied, by an independent appraisal, that Regal Place was worth what he had offered to pay for it. However, it is reasonable to say that the condition with respect to being satisfied with the financial statements would include satisfaction that the represented income was supportable and thus, assuming an income approach to valuation was used, the value of the hotel was at least approximately equal to what he had offered to pay for it.

**13**  On January 3, 1997, Mr. Burgess wrote a letter to Mr. Binkley, who was at that point in San Antonio, confirming the engagement of Burgess, Austin to undertake an appraisal of Regal Place and estimating its fees to be approximately $2,500 to $3,000 plus taxes and disbursements. Thereafter, on or about January 6, 1997, Mr. Binkley met briefly with Mr. Burgess who introduced him to Mr. Neufeld. According to Mr. Binkley, in his initial discussions with Mr. Neufeld, he advised Mr. Neufeld that the purchase of Regal Place would be his largest investment; that it was his own money, he had not inherited it; that he did not trust the source of information about the hotel (including its income) he had been given and wanted the information corroborated. He said that he told Mr. Neufeld about what he had learned of the alleged criminal activity of the vendor.

**14**  Mr. Neufeld made no comment in his evidence that I can find either confirming or denying that the above information was received by him from Mr. Binkley.

**15**  If Mr. Binkley did express the concern about his not trusting the source of the information received from the vendors and wanted it confirmed, it strikes me as odd, to say the least, that Mr. Neufeld would, when faced with that concern, accept the rent roll as accurate. However, with one possible exception, I accept that Mr. Binkley did express those concerns to Mr. Neufeld. The exception is whether he made any mention to Mr. Neufeld about what he had heard about the possibility of the vendor engaging in certain criminal activity. In his examination for discovery, Mr. Binkley could not then recall if he had made that statement to Mr. Neufeld. At this point, I cannot be sure that he did either.

**16**  For his part, Mr. Neufeld said that he realized, at that first meeting, that Mr. Binkley had done an incredible amount of due diligence and he asked him for the information he had put together. He says that he expressed concern to Mr. Binkley about his being an absentee owner and that, if he proceeded with the purchase, he would be advised to have management in whom he could be confident.

**17**  Mr. Binkley did leave it up to Burgess, Austin as to how its report would be prepared. He stated in cross-examination that he did not dictate how they should do their work. He also said in cross-examination that he was not concerned what they included in the appraisal as long as they followed acceptable standards.

**18**  Following his appointment with Mr. Neufeld, Mr. Binkley provided him with various documents, including the rent roll which Mr. Neufeld accepted as accurate. This appears to be the misunderstanding which was fundamental to the problems that ensued. It appears that Mr. Binkley wanted something more akin to a forensic audit, something to assure him of the validity of the rents being charged and provide a level of assurance that those rents were achievable in the marketplace given the debt he would assume and the plans he had for the building. Mr. Neufeld, on the other hand, seems to have started from a given that the rents were already being achieved, and, from the perspective that the Regal Place was a superior property to most of the comparables available to him, concluded that the levels of rent being charged were supportable and reasonable. No caution was given to Mr. Binkley that, because most of the rents were being paid directly by welfare, the provincial government's welfare policy would not pay two related occupants of one room twice the single rate of $325 but would rather reduce it to $520.

**19**  Subsequently, in an appraisal report dated January 20, 1997 authored by Mr. Neufeld and reviewed before publication by Mr. Burgess, Burgess, Austin provided to Mr. Binkley its opinion that Regal Place had a value of $1,440,000. Mr. Neufeld had arrived at that conclusion employing an income approach to valuation. That is, he assumed room rentals of $650 a month for 26 double rooms and $400 a month for 13 single rooms as well as some nominal income from the tobacco shop and laundry. He factored in a vacancy and turnover rate of 5% for the retail space and 2% for the hotel rooms. He then estimated operating expenses of just over 40% of effective gross income to arrive at a projected net operating income of just under $158,000. If achievable, that would have permitted Mr. Binkley to service his mortgage and carry out his program of renovations.

**20**  Relying on the appraisal (and presumably other information he had received with respect to other conditions placed in his offer to purchase), Mr. Binkley proceeded with the purchase of the hotel through the vehicle of VSH Management Inc. ("VSH Management"), a company he had incorporated for the purpose of owning and operating the hotel.

**21**  Mr. Binkley was aware, not only from Mr. Neufeld but from others as well, that strong management was essential to the proper operation of this type of rental accommodation. Following leads, he consulted with both Ms. Betty Wu ("Ms. Wu") and Mr. Jack Spitz ("Mr. Spitz"), both of whom owned and operated similar facilities. Both stressed the importance of hands-on management. Mr. Spitz gave evidence that he told Mr. Binkley that it was important to have 24-hour security, a very comprehensive maintenance program, and to closely monitor tenants. He stressed that it was important to have a manager who knew the area in Vancouver's downtown east side and that he would have to be on top of the staff and in touch with them on a daily basis. If not, cautioned Mr. Spitz, the building could be overrun in a matter of weeks by bad tenants such as drug users and drug dealers.

**22**  This sort of advice was particularly important given the location of Regal Place. It is on Victory Square at 144 - 146 West Hastings Street. While urban development had taken place in some nearby areas, gentrification had by no means begun to make its presence felt in Victory Square.

**23**  Things did not go well for the plaintiffs after VSH Management acquired title to Regal Place on or about February 7, 1997. Mr. Binkley had not been able to make arrangements with either Ms. Wu or Mr. Spitz to manage Regal Place on behalf of VSH Management. While both were prepared to lease the building from him or (at least in the case of Ms. Wu) enter into a form of management contract, the lease payments offered were too low and the management contract price was too high to be viable. Mr. Binkley settled for Mr. Felix Wang ("Mr. Wang"), Ms. Wu's nephew, who had worked for her in a number of capacities but had never actually managed a building himself. Ms. Wu offered to oversee Mr. Wang's management of Regal Place to ensure that he was doing things properly. Mr. Binkley was satisfied with this arrangement and felt that it worked reasonably well until September of 1997 when Mr. Wang could no longer continue due to having developed health problems.

**24**  In my view, the overall thrust of the evidence is that Mr. Wang was coping with his management responsibilities less well than Mr. Binkley would have me believe.

**25**  Shortly after taking possession of the hotel, the plaintiffs learned that Room 205 was not licensed for rental and that the tenant or tenants in that room should be evicted forthwith. It took Mr. Binkley many months to get the room properly licensed for rental. He further got notice that Room 202 was classified as a manager's room and therefore also not available for rental. An application had to be made to properly license Room 202 for rental.

**26**  Not long after Mr. Binkley purchased the hotel, provincial officials visited the premises. Within a matter of months, the plaintiffs experienced problems in getting the provincial government to pay $650 a month for two tenants in one room. As best as I can determine from the evidence, these rooms had one double bed rather than separate twin beds. While the provincial government was prepared to pay $325 a month for a single occupant, it was not prepared to pay more than $520 for two occupants to a room unless they were unrelated. Thus, while individuals such as Ms. Judith Graves ("Ms. Graves"), the coordinator of tenant assistance for the City of Vancouver, would have been prepared to look the other way (her role with her team was service, not enforcement), the reality of provincial government policy was (as already stated) that if two related persons (spouses, blood relatives, gay couples) occupied one room, the provincial government would only pay $520 for the two of them, not twice $325.

**27**  In essence, then, because Regal Place primarily relied on tenants whose accommodation was paid for by welfare, for it to obtain $650 a month from two such tenants occupying a single room required either a program of deception on the part of the hotel management, rigorous policing by management to ensure two individuals who were staying in a room were, in fact, truly individuals (Mr. Spitz said, properly, that it's not his business to be doing that), or finding tenants that were not on welfare and who would be prepared to pay $650 a month because of the superior amenities offered by Regal Place.

**28**  Mr. Binkley had been warned, however, that tenants who stayed in that type of building who were able to afford a rent of about $650 a month, and who were not on welfare, could well be a problem because of the potential for their being in the drug trade. The safest and most sensible course, therefore, particularly for a person like Mr. Binkley who was an absentee owner, was to continue with renting to individuals whose rent was paid for by welfare. The only way such individuals could afford $650 a month was by taking money from their welfare living allowance which, given its then levels, would reduce the individuals to very little to live on each month.

**29**  There was evidence that while some tenants were prepared to do that, particularly to obtain good, safe accommodation, that was probably not the usual experience for such hotels. Mr. Spitz did say, however, that he set rentals for some of his rooms above the welfare rates, it not being his concern how his tenants came up with the money to pay for the rent.

**30**  Apart from this problem, the rent rolls reveal that the room vacancy was often above 2%.

**31**  In October of 1997, a new city building inspector was assigned to the downtown east side. It was Mr. Binkley's perception (and complaint) that Mr. Tom Hamilton ("Mr. Hamilton") was much more rigorous about enforcing regulations than his predecessor. Mr. Hamilton did not, however, in any way exceed his mandate.

**32**  I got the impression from Mr. Binkley that he felt that Ms. Graves, for whatever reason, was biased against him. After hearing her evidence, I have to say that I came to the conclusion that his concern was not misplaced.

**33**  Ms. Graves said, in effect, that she had never referred a tenant to Regal Place but would have done so if she had felt it to be a safe and secure environment. She listed numerous reasons why she felt that it was not so. She said that she could have filled it, even at the listed rates of $400 for singles and $650 for doubles - with a waiting list. I just do not believe that.

**34**  While I do accept, from her evidence and that of others, that the management of Mr. Wang and his two (or perhaps more) successors left much to be desired, which contributed in a substantial way to the difficulties experienced by the plaintiffs, I do not accept that, even with very good management, the plaintiffs would have been able to easily secure tenants prepared to pay $650 for the double rooms without, effectively, misleading the provincial government as to the true status of those individuals occupying rooms together.

**35**  I do, however, accept the evidence of Ms. Pamela Brown ("Ms. Brown"), another witness called on behalf of the defence. Ms. Brown is a verification officer with the Human Resources Ministry of the Province of British Columbia. Her job is to verify that tenants on income assistance are, in fact, residing where they say they are and that baseline standards for accommodation for those individuals are being met. Those baseline standards are, essentially, that the accommodation is safe and secure. I qualified Ms. Brown to give expert evidence in the area of market rates paid by the Province of British Columbia for accommodation for persons on assistance.

**36**  Ms. Brown gave evidence, which I accept, that she first went to Regal Place in late August or September of 1997. The atmosphere in the hotel was such that she did not feel safe. She had a difficult time getting past people in front of the hotel, for example. She found numerous problems with the hotel including no doorknobs on some of the doors; some of the door jambs had been kicked in; beds were dirty; some refrigerators were inoperable; some toilets were backing up; the hotel register did not accord with the list of whom she understood were living in the building; the back exit was chained and locked; there was a problem with people entering the building who had no reason to be there without apparent control by the desk clerk. There were numerous other problems that she observed that I will not recite in detail. Her description of Regal Place certainly convinces me that on her inspection or inspections of the hotel in the fall of 1997, the hotel was being poorly maintained and was neither safe nor secure.

**37**  Ms. Brown did say that she met with Mr. Binkley and observed that he seemed determined to improve the conditions of the building. She offered him her support. When Mr. Greg McDonald ("Mr. McDonald") took over the management of the hotel in late October of 1997 she offered him the same assistance she had offered Mr. Binkley. Initially, she said, the situation improved dramatically, however, in her view, upon Mr. McDonald leaving the position of manager in April of 1998, conditions again appeared to deteriorate.

**38**  Probably the most significant part of Ms. Brown's evidence was her confirmation that the Province of British Columbia paid $325 to a person for shelter allowance. However, that allowance would be reduced to $175 a month if the individual was employable but increased to $460 a month if the person was handicapped. She added that a married couple was paid $520 a month for shelter and $282 a month for other support.

**39**  She noted that she can take steps to ensure that couples together only get $520 a month. However, it was her position that, if there was an allegation that a couple was living common-law, she commonly does not enforce the regulation. She said that she never enforced herself at Regal Place. As far as Ms. Brown was concerned, in the eyes of the Ministry of Health, everyone was considered single in Regal Place and all were getting $325 a month. She says that she never told Mr. Binkley that he could only get $520 a month for two related persons occupying a double room in Regal Place. She also stated that to rent a single room for $425 and a double room for $620 would not attract a criminal element if the building was properly managed. She added that there were students at a college around the corner from Regal Place and, if properly managed, they were possible tenants (who, presumably, would pay $650 a month).

**40**  From the view of Ms. Brown, the tobacco shop in the hotel was a problem because individuals were attracted to the store for a variety of reasons. I got the impression from her evidence that she was referring to people who were not necessarily desirable to have in the vicinity of the hotel.

**41**  In cross-examination, Ms. Brown conceded that if individuals admitted to her that they were common-law, she would only pay them $520 a month for two individuals occupying one room. From her statement that, "it is a matter of survival down there", I got the impression that Ms. Brown's unofficial interpretation of how she carried out her duties was to look the other way when it came to enforcing the provincial government's regulation for maximum shelter benefits payable to related individuals because of her social conscience. She did not suggest in her evidence that others in her department were of like views or took the same position.

**42**  Another factor that impacted on the rentability of rooms in Regal Place was what Mr. Binkley described as the "pressure of the street". In other words, the drug traffic on the street outside the hotel increased after the plaintiffs purchased it which, in turn, impacted on their tenants, particularly since they did not have sufficiently strong management in place to keep these individuals out of the building. I also accept that their presence in the vicinity of the hotel may well have discouraged some individuals from taking up tenancy in the building.

**43**  In any event, circumstances worsened through early 1998 so that by then City inspectors were becoming increasingly insistent on repairs being made to the hotel - repairs that, I accept, in many circumstances resulted from damage by unsavoury tenants. Finally, in response to an ultimatum from the City of Vancouver (with which Mr. Binkley says he was in agreement), he had to close the hotel and eject all of the tenants. Regal Place was closed on June 9, 1998.

**44**  Thereafter, Mr. Binkley explored various possibilities for going into partnership with the City of Vancouver or others to try to save his investment. Ultimately, however, the plaintiffs were forced to sell the building to the Greater Vancouver Housing Corporation for the sum of $1,090,000. The sale was effective December 11, 1998.

**45**  The plaintiffs lost a considerable amount of money as a consequence of this failed venture. Thus, they look to the defendants who, in turn, claim that the plaintiffs are the authors of their own misfortune.

**46**  The plaintiffs claim, firstly, that the defendants owed them a fiduciary duty in the particular circumstances of their relationship. Secondly, the plaintiffs allege that the defendants were negligent in the preparation of the appraisal report in a number of particulars and that they would not have purchased Regal Place had the defendants calculated a value for the hotel even as much as $40,000 less. The plaintiffs allege that this most certainly would have been the case had the defendants not negligently misstated a number of matters in the report, some of which were critical to the determination of the value of the hotel. I will deal with each of these allegations later in the judgment.

1. FIDUCIARY DUTY

**47**  The first question that arises is whether the defendants owed a fiduciary duty to the plaintiffs. Let me say at once that I fail to see how the suggestion of a fiduciary duty can arise between VSH Management and the defendants in that the defendants were retained only by Mr. Binkley and reported only to him. By my recollection, there was no evidence that suggested any relationship between the defendants and VSH Management.

**48**  I will first consider the law relating to fiduciary duty generally and then whether, on the facts of this case, the defendants owed a fiduciary duty to Mr. Binkley.

1. The Law on Fiduciary Duties

**49**  Fiduciary obligations fall under two categories.

1. Fiduciary obligations occur in traditional relationships that have been presumptively fiduciary such as trustee-beneficiary, solicitor-client, or director-company.
2. Fiduciary obligations can be created within specific, factual circumstances.

**50**  The starting point for determining fiduciary obligations in factual circumstances is Frame v. Smith [*(1987), 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=) at 136 (S.C.C.) where Madam Justice Wilson, in dissent, outlined the criteria that are requisite for a finding of a fiduciary relationship:

1. The fiduciary has scope for the exercise of some discretion.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

**51**  Mr. Justice Sopinka, writing for the majority in LAC Minerals Ltd. v. International Corona Resources Ltd. [*(1989), 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=) at 62 (S.C.C.), endorsed Madam Justice Wilson's criteria of fiduciary relationships as a "rough and ready guide" for identifying fiduciary relationships outside the established categories. He further explained at 63 that vulnerability was the one feature that was "indispensable to the existence of a fiduciary relationship".

**52**  In 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=), the Supreme Court of Canada attempted to further clarify the meaning of vulnerability in fiduciary relationships.

**53**  In Hodgkinson, a client relied on the representations of his investment advisor in purchasing an interest in a multi-unit residential building ("MURB"). The advisor did not disclose to his client that he was receiving a commission from the developer for each client that invested in the MURB. Hodgkinson was vulnerable in the sense that he trusted his investment advisor to consider only his interests in advising him; however, he was not inherently vulnerable in that he had the choice to ignore the suggestion of his investment advisor.

**54**  Mr. Justice La Forest, writing for the majority, followed the definition of fiduciary obligation offered by Chief Justice Dickson in Guerin v. R. [*(1984), 13 D.L.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=) (S.C.C.). Mr. Justice La Forest stated at 408 that:

[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary...

He also referred to the criteria set out in Frame and LAC Minerals mentioned above.

**55**  Mr. Justice La Forest agreed with the dissenting opinion of Madam Justice McLachlin and Mr. Justice Sopinka at 410 that "[i]n relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary." However, he stated at 412-413 that "...the relative 'degree of vulnerability', if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations." Therefore, Mr. Justice La Forest determined that the real question is whether 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. The answer to this question depends on an examination of all the circumstances, with particular emphasis on discretion, influence, vulnerability and trust. What is ultimately required is evidence of a mutual understanding that one party has relinquished its own self-interest and will act solely on behalf of the other party.

**56**  Mr. Justice La Forest relied on the case of Varcoe v. Sterling [*(1992), 7 O.R. (3d) 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M4HH-00000-00&context=) (Gen. Div.), which the plaintiffs cite in the present case. He noted in Hodgkinson that in this case the court sought to "demarcate the boundaries of the fiduciary principle in the broker-client relationship". He quoted Mr. Justice Keenan from Varcoe at 236 at 419 as follows:

The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith... *It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client*. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly. [Emphasis added]

**57**  Mr. Justice La Forest went on to comment at 420 that:

In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisors be accountants, stockbrokers, bankers, or investment counsellors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary relationship on the part of the advisor.

**58**  Therefore, it is clear that in order to establish a fiduciary relationship between an appraiser and client a court must find that there was an undertaking by the appraiser to make a decision for the client. There has to be substantial reliance on the part of the plaintiff and he or she must have reposed his or her trust or confidence in the appraiser. As well, for policy reasons, the court must find that appraisers are of a great value to society and that such an onerous duty should be placed on them.

1. Did the Defendants owe a Fiduciary Duty to Mr. Binkley?

**59**  Counsel for the plaintiffs has relied on Hodgkinson and Varcoe, as well as Madhani v. Pirani, [*[1997] B.C.J. No. 2280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24JH-00000-00&context=) (S.C.) and Roe, McNeill & Co. v. McNeill [*(1998), 45 B.C.L.R. (3d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1PG-00000-00&context=) (C.A.). In Madhani, at para. 43, Madam Justice MacKenzie quoted Mr. Justice Cory from R. v. Kelly [*(1992), 92 D.L.R. (4th) 643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607D-00000-00&context=) at 657 (S.C.C.) regarding the relationship between investment advisors and clients.

With increasing frequency financial advisors are acting as agents for their clients. Very often business and professional people earning a good income are too busy earning that income to properly arrange their financial affairs. They turn to financial advisors for assistance.

The principal-agent relationship is almost invariably based upon the disclosure by the principal to the agent of confidential information. The relationship is founded upon the trust and confidence that the principal can repose in the advice given and the services performed by the agent.

**60**  Madhani involved a situation similar to Hodgkinson where the financial advisor encouraged his client to invest in a project that the investor had an interest in personally. In Madhani, Madam Justice MacKenzie stated at para. 47 that "[t]he defendant deliberately exploited the vulnerability of the plaintiff in this transaction to promote his own interest in salvaging the financially troubled hotel project". She found that the advisor had a duty to act in the best interests of his client.

**61**  In Roe, Mr. Justice Finch (as he then was) simply reiterated that the court could find a fiduciary relationship between two parties who already have a contract.

**62**  The plaintiffs are maintaining that the role of the real estate appraiser in the present case should be elevated to the role that the investment advisors held in Madhani, Hodgkinson, and Varcoe. This is difficult to establish. The plaintiffs have stated in their submissions that the nature of the relationship created between the parties is such that the defendants were clearly in a position where Mr. Binkley placed reliance upon them. This was, because the defendants purported to possess a special skill and knowledge in appraising properties similar to Regal Place, they in the circumstances knew or should have know that Mr. Binkley would be relying on their skill and judgment in appraising the hotel, and in the circumstances it was reasonable for Mr. Binkley to rely on their appraisal.

**63**  The defendants have relied on the cases of Haida Inn Partnership v. Touche Ross & Co, [*[1989] B.C.J. No. 1186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1YC-00000-00&context=) (S.C.) and A.(C.) v. Critchley [*(1990), 60 B.C.L.R. (3d) 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M0YH-00000-00&context=) (C.A.). In Haida Inn, the court limited fiduciary relationships to situations where there was the additional element of power or discretion. Madam Justice Huddart (as she then was) found that the defendants lacked the discretion to unilaterally affect the interests of the plaintiffs. In Critchley, the court found that for a fiduciary duty to be placed on the defendant, the defendant had to have taken advantage of a relationship of trust or confidence for his direct or indirect advantage. Both of these cases were decided before Hodgkinson.

**64**  The defendants contended that there was no basis (factually or in law) for elevating the role of appraisers to being fiduciary. They stated that: they did not have any unilateral power that could have affected the interests of Mr. Binkley, nor did Mr. Binkley allow them to exercise any unilateral power; there was no evidence to suggest that Mr. Binkley put his trust and confidence in them to assess the value of the hotel in order to determine whether to remove the conditions in his offer and purchase the hotel; upon receipt of the appraisal report, Mr. Binkley did not seek any advice from them, nor was Mr. Binkley a vulnerable person in this transaction; he retained his own advisors (realtors) respecting the purchase of the hotel; there was only an undertaking to prepare an appraisal of the hotel and there was no "stench of dishonesty". This last point is regardless of the fact that Mr. Neufeld did not disclose that the son of Mr. Sullivan, the vendor's realtor, worked for the defendants. They claimed this was merely an oversight. I accept that it was an oversight.

1. Was there an Undertaking?

**65**  The defendants did undertake to prepare an appraisal report on Regal Place. However, I am not convinced that undertaking was one which imposed a fiduciary duty on the defendants.

**66**  In Hodgkinson, Mr. Justice La Forest stated at 409-410 that:

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

**67**  What specifically was the undertaking of the appraisers? Here, I note the first two criteria set out in Frame:

1. The fiduciary has scope for the exercise of some discretion.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

**68**  What was within the defendants' discretion? They were hired by Mr. Binkley to prepare an appraisal of a hotel. Mr. Binkley claims that he clearly stated that he wanted an independent appraisal done on the hotel because he was investing his own money into the hotel, that this was going to be the largest investment in his life, and he did not trust the information provided by the vendor. Mr. Binkley also stated his plan for the hotel which was to operate the hotel and use the income to pay off the mortgage, to upgrade the hotel with any leftover revenue and to live part-time in the hotel with his family. Mr. Burgess and Mr. Neufeld did not remember this conversation with the plaintiff. However, Mr. Neufeld testified that usually when meeting a new client he would discuss what the client's intentions are for the property, how the client was going to operate the property, what the particular nature of the property was and what were the managerial requirements. Mr. Neufeld also proved to be aware of the importance of cash flow in financing the property.

**69**  I find that the appraisers were hired to perform a function that they would perform for any client. Mr. Binkley's demands do not seem any more onerous than the average client's expectations and they cannot alter the relationship from simply being appraiser-client to a fiduciary one where there is absolute trust and confidence and a reposing of one's own discretion.

**70**  Mr. Justice La Forest himself stated in Hodgkinson at 409-410 that "there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be found". The role of the real estate appraiser is to provide information to his client on the value of a particular property. This is what the defendants provided and for which they were responsible regardless of what Mr. Binkley claims to have communicated. There was nothing else expected of the defendants and Mr. Binkley never contacted them after the appraisal was completed.

1. Was there Reliance?

**71**  Mr. Binkley was relying on the appraisal to aid him in his decision to purchase the hotel. However, what was the extent of that reliance? Here, it is necessary to consider the third criteria set out in Frame: is the beneficiary peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power?

**72**  Counsel for the plaintiffs relied on the case of Varcoe where the court held at 236 that "[i]t is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client". [Emphasis added] The defendants were never expected by Mr. Binkley to make a decision for him. He retained his own real estate agents and never reposed his own decision-making power substantially in the defendants. It was ultimately Mr. Binkley who independently chose to consider buying the hotel and who subsequently did decide to purchase the hotel.

**73**  There was never any inherent vulnerability on the part of Mr. Binkley because of a unilateral power held by the defendants - Mr. Binkley always retained the choice of buying the hotel. There was never any suggestion of Mr. Binkley expecting the defendants to actually make that decision for him.

1. Are there Policy Reasons for imposing a Fiduciary Duty on an Appraiser?

**74**  The role of the real estate appraiser is fundamentally different from that of a financial advisor. A financial advisor directly works with a client and the money that he or she has chosen to invest. A real estate appraiser is never directly linked to the investor's money and is never given control over that money for investment. Appraisers are told what property the client is interested in and they then appraise that particular property. They are always at an arms-length distance from the actual transaction. If the report is found to be misleading or incorrect, then the proper recourse is breach of contract or ***negligence***, not a finding of breach of fiduciary duty.

**75**  I note the words of Madam Justice Kent of the Alberta Queen's Bench when she considered the guidelines from Frame, following the decision of Hodgkinson. In Ubacol Investments v. Royal Bank, [*[1995] A.J. No. 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-DY33-B4KP-00000-00&context=), (25 May 1995), Calgary District 9201-19598, she stated:

If you try, it is possible to find in almost any relationship between two individuals, a time or a circumstance when one party has the ability to exercise some discretion that could significantly affect the other party and over which the party has no say and is particularly vulnerable. Taking the most mundane, a person who wants to eat in a restaurant enters into a relationship with that restaurant. How the food is cooked is a matter of discretion for the restaurant, including whether on any particular occasion the cook follows safe procedures. If the customer becomes ill from the food for failure to follow safe procedures it may be that there is a case in ***negligence*** but surely there is no fiduciary relationship.

**76**  I conclude that the defendants did not owe Mr. Binkley (or VSH Management) any duty of a fiduciary nature in these circumstances.

1. NEGLIGENT MISSTATEMENT

**77**  I now turn to the question of whether the defendants are liable to the plaintiffs for negligent misstatement in their appraisal report of January 20, 1997.

1. Can Real Estate Appraisers be Liable for Negligent Misstatement?
2. The Test for Negligent Misstatement

**78**  Madam Justice Levine (as she then was) in Abbey Blinds Inc. v. Mikesh, [*[1996] B.C.J. No. 920*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3KF-00000-00&context=) at paras. 24 - 27 (S.C.) set out the appropriate test for negligent misstatement:

Counsel provided a number of authorities in which the required elements of a successful claim for negligent misstatement, based on the doctrine established in Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465, are summarized.

In Kingu v. Walmar Ventures Ltd. [*(1986), 10 B.C.L.R. (2d) 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S0MB-00000-00&context=) (B.C.C.A.) at p. 23, McLachlin J.A., as she then was, summarized the requirements of tort liability for negligent misstatement as follows:

1. A false statement negligently made.
2. A duty of care on the person making the statement to the recipient. A duty of care does not arise unless:
3. the person making the statement is possessed of special skill or knowledge on the matter in question, and
4. the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment;
5. Reasonable reliance on the statement by its recipient;
6. Loss suffered as a consequence of the reliance.

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 p. 110, Iacobucci J. summarized the decisions of the Supreme Court of Canada as follows:

The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Though presented in a different order, the elements outlined are the same: (1) a duty of care; (2) a false, inaccurate or misleading statement; (3) ***negligence*** in making the statement; (4) reasonable reliance; and (5) loss resulting from the reliance.

1. What is the Duty of Care of Real Estate Appraisers?

**79**  The duty of care of a real estate appraiser is succinctly stated by Mr. Justice MacPherson of the Saskatchewan Queen's Bench in the case of Avco Financial Services v. Holstein [*(1980), 109 D.L.R. (3d) 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6V1-F65M-61J6-00000-00&context=) at 130:

The duty owed by an appraiser to his client is identical in principle to the duty owed by all professional men to people who employ them. It is always implied that he will carry out the duty with a reasonable degree of care, knowledge and skill. An appraiser who fails to live up to that standard is negligent and is liable for his client's loss.

1. What is the Standard of Care of Real Estate Appraisers?

**80**  Courts have recognised that property appraisal is not an exact science and that variations in value among appraisals on the same property are not uncommon (see Cari-Van Hotel Ltd. v. Globe States Ltd. et al., [*[1974] 6 W.W.R. 707*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G31D-00000-00&context=) (B.C.S.C.)).

**81**  At the trial level, Lord Justice Goddard in Baxter v. F.W. Gapp & Co. Ltd., [1938] 4 All E.R. 457 at 459 (K.B.) described the standard of care of a real estate appraiser as follows:

I think one may state quite simply the duty which he owed. His duty was, first of all, to use reasonable care in coming to the valuation which he was employed to make and he must be taken to have held himself out as possessing the experience and skill required to value the particular property. If he did not know enough about the property market, or the value of the property at the place where the property was situate, he ought to have taken steps to inform himself of the values of the properties there, or of any circumstances which affect the property... On the other hand, one also has to bear in mind very carefully the fact that valuation is very much a matter of opinion. We are all liable to make mistakes, and a valuer is certainly not to be found guilty of ***negligence*** merely because his valuation turns out to be wrong. He may have taken too optimistic or too pessimistic a view of a particular property. One has to bear in mind that, in matters of valuation, matters of opinion must come very large into account.

**82**  This reasoning was accepted in Kokanee Mortgage MIC Ltd. v. Concord Appraisers Ltd., [*[2000] B.C.J. No. 1629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22P7-00000-00&context=) at para. 52.

**83**  In Friedland v. Derochie, Hoffman Ltd., [*[1992] O.J. No. 1179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCR1-JB2B-S4WT-00000-00&context=) (Ont. Ct. Gen. Div.), the court noted that the question to consider is not whether the defendant overstated the value of the property but whether the defendant was guilty of professional ***negligence*** in arriving at the appraisal which he filed. Errors in arbitrary assumptions will not necessarily result in a finding of professional ***negligence***. The court will consider whether the appraiser followed professional guidelines.

**84**  In determining whether or not an appraiser has been negligent, the court will consider whether or not the appraiser, in forming his opinions on the value of the property, became acquainted with the property, its surroundings, the local market, and any special circumstances affecting it. (See Avco Financial Services v. Holstein.)

**85**  There has been judicial recognition that an appraiser is not an architect, engineer, quantity surveyor or building inspector. (See Haven Investments Ltd. v. Harper, [*[1985] B.C.J. No. 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-FBFS-S1CS-00000-00&context=) (8 August 1985), Dawson Creek Registry (B.C. Cty. Ct.); aff'd [*(1987), 10 B.C.L.R. (2d) 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7G6-62C5-00000-00&context=) (C.A.)).

**86**  The plaintiffs referred to the case Caisse Populaire de Maillardville Credit Union v. Severn, Buchan & Associates Ltd., [*[1985] B.C.J. No. 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-FBFS-S14D-00000-00&context=) (S.C.); aff'd [*[1986] B.C.J. No. 990*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FBN1-2121-00000-00&context=) (C.A.). In that case, the court determined that if an appraiser includes a fact in an appraisal he must take necessary steps to ensure that those matters included within the appraisal are correct, and his failure to do so will result in a finding of ***negligence***, regardless of the final estimate of value. However, in Eaton Bay Trust Co. (Alta.) v. First Citizens Fin. Corp. [*(1988), 30 B.C.L.R. (2d) 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JSC5-M2W7-00000-00&context=), (S.C.), Mr. Justice Wood expressed doubt that certain erroneous descriptive statements contained in an appraisal which nonetheless accurately valued property could give rise to liability on the part of the appraiser. He said at 93:

Counsel did not direct me to, nor have I been able to find, any case in which it is suggested that the scope of an appraiser's function is any broader than to provide a reasonably accurate opinion as to the value of the property being appraised. I have grave doubts that, *absente* a plaintiff's privity to a contract to provide more than a simple opinion as to value, an appraiser can be held responsible for a misstatement which appears in the appraisal report in support of an accurate valuation and *which is subsequently relied upon for a purpose for which the report was not contracted*. [Emphasis added]

**87**  In summary, the determination of whether or not an appraiser was negligent will be based on whether or not the appraiser acted reasonably having regard to the standards prevailing in the profession and the imprecision inherent in the methods by which the value of the property is determined. This is the minimum standard that an appraiser must meet in order to not be found negligent.

1. Are the Defendants Liable for Negligent Misstatement?
2. Was There a Duty of Care?

**88**  The main questions to ask at this point are: did the defendants possess a special skill or knowledge on the matter in question, and did the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his skill or judgment?

**89**  I find that the defendants owed a duty of care to Mr. Binkley. It is clear that they possessed special skill and knowledge regarding real estate appraisal. They purported to be experts in the field of real estate appraisal and it is clear that Mr. Binkley was relying on their skill to properly assess Regal Place.

1. Did the Defendants make False, Inaccurate or Misleading Statements?

**90**  The most serious alleged inaccuracy was the statement by the defendants that double rooms in the hotel could be rented for $650 a month based on double occupancy, the rental for which was paid by the BC Human Resources Ministry directly to the hotel. These statements were misleading in two important respects.

**91**  Firstly, while not impossible to attain, I conclude that rents of $650 a month for the double rooms in Regal Place, despite their superior amenities, were unlikely to be obtained unless the Province of British Columbia was to ignore its policy of paying only $520 a month for two people residing in the same accommodation if they were in a spousal or dependency relationship. The reality was that many of the tenants living in double rooms in Regal Place in January of 1997 were probably in spousal or dependency relationships. That quickly became apparent within months after the plaintiffs' purchase when the Province of British Columbia carried out an inspection and gave notice to Mr. Wang that the hotel could not expect to continue to receive, directly from them, payments of $325 a month for each of the two tenants in double rooms. Mr. Binkley had been warned that to try to achieve rents above the welfare rates could well result in attracting undesirable elements to the hotel such as those in the drug trade. He did not tell that to Mr. Neufeld, of course.

**92**  Secondly, the report was actually misleading as to what rent a landlord could expect to receive for each tenant. At pp. 20-21 of the appraisal report, the defendants, in referring to rooming house rentals, stated:

These rooms typically rent for a base rent of $325 per month which is the amount that the BC Human Resources Ministry pays directly to the landlord *for each tenant who occupies one of these rooms* who is on welfare; these rooms are typically occupied by welfare recipients. [Emphasis added]

**93**  No caution or qualification is provided to the reader of the report that the Province of British Columbia would only pay $325 for each tenant occupying a room when those individuals were not in a spousal or dependency relationship.

**94**  In his evidence, Mr. Neufeld said that he knew of this qualification yet he conceded that he made no inquiries and, clearly, in his report he made no disclosure of this important factor. The defendants did not say, for example, that due to the superior quality of the rooms in Regal Place, it was possible to attain $650 per month but that caution had to be exercised not to contravene the policy of the BC Human Resources Ministry.

**95**  In essence, the defendants stated the income for the hotel at its most optimistic level, a level that did not take into account the reality of Mr. Binkley's financial circumstances and needs that he had communicated to the defendants. Mr. Neufeld knew that he was using an income approached evaluation. Therefore, his optimistic assessment of the rental revenues translated into an overly optimistic assessment of the value of the hotel.

**96**  I appreciate that there are occasions when clients wish an appraiser to give an optimistic value. For example, when they wish to maximize the amount of mortgage financing that they can obtain to purchase a property. There is no suggestion that that was the nature of the brief given to the defendants.

**97**  This unrealistic assessment of the rental revenue (or an assessment that, at the very least, did not contain a caveat as to the policy of the Province of British Columbia in making direct payments to landlords for welfare recipients) as well as the statement as to what the Province of British Columbia paid for each tenant occupying a room were statements that were inaccurate and misleading.

**98**  In the "ASSUMPTIONS AND LIMITING CONDITIONS" to the report, it is stated at p. 31:

Information contained within this report is from sources considered reliable and believed to be correct. No responsibility is accepted for the accuracy of information supplied by others.

**99**  The defendants cannot hide behind this condition. Mr. Binkley warned Mr. Neufeld that he did not consider the sources of the rental information reliable.

**100**  Although not a misstatement contained within the report, I note that when Mr. Burgess gave Mr. Binkley an estimate of between $2,500 and $3,000 for the fees of Burgess, Austin for the preparation of the report, that was based, according to Mr. Neufeld, on about 27-28 hours time (for $3,000). Mr. Neufeld, in fact, spent approximately 17 hours on the appraisal. This would lead to a bill of less than $2,000 on an hourly basis for his time. There may well be force to the argument of Mr. Hinkson, on behalf of the plaintiffs, that had Mr. Neufeld spent all the time that Mr. Burgess estimated would be required for the appraisal, he may well have been able to provide a proper and accurate report.

**101**  The defendants also made a false and misleading statement at p. 18 of the appraisal:

In the process of completing the report, our investigators have included discussions with owners, managers and agents and others knowledgeable with this type of property or this sector of the market as well as municipal officials.

**102**  Mr. Neufeld was unable to provide any name of any person with whom he may have discussed the information provided in the appraisal. In fact, what Mr. Neufeld did was to refer to a collection of other appraisals performed for clients of Burgess, Austin and apparently kept as a resource for the preparation of other appraisals of like properties. As that was the source of his information, Mr. Neufeld should have said so in the appraisal report and not led Mr. Binkley to believe that he had actually made the effort to have discussions with owners, managers, agents and others knowledgeable with this type of property. To the extent that Mr. Neufeld believed that he knew the answers to such inquiries without having to go to the effort of making them, in important respects (as I will discuss later in this section) he kept them to himself.

**103**  Finally, the defendants failed to report that there was an easement registered on title in favour of the City of Vancouver prior to the appraisal. However, in the appraisal report, Austin, Burgess stated at p. 31 that, "[i]t is assumed that the title to the subject property is good and marketable and capable of providing security for typical market financing. Unless otherwise stipulated in this report, the title documents for the subject property have not been inspected and are assumed to be free and clear of any financial encumbrances which would have a material effect on value". It cannot be said that this was inaccurate or misleading in any manner.

1. Were the Appraisers Negligent in making their Report?

**104**  In order to determine whether the defendants were negligent, it is necessary to look at the standards that real estate appraisers should follow when practising in this field. What are the standards that should be applied to real estate appraisers practising in British Columbia in 1997?

**105**  In the plaintiffs' report of Collier International, appraiser Mr. Ken Hollett stated in a letter dated July 23, 1998:

The conclusion formed in the report are documented and supported by the information contained within the report, however, based on our analysis it would appear that the report was in error as to property specific data, and therefore the analysis and conclusions are not appropriate or reasonable. Further, the report was not made in conformance with the Uniform Standards of Professional Appraisal Practice ("UPSAP") adopted by the Appraisal Standards Board of the Appraisal Foundation and the Appraisal Institute of Canada. As a result of this analysis, we are of the opinion that it would not be reasonable to rely on this report.

**106**  Mr. Hollett appears to have relied on the American version of the Uniform Appraisal Standards of Professional Practice. However, I agree with Mr. Larry Dybvig, an appraiser with Grover, Elliott & Co. Ltd. provided by the defendants, that the appropriate standard to consider is specifically the one that the Appraisal Institute of Canada has adopted. The Canadian Uniform Appraisal Standards of Professional Appraisal Practice from the Appraisal Institute of Canada provides a set of rules that appraisers should follow when they are developing and communicating a formal opinion of value.

**107**  These rules appear to be much more general than the rules that have been adopted in the United States, but they provide a clear procedure that real estate appraisers should follow. However, I also agree with Mr. Dybvig that these standards do not necessarily reflect how a typical and competent appraiser had to undertake his or her work in 1997; rather, they reflect the aspirations of the Appraisal Institute of Canada for the conduct of its members. In light of these guidelines, it is also necessary to reconsider the case, Baxter v. F.W. Gapp & Co. Ltd., [1938] 4 All E.R. 457 at 459 (K.B.), where the court stated:

If he did not know enough about the property market, or the value of the property at the place where the property was situate, he ought to have taken steps to inform himself of the values of the properties there, or of any circumstances which affect the property.

**108**  This was also that view expressed in Friedland v. Derochie, Hoffman Ltd., and Avco Financial Services v. Holstein.

**109**  From this standpoint, it is necessary to consider the mistakes that were found in the appraisal report and if they were a result of the defendants being negligent in the steps they took to determine the value of the hotel.

**110**  I find that the defendants were negligent in preparing the appraisal. This is especially evident regarding the information about rental rates. The defendants simply did not take the necessary steps to properly inform themselves of the reliability of the rental income of the hotel and how that impacted on the values of this and similar properties. This is especially true in light of the conversation that Mr. Binkley had with Mr. Neufeld. Mr. Neufeld knew that Mr. Binkley was sceptical of the information provided to him about the rental rates and he expressed this to him. Despite this communication, this was the main area of the report that was misleading.

**111**  However, the defendants contend that the rates of $400/single room and $650/double room that they averaged were not only attainable but entirely reasonable. This is because of the rent roll and Revenue Canada statements supported the represented rents. Mr. Binkley, in fact, confirmed that he charged those rates when he took control of the hotel. However, this meant charging more than the amount that was provided by the Province of British Columbia to the recipients for their rent.

**112**  To the extent that two witnesses for the defence, Ms. Brown and Ms. Graves, suggest that the room rates for Regal Place were reasonable and achievable, I have this to say. I have indicated that I do not accept the evidence of Ms. Graves. I do accept that it was Ms. Brown's individual approach to her job that she commonly looked the other way rather than enforce the regulation that it was her duty to enforce. The evidence of Mr. David Butcher, the BC Benefits coordinator for Vancouver (and Ms. Brown's superior) called by the plaintiffs, was that if the Province of British Columbia is suspicious that parties are in a dependency relationship, a verification officer does an investigation. He added that if the verification officer finds that the individuals are in a dependency relationship, the two individuals will be told to reapply as a couple. In essence, then, landlords being able to maintain payment of $325 each from two related individuals in one room were dependent either upon the Province of British Columbia not becoming aware of the status of those persons or, if so, upon the individual social conscience (however well-intended) of verification officers such as Ms. Brown who were prepared to ignore the rules of their employer. Obviously, this was a situation where, as the income of the hotel was largely dependent upon direct payment from the Province of British Columbia, the factors affecting their reliability and certainty of that revenue stream were critical. That, of course, in turn impacted on the value of the hotel to a purchaser such as Mr. Binkley.

**113**  At a minimum, I would have expected that a caution would have been given by the defendants in the appraisal report as to the sustainability of rentals of $650 a month for double rooms. However, no mention was made at all in their report of the policy of the Province of British Columbia with respect to paying shelter allowances and how that might impact on achievable rents. Nor was there any information provided regarding whether couples or singles inhabited the rooms, which ultimately greatly affected the amount of dependable revenue that could be received from the Ministry. The defendants did not adequately seek out information pertaining to rental rates.

**114**  The appraisers were also negligent in determining that there were 39 licensed rooms for rent.

**115**  The appraisers' negligent acts are even more evident from their estimation (as reflected in their billing) of having worked on the report for 27-28 hours when in fact they only spent 17 hours on the appraisal.

**116**  One last issue to consider, however, is whether these inaccuracies are simply "erroneous descriptive statements" as described in Eaton Bay Trust Company which cannot give rise to a finding of ***negligence***, or if this is a situation akin to the one found in Caisse Populaire de Maillardville where the court held that an appraiser must take the necessary steps to conclude that the information contained in the report is correct and his failure to do so will result in a negligent appraisal. In my view, it was central to the agreement that the defendants obtain information that was correct with respect to the income generated by the hotel. The analysis of the rental rates were not erroneous descriptive statements. They played a critical role in Mr. Binkley's decision to purchase the hotel in that they formed the basis of an overly optimistic value for it. The defendants (notably Mr. Neufeld) were negligent in obtaining that information and should be held liable for the losses flowing from those negligent acts.

**117**  In addition to the above, although not properly described as a negligent misstatement, the defendants should have disclosed to Mr. Binkley before undertaking this work on his behalf that the son of the vendor's realtor was employed in their office. This is particularly so since contact with respect to the proposed appraisal of Regal Place for Mr. Binkley was initiated by the realtor, Mr. Sullivan, even before there was any contact between Mr. Binkley and the defendants. While I do not suggest any collusion between Mr. Sullivan and the defendants, in my view, at the least, this connection should have been disclosed to Mr. Binkley to give him the choice of whether to engage the defendants to do the appraisal in that circumstance.

1. Was there Reasonable Reliance?

**118**  In Kripps v. Touche Ross & Co. [*(1995), 5 B.C.L.R. (3d) 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M1XF-00000-00&context=) at 59 (S.C.), Mr. Justice Lowry noted that:

...[O]ne who seeks to recover a loss allegedly suffered due to a misrepresentation that was negligently made must prove that he or she relied on it. The reliance must have been such that the misrepresentation is shown to have been a real inducement having played a substantial part in the decision that led to the loss. The law guards against turning advice or information negligently given into an ex posto facto excuse for an unwise business decision. And so it must.

**119**  Therefore, it must be shown that the statements were a real inducement to purchasing the hotel and that Mr. Binkley relied upon those statements before entering the transaction. This determination also ties in with causation, but it is necessary to consider this issue at this point in the analysis.

**120**  As Mr. Justice Lowry held in Kripps at 64, the burden of proving that there was reasonable reliance is on the plaintiffs. Further, this has to be inferred from the evidence as a matter of fact, not as a matter of law.

**121**  In light of this, it is interesting to note that Mr. Binkley retained a structural expert to evaluate the soundness of the hotel's structure. He did not expect the appraisers to provide him with expertise regarding this. However, this does bring up a point that is in favour of the defendants. If Mr. Binkley recognised that the defendants were unable to evaluate the structure of the hotel because they were simply real estate appraisers, why would Mr. Binkley expect them to be able to financially account for all of the income of the hotel? Mr. Binkley should have considered hiring an accountant or auditor for such a job. Despite this, it is important to recognise that: 1) the defendants took on the appraisal knowing that Mr. Binkley wanted a verification of the rental income (and this was further evident in their use of the income approach to valuation); and 2) in order to properly appraise the value of the hotel, it was absolutely crucial to have a sound estimate of the hotel's income.

**122**  It is reasonable to assume from the conversations that Mr. Binkley had with Mr. Neufeld and Mr. Burgess regarding the appraisal of the hotel that Mr. Binkley was reasonably relying on the report. His demands were not onerous and they were in accord with the general questions that Mr. Burgess said he would have asked any client before doing the appraisal.

**123**  As Mr. Justice Lowry stated in Kripps at 60,

Whether the reliance was reasonable is a question of duty. The auditors' duty of care extended only to those prospective purchasers who relied reasonably on their report. And, a duty was owed only to the extent that the report was used in the manner that was in the reasonable contemplation of the auditors. A duty arises in respect of a negligent misrepresentation only when reliance, as seen from both sides, is reasonable: Kingu v. Walmar Ventures Ltd. [*(1986), 10 B.C.L.R. (2d) 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S0MB-00000-00&context=) at 28 (C.A.).

**124**  I conclude that Mr. Binkley reasonably relied on the appraisal.

1. Was there Loss resulting from the Reliance?

**125**  Ultimately, this is the crux of the plaintiff's claim for negligent misstatement. But for the ***negligence*** of the defendants, would the plaintiffs have suffered a loss? Basically, Mr. Binkley contends that he suffered an economic loss because he purchased the hotel for more than it was worth, and he would not have purchased the hotel for that amount "but for" the ***negligence*** of the defendants. This is a question of basic causation. In this case, however, it is not easy to draw the conclusion that all of Mr. Binkley's losses are causally connected to the negligent acts of the appraisers.

**126**  There are two cases from the Supreme Court of Canada that have effectively summarized the law of causation: 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=). It is convenient, however, to set out briefly what Mr. Justice Allen M. Linden has to say about causation. He stated in Canadian Tort Law (Vancouver: Butterworths, 1997) at pp. 104-5:

The defendant's conduct must cause the plaintiff's loss or else there is no liability. In other words, there must be some connection or link between the wrongful act and the damages...

Fortunately, the courts have not been trapped into endless philosophical discourse on the concept of causation. Instead, they have adopted a common sense approach to the problems. Mr. Justice Sopinka has recently reiterated this in Snell v. Farrell when he declared that causation need not be proven with "scientific precision". He explained that "Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former...

The most commonly employed technique for determining causation-in-fact is the "but for" test, sometimes called the sine qua non test. It works like this: if the accident would not have occurred but for the defendant's ***negligence***, this conduct is a cause of the injury. Put another way, **if the accident would have occurred just the same, whether or not the defendant acted, this conduct is not a cause of the loss**. Thus the act of the defendant must have made a difference. If the conduct had nothing to do with the loss, the actor escaped liability. [Own emphasis]

**127**  Generally speaking, the burden of proof is on the plaintiff. In Snell at 301, Mr. Justice Sopinka stated:

The legal or ultimate burden rests with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced.

**128**  However, if the defendant attemps to prove that the plaintiff would have entered into a different contract under different terms, the burden is on the defendant. This was clear in the case of Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., [*[1991] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6045-00000-00&context=). Here, the Supreme Court of Canada stated at 15-16:

Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the defendant or plaintiff bear the risk of non-persuasion? Must the plaintiff negative all speculative hypothesis about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?

Although the legal burden rests with the plaintiff, it is not immutable [citations omitted]. Valid policy reasons will be sufficient to reverse the ordinary incidence of proof. In my opinion, there is good reason for such a reversal in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position." A tortfeasor who says "Yes, but you would have assumed a position other than the status quo ante," and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the status quo ante. [Emphasis added]

**129**  Because of the nature of negligent misstatement, it is often the case that the plaintiff's prima facie case will be established by merely asserting reliance on the misstatement. The court will often be in a position to infer from the nature of the misstatement that, but for the misstatement, the plaintiff would not have changed his or her position. The burden then shifts to the defendant to rebut this inference. Therefore, when a defendant seeks to rebut the plaintiff's prima facie case regarding causation by proposing a hypothetical position that the plaintiff would have taken but for the misstatement, the defendant bears the burden of establishing the hypothetical.

**130**  Lastly, there is the case of Canson Enterprises v. Broughton & Co., [*[1991] 3 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6052-00000-00&context=) which was referred to in Mr. Justice MacDonald's reasons in Granville Savings & Mortgage Corp. v. Mark Swallow Thompson Allard & Co., [*(1996) 19 B.C.L.R. (3d) 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3TS-00000-00&context=). He stated that it was possible, in situations where the court has to determine damages in a ***negligence*** matter, to adopt the comments of Madam Justice McLachlin in Canson, where the Supreme Court of Canada was concerned with a breach of a fiduciary duty, and to impose that standard in determining causation in ***negligence***. Mr. Justice Macdonald stated at 310:

Canson...is authority for the proposition that the loss must flow from the breach in order to be recoverable. In her judgment concurring in the result (but dissenting on the issue of whether damages for breach of fiduciary duty should be measured by analogy to tort or contract), Madam Justice McLachlin states, at pp. 556/7:

...it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

**131**  This is basically a relaxing of the "but for" test where the court can simply look at what was causally connected to the breach.

**132**  The decision of Rainbow Caterers is important because, in this case, the defendants maintain that Mr. Binkley would have still bought the hotel even if he had known that they had been negligent. In other words, Mr. Binkley would not have altered his position because the errors in the appraisal do not greatly affect the value of the hotel nor were the statements entirely untrue or irreversible.

**133**  The defendants argued that even though they may have been in error as to the amount of the rental payments that would be paid by the Province of British Columbia, it was still proven that Mr. Binkley could rent out the double rooms for $650, regardless of whether they were rented to single persons or couples. The defendants stated that the market allowed the practice of renting out the rooms, whether or not they were licensed, to couples who acted as singles. I have already indicated that I reject that argument.

**134**  I therefore conclude that Mr. Binkley suffered loss from his reliance on the misstatements of the defendants. The defendants are therefore liable to Mr. Binkley for negligent misstatement.

1. Extent of Loss resulting from the Reliance

**135**  While the extent of the plaintiffs' loss is really a question of damages, it is appropriate to say something here as to the probable extent of that loss. In that respect, I agree with the defendants' hypothetical (at least in part) that Mr. Binkley would still have purchased Regal Place had their appraisal report not contained negligent misstatements.

**136**  Mr. Binkley (at least in 1997) was clearly in love with Vancouver. He undoubtedly had what may be best described as a concept of building ownership that was more romantic than pragmatic. This was a project that he very much wished to do. I do not doubt that he would not have proceeded with his offer to purchase of December 20, 1996 had Mr. Neufeld either employed legally achievable rates from the Province of British Columbia for both single rooms ($325) and for double rooms ($520 for related individuals) with, perhaps, a percentage of those rooms being based on double occupancy by unrelated individuals, or if he had at least provided a warning of the potential downside to achievable rental income because of the policy of the BC Ministry of Human Resources. I do accept that, had the assessed value been some $30,000 to $40,000 less than he had offered, Mr. Binkley would not have proceeded with his original offer.

**137**  That said, however, I do not doubt that Mr. Binkley would have still bought the hotel but at a lower price to reflect a lower realistic assessed value based on lower realistically (and legally) achievable rentals. That, of course, would have depended on whether the vendor would have sold for a lesser amount but that is something that cannot be known with any certainty for this scenario on the evidence before me. For the purposes of dealing with this hypothetical, it can only be assumed.

**138**  I do conclude that if Mr. Binkley had known that Rooms 202 and 205 were not licensed, he probably would have applied to the City of Vancouver immediately after purchasing the hotel and would have received a permit to rent out those rooms. I doubt that he would have altered his offering price for the hotel had he known of that misstatement.

**139**  Nor did Mr. Binkley suffer any loss from the defendants not identifying the easement. It would appear that he knew about the easement. However, he may have altered his offering price as a consequence. In any case, I accept the defendants' submission that they are entitled to rely on the assumption that the property was free and clear of encumbrances.

**140**  Therefore, I conclude that, whatever other damages may properly arise from the negligent misstatement of the defendants, it can be said that the difference between the purchase price of $1,338,000 and an actual fair market value of Regal Place in January 1997, based upon a proper assessment of its value, is a loss that is causally connected to the negligent misstatements.

1. DAMAGES
2. Applicable Law

**141**  Two methods of assessing damages in cases of this nature are described by Madam Justice Huddart in Haida Inn Partnership v. Touche Ross & Co. [*(1989), 42 B.C.L.R. (2d) 151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2196-00000-00&context=) (S.C.) at 156:

The difference between the price paid and fair market value is one method, usually applied in the simple case of the purchase of property at a price in excess of its market value because of the tortious behaviour of the defendant. This is the "contract" measure mentioned by the Court of Appeal in Rainbow. In addition to that economic loss calculated as at the date of the breach, an injured party may be compensated for the foreseeable physical consequences, if any, flowing directly from the breach of duty, and for any loss incurred in a reasonable attempt to fulfil its duty to the defendants to mitigate damages in their interests as well as the plaintiffs' own. The awards will include court order interest. This measure was applied in Philips v. Ward, [1956] 1 W.L.R. 471, [1956] 1 All E.R. 874 (C.A.); Ford v. White & Co., [1964] 1 W.L.R. 885, [1964] 2 All E.R. 755; and Perry v. Sidney Philipps & Son, [1982] 1 W.L.R. 1297, [1982] 3 All E.R. 705 (C.A.). These cases helped me to reach the understanding of the measure I have just expressed.

Alternatively, persons injured by a negligent act may be compensated for the actual cash losses they suffered as a result of the negligent act, sometimes called "loss of capital". That amount may be money paid out-of-pocket or liability incurred but not paid at the date of quantification of the loss. The award will bear interest. This is the method applied in Esso Petroleum Co. v. Mardon, [1976] 2 All E.R. 5 and approved in Rainbow and Sunshine Vacation Villas Ltd. v. Gov. & Co. of Adventurers of England Trading into Hudson's Bay [*(1984), 58 B.C.L.R. 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F8SS-6333-00000-00&context=), [*13 D.L.R. (4th) 93*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F8SS-6333-00000-00&context=) (C.A.). It involves calculating the full amount of the plaintiffs' actual loss proven to have flowed naturally from the negligent representation and then considering how much of it is recoverable in law taking account of the principles of foreseeability, remoteness and mitigation.

**142**  The plaintiffs suggest that the second described method is the appropriate one here while the defendants would have me adopt the first, or "contract" measure of assessing damages. Given my conclusion that Mr. Binkley would have purchased Regal Park in any event (although at a lower price), I conclude that the "contract" measure of damages is the appropriate method for me to employ to quantify damages in this case. My decision is also based on my conclusion that the plaintiffs' losses are in no small measure due to their failure to provide adequate management of the hotel premises so that they were safe, secure and reasonably attractive to tenants.

1. Calculation of Damages

**143**  I heard a lot of evidence with respect to the plaintiffs' management, or lack of management, of the hotel. Despite Mr. Binkley's optimistic portrayal of the management of Mr. Wang and his successors, I conclude that the plaintiffs largely failed to provide adequate management of Regal Place. Mr. Binkley was cautioned before purchasing the hotel by both Mr. Spitz and Ms. Wu that strong, virtually daily, hands-on management was a requisite to the successful operation of this type of facility. I have no doubt that if Mr. Binkley had hired either of those individuals to manage the hotel for him, or leased the building to either of them, he would not have had the experience of owning a building that, within the space of less than a year and a half after his purchase, had to be closed by order of the City of Vancouver.

**144**  Had Mr. Binkley received an appraisal report that did not contain the negligent misstatements I have described, particularly that relating to achievable income as consequently reflected in the income-based assessment of value, he would, as I have found, still purchased this hotel and, with the management arrangements he put in place, still have had the same problems. Thus, the losses experienced by VSH Management (and any consequent losses to Mr. Binkley) would have been experienced in any event. The plaintiffs cannot look to the defendants for compensation for those losses.

**145**  However, absent the negligent misstatements and with a consequent more realistic assessment of value by the defendants, Mr. Binkley would have purchased the hotel for less than $1,338,000. The question is, for how much less? That is his measure of damages.

**146**  Regal Place was listed by Bruneau & Associates Realty Ltd. at $1,668,000. As noted earlier, Mr. Binkley caused VSH Management to purchase the hotel for $1,338,000. It was Mr. Binkley's money that was used to fund the purchase (other than mortgage funds).

**147**  The defendants' estimate of the fair market value of the hotel in January of 1997 was $1,430,000. In his opinion, on behalf of the defendants, Mr. Dybvig of Grover, Elliott & Co. Ltd. estimated the value of the hotel on January 15, 1997 at $1,350,000. However, Mr. Hollett of Colliers International was of the opinion that the value of the hotel in January of 1997 was between $1,064,000 and $1,092,000.

**148**  As an exercise in comparison to the latter two appraisals, I calculated a comparable income approach to value using the following hypothetical:

|  |  |  |  |
| --- | --- | --- | --- |
| Double Rooms | 2 unlicensed | $ - |  |
|  | 18 @ $520 per month | 112,320 |  |
|  | 6 @ $650 per month | 46,800 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| Single Rooms | 10 @ $325 per month | 39,000 |  |
|  | 3 @ $400 per month | 14,400 |  |

|  |  |  |  |
| --- | --- | --- | --- |
| Laundry | $280 per month | 3,360 |  |
| Tobacco Shop | $300 per month | 3,600 |  |

|  |  |
| --- | --- |
| $219,480 |  |

|  |  |  |
| --- | --- | --- |
| Vacancy 5% (rounded) | ($10,980) |  |

|  |  |  |
| --- | --- | --- |
| Gross Income | $208,500 |  |

|  |  |  |
| --- | --- | --- |
| Gross Income Multiplier of 5.4 x $208,500 | $1,126,000 |  |
|  | (rounded) |  |

**149**  In the above scenario, I have assumed the majority of the rooms being rented for the maximum allowable housing allowance provided for individuals on welfare by the provincial government with some being rented at higher rates. I have assumed the same laundry and tobacco shop income as did Mr. Neufeld. I have, however, used a vacancy rate of 5% for both the rental rooms and the tobacco shop (as opposed to Mr. Neufeld's 2% and 5%) given the evidence as to the history of experience with the building and, I believe, the realistic consideration that it probably is not possible to always rent a double room to two people. In other words, on occasion, only one person will occupy a double room. That certainly was the plaintiffs' experience.

**150**  I used a gross income multiplier of 5.4 as that was the multiplier used by the defendants in their report.

**151**  Based on this calculation, which I regard to be consistent with the evidence I heard, I reach a value of $1,126,000. For what it is worth, that estimate is $224,000 lower than that of Mr. Dybvig but $34,000 to $62,000 higher than that of Mr. Hollett. Ironically, however, it was somewhat less than Mr. Dybvig's appraisal of the value of the property, as at July of 1998, of $1,200,000, if repaired. In fairness, Mr. Dybvig did suggest that the condition of the building, as it was, was only $1,000,000. The plaintiffs did expend approximately $90,000 to bring the building up to a better standard which was reflected in the ultimate sale price by VSH Management to the Greater Vancouver Housing Corporation for $1,090,000 in December of 1998.

**152**  I find that it is improbable, notwithstanding the rough treatment the hotel experienced during its ownership by the plaintiffs, that it would have actually decreased in value by $350,000 ($150,000 if repaired) between January of 1997 and July of 1998. It is my conclusion that Mr. Hollett's appraisal more closely reflects the reality of the value of Regal Place as at July of 1997 than does that of Mr. Dybvig. While the lower of the two values found by Mr. Hollett resulted from his using the income approach to valuation rather than the comparison approach which resulted in his higher valuation, I nonetheless conclude that the probable price that Mr. Binkley and VSH Management would have paid for Regal Place as at February 7, 1997 is something slightly above Mr. Hollett's higher calculation, or $1,100,000.

**153**  Thus, Mr. Binkley has suffered damages of $238,000 for having paid more for Regal Place than, I find, he otherwise would have.

**154**  I conclude, however, that the other expenses that Mr. Binkley would have had in connection with this purchase would have remained constant. For example, as best that I can determine from my review of the material, he was not responsible for any fees that were calculated on a percentage basis. Even if that could be said to apply to the fees that he paid to his own lawyers, he did not pay the lawyers' full account. He would have been responsible for fees in the vicinity of that which he did pay.

**155**  The defendants charged Mr. Binkley for their work on an hourly basis. The evidence discloses that, although they estimated that their fees would be in the region of $2,500 to $3,000 (they charged $2,800), their actual earned professional fees were something less than $2,000. In my view, Mr. Binkley is entitled to a refund of $800. I would include that amount in the damages he is entitled to recover.

**156**  I therefore award Mr. Binkley total damages of $238,800 against the defendants. He is, in addition, entitled to court order interest at registrar's rates from February 7, 1997 to date of judgment.

1. COSTS

**157**  Counsel may speak to costs at a time to be arranged or make written submissions.

MELNICK J.

**End of Document**

[***Achtymichuk v. Bayer Inc., [2018] B.C.J. No. 879***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SBM-WNB1-FGJR-21Y8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N. Sharma J. (In Chambers)

Heard: May 1, 2018.

Oral judgment: May 1, 2018.

Docket: S167919

Registry: Vancouver

**[2018] B.C.J. No. 879** | 2018 BCSC 776

Between Lloyd Achtymichuk, Plaintiff, and Bayer Inc., Janssen Inc., Janssen Pharmaceuticals, Inc., and Janssen Research & Development, LLC, Defendants

(32 paras.)

**Case Summary**

**Civil Litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Failure to disclose a cause of action or defence — Application by defendant for order striking portions of plaintiff's application for production dismissed — Plaintiff commenced proposed class proceeding against defendant pharmaceutical companies alleging they manufactured defective or dangerous product — Instead of application for certification, plaintiff brought application for production — Defendant claimed allegations in number of paragraphs were unsubstantiated and improper — Paragraphs repeated and reproduced allegations in claim — Paragraphs did not add to claim but did not prejudice defendants — Supreme Court Civil Rules, Rules Rule 9-5(1), 9-5(1)(a), 9-5(1)(b), 9-5(1)(c), 22-1(4).**

**Civil Litigation — Civil evidence — Documentary evidence — Affidavit evidence — Cross-examination on — Application by defendant for order permitting cross-examination filed by plaintiff in support of application for production dismissed — Affidavit merely attached product monographs wit no explanation or description of how they were relevant to claim or application — To extend that existence, significance, relevance, or providence of monographs might be relevant to application, cross-examining plaintiff would not provide any assistance to court.**

|  |
| --- |
| Application by the defendant, Bayer Inc., for an order striking portions of the application of the plaintiff, Lloyd Achtymichuk, for production, and for an order permitting cross-examination of Achtymichuk. The applications arose in the context of a proposed class proceeding. Achtymichuk alleged that Bayer and the other defendants manufactured a defective or dangerous product with unsuitable or inadequate warnings, knowing it could cause harm, and they are therefore liable in product liability ***negligence***, negligent misrepresentation, breach of warranty, fraud, fraudulent concealment, and unjust enrichment. No application for certification was filed. Instead, Achtymichuk filed an application for the production of documents. Bayer submitted that a number of paragraphs in the plaintiff's application were unsubstantiated allegations. Bayer also contended that the paragraphs were improper because they amounted to legal argument.  HELD: Application dismissed.  Bayer failed to meet the legal requirements to strike the impugned paragraphs. Bayer acknowledged that the allegations in Achtymichuk's claim met the test in Rule 9-5(1) of the Supreme Court Civil Rules by disclosing a cause of action. The allegations did not fail to meet the test when repeated and reproduced in an application for production of documents. The paragraphs in the application did not add anything new to what already existed in the notice of civil claim but there was no prejudice to Bayer and the other defendants. Achtymichuk's affidavit merely attached product monographs wit no explanation or description of how they were relevant to his claim or application. To the extent that the existence, significance, relevance, or providence of the monographs might be relevant to the application, cross-examining Achtymichuk would not provide any assistance to the court. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 9-5(1), Rule 9-5(1)(a), Rule 9-5(1)(b), Rule 9-5(1)(c), Rule 9-5(1)(d), Rule 22-1(4)

**Counsel**

Counsel for the Plaintiff: K. Garcha, B. Sanghe.

Counsel for the Defendant Bayer Inc.: W. McNamara.

Counsel for the Defendants Janssen Inc.; Janssen Pharmaceuticals, Inc.; and Janssen Research & Development, LLC: R. Reinertson.

**Oral Reasons for Judgment**

|  |
| --- |
| **N. SHARMA J. (orally)** |

**1**   This is my decision on the application I heard on May 1, 2018.

**2**  The defendant Bayer Inc. ("Bayer") brings this application seeking two orders: to strike portions of the plaintiff's application for production of documents, which will be heard at the end of this month, and; to require the plaintiff to be cross-examined on his affidavit filed in support of that application.

**3**  The applications arise in the context of a proposed class action proceeding. The plaintiff alleges that the defendants manufactured a defective or dangerous product with unsuitable or inadequate warnings, knowing it could cause harm, and they are therefore liable in product liability ***negligence***, negligent misrepresentation, breach of warranty, fraud, fraudulent concealment, and unjust enrichment.

**4**  The allegations centre on the design, development, testing, manufacturing, labelling, packaging, marketing, promotion, advertising, distribution, and licensing of two broad spectrum antibiotics whose trade names are Cipro and Levaquin.

**5**  No application for certification has yet been filed. Instead, the plaintiff has filed an application for the production of documents, which the defendants oppose. That application is set to be heard for two days starting May 31.

**6**  The other defendants (referred to as Janssen) take no position on this application, but they will be opposing the plaintiff's application for production of documents.

**7**  I turn first to Bayer's application to strike portions of the plaintiff's application. Although not stated in the notice of application itself, I understand counsel to base the application on a combination of Rules 22-1(4) and 9-5(1).

**8**  Rule 22-1(4) stipulates that on an application heard in chambers, evidence must be given by affidavit. Rule 9-5(1) permits the court to strike or amend in whole or in part, a pleading, petition, or other document on one of four grounds listed at (a) to (d). Bayer relies on (b) to (d), which allows striking pleadings if they are unnecessary, scandalous, frivolous or vexatious, as contained in subparagraph (b), if they may prejudice, embarrass or delay the fair trial or hearing, at subparagraph (c), or otherwise are in abuse of the court's process under subparagraph (d).

**9**  Counsel for Bayer submits that a number of paragraphs in the plaintiff's application are unsubstantiated allegations, merely lifted from the amended notice of civil claim. Bayer submits the allegations are unsupported by the plaintiff's affidavit filed in support. The allegations include serious allegations of deception, fraud and illegality.

**10**  Bayer recognizes that the allegations can properly be made in the notice of civil claim but says they are improperly contained in the application for production of documents because they are not supported by any evidence. Bayer also contends that the paragraphs are improper because they amount to legal argument.

**11**  Bayer emphasizes that its submissions are focused on what it says are the prejudicial nature of the impugned paragraphs, as they pertain only to the application to produce documents, as opposed to what is more often the subject of Rule 9-5(1) applications, which are applications to strike out an entire cause of action. The plaintiff says either way Bayer has failed to meet the test, so the identified paragraphs ought to be struck out.

**12**  That test for striking under Rule 9-5(1) is that it is plain and obvious that the pleading offends one of the grounds listed: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [*[1999] B.C.J. No. 2160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=) (S.C.) at para. 45. In that case, the court summarized the jurisprudence about old Rule 19(24)(b) and (c) (now, Rule 9-5(1)(b) to (c) in the new Rules), noting, among other things, the following at para. 47: irrelevance and embarrassment, as they are used in the rule, refer to pleadings that are so confusing that they are difficult to understand; a pleading that is embarrassing and scandalous is one that is so irrelevant that it will involve the parties in useless expenses and prejudice the trial of the action itself; unnecessary and vexatious pleadings are those that do not go to establishing the plaintiff's cause of action or do not advance a claim known at law; and, frivolous, in the context of the rule, means it is unsustainable, not in the sense of lacking evidence to support it, but more in the sense of estoppel.

**13**  In *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=), the Supreme Court of Canada noted, at para. 37, that abuse of process involves situations where the doctrine of issue estoppel may not apply so as to preclude the litigation, but allowing the action to proceed would violate principles of judicial economy, consistency, finality, and/or the integrity of the administration of justice.

**14**  I asked Bayer why the points made in this application could not simply be part of its response to the plaintiff's application for production of documents. Bayer's position is that the allegations in the paragraphs are so serious that they require a response in the form of its application to strike. Thus, its position is that it will suffer prejudice and injustice (in the sense of abuse of process) because, unless struck, it would be forced to respond to serious allegations that are unsubstantiated.

**15**  In my view, Bayer has not met the legal requirements to strike the impugned paragraphs under any of the subparagraphs under Rule 9-5(1). The rule is meant to remove from the court process pleadings that are akin to an abuse of process in the sense that an injustice would occur in a way that negatively impacts the administration of justice if the pleadings continue to stand. The common thread in Rule 9-5(1)(b) to (d) is the requirement to show that the allegations in the pleading are ones that ought not be brought before the court.

**16**  That is not the situation before me. Bayer acknowledges that the plaintiff's action would pass the test under Rule 9-5(1)(a), in that it discloses a cause of action. However, Bayer argues when restricting the court's focus to reviewing the necessity and prejudicial effect of particular paragraphs in the plaintiff's application, they can meet the test.

**17**  I do not agree that the ambit of scrutiny under Rule 9-5(1) should be altered depending on the type of pleading being challenged, that is an application for production of documents, rather than a notice of civil claim. If the allegations as they exist in the notice of civil claim do not run afoul of Rule 9-5(1)(b) to (d), they do not become so when repeated and reproduced in an application for production of documents. Nor is there any greater or different prejudice to Bayer at this stage than there was before the plaintiff's application was filed. The paragraphs in the plaintiff's application to which Bayer objects contain assertions of facts that are, for the most part, also in the notice of civil claim. They do not take on greater credence simply because they are repeated in the application.

**18**  More properly framed, Bayer's complaint is that the allegations in the impugned paragraphs of the plaintiff's application are irrelevant and unnecessary because they do not provide any explanation, or point to any evidence as to why the plaintiff should be entitled to documents prior to certification.

**19**  Bayer has every ability to make those submissions at the hearing of that application, but suggested it was prudent to bring this application lest there be any doubt as to whether it needed to respond to the allegations, and that is the prejudice that it raises in front of me.

**20**  In response, the plaintiff contends that nothing about his application is improper. In his view, the test he has to meet for an order that the defendants produce documents prior to certification is no different than the test for document production at any other point in the proceedings. The plaintiff says in that sense, the allegations are relevant to the issue to be decided at the May 31 hearing for production of documents. In that application, I understand the plaintiff will argue that the documents he seeks are necessary because they are relevant and material to the issues being tried. Thus, the impugned paragraphs in his application are needed to establish a connection between what has been pleaded and the documents he will be seeking. The plaintiff submits the fact they may be argumentative or not supported in evidence does not diminish his need to include them to succeed on the document production application.

**21**  With respect, the plaintiff is not correct. In British Columbia, the case law has consistently held that only in exceptional cases will a document production order be granted pre-certification. Those exceptional cases are where the documents sought are necessary to inform the court about the certification issues, but not from a substantive view, from a procedural view. At the May 31 hearing, the test for whether production of documents will be ordered at the pre-certification stage, and will be whether, procedurally speaking, the production of documents is necessary to inform the court's decision as to whether there is some basis in fact for the claims to proceed as a class action. Counsel for the defendant referred me to *Cantlie v. Canadian Heating Products Inc.*, [*2014 BCSC 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1SG-00000-00&context=), where at paras. 35-44, that test for pre-certification document production is discussed. The test is set out by the court at para. 44, and it is whether the plaintiff can demonstrate the documents requested are "necessary for the certification hearing", and a burden that "will be met only in extraordinary cases". Thus, the test is different than the test applied for the production of documents in an action where the only issue is relevance to an issue in the pleadings.

**22**  In conclusion, I do not find that the impugned paragraphs are pleadings that ought to be struck pursuant to Rule 9-5(1)(b), (c), or (d). But, because I am also the case management judge, I add, for the benefit of Bayer's counsel, that it is difficult to perceive how Bayer could be prejudiced if it does not respond in its evidence to the allegations contained in the plaintiff's application that it says are unsupported by evidence.

**23**  Although it is too early for me to decide, I will consider the plaintiff's submissions on the matter. I cannot see how the allegations in the plaintiff's application add anything new to what already exists in the notice of civil claim, and there may be an issue whether those paragraphs are necessary or helpful at all. However, I have not pre-judged that issue.

**24**  Accordingly, I dismiss Bayer's application to strike portions of the plaintiff's application.

**25**  With regard to the affidavit, Bayer seeks to cross-examine the plaintiff. Both counsel referred me to a number of cases. They did not disagree on the relevant test, which is set out, among other places, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2008 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S37Y-00000-00&context=) at para. 56.

**26**  In that case, a party was seeking cross-examination of affidavits filed in support of certification. Justice Myers stated that cross-examination is permitted if there is a conflict in affidavit evidence that is germane to certification.

**27**  Bayer contends that there are inherent internal contradictions in the plaintiff's evidence in two ways. Firstly, the plaintiff, in his notice of claim, states he did not receive any warnings about the use of the medications at issue. However, in his affidavit he attaches a receipt for the medications that contains a statement advising him to contact a doctor if certain symptoms appeared. Secondly, the plaintiff attaches to his affidavit a product monograph, apparently reproduced from the Compendium of Pharmaceuticals and Specialties (CPS) of two of Bayer's products, which are the subject of litigation. However, at the same time, the plaintiff seeks in his application for production of documents that the defendants produce its product monographs.

**28**  Counsel for Bayer asserts the conflict in the plaintiff's evidence about what warnings he actually received justifies cross-examination. I agree with the plaintiff that if this is a conflict, it is not one that goes to an issue germane to the application I will be hearing at the end of the month. It goes more to the merits of the plaintiff's claim.

**29**  With regard to the monographs attached to the plaintiff's affidavit, there is apparently some conflict in the evidence about the significance or providence of those documents. Apparently, Bayer has filed an affidavit which addresses those issues. However, it is not clear to me that this is the type of conflict in which cross-examination would provide any clarification.

**30**  At this stage, the issues before me at the end of the month will be about pre-certification production of documents. It appears the test I will be applying is whether the plaintiff has established that production is necessary to have documents to inform me about issues on certification. The plaintiff's affidavit merely attaches the CPS monographs with no explanation or description of how they are relevant to his claim nor application. To the extent that the existence, significance, relevance, or providence of those monographs might be relevant to the application for production of documents, I do not see how cross-examining the plaintiff about them will provide any assistance to me either way.

**31**  I also note that the issues on certification have not crystalized yet because no application for certification has been filed. In other words, the plaintiff has not yet identified the common issues he will be asserting justify a class action. That is yet another reason why it is difficult to see how cross-examination would serve any useful purpose at this stage.

**32**  Therefore, I also dismiss the defendant Bayer's application for cross-examination.

N. SHARMA J.

**End of Document**

[***Axa Pacific Insurance Company Ltd. v. Guildford Marquis Towers Ltd., [2000] I.L.R. para. I-3801***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JJ1H-X2X4-00000-00&context=)

Canadian Insurance Law Reporter Cases

British Columbia Supreme Court

Before: Bauman J.

Decision: February 2, 2000.

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2000s* > *2000***

**[2000] I.L.R. para. I-3801** | [*[2000] B.C.J. No. 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X21M-00000-00&context=)

Axa Pacific Insurance Company Ltd. v. Guildford Marquis Towers Ltd.

**Case Summary**

**Duty to defend — Builder's liability insurance — Construction defects causing water damage to condominium project — Exclusionary clause — Claim for damage to work done caused by defect in work — Exclusion limited to defective part of work — Claims for economic loss arising from defective work were recoverable.**

|  |
| --- |
| **Facts:** This was an application for a declaration that the insurer was required to provide a defence for the claims against its insured, G and M. They were the developer and general contractor in a condominium project. It was alleged in the underlying action that G was responsible for substantial defects in the construction, caused by the ***negligence*** of M, which resulted in serious leaking in the exterior walls of the building. The bulk of the claims involved the costs of repairing the building. The insurer argued that the claims were for purely economic loss and were not within the policy's coverage. The policy covered injury to property, but excluded coverage for injury to goods or products manufactured by the insured, or the defective portion of work done on behalf of the insured if caused by a defect in the work.  HELD: The insurer was required to provide a defence.  The economic loss claimed in the underlying action did constitute property damage covered by the policy. The exclusion for goods manufactured by the insured applied to the condominium project, and this created an ambiguity in the policy, since the exclusion for defective work was narrower than the goods manufactured exclusion. The Court then considered the insurer's product bulletin relating to this exclusion to clarify the policy, and found that the defective goods exclusion was the one that applied to this action. Only the defective part of the work was excluded from coverage, and the resultant damage to the property of third parties was covered. The insurer was required to provide a defence to the claims that were covered.  Defence costs would be allocated between covered and non-covered claims, but allocation was to be made after trial. |

**Counsel**

M.L. Tweedy for the applicant; T.A.M. Peters for the respondent.

|  |
| --- |
| **BAUMAN J.** |

1. OVERVIEW

**1**  In this so-called "leaky condo" litigation there are two petitions before the court. Both concern the issue of coverage under an insurance policy issued by Axa Pacific Insurance Company Ltd. ("Axa") to Guildford Marquis Towers Ltd. ("Guildford") and Metro-Can Construction (GM) Ltd. ("Metro-Can"), the developer and general contractor, respectively, of two high-rise residential buildings in Surrey, British Columbia.

**2**  In the underlying action, it is alleged that Guildford is responsible for "substantial defects in design and construction" of the buildings which have resulted in "substantial water infiltration into the exterior walls." The defects are alleged to have been caused solely or in part by the ***negligence*** of Metro-Can.

**3**  Guildford and Metro-Can say that some of the claims in the underlying action are within the coverage provided by the policy of insurance and that accordingly Axa is bound to defend them in the action.

**4**  Axa maintains that the claims in the underlying action overwhelmingly represent ones for pure economic loss, that such claims are not within the policy's coverage on the face of its wording or, at least, are expressly excluded from coverage.

**5**  The claims in the underlying action which Axa admits do trigger a duty to defend are so minor that Axa seeks an order at this time apportioning defence costs.

**6**  On Axa's rough and ready calculation, it should only be responsible for about 2% of the defence costs in the action.

1. THE COMPREHENSIVE GENERAL LIABILITY POLICY

**7**  I set out these relevant provisions from the policy of insurance:

INSURING AGREEMENTS

1. The Insurer agrees to pay on behalf of the Insured all sums (including prejudgement interest) which the Insured shall become obligated to pay by reason of the liability imposed by law upon the Insured or assumed by the Insured under contract (as defined herein), for damages because of:

...

1. injury to or destruction of property, including loss of use thereof, or loss of use of property which has not been physically injured or destroyed, due to an accident or occurrence (as defined herein);

during the Policy period, subject to the limits of liability, exclusions, conditions and other terms contained herein.

...

1. ADDITIONAL AGREEMENTS

With respect to the insurance afforded by the other terms of this Policy, the Insurer agrees:

1. to defend in the name of and on behalf of the Insured, claims, suits or other proceedings which may at any time be instituted against the Insured for any occurrence covered by this Policy, although such claims, suits, proceedings or allegations and demands may be groundless, false or fraudulent; or to make settlement of such claims as may be deemed expedient by the Insurer, or if the Insurer is prevented by law or otherwise from defending the Insured as aforesaid, the Insurer will reimburse the Insured for defense costs and expenses incurred with the consent of the Insurer;

...

EXCLUSIONS

...

1. This insurance does not apply to claims for injury to or destruction of or loss of use of:
2. goods or products manufactured or sold by the Insured; or
3. work done by or on behalf of the Insured where the cause of the occurrence is a defect in such work, but this exclusion shall only apply to that part of such work which is defective.

...

1. THE NATURE OF THE PROPERTY DAMAGE

**8**  The plaintiff in the underlying action pleads that:

... the Plaintiff has suffered, and will suffer, damages, losses and expenses as follows:

1. The cost associated with inspecting and investigating water infiltration into the building;
2. The cost of effecting temporary and urgent repairs to the building;
3. The cost of effecting permanent repairs to the project;
4. Diminution in the value of their investment.

**9**  In that proceeding, the plaintiff has filed a Scott schedule defining, at this time, the nature and quantum of its alleged loss. The claims in the schedule total some $513,000.

**10**  The bulk of the claims involve costs associated with repairing the buildings themselves.

**11**  These fall into at least two categories: required repairs to a part of the building which was constructed defectively and required repairs to a part of the building which was damaged as a result of defective construction in another element of the building. For example in the first category we find this item in the east tower:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | ITEM | AMOUNT | BASIS FOR |  |
|  |  | CLAIMED | LIABILITY |  |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| 4. |  | Provide caulking | $69,816 |  | The sub-standard |  |
|  |  | at all joints of |  |  | windows and lack of |  |
|  |  | window assemblies |  |  | waterproofing details |  |
|  |  | including corner |  |  | used by the Contractor |  |
|  |  | posts, vertical |  |  | has allowed water to |  |
|  |  | couplers, |  |  | enter through the |  |
|  |  | horizontal |  |  | window units as well |  |
|  |  | mullions, window |  |  | as surrounding |  |
|  |  | frames to sill |  |  | construction damaging |  |
|  |  | flashings and to |  |  | other elements of |  |
|  |  | surrounding |  |  | the building. |  |
|  |  | construction. |  |  |  |  |

**12**  In the second category, we have this entry:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | ITEM | AMOUNT | BASIS FOR |  |
|  |  | CLAIMED | LIABILITY |  |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| 4. |  | Unit 601. Paint | $500.00 |  | Incorrect construction |  |
|  |  | the northwest |  |  | and sealing of the |  |
|  |  | corner of the |  |  | exterior claddings by |  |
|  |  | bedroom. Replace |  |  | the Contractor has |  |
|  |  | drywall and re- |  |  | allowed water to |  |
|  |  | paint the west |  |  | infiltrate the unit. |  |
|  |  | wall of the |  |  |  |  |
|  |  | living room. |  |  |  |  |

**13**  It is Axa's position that a small number of claims involve damage to something other than the buildings themselves. As an example, it points to damage to resident-installed wallpaper in one unit. Axa calls these "resultant damage claims." It acknowledges that such claims are within the policy and that it has a duty to defend Guildford and Metro-Can in respect of them. But they amount to only $10,100 on the basis of the Scott schedule at this time.

1. THE EXTENT OF COVERAGE

**14**  It is common ground between the parties that the vast bulk of the claims which have been particularized to date are ones for pure economic loss.

**15**  In Bird Construction Company Ltd. v. Allstate Insurance Company of Canada [*(1996), 110 Man. R. (2d) 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-FCK4-G0SS-00000-00&context=), [*[1996] 7 W.W.R. 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-FCK4-G0SS-00000-00&context=), [*36 C.C.L.I. (2d) 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-FCK4-G0SS-00000-00&context=) (C.A.), the issue was whether Allstate's policy covered the builder for the costs of replacing the exterior stone cladding of a building. The cladding had to be replaced because its mortar work was defective. In earlier proceedings, the Supreme Court of Canada had held that the builder could be liable in tort to subsequent purchasers for the loss: Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [*[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=), [*121 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GT-00000-00&context=), 3 W.W.R. 85.

**16**  In Winnipeg Condominium, Justice La Forest, for the court, observed at p. 97, para. 13 (S.C.R.):

Traditionally, the courts have characterized the costs incurred by a plaintiff in repairing a defective chattel or building as "economic loss" on the grounds that costs of those repairs do not arise from injury to persons or damage to property apart from the defective chattel or building itself; see Rivtow Marine Ltd. v. Washington Iron Works, [*[1974] S.C.R. 1189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B087-00000-00&context=), at p. 1207.

**17**  In the result in Bird Construction the court held that the losses did not come within the insurance coverage provided, that is: "physical injury or destruction of tangible property ...".

**18**  Now I wish to return again to the categories of loss which present here.

**19**  Apart from the diminution in value claim, they break down, as I outlined above, as follows:

1. repairing the defective parts of the buildings themselves;
2. repairing parts of the buildings which were damaged as a result of defects in other parts: e.g. drywall damaged by the ingress of water through the defective joints or caulking; and
3. repairing third party property damaged by the ingress of water - that is Axa's category "resultant damage."

**20**  The parties agreed before me that categories (i) and (ii) are claims for pure economic loss.

**21**  It might be argued that category (ii), analytically, is "resultant damage" - that is, the defective element in the building has led to the resulting water damage to, for example, the interior drywall of the building.

**22**  In Winnipeg Condominium, Justice La Forest considered the condominium corporation's submission that the losses in question could, in fact, be characterized as damage to property as opposed to pure economic loss. Justice La Forest called this approach the "complex structure" theory. By this theory, the claimant seeks to localize the defect in one part of the structure and to claim that the damage to the rest of the structure was "caused" in some manner by the defect.

**23**  Justice La Forest accepted Lord Bridge's criticism of the complex structure theory in Murphy v. Brentwood District Council, [1990] 2 All E.R. 908 at 928 (H.L.)(quoting Lord Bridge at S.C.R. 99-100):

The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to other 'property'.

A critical distinction must be drawn here between some part of a complex structure which is said to be a 'danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the ***negligence*** of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on Donoghue v. Stevenson principles, [1932] A.C. 562.

**24**  In this case, it is arguable that category (ii) damage does not include parts of the buildings which form "a single indivisible unit" of structural elements with the defective parts of the buildings.

**25**  Justice La Forest, as did Lord Bridge, recognized that damage caused by a distinct item incorporated into a structure, when it malfunctions, is not pure economic loss. His Lordship noted (at 98):

... Adopting this traditional characterization as a convenient starting point for my analysis, I observe that the losses claimed by the Condominium Corporation in the present case fall quite clearly under the category of economic loss. In their statement of claim, the Condominium Corporation claim damages in excess of $1.5 million from the respondent Bird, the subcontractor Kornovski & Keller and the architects Smith Carter, representing the cost of repairing the building subsequent to the collapse of the exterior cladding on May 8, 1989. *The Condominium Corporation is not claiming that anyone was injured by the collapsing exterior cladding or that the collapsing cladding damaged any of its other property*. Rather, its claim is simply for the cost of repairing the allegedly defective masonry and putting the exterior of the building back into safe working condition.

[Emphasis added.]

**26**  However, as I have indicated the parties argued this case on the basis that category (i) and category (ii) damages represented pure economic loss and I will analyse the issue of coverage on that basis.

**27**  The question then is this: Are category (i) and (ii) damages within the insuring agreement's words: "injury to or destruction of property, ..., due to an accident or occurrence (as defined herein)?"

**28**  No issue was taken by Axa based on the definitions of "accident or occurrence".

**29**  It rested its case on the submission that economic loss is not "injury to or destruction of property". It relied on my colleague Justice Drost's decision in Privest Properties Ltd. v. Foundation Co. of Canada Ltd. [*(1991), 57 B.C.L.R. (2d) 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60JN-00000-00&context=), [*6 C.C.L.I. (2d) 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60JN-00000-00&context=) (S.C.).

**30**  There, the court was considering a claim covering the cost of removing defective asbestos fireproofing material. Again, it was clear that it was considered to be a case of pure economic loss.

**31**  Justice Drost then considered whether the loss was covered by the wording of five separate insurance policies.

**32**  The policies in question covered property damage liability with various wordings:

1. "physical injury to or destruction of tangible property";
2. "damage to or destruction of property";
3. "damage to or destruction of ... tangible property"; and
4. "injury to or destruction of property".

**33**  In a very thorough analysis my colleague detailed the evolution of the wording of property damage coverage in the North American insurance industry as insurers struggled to contain coverage in the area of economic loss.

**34**  Justice Drost analysed the plaintiffs' claims and concluded (at 125) that none of them could be construed as allegations of a state of facts which, if proven, would constitute physical injury or damage to or loss of use of tangible property. That excluded three of the policies.

**35**  However, the learned judge then went on (at 125):

... I find that the decisions to which I have referred do support a finding that the claims advanced by the plaintiffs allege facts which, if proven, would constitute "injury to property" in the sense of an infringement of intangible property or an incorporeal right. As such, they fall within the terms of cl. (c)(i) of the Allstate insuring agreement.

I am also of the opinion that those claims allege facts which would constitute "damage to property" and therefore fall within the terms of the Dominion insuring agreement. While the word "damage" may have a narrower meaning than that of "injury", they are quite similar, and as Mr. Justice Macfarlane observed [p. 331] in the Greenwood case, "the terms may, in a certain context, be synonymous." I believe that when they are considered in the context of an insuring agreement, to which a liberal interpretation should be given, as opposed to the context of an exclusion clause in which any ambiguity will be resolved against the insurer, they are synonymous

**36**  It will be observed that the wording of the property damage coverage at bar is the same as Allstate's wording considered in Privest. I conclude, therefore, that Axa's property damage coverage does extend to economic loss like that claimed in the underlying action.

1. THE SCOPE OF THE EXCLUSION

**37**  In anticipation of such a finding, Axa relied on the exclusions set out in its policy. In particular, it invoked exclusion 6(a). It provides:

1. This insurance does not apply to claims for injury to or destruction of or loss of use of:
2. goods or products manufactured or sold by the Insured;

**38**  On this submission, Axa rests on the decision in Pier Mac Petroleum Installation Ltd. v. Axa Pacific Insurance Co. [*(1997), 41 B.C.L.R. (3d) 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0S8-00000-00&context=), [*47 C.C.L.I. (2d) 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0S8-00000-00&context=) (S.C.).

**39**  There, the general contractor constructed a gas bar with underground storage tanks and pipes. The underground pipes leaked and the owner sued the contractor for the cost of repairs. Axa denied coverage under its CGL policy to the contractor and it relied on exclusion 6(a). Justice Drossos held (at para. 25, p. 334):

Pier Mac submits that the word "products" or the phrase "products manufactured" as used in the exclusion clauses, in particular 6(a), does not include the gas bar, and its storage tanks and pipes, as a product of Pier Mac. I am, however, satisfied on considering the plain and normal meaning of those words as used in the exclusion clauses, and 6(a) thereof, and in the context of the whole of the Insurance Policy that it was intended by the parties to be a general liability insurance policy and not a performance bond, that the words "products" or "products manufactured" include the gas bar constructed, in effect, manufactured, by Pier Mac for Domo. ...

**40**  Now in the policy at bar, the work/product exclusion includes clause 6(b):

1. This insurance does not apply to claims for injury to or destruction of or loss of use of:

...

1. work done by or on behalf of the Insured where the cause of the occurrence is a defect in such work, but this exclusion shall only apply to that part of such work which is defective.

**41**  Justice Drossos found that the gas bar, tanks and pipes in Pier Mac were "goods or products manufactured or sold by the insured."

**42**  At first blush, one might not normally consider a construction project as a "good or product manufactured or sold". But Justice Drossos did for the reasons he stated.

**43**  Indeed, as a matter of first impression, one would more readily categorize a construction project as a "work done by or on behalf of the Insured" within clause 6(b).

**44**  I am told by counsel for Axa before me, who was also counsel in Pier Mac, that the policy considered by my colleague included exclusion 6(b) but that the clause was not referred to in argument.

**45**  That fact allows this court to consider a principled departure from the conclusion in Pier Mac in accordance with In re Hansard Spruce Mills Limited (In Bankruptcy) [*(1954), 13 W.W.R. (N.S.) 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2JF-00000-00&context=) (B.C.S.C.).

**46**  On the meaning and scope of exclusion 6(b), Guildford and Metro-Can seek to lead extrinsic evidence consisting of a product bulletin issued by Laurentian Pacific Insurance Company (Axa as it then was) in September 1990. The policy at bar was issued in February 1990, but it was renewed thereafter annually.

**47**  Axa objected to the admission of the bulletin.

**48**  In my view, in light of Pier Mac there is an ambiguity on the face of the policy. If exclusion 6(a) covers a construction project as well as more traditional "goods or products manufactured or sold" as Pier Mac holds, what is one to make of exclusion 6(b)? What is left for it to cover? This is particularly important because exclusion 6(b) is a narrower one than 6(a): the exclusion under clause 6(b) does not include all work done by or on behalf of the insured, only that part of such work which is defective.

**49**  In my view, given Pier Mac, exclusions 6(a) and 6(b) are irreconcilable and a patent ambiguity on the face of the policy arises: Brown, Insurance Law in Canada, (Toronto: Carswell, 1999) pp. 8-8, 8-9.

**50**  Accordingly, extrinsic evidence is admissible to assist in resolving the ambiguity: Fridman, The Law of Contract in Canada, 4th ed. (Toronto: Carswell, 1999) pp. 482-484).

**51**  Turning then to the bulletin, the intended scope of exclusion 6(b) is made clear. First, exclusion 6(b) is specifically applicable to the construction industry. Second, the bulletin touts the added breadth of Laurentian Pacific's coverage by comparing its exclusion 6(b) to two other standard industry wordings.

**52**  I reproduce these parts of the bulletin:

...

The standard industry wording excludes:

1. Property damage to work performed by or on behalf of the insured arising out of the work or any portion

thereof......

Some companies will upgrade this standard exclusion to read:

1. With respect to the completed operations hazard; to property damage to work performed by the insured arising out of the work or any portion thereof...

The difference between these two clauses could be illustrated as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| 1. - |  | A house building contractor - Does framing, electrical and mechanical work worth $30,000 - All other portions of the job are sublet for $45,000.00. Total project value $75,000.00. |  |
| - |  | A house fire caused by faulty wiring in the kitchen, causes a total loss fire, one year after completion. |  |

- Damages - Building $75,000.00 - Standard Exclusion

(A) would Eliminate Coverage Completely.

|  |  |  |  |
| --- | --- | --- | --- |
| 2. - |  | Under Exclusion (B) Broad Form P.D. including completed operations, using the same figures as above: |  |
| - |  | Of the $75,000.00 in damage, $30,000.00 is excluded as the Insured's work, The Balance is covered. |  |

The Laurentian Pacific Insurance Company has gone one step further in providing (C) Broad Form Completed Operations Coverage by virtue of its Exclusion 6(B) which reads:

Work done by or on behalf of the insured where the cause of the occurrence is a defect in such work, but this exclusion shall only apply to that part of such work which is defective.

1. - As a result, using the previous examples:

|  |  |  |  |
| --- | --- | --- | --- |
| - |  | With damages of $75,000.00 where $1,000.00 of the work was wiring and this turned out to be faulty: ONLY THAT $1,000.00 OF FAULTY WIRING WOULD BE EXCLUDED |  |

The advantages to your contractor clients will vary depending on their style of business, but this coverage would be advantageous to BOTH GENERAL CONTRACTORS and SUB-TRADES.

...

[Emphasis in original.]

**53**  From this it becomes clear that exclusion 6(b) is the relevant provision to consider in the case of the condominium towers constructed by Guildford and Metro-Can. And it seems that the insurer has adopted what might be characterized as a modified "complex structure" approach to coverage. That is, at least to this extent: one is to isolate (and exclude from coverage) only that part of the work which is defective.

**54**  On this wording, the exclusion would not extend to deny coverage to what I have characterized as category (ii) damage. And it goes without saying that category (iii) damage, Axa's "resultant damage", is not excluded from coverage.

**55**  I conclude that exclusion 6(b) is the relevant exclusion and it is limited in the manner which I have described, and which the Bulletin explains by way of example.

**56**  I should add that this conclusion does not offend the policy consideration that Justice Drossos gave effect to in Pier Mac. That is, I have not transformed a CGL policy into a performance bond. I have simply given effect to the insurer's express limitation on its work/product exclusion.

1. ALLOCATION OF DEFENCE COSTS

**57**  Axa acknowledges that a duty to defend arises under the policy in respect of claims "which may be argued to fall under the policy": 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=), [*68 D.L.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6545-00000-00&context=), [*45 C.C.L.I. 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6545-00000-00&context=), at 812 of S.C.R.

**58**  Here, as Axa has admitted in respect of resultant damage claims, and as I have explained in respect of the exception to exclusion 6(b), there are claims which fall under the policy.

**59**  We do not now know their extent. The claims excepted from exclusion 6(b) will only be known with certainty after the difficult findings of fact are made by the trial judge after trial. The quantum of Axa's "resultant damage" category must similarly await trial. I agree with Mr. Peters that the Scott schedule prepared by the plaintiff in the underlying action cannot be taken as a definitive statement of the amount of these claims at this time.

**60**  The claims, then, represent a mix of those within and those without coverage and there should be an apportionment of defence costs between the covered and non-covered claims: Surrey (District) v. General Accident Assurance Co. of Canada [*(1994), 92 B.C.L.R. (2d) 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S19M-00000-00&context=), [*[1994] 7 W.W.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S19M-00000-00&context=), [*24 C.C.L.I. (2d) 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S19M-00000-00&context=) (S.C.); [*(1996), 19 B.C.L.R. (3d) 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3FP-00000-00&context=), [*[1996] 7 W.W.R. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3FP-00000-00&context=), [*35 C.C.L.I. (2d) 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3FP-00000-00&context=) (C.A.).

**61**  However, in my view, it is premature to consider a fair allocation of defence costs at this time. In the circumstances that should await trial and it should be undertaken retrospectively: Continental Insurance Co. v. Dia Met Minerals Ltd. [*(1996), 20 B.C.L.R. (3d) 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1RY-00000-00&context=), [*[1996] 7 W.W.R. 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1RY-00000-00&context=), [*36 C.C.L.I. (2d) 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1RY-00000-00&context=) (C.A.).

1. DISPOSITION

**62**  Guildford and Metro-Can shall have a declaration that Axa has a duty to provide a defence in respect of Vancouver Registry Action No. C972316, limited to claims within the policy as I have described. The petition of Axa is dismissed.

**63**  Guildford and Metro-Can are entitled to their costs on scale 3.

BAUMAN J.

**End of Document**

[***Bingo City Games Inc. v. British Columbia Lottery Corp., [2003] B.C.J. No. 985***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X30M-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

Rogers J. (In Chambers)

Heard: April 16 and 17, 2003.

Judgment: April 25, 2003.

Prince George Registry No. 16861/02

**[2003] B.C.J. No. 985** | 2003 BCSC 637 | 122 A.C.W.S. (3d) 844

Between Bingo City Games Inc. and Frank Valentini, plaintiffs, and British Columbia Lottery Corporation, Her Majesty the Queen in Right of the Province of British Columbia and The Minister of Public Safety and Solicitor General for the Province of British Columbia, defendants

(80 paras.)

**Case Summary**

**Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action or defence — Amendment of pleadings — To remedy deficiency — Crown — Liability of Ministers.**

|  |
| --- |
| Application by the defendants, the British Columbia Lottery Corporation and the Crown, to strike out portions of the statement of claim of Bingo City Games. The defendants also sought to dismiss the action against the Minister of Public Safety. Bingo contracted to provide bingo services to a group of charities. It claimed that the defendants destroyed this venture when they divested the charity group of the responsibility to manage its bingo operation. The responsibility was transferred to Lottery, which made a new contract on different terms with Bingo. The defendants also approved the relocation of Bingo's competitor into premises recently vacated by Bingo. Bingo claimed that this approval was unlawful or negligent. It did not particularize the negligent conduct. Lottery was alleged to have participated in the relocation scheme. Bingo alleged that Lottery unlawfully interfered with its economic relations. Bingo further alleged that the Minister unlawfully abused his public office and negligently imposed the contract on Bingo. A number of claims of negligent misrepresentation were raised against the defendants. Bingo pleaded that the defendants breached a public duty of care.  HELD: Application allowed in part.  The claim against Lottery for the relocation was struck out. There was nothing in the pleading to connect Lottery to the relocation. It could not reply to this claim. The similar claim against the Minister was struck out. Bingo did not allege that the Minister committed an abuse of his office. The intentional interference claim was not struck out, as the pleading contained the elements of this claim. The claims of abuse and ***negligence*** against the Minister were struck out. No action lay against the Minister as a public officer for things done negligently. The negligent misrepresentation claims were struck out, as the foundation for these claims was not properly pleaded. There was no cause of action for breach of public duty. Bingo was given leave to amend its statement of claim. No personal claim survived against the Minister, and Bingo was given leave to substitute an individual for this office. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 15(5)(a)(i), 19(5).

Crown Proceedings Act, s. 7.

Police Act, R.S.B.C., c. 367, s. 21(2).

**Counsel**

J.J. Smith, for the plaintiffs. L.R. Backman, Q.C. and D.E. McCabe, for the defendant, British Columbia Lottery Corporation. K.D Dann, for the defendants, Her Majesty the Queen in Right of the Province of British Columbia, and the Minister of Public Safety and Solicitor General for the Province of British Columbia.

|  |
| --- |
| **ROGERS J.** |

INTRODUCTION

**1**  The defendants Lottery Corporation and the Crown have applied for orders:

1. striking certain portions of the plaintiff's statement of claim;
2. requiring the plaintiff to provide particulars with respect to certain of their allegations; and
3. dismissing the plaintiff's claims against the Minister of Public Safety and Solicitor General for the Province of B.C.

**2**  The plaintiffs oppose the applications.

BACKGROUND

**3**  The plaintiffs are a corporation and its principal; for the purposes of this application their interests are one. I will refer to the plaintiffs in the singular.

**4**  The plaintiff alleges that in 2001 it made two 10-year contracts to provide bingo services and physical facilities to a group of charities. According to the statement of claim, under the original bingo regime in B.C. at the time the Provincial Government delegated to the charity group responsibility to manage their bingo operations. The group had, then, had a need to acquire bingo services (card sales and such) and to rent premises. The group contracted to acquire those services and facilities from the plaintiff. The plaintiff says it stood to make a profit from those contracts.

**5**  The plaintiff says that its business venture was damaged or destroyed when, in late 2001 and early 2002, the defendants took steps to divest the charity group of responsibility to manage their bingo operation. That responsibility was transferred to the defendant Lottery Corporation, and the Lottery Corporation then made a new contract on different terms with the plaintiff. The plaintiff says that the defendants acted illegally or negligently, or by abuse of public office when they took those actions.

**6**  Further, the plaintiff maintains that the defendants breached of their "public duty of care" to the plaintiff and that it suffered a loss as a consequence of that breach.

**7**  The plaintiffs also complain that the defendants acted illegally or negligently or both when, in late 2001, they approved a competitor's move into premises recently vacated by the plaintiff.

**8**  The defendants deny all allegations. The defendants say that the steps about which the plaintiffs complain were taken with proper legislative authority and for a proper public purpose.

**9**  The matter is set for six weeks of trial in September 2004.

STRIKE PLEADINGS

**10**  The defendants' application to strike the portions of the statement of claim are pursuant to Rule 19 of the Rules of Court.

GENERAL PRINCIPLES

**11**  The general principles of pleading are conveniently summarized by Smith J. in Homalco Indian Band v. British Columbia, [*[1998] B.C.J. No. 2703*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M15W-00000-00&context=):

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action.

**12**  I cannot improve on that statement.

**13**  I will turn to the statement of claim to consider each cause of action advanced by the plaintiff and the pleadings that underpin that cause.

RELOCATION

The Pleading

**14**  At paragraphs 26 to 31 the plaintiff alleges that it has causes of action against the Minister for unlawfully or negligently approving the relocation of the plaintiff's competitor.

**15**  The statement of claim particularizes the alleged unlawful conduct, and says that the decision was unlawful because it was:

1. Made without due process; or
2. Made contrary to the law; or
3. Made without jurisdiction; or
4. Made contrary to the doctrine of legitimate expectations; or
5. Made without consideration of compelling reasons to deny the relocations; or
6. Made negligently; or
7. Contrary to the statute conferring the statutory power of decisions; or
8. Made erroneously, based on omission or failure to consider mandatory issues or matters; or
9. Patently erroneous in the face of undisputed facts; or
10. Made in a manner that was obviously wrong; or
11. Made under mistake of law; or
12. Made in a manner that is manifestly unjust or palpably wrong; or
13. Unreasonable; or
14. Without due consideration of public interest.

**16**  Paragraph 31 does not particularize the negligent conduct beyond referring the reader back to paragraph 30.

**17**  At paragraph 53 the plaintiff alleges that the Lottery Corporation participated in the relocation scheme, and is liable for the plaintiff's loss thereby. Curiously, there is no allegation earlier in the statement of claim that the Lottery Corporation played any role in the relocation decision.

The Defendants' Position

**18**  The defendants say that if a public officer exercises a statutory power of decision, no claim may lie for the negligent exercise of that power. They say that if the plaintiff's real theory is that if the Minister made the relocation decision (which they deny) and if the Minister abused his office in doing so, then the plaintiff must plead that cause of action specifically. According to the defendants, absent a claim for abuse of public office, the only remedy open to the plaintiff for these complaints is review by petition under the Judicial Review Procedure Act. They say that it is an abuse of process to proceed by writ claiming relief available only by petition.

The Plaintiff's Position

**19**  The plaintiff says that the particulars of unlawful conduct set out in paragraph 30 describe the facts on which the plaintiff will build its case for abuse of public office. It says that upon proof, for example, that the Minister acted without jurisdiction, the trier of fact will infer that the Minister knew he had no jurisdiction and that his action was, therefore, an abuse of his office. The "unlawful" conduct amounts, therefore, to actionable abuse of public office.

Analysis

**20**  The pleadings establish that the plaintiff's complaint about the relocation decision is founded solely on alleged actions taken by the Minister. There is nothing in the particulars of those actions to connect the Lottery Corporation to the relocation decision. The allegation in paragraph 53 that the Lottery Corporation participated in and was responsible for consequences of the relocation decision is, therefore, anomalous. It is vexatious because it asserts a claim against the Lottery Corporation that lacks foundation made elsewhere in the statement of claim. It simply asserts a conclusion without alleging facts on which the conclusion might be based. Paragraph 53 is embarrassing to the Lottery Corporation because it provides nothing to which the Lottery Corporation can reply in its defence.

**21**  Paragraph 53 must, therefore, be struck from the statement of claim.

**22**  No action may lie against a public officer for the negligent administration of his office: Saskatchewan Wheat Pool v. Canada, [*[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=) (S.C.C.). The plaintiff's pleading that the Minister negligently approved the relocation cannot lead to judgment in the plaintiff's favour. That pleading is, therefore, vexatious.

**23**  An action may lie against a public officer who commits an abuse of public office. That is a very particular tort, and one that requires proof of certain facts. Those facts are, according to Price v. British Columbia, [*[2001] B.C.J. No. 2284*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61GC-00000-00&context=) and B.K. Tree Services Ltd. v. B.C. Hydro and Power Authority, [*[2002] B.C.J. No. 2553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X38S-00000-00&context=):

1. The defendant must be a public officer;
2. There must be exercise of a power as a public officer;
3. There must be a state of mind of the defendant that is either targeted malice or he must have acted in the knowledge of, or with reckless indifference to, the legality of his act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff;
4. There must be a duty to the plaintiff or sufficient interest in the plaintiff to found a legal standing to sue; and
5. The exercise of power must have caused a loss to the plaintiff.

**24**  On my reading of the statement of claim, nowhere in the context of the relocation decision does the plaintiff allege that the Minister committed an abuse of his office. Pleadings ought not fail because they do not use a magic phrase; but neither should the defendants be left wondering if the amorphous "unlawful" conduct alleged in paragraphs 26 to 31 is the tort of abuse of public office or is merely an assertion that the Minister's decision was made without due process.

**25**  In my opinion the plaintiff's failure in this part of the statement of claim to clearly assert abuse of public office, the failure to describe conduct it says amount to that abuse, and the plaintiff's failure to allege that the Minister acted with malice or recklessness toward the plaintiff, altogether amount to a failure to properly plead the tort it wishes to prove. No defendant reading paragraphs 26 to 31 would appreciate that he is in jeopardy of liability for abuse of his office.

**26**  Paragraphs 26 to 31 must be struck from the statement of claim because they describe a claim for negligent performance of a statutory power of decision (which is not actionable) and unlawful behaviour (which is not tantamount, on the pleadings, to abuse of public office).

UNLAWFUL INTERFERENCE WITH ECONOMIC RELATIONS

The Pleading

**27**  By paragraphs 32 to 37 the plaintiff alleges that the Lottery Corporation had no authority to cancel the 10-year bingo services and facilities contracts; that it had no authority to enter into the new Bingo Operation Services Agreement (BOSA) with the plaintiff; and that it forced the plaintiff to enter into that contract. By paragraphs 38 to 42 the plaintiff alleges that the Lottery Corporation and the Crown together interfered in the plaintiff's economic relations thereby causing financial harm to the plaintiff. Paragraph 43 alleges that the Lottery Corporation's actions were wonton and callous and give rise to an award for punitive damages.

The Defendants' Position

**28**  The defendants complain that the plaintiff asserts lack of legislative authority without stipulating the legislation in issue. They say that these pleadings are prolix, confusing, and repetitive.

The Plaintiff's Position

**29**  The plaintiff defends its pleadings here, saying that they describe the elements of the tort of interference with contractual relations. It says that the pleadings adequately describe the pre-existing contract between it and the charity group, the agency between the Crown and Lottery Corporation, and the latter's intentional acts which interfered with that pre-existing relationship.

Analysis

**30**  Paragraphs 32 to 42 are not an easy read. They were drafted with an excess of vitriol. The writer could have but did not prevent his or her indignation and outrage from creeping into the statement of claim. High feeling does not, however, in and of itself render the pleadings improper.

**31**  Tortuous interference with contract requires that the plaintiff allege the existence of a contract, intentional interference in that contract by the defendant, and harm to the plaintiff consequent to the interference. The statement of claim sets out those elements sufficiently so that the defendants may understand the nature of the claim against them, the acts complained of, and the harm alleged to have been done by those acts.

**32**  Paragraphs 32 to 42 need not be struck from the statement of claim.

**33**  Paragraph 43 merely alleges that because the Lottery Corporation knew that it was not authorized to make or break bingo services contracts but did so anyway its conduct should be punished by an award for punitive damages. There is nothing about this pleading that is defective or deficient.

**34**  I note that the plaintiff describes its entry into the BOSA as something done entirely against its will. I am not sure if by this pleading the plaintiff intends to allege that the Lottery Corporation extorted the plaintiff's agreement to the BOSA or that the plaintiff should be excused from the BOSA on the premise of non est factum. If either is the plaintiff's intent, then the plaintiff should know that its pleadings are not adequate to support those positions.

ABUSE OF PUBLIC OFFICE WITH RESPECT TO THE BOSA

The Pleadings

**35**  At paragraph 44 the plaintiff makes a specific pleading of abuse of public office against the Minister. The paragraph reads:

1. The Plaintiff, BCG says that the Defendant, the Solicitor General, unlawfully purported to delegate authority to the Defendant, Lottery Corporation, to unlawfully impose the BOSA, and in doing so abused his public office since the imposition of the BOSA was the deliberate doing of an unlawful act with the knowledge that the Plaintiff, BCG was likely to be injured as a consequence.

The Defendants' Position

**36**  The defendants argue that one cannot hang abuse of office on the allegation that a thing was done "unlawfully" because "unlawfully" could mean anything on the spectrum from contrary to natural justice, through to breach of a private duty of care, and ultimately contrary to the Criminal Code of Canada.

The Plaintiff's Position

**37**  The plaintiff says that the unlawful nature of the Solicitor General's act may be derived from the paragraphs preceding number 44.

Analysis

**38**  As I noted above, if a plaintiff wishes to allege the tort of abuse of public office, he, she, or it should employ clear unambiguous language. The word "unlawfully" in paragraph 44 is simply too imprecise an adverb to adequately inform the defendants of exactly what defect on which the plaintiff relies.

**39**  Paragraph 44 must be struck from the statement of claim because it does not set out in sufficient detail the elements of the tort of abuse of public office.

NEGLIGENT IMPOSITION OF THE BOSA

The Pleading

**40**  At paragraph 45 the plaintiff alleges that the Solicitor General and the Lottery Corporation were negligent in their imposition of the BOSA on the plaintiff.

The Defendants' Position

**41**  Oddly, the defendants did not attack paragraph 45.

Analysis

**42**  Notwithstanding the defendants' lack of concern about paragraph 45, I propose to deal with it nevertheless. That paragraph is obviously defective. No suit can lie against the Minister as a public officer for things done negligently. Unless the plaintiff alleges that the decision to implement the BOSA was not an exercise of a statutory power of decision or it was done by abuse of public office, this pleading must fail for not describing a cause of action.

**43**  Paragraph 45 of the statement of claim must be struck.

NEGLIGENT MISREPRESENTATION

The Pleading

**44**  At paragraph 46 the plaintiff alleges that it was the victim of negligent misrepresentation by the Solicitor General. At paragraphs 47 and 49 the plaintiff alleges that there was a relationship between the plaintiff and the Solicitor General. Presumably the purpose of that pleading is to establish that was foreseeable that the former would rely on the latter's representations, and that it was reasonable for the plaintiff to rely on those representations. Paragraph 48 asserts that the Solicitor General and the Lottery Corporation breached a duty of care to the plaintiff by making those misrepresentations. Paragraph 50 alleges that the plaintiff suffered damage as a result of the negligent misrepresentations. Paragraph 51 says in plain language what paragraph 47 struggles to convey: that the Solicitor General and the Lottery Corporation could foresee that if they breached their duty of care vis-a-vis the representations the plaintiff would suffer damage.

The Defendants' Position

**45**  The defendants point out that misrepresentations are alleged against the Solicitor General but that the statement of claim is silent as to the mechanism by which the Lottery Corporation is liable for them.

The Plaintiff's Position

**46**  The plaintiff merely says that its pleadings touch all the bases required when making a claim for damages arising out of negligent misrepresentation.

Analysis

**47**  Paragraph 46 demonstrates the generally strained nature of these pleadings. The plaintiff does not allege in one paragraph that a representation was made and in the next paragraph allege that the representation was not true. Rule 19(5) requires that assertions of fact be separated into individual paragraphs, and paragraph 46 is clearly contrary to that requirement.

**48**  The defendants did not note it, but paragraph 46(c) alleges a representation made on November 20, 2001, which is after the plaintiff entered into the 10-year contracts with the charity group. As such the plaintiff cannot assert that it relied on that representation when it committed itself to the obligations that later caused it financial loss. The statement of claim does not reveal any other decision or action taken by the plaintiff post November 20, 2001 that could have been made in reliance on that representation. The allegation in paragraph 46(c) is, therefore, completely unnecessary to any cause of action advanced by the plaintiff.

**49**  Paragraph 46 must be struck from the statement of claim because it runs afoul of Rule 19(5) by collapsing two allegations into one paragraph (i.e.: that there were representations, and that they were not accurate). Paragraph 46(c) must, in any event, be struck from the statement of claim because it has nothing to do with a cause of action asserted by the plaintiff.

**50**  As to paragraphs 47 to 51, there is no allegation that the Lottery Corporation made the impugned representations in the first instance, or that it subsequently adopted them as its own. Neither does the plaintiff describe the legal mechanism by which the Lottery Corporation should be liable for representations made by the Minister. The plaintiff has not, therefore, laid the ground work for a claim against the Lottery Corporation for negligent misrepresentation. I could order that the references to the Lottery Corporation be expunged from paragraphs 47 to 51 of the statement of claim, but the result would be a dreadful hatchet-job on the pleadings. The remaining portions of paragraphs 47 to 51 would be nearly unreadable.

**51**  Paragraphs 47 to 51 cannot survive editing with easy readability. They will, therefore, be struck from the statement of claim.

BREACH OF PUBLIC DUTY OF CARE

The Pleading

**52**  At paragraphs 52 and 53, the plaintiff alleges that the defendants owed a "public law duty of care" to the plaintiff and that they breached that duty of care. By paragraph 54 the plaintiff alleges it suffered damages as a result of that breach. Numbers 52 and 53 read:

1. The defendants and each of them have a public law duty of care to conduct business, or to act, in furtherance of the creation of or implementation of public policy, in a reasonable manner, bona fide in the exercise of statutory authority, and not to act unlawfully or contrary to the public interest, or in a manner which abuses the public confidence or trust.
2. The defendants and each of them, breached their public law duty of care in the conduct of business or in their actions in furtherance of public policy, by acting unreasonably, without regard to bona fides, in the exercise or purported exercise of statutory authority, by acting unlawfully or contrary to the public interest, or in a manner which breached public confidence or trust, by imposing the BOSA unlawfully, by approving the BCA relocation negligently or contrary to the law, by making negligent misrepresentations and by abusing economic power in their dealings with the Plaintiff BCG.

The Defendants' Position

**53**  The defendants argue that paragraph 52 describes a claim that is not known in law.

**54**  The defendants say that paragraph 53 is simply a jumble of verbiage that conveys nothing not otherwise set out in the statement of claim. The kindest criticism the defendants levy against paragraph 53 is that it is superfluous and should be struck as unnecessary.

The Plaintiff's Position

**55**  The plaintiff says that paragraph 53 is a sort of "rolled up" pleading summarizing all of the wrongs done by the defendants to the plaintiff. The plaintiff says there is nothing wrong with this and it should be allowed to remain.

Analysis

**56**  The parties did not refer the court to authority that a cause of action can be founded on a "breach of public law duty of care". I have concluded that there is no such beast. To the extent that a public official's decision is made without jurisdiction or contrary to the plaintiff's perception of the public interest, that decision may be reviewed by the Judicial Review Procedure Act or the ballot box. No action for damages can be based on such allegations (excepting, of course, abuse of public office which is actionable).

**57**  I have ruled earlier that paragraph 53 should be expunged from the statement of claim because it alleges wrongs against the Lottery Corporation that are not supported elsewhere in the document. If I am wrong about that, I would strike paragraph 53 as simply unnecessary. It is merely an exercise in rhetoric.

**58**  Paragraphs 52 and 53 must be struck from the pleadings because they do not describe a cause of action. Paragraph 54 suffers the same fate because it alleges damage consequent to non-actionable matters.

PARTICULARS

**59**  Although applications for particulars remain outstanding, I will make no order with respect to those applications at present. That is because the pleadings may be amended following these reasons, and it may be that the amendments render current demands moot.

**60**  I will, however, order that any particulars already delivered concerning paragraphs struck are themselves struck. The parties should have no doubt that in so far as the expunged pleadings are concerned, they shall start again from square one.

LEAVE TO AMEND

**61**  The plaintiff shall have leave to amend its statement of claim. So that the parties are clear, the plaintiff may revise its statement of claim from stem to stern in order that the result may give its reader a clear, concise, and logical description of the plaintiff's causes of action. The defendants shall have concomitant leave to amend their statements of defence.

**62**  This leave should not be read by the parties to authorize the plaintiff to now allege a new cause of action it could have alleged earlier but which is presently barred by a limitation period. If the defendants consider that the amended statement of claim does give rise to a limitations defence, that defence should be plead and made the subject of argument in due course.

DISMISS AGAINST THE MINISTER

**63**  One of the defendants in this action was identified only as "The Minister of Public Safety and Solicitor General for the Province of British Columbia". During argument on the motion, I asked plaintiff's counsel if his client were successful then:

1. to whom he would present judgment for payment;
2. against whose property he would file the judgment to secure payment;
3. whose wages he would garnish; and
4. whose goods he would have the sheriff seize?

**64**  Answer came there none, and that is hardly surprising because the plaintiff here decided to sue an office rather than a person. An office, even one as high as the Solicitor General, must be filed by a person, and if a plaintiff wishes to claim damages for a tort committed against him by the Solicitor General, the plaintiff must name the individual he says did him harm.

**65**  I need go no further to explain the reason that the pleadings against the Minister as they are presently drawn cannot stand. However, the defendants advance two additional arguments in support of the proposition that the claims against the Minister must be struck.

Defendants' Position

**66**  The defendants say that no claim may be made against the Province except in the manner authorized by the Crown Proceeding Act. The Act defines a Minister as an officer of the government. Section 7 of the Act requires that actions against the government describe the defendant as: Her Majesty the Queen in Right of the Province of British Columbia. According to the defendants, so long as the Minister acted in furtherance of his office, his actions were the government's actions, and the suit should name only the government in the manner prescribed by the Crown Proceeding Act.

**67**  Further, the defendants maintain that just as the officers of a corporation cannot be personally liable for decisions they make in furtherance of their employment, so the Minister may not be made liable for actions he took in the execution of his office as a Minister of the Crown: Digital Doc Services (Canada) Inc. v. Future Shop Ltd., [*[1997] B.C.J. No. 1689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0V7-00000-00&context=), and Morriss v. The Queen et al, [*[2001] B.C.J. No. 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1H0-00000-00&context=).

Plaintiff's Position

**68**  The plaintiffs say not so; they say that their claims against the Minister are predicated on his acting beyond the scope of his authority and jurisdiction. They say that the Minister should therefore be held personally to account for his excesses.

Analysis

**69**  There is no analogue in the Crown Proceeding Act of s. 21(2) of the Police Act RSBC c. 367:

1. No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

**70**  The Police Act relieves police officers of personal liability for actions taken in the course of their duties and has the effect of making it improper to name police officers as personal defendants.

**71**  Nothing in the Crown Proceeding Act actually prohibits naming a Minister of the Government as a defendant. I do not think, therefore, that the Crown Proceeding Act prevents the plaintiff from suing the Minister.

**72**  However, the common law may provide what the legislation lacks. There is good and compelling authority that absent a pleading of a cause of action between the plaintiff and a corporate employee, the employee ought not be a defendant in an action: Canada v. Scotia McLeod Inc. [*(1995), 129 D.L.R. (4th) 711*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B17H-00000-00&context=) followed Rafiki Properties Ltd. v. Integrated Housing Developments Ltd., [*[1999] B.C.J. No. 243*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21P8-00000-00&context=). In Digital Doc Services, a case where the plaintiff sued a corporate defendant and its officers claiming the latter caused the former to breach the plaintiff's contract, Warren J. held:

On the materials before me, I am satisfied that all the allegations made by the plaintiff against the individual defendants focus on the conduct as agents of the corporate defendant and they were acting within the ordinary course and scope of their employment responsibilities. There is no allegation that any of the individual defendants acted for personal gain or out of malice toward the plaintiffs. In my view, the plaintiffs' claim against the personal defendants disclose no reasonable cause of action and the claims are bound to fail.

**73**  That this principle extends to acts of a government Minister was determined by the Honourable Master Groves in the Morriss case, supra.

**74**  I have studied the plaintiff's pleadings. There are no pleadings that survive these reasons that say the Minister was motivated by personal gain or malice or recklessness toward the plaintiff. As such, the statement of claim does not disclose facts on which a claim could be made against the Minister personally.

**75**  The plaintiff has not named the individual defendant it accuses of abuse of public office, nor has the plaintiff alleged targeted malice against it. Neither has the plaintiff alleged reckless indifference. There is, therefore, no foundation in the pleadings on which a claim could be built against an individual public officer such as the Minister in office at the relevant times.

**76**  In the event that the plaintiff wishes to advance a claim against the Minister personally in some future amendment to the pleadings, the plaintiff must frame its complaint so as to allege that the Minister's actions amount to an abuse of public office. The requirements of that pleading are well documented in Price v. British Columbia, and are set out above.

**77**  The question at this point is whether the Minister should be removed as a party pursuant to Rule 15(5)(a)(i), the claims against him should be dismissed, or the plaintiff should have leave to substitute an individual for the office.

**78**  In my view the fair thing to do is to permit the plaintiff to substitute an individual for the office described in the statement of claim. That substitution would be without prejudice to any limitation defence the individual might care to advance. Oddly, the plaintiff did not come into this application armed with such an application. The parties may be able to agree on the substitution, or they may bring the matter back to court on an application.

COSTS

**79**  The defendants were substantially successful in this application. Absent the extensive amendments mandated by these reasons the litigation could not have proceeded in an orderly way. It would likely have degenerated into confusion and disarray. This is not, therefore, the kind of application the true import of which cannot be known until the end of the trial. This application was necessary in order to save the litigation from chaos, and it was made necessary by the plaintiff's failure to properly frame its pleadings at the outset.

**80**  Accordingly it is appropriate that the defendants should recover their costs against the plaintiff, and that those costs be assessed on Scale 3 and be payable forthwith. The action will not be stayed pending payment of those costs.

ROGERS J.

**End of Document**

[***Bittante v. Zichy, [2008] I.L.R. para. M-2244***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2DG-00000-00&context=)

Canadian Insurance Law Reporter Cases

British Columbia Supreme Court

Before: Baker J.

Decision: June 6, 2008.

Docket No. M031278

***Canadian Insurance Law Reporter Cases*  > *Cases* > *2000s* > *2008***

**[2008] I.L.R. para. M-2244** | [*[2008] B.C.J. No. 1043*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G2S1-00000-00&context=) | [*2008 BCSC 728*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G2S1-00000-00&context=)

Bittante v. Zichy

**Case Summary**

**Personal injury damages — Soft tissue injuries — Permanent impairment of capacity to earn income — Defendant admitted liability for accident — Plaintiff commenced claim alleging permanent impairment of her ability to earn income — Action allowed — Plaintiff awarded damages for injury, but injury did not impair her capacity to earn future income.**

|  |
| --- |
| **Facts:** The plaintiff, Bittante, and the defendant, Zichy, were in a motor vehicle accident, and Bittante commenced a claim for damages. Although Zichy admitted liability and also conceded that Bittante suffered some damages as a result of his ***negligence***, he disputed Bittante's allegation that the accident caused the headaches she continued to experience, and thus also disputed the quantum of damages to which she was entitled.  HELD: The action was allowed.  The Court found that, although the accident contributed to an exacerbation of the headaches Bittante experienced prior to the accident, those headaches had largely resolved themselves within a year of the accident. Bittante failed to prove that the headaches she continued to experience were caused by the accident, and the Court concluded that those headaches would have developed regardless of the accident. The Court awarded general damages of $45,000 but declined to award any amount for past loss of income or loss of future income, since Bittante had not proven either. Special damages were awarded in an amount to be determined by agreement of the parties, further to instruction provided by the Court. |

**Counsel**

A.A. Vecchio, J.U. Buckley, and L. Russoli for the plaintiff; C.B. Doll and J.D. James for the defendant.

**Reasons for Judgment**

|  |
| --- |
| **W.G. BAKER J.** |

**1**   Cristina Bittante ("Ms. Bittante") was injured on March 16, 2001 when the motor vehicle she was driving collided with a motor vehicle driven by the defendant, Mr. Zichy. Mr. Zichy admits that the accident was caused by his ***negligence***. While the defendant also concedes that Ms. Bittante suffered some injuries as a result of his ***negligence***, he disputes the plaintiff's allegation that the accident caused the headaches she continued to experience six years after the accident. At issue in this trial is causation of the plaintiff's headaches, and the quantum of damages to be awarded to compensate her for the injuries caused by the accident.

**2**  The matter is of some significance as the plaintiff alleges permanent impairment of her capacity to earn income and seeks an award of damages in excess of $900,000. The defendant, on the other hand, responds that the plaintiff suffered only a mild soft tissue injury and submits that an award of damages of $10,000 to $20,000 only is warranted.

**FACTS**

**3**  Ms. Bittante was born on January 17, 1982 and was 19 years old when the accident happened, and 25 years old when the trial commenced. She grew up in the Lower Mainland of British Columbia. Her father is a retired police officer, who also works as an actor. Her mother is a business development manager at a public utility company. Ms. Bittante has one sister, Nadia Bittante ("Ms. N. Bittante"), who is two years younger than the plaintiff. Ms. N. Bittante is attending University and hopes to become a teacher.

**4**  Ms. Bittante was a physically active and athletic child and adolescent. She began gymnastics at age three or four, started competing by age 10 and continued until high school. She also coached gymnastics. In high school, Ms. Bittante played volleyball, field hockey and rugby, belonged to a ski and snowboard club, and took dance classes. In addition to school and her sports and social activities, Ms. Bittante began working part-time at a grocery store at age 15 and later worked at a Canadian Tire store as a cashier. She had an active social life and many friends, and was voted "Prom Queen" by her classmates in Grade 12.

**5**  Ms. Bittante was a good student in high school, but not outstanding. Her marks in Grade 12, disregarding a grade of 100% in "work experience", ranged from a low of 73 to a high of 94. Her average on graduation from high school in the spring of 2000 was about 80%. She received some scholarships, including a "Passport to Education Award", for which she qualified by having grades in the top 20% of her class from Grade 9 to 12 inclusive. She received a scholarship from her mother's employer, and also from her father's employer.

**6**  While in high school, Ms. Bittante planned to go on to post-secondary education. She decided to apply to Capilano College, located conveniently near Ms. Bittante's parents' home in North Vancouver, with the goal of eventually transferring to the Business Administration program at Simon Fraser University.

**7**  In the summer after her high school graduation, Ms. Bittante spent seven weeks travelling around Europe. While she was on vacation, her mother submitted her College application for her. Ms. Bittante was accepted at Capilano College and enrolled in 4 courses. Ms. Bittante testified that students could take a full load of five courses, but many chose not to. During her first semester in the fall of 2000, Ms. Bittante continued to work part-time.

**8**  In that first semester, Ms. Bittante achieved an A-, two B+, and a B. In January 2001, after she turned 19, Ms. Bittante started working as a server at a pub. She continued to live at home with her parents and sister.

**9**  Ms. Bittante did not testify until the eighth day of trial. She was the only witness who had been present at the motor vehicle accident on March 16, 2001. She had been at the gym she regularly attended and was driving home in her 1987 Chevy Nova. As she was passing a parking lot, she noticed the defendant's vehicle edge out of the lot and saw it begin to turn left directly across the path of her own vehicle. Ms. Bittante anticipated the collision and had time to step on the brake and the clutch of her vehicle, shift into neutral, and to brace herself for the impact. Although Ms. Bittante estimated that both she and Mr. Zichy were travelling at 60 kph, I consider that improbable. Mr. Zichy was just leaving a parking lot and would not have had time to accelerate to 60 kph over such a short distance. The fact that Ms. Bittante had time to anticipate the collision and react as she did indicate that both she and Mr. Zichy were travelling at moderate speed. Ms. Bittante described the collision to various people as a "T-bone", but photographs indicate that only the front left portion of Ms. Bittante's car struck the driver's side door and a portion of the rear driver's side door of the defendant's vehicle.

**10**  Ms. Bittante was restrained by her three-point seatbelt. She testified that immediately following the collision she felt shaken up; her left arm felt numb and she was sore across her chest where she had been restrained by the chest strap of the seatbelt. She had broken an acrylic fingernail, likely by striking it against the steering wheel, but doesn't recall hitting any other part of her body on the interior of the vehicle. She exited her vehicle, retrieved her registration papers and spoke to a passer-by who ran over and gave her a business card. She approached Mr. Zichy and they exchanged driver's licence and registration information.

**11**  Although damaged, Ms. Bittante's vehicle was operational and she drove her vehicle home. Photographs of the damage to her vehicle indicate minimal damage to the left front quarter panel and a front side light. Although the vehicle was 14 years old, Ms. Bittante's insurer paid for the vehicle to be repaired.

**12**  Ms. Bittante had planned to attend a social event the evening of March 16, but cancelled and went on her own to see a doctor at a walk-in clinic in North Vancouver. Ms. Bittante had a family doctor, Dr. Squire, but had also been to the walk-in clinic on previous occasions.

**13**  The notes made by the doctor who examined Ms. Bittante at the clinic record that Ms. Bittante reported that her left shoulder and arm hurt. The doctor noted that Ms. Bittante's skin was "slightly pink" across the left trapezius area and chest wall; attributed to slight early bruising. Ms. Bittante had full range of motion in her neck. The doctor suggested ice, rest and non-prescription aspirin; and recommended that Ms. Bittante see her own doctor.

**14**  Ms. Bittante testified that she believes she had some bruising from the seat belt across her chest and shoulder for the next few days, but that this resolved fairly quickly. She returned to her College courses and resumed her part-time job without missing any classes or shifts at work.

**15**  Ms. Bittante's sister, mother, father and her friend Katie Whibley all testified about their recall of how Ms. Bittante's injuries affected her in the days and weeks after the accident. Nadia Bittante had very little memory of the effect the accident had on Ms. Bittante in the days, weeks and months following the accident. It clearly made little impression on her, which suggests that Ms. Bittante's injuries were not perceived to be significant at the time, and that Ms. Bittante's condition did not have much of an impact on the routine of the Bittante household.

**16**  Nadia Bittante did recall that Ms. Bittante had massage therapy, but could not recall if it was before or after the motor vehicle accident, (it was both before and after), or what the therapy was for. Her evidence was of little assistance in determining when Ms. Bittante's various symptoms emerged. She testified, for example, about Ms. Bittante being very irritable on a vacation the family took together to Mexico, but according to the plaintiff's evidence, that vacation was in April 2004, more than three years after the motor vehicle accident. Nadia Bittante testified that she and her sister did not speak to each other for about a year after that unfortunate vacation.

**17**  Ms. Bittante's parents testified about the impact their daughter's headaches have had on her, and their concern about what the future may hold for the plaintiff. Much of their testimony about Ms. Bittante's health problems was essentially hearsay evidence, as their knowledge of how Ms. Bittante was feeling had to have been relayed to them by her. Understandably, given the long passage of time between the accident and the trial, their memories have faded. I have also concluded that in the initial days, weeks and months following the accident, no one regarded Ms. Bittante's injuries as serious, and that has affected the ability of witnesses who were not keeping notes to recall the events in the first six months after the accident.

**18**  Some of Mrs. Bittante's evidence was inconsistent with that of the plaintiff, and inconsistent with clinical records of health professionals who have been involved in Ms. Bittante's care. Mrs. Bittante recalled, for example, that soon after the motor vehicle accident, Ms. Bittante would stay in her room with the lights off when she had a headache, and could not tolerate noise. The clinical records of Ms. Bittante's family doctor, however, indicate that when she saw Ms. Bittante on August 10, 2001, Ms. Bittante denied sensitivity to sound or light when she had headaches, and said that her headaches were not worse when she exercised.

**19**  I conclude that it is likely that Mrs. Bittante is recalling her daughter's condition much later, probably in late 2001 or 2002, when the plaintiff actually did develop symptoms of phonophobia and photophobia associated with her headaches. Dr. Squire's clinical records indicate that it was not until December 12, 2001 that Ms. Bittante reported that she often had to go to bed when she had headaches, and had developed a sensitivity to sound, although she still had no photophobia associated with her headaches. In pointing out these inconsistencies, I am not suggesting that Mr. or Mrs. Bittante were attempting to mislead the court; rather that given the passage of time between the date of the accident and the trial, the timing and sequencing of certain events had become vague. I consider it likely that the clinical records available are more reliable in terms of the emergence of symptoms.

**20**  Ms. Bittante did not see her own doctor, Dr. Squire, until March 30, 2001, two weeks after the accident. In the interim, she had been to see her massage therapist twice. Ms. Bittante had been having massage therapy regularly for some months prior to the accident and she testified that it was easier to get an appointment with her massage therapist than with her doctor.

**21**  By the time Ms. Bittante saw Dr. Squire, she had had some headaches, which she described as located in the temple area on the left side of her head. She described the pain from these headaches in two different ways. She said the pain felt like it was coming from the back of her head at the neck level. However, she also described it as a feeling of "moderate pressure"; like someone was pushing really hard with a pen against her left temple.

**22**  Ms. Bittante testified that the headaches she began to experience after the motor vehicle accident were different than headaches she had before the accident. Various pre-accident records do document, however, that despite her young age, Ms. Bittante had had problems with headache, as well as neck and upper back pain that had persisted for more than a year prior to the March 16, 2001 accident.

**23**  On May 15, 2000, Ms. Bittante had reported to Dr. Squire's colleague Dr. Janzen that she had been having headaches for several months. According to Dr. Janzen's clinical notes, Ms. Bittante described these as "tension type" headaches, with discomfort over her frontal sinuses to her temples on both sides. She also reported she had been playing field hockey and had strained her back on one occasion with sharp twinges of pain. She also reported that her right foot became numb if she crossed her legs.

**24**  On examination, Dr. Janzen noted prominent paraspinal muscle spasm on the right side of Ms. Bittante's neck, and in the area between her shoulder blades; and spasm in the lumbosacral area on the right side also. Dr. Janzen concluded that Ms. Bittante had likely been injuring and re-injuring her back by playing field hockey. She recommended a course of massage therapy to attempt to reduce the muscle spasm and eliminate the headaches; and suggested that Ms. Bittante stop playing field hockey if the back pain recurred.

**25**  The note written by Dr. Janzen referring Ms. Bittante to the massage clinic stated: "Strain of spinal ligaments with subsequent muscle spasm causing headaches -- due to grass hockey."

**26**  The clinical records of the massage therapy clinic attended by Ms. Bittante indicate that between May 27, 2000 and December 7, 2000 Ms. Bittante received massage therapy 19 times.

**27**  The first entry, on May 27, 2000, records that Ms. Bittante was complaining of pain in her upper back and neck, with headaches. The massage therapist's clinical record indicates that Ms. Bittante reported that her headaches were located more on the left side than the right. I note here that the headaches Ms. Bittante has experienced after the motor vehicle accident also tend to be on the left side of her head.

**28**  Ms. Bittante was also noted to have muscle spasm; was tight in the thromboid muscles, more on the left side than the right; and had tightness in her trapezius muscles. The symptoms were attributed to field hockey. Ms. Bittante received massage treatment to her full back, neck and shoulders.

**29**  Similar findings were recorded by the massage therapist on June 1, 2000, with the addition of numbness in Ms. Bittante's feet. The massage therapist noted that there had been "no previous back injury", but that Ms. Bittante had done gymnastics on and off for years.

**30**  On June 6, 2000, Ms. Bittante reported to the massage therapist that her headaches were decreasing but she was still having numbness in her feet. She made a similar report on June 13. On June 19, 2000, she reported that she had had a "wicked headache last week". The massage therapist found she was tender in her upper back, going from the neck area to the head. Ms. Bittante received therapy for the problems with her cervical spine and neck on June 27 and again on July 1. On the latter date, she reported having upper back and neck pain, perhaps attributable to having "slept funny".

**31**  On July 14, 2000, Ms. Bittante reported having had headaches due to stress. She was planning to leave shortly on a two month trip to Europe.

**32**  Ms. Bittante returned to see the massage therapist on September 9, 2000, after returning from her backpacking holiday in Europe and continued with therapy almost weekly for the next two months. She reported having had lots of back problems while she was on vacation, with pain in the area between her shoulder blades. She received massage therapy to her full back, neck and shoulders. Ms. Bittante testified that she believed these problems related to the weight of the backpack she had been carrying while on vacation.

**33**  Similar treatment was provided on September 18, and October 4, 2000. I cannot decipher the treatment note for October 11, 2000. On October 18, 2000, Ms. Bittante again complained of headaches. She received massage to her back and neck on that date, on October 23, and on October 30. On November 6, she again complained of headache. She was treated that day, and on November 20, 27, and December 7.

**34**  The massage therapy clinic also offered the services of a kinesiologist, and in November 2000 Ms. Bittante began seeing the kinesiologist in addition to the massage therapist. There are notes that appear to have been made by the kinesiologist when she first saw Ms. Bittante. The notes refer to a field hockey accident. One of the notes reads: "had never had problems before; after hockey [greater than] headaches" and another note reads: "has to sit and to write a lot [greater than] headaches". Ongoing clinical notes made by the kinesiologist note that on November 8, Ms. Bittante was described as having "big knots". She was given massage to the trapezius area. On November 15 and 22, the therapist worked on Ms. Bittante's right side. On November 29, 2000, the therapist focused on Ms. Bittante's left thoracic rotation. Ms. Bittante had further treatments on December 6, 2000. After that there was a hiatus, but Ms. Bittante returned for treatment on March 13, 2001, only two days before the accident. On March 13, the therapist noted "big knots re: trapezius, had pain left side also."

**35**  These records indicate that even before the accident, Ms. Bittante had been experiencing problems with her neck and back that were sufficiently serious to warrant frequent massage therapy treatments, and that she had headaches for a period of more than a year prior to the accident.

**36**  Ms. Bittante saw Dr. Squire for the first time after the accident on March 30, 2001.

**37**  Ms. Bittante told Dr. Squire about the motor vehicle accident that had occurred on March 16. According to Dr. Squire's clinical records, Ms. Bittante did not report that she was having neck pain. She reported that she had developed upper thoracic pain three or four days following the accident. Ms. Bittante told Dr. Squire that prior to the accident she had not had any thoracic back pain in the last six months. Ms. Bittante told Dr. Squire that after having had a massage on March 21, she felt much better; and had had another massage therapy treatment on March 28.

**38**  Dr. Squire recorded that Ms. Bittante reported having had headaches three to four times a week in the left frontal/temporal area, with moderate pain; most headaches occurring at night, and that they were usually relieved by sleeping. Ms. Bittante told Dr. Squire she had been working as a waitress three times a week and had missed no work; had missed no College classes, and that none of her other activities had been affected by the accident injuries except that she had missed one social event the night of the accident due to severe left shoulder pain.

**39**  Ms. Bittante reported no significant arm pain or numbness when she saw Dr. Squire, although she reported that she had had some left arm pain restricted to the day of the accident and the next day only.

**40**  Dr. Squire found Ms. Bittante to have normal range of motion in her neck, except for a slight decrease in range on left lateral rotation. She found no tenderness over the thoracic or cervical spin, and there were no active trigger points found on palpation. Dr. Squire diagnosed a "resolving mild strain" and recommended no specific treatment except massage therapy; indicating that she expected a total of eight sessions would be reasonable. No medications were prescribed. After the visit to Dr. Squire's office on March 30, 2001, Ms. Bittante did not return to see the doctor about her accident injuries until August, 2001.

**41**  Ms. Bittante completed her second semester at Capilano College in the spring of 2001. She received an A-, a B, a B- and a D. The latter grade was in a course called Financial Accounting 1.

**42**  Ms. Bittante attributes the D grade to the effect of the accident injuries on her ability to study and to concentrate, but I am not persuaded this attribution is warranted. By the time the accident happened on March 16, 2001, Mr. Bittante was two-thirds of the way through the semester. She was able to achieve grades in her other courses similar to those achieved in the previous semester. She did not miss any classes due to the accident injuries, not even in the days immediately following the accident. Nothing is noted in Dr. Squire's clinical records concerning a complaint by Ms. Bittante that the accident injuries were impairing her performance at school; in fact Dr. Squire's notes indicate that Ms. Bittante reported that the accident injuries were not affecting any of Ms. Bittante's work, school or social activities. I consider it more probable than not that the course in which Ms. Bittante received a D was simply an anomaly -- a course in which Ms. Bittante did not perform to her usual standard.

**43**  As I stated earlier, after she saw Dr. Squire on March 30, 2001, Ms. Bittante did not return to see her doctor about muscle pain or headaches until August 10, 2001. Ms. Bittante did see Dr. Squire on June 4 and 6, 2001. The purpose of her visits was to obtain vaccinations for a holiday she was planning, but Dr. Squire's clinical records do not indicate that Ms. Bittante reported any problems relating to the accident injuries on those visits. I conclude that any symptoms Ms. Bittante was experiencing through the late spring and early summer of 2001 were not sufficiently serious to lead her to seek medical attention.

**44**  That conclusion is consistent with the testimony of Ms. Bittante's friend Katie Whibley, who also attended Capilano College. She testified that she and Ms. Bittante had met in high school but became best friends during their first semester. She testified that although she and Ms. Bittante were not in the same classes, they talked to each other every day, had lunch together, and went out together on weekends. Ms. Whibley said that Ms. Bittante told her about having been in the accident on March 16, 2001 but that it didn't seem like a big deal. She said that later on Ms. Bittante began to complain of headaches, but I infer from her testimony that she did not perceive the headaches to be having any real impact on Ms. Bittante's life until the two of them were on vacation together in June 2001.

**45**  Ms. Whibley testified that she and Ms. Bittante went to Bali and Hong Kong. At first everything seemed fine, but after a few days in Bali, Ms. Bittante sometimes didn't want to go out in the evening, complained of headaches and wanted to stay in their hotel room. She recalled that on a couple of evenings, Ms. Bittante went back to their hotel early while Ms. Whibley carried on alone.

**46**  However, on return from vacation Ms. Bittante did not consult Dr. Squire again until August 10, 2001 -- five months after the accident and more than a month after her return from holidays. Ms. Bittante reported to Dr. Squire on August 10 that she had had headaches in the six weeks preceding this visit. That statement could be taken to mean that Ms. Bittante had been headache-free prior to the six weeks referred to, but I consider it more likely that Ms. Bittante was simply inaccurate in her recollection of the time frame. She told Dr. Squire that the headaches were "mostly" in the left temporal area, with onset usually after supper. She described the headaches as "pressure sensation, no throbbing", the severity as seven on a scale of 10; and said that the headaches lasted several hours to a day or more. The headaches were not accompanied by "aura", or sensitivity to sound or light and were not worse with exercise. Ms. Bittante did not identify any recent stresses in her life. She remarked that she did grind her teeth. Over the counter Tylenol and Advil did not relieve the headaches. Ms. Bittante also reported having had some neck pain that was "occasionally severe", but Dr. Squire's notes do not indicate that Ms. Bittante reported the neck pain and headaches occurred simultaneously or in association with each other.

**47**  On examination Dr. Squire found normal reflexes and sensation; no neck tenderness or spasm; and normal range of motion in the neck. Dr. Squire found Ms. Bittante's TMJ joint was not tender unless palpated on the upper maxilla, with which it was very tender. Dr. Squire's tentative diagnosis was cervicogenic headaches. She prescribed Tylenol with codeine and an anti-inflammatory medication; and recommended that Ms. Bittante see her dentist regarding a possible TMJ problem suspected of causing the headaches.

**48**  When Ms. Bittante returned to see Dr. Squire on August 17, 2001, she reported that she was doing much better on the prescribed medication and had had only one headache in the past week. Dr. Squire renewed the prescription for the anti-inflammatory medication and recommended that if the symptoms recurred, Ms. Bittante should return. Ms. Bittante did not see Dr. Squire again until mid-December, 2001.

**49**  Ms. Bittante returned to Capilano College for the fall semester in 2001. She took four courses, and received an A, two B-, and a B+.

**50**  After August 2001, Ms. Bittante did not return to see Dr. Squire for a further four months. When she came in on December 12, 2001, which was nine months after the motor vehicle accident, she was reporting a problem with hives on her feet that prevented her from walking. She also reported that she was continuing to have headaches two to three times a week, lasting six to seven hours. On this visit, she said the headaches were in the occipital area of her head, radiating around to the front temple area. She described the headaches as pressure-like; not throbbing. There is no reference to neck pain or stiffness coinciding with the headaches and Dr. Squire's notes do not indicate that the headaches were associated with, or originated with neck pain or stiffness.

**51**  Ms. Bittante reported that although the headaches continued to lack sensitivity to light; she was now experiencing phonophobia -- sensitivity to sound. She told Dr. Squire that she was quite dysfunctional when she had the headaches, and often had to go to bed. She told Dr. Squire that she had a family history of migraine headaches and that two of her maternal aunts and her maternal grandmother had migraines. Dr. Squire's notes do not indicate that the headaches were associated with neck pain or stiffness.

**52**  Dr. Squire's revised tentative diagnosis on this visit was migraine headaches. She prescribed Maxalt for the headaches and referred Ms. Bittante for more massage therapy. She also recommended that Ms. Bittante keep a headache diary. She provided Ms. Bittante with a page of instructions about how and what to record, and a "Migraine Tracking Calendar".

**53**  Although several doctors, beginning with Dr. Squire, have recommended to Ms. Bittante that she maintain a headache diary to record the occurrence, duration, and severity of her headaches, and to attempt to identity "triggers" or events or activities possibly associated with her headaches, Ms. Bittante's compliance with these recommendations has been sporadic and with the exception of a period of six weeks in early 2003, she kept no records of events or activities that may have "triggered" or exacerbated the headaches.

**54**  Ms. Bittante's first attempt at keeping such a diary started nearly 10 months after the accident, and lasted only two months. She maintained the calendar provided to her by Dr. Squire for the period December 31, 2001 to March 3, 2002, but did not record all of the information provided for on the form. This diary indicates that Ms. Bittante did not have frequent headaches during this period -- the period in closest proximity to the accident during which she kept any record of her headaches -- and that the headaches were not usually severe. In the first week of January 2001, for example, she had headache only one day, with no pain in the morning, and only "some pain" -- 1 on a scale of 3 -- in the afternoon and evening. After this headache -- on January 6, 2002 -- she did not record another until January 15. This was a mild headache only, and only in the evening/night period. On January 18, Ms. Bittante had a headache that was severe in the afternoon and evening, and it continued the next morning as a 2, but was reduced to a 1 during the afternoon and evening. She had a mild headache late in the day on January 22, and 28, and then headaches of varying severity on the 29th, 30 and 31. She had more frequent headaches in February -- on February 4, 11, 12, 13, 15 and 16, 20, 21, 25, 27 and 28. However most of these were only 1 on a scale of 1 to 3 and most lasted less than a full day. She recorded no headaches in the first three days of March and then ceased recording.

**55**  Ms. Bittante completed the portion of the diary for recording possible "triggers" on only a few occasions during this period. However, she did identify chocolate, sleeping patterns, ovulation, contraceptives, caffeine and menstruation as events possibly associated with her headaches.

**56**  After the first three days of March, 2002, Ms. Bittante did not keep a headache diary again until February 2003. She maintained the second diary until mid-June 2004, and then stopped recording for two weeks. She resumed recording in July and continued until January 2004. She omitted to record for the months of February and March 2004, and then resumed recording in April 2004 and continued, it appears, until May 11, 2005. The record provided for the period from June 2004 to May 11, 2005 is a word-processed two-page summary that appears to have been created from original records that are not in evidence. No attempt was made to record headache triggers during these periods.

**57**  After May 2004, Ms. Bittante discontinued her record-keeping until April 2006. She recorded during that month and then discontinued until August 2006; recorded only sporadically in September 2006 and then resumed recording in October 2006 until February 2007.

**58**  In the record Ms. Bittante kept in February 2003, she made reference to neck pain in association with some of her headaches. However, she did not describe the headaches as radiating from her neck to her head; rather she described the headaches as "lots of pressure & tension (usually on left side of head extending to left side of neck)". In her diaries she did not note any association between the occurrence or severity of her headaches and physical activity involving the muscles of her neck or upper back. There is no reference to any association between neck pain or stiffness and headache in any other records maintained by Ms. Bittante.

**59**  From time to time, Ms. Bittante recorded efforts made by Dr. Squire, Dr. Marchanda, Dr. Robinson and Dr. Naran to attempt to give Ms. Bittante relief from headache by injecting various medications into her neck to attempt to block nerve transmissions from her neck to her head. Generally it appears that these injections did not relieve Ms. Bittante's headaches. On October 24, 2006, for example, Ms. Bittante's headache calendar indicates that Dr. Squire injected her with xylocaine. That evening she had a headache rated 4 out of 10 on the severity scale she was then using; and the next day she had a headache that was a 6/10 in the afternoon, worsened to a 9/10 that evening and was still present as a 6/10 the next morning. On October 31, 2006 she received another xylocaine injection from Dr. Squire. That evening she had a headache that was rated as 2/10.

**60**  Another example is Mr. Bittante's note that Dr. Marchanda injected Ms. Bittante with cortisone on November 6, 2006. This injection did seem to provide some relief -- Ms. Bittante had had a headache she classed as 10/10 earlier that day and it was improved to a 7/10 by the afternoon. However, an injection of Torodol by Dr. Robinson on November 20, 2006 did not provide relief -- a headache rated 3/10 in the morning was rated as 9/10 that afternoon and was still 8/10 the next morning.

**61**  I shall discuss the significance attributed to the inefficacy of these injections later in these Reasons.

**62**  Ms. Bittante was seen by Dr. Janzen on January 2, 2002. She told Dr. Janzen she was having intermittent massage therapy treatment; had not tried physiotherapy, and was not involved in a regular exercise program. Dr. Janzen recorded that Ms. Bittante was not working and was attending classes at Simon Fraser University. She reported to Dr. Janzen that she had tenderness over the left occipital area and stiffness when she tried to turn her head to the left. Dr. Janzen referred her for physiotherapy.

**63**  Ms. Bittante had applied for admission to the College of Business Administration at Simon Fraser University for the semester commencing January 2002, but was not accepted in that program, so instead enrolled in a General Arts program at SFU, taking only four, rather than five classes, in hopes of improving her grades and eventually gaining admission to business school. She took four courses in the 2002 spring semester at SFU, receiving a C+, two B-, and a B. However, her average was not high enough to gain admission to the business administration program for the fall semester.

**64**  Ms. Bittante visited Dr. Squire on April 10, 2002, 13 months after the motor vehicle accident. She reported to Dr. Squire that she was attending physiotherapy and felt there had been significant improvement in the range of motion in her neck. Despite this, her headaches had become worse. They were now severe and completely incapacitating. The Maxalt prescribed for her -- a medication typically prescribed for the relief of migraine headaches -- had completely relieved the headaches, but Ms. Bittante experienced unpleasant side effects and had stopped taking the Maxalt.

**65**  Ms. Bittante testified that she actually only tried taking Maxalt once, although Dr. Squire does not appear to have been aware of this. In any event, on April 10, 2002 Dr. Squire prescribed another migraine medication -- Imitrex.

**66**  After the visit on April 10, 2002, Ms. Bittante did not see Dr. Squire for 10 months -- until February 17, 2003. This was primarily due to the fact that in April 2002 Ms. Bittante moved to London, England. She initially planned to stay in England for four months, but changed her plans and stayed for eight months. Two months after arriving in London, she found work as a medical secretary in a hospital and worked 35 to 40 hours a week until December 2002. She said that if she missed work because of medical appointments she could make it up, but didn't recall missing any significant amount of work.

**67**  Ms. Bittante found a family doctor in London, and he referred her for physiotherapy treatments. A short note indicates she had nine treatments for "recurrent left neck stiffness/pain". There is no reference to headache in the note, but Ms. Bittante told Dr. Squire that she did have headaches and took a medication prescribed for her by her English doctor.

**68**  Ms. Bittante returned to Canada at the end of 2002, and returned to classes at SFU in the spring semester of 2003. She took only three courses in hopes of raising her grade point average. Although she returned to Canada at the end of 2002, she did not see Dr. Squire until February 17, 2003. By this time, almost two years had passed since the motor vehicle accidence. Ms. Bittante's headache problems continued to worsen.

**69**  Ms. Bittante told Dr. Squire she was now having about 10 headaches a month; most of them were now moderate to severe and lasted two days on average. Although she found the Imitrex prescribed for her to be very helpful, she did not like the side effects. Her headaches were always on the left side of her face, and radiated to her neck. They were not throbbing, but she had now developed sensitivity to both light and sound, and would shut herself in her bedroom when she had a headache.

**70**  Dr. Squire concluded that Ms. Bittante's symptoms were becoming more typical of migraines. She prescribed another medication, but when Ms. Bittante returned for a complete physical examination on February 28, 2003 she told Dr. Squire she had tried the new medication, but had developed "chest tightness and heavy arms" after the first dose. She reported that she did not feel the medication had worked the second time she took it, and that it had taken four hours to be effective. Dr. Squire found this to be inconsistent with the anticipated effect of the medication. Ms. Bittante reported having had six headaches in the previous 10 days.

**71**  On examination, Dr. Squire found no neurological abnormalities, which she considered to be consistent with a diagnosis of primary migraine headache.

**72**  Dr. Squire prescribed a new medication and a second medication to be taken to prevent the nausea and vomiting associated with Ms. Bittante's headaches.

**73**  This action was commenced on March 13, 2003. Ms. Bittante returned to see Dr. Squire on April 29, 2003, more than two years after the motor vehicle accident. Her headaches were now very frequent. Although in February she said she had been having about 10 headaches a month, she now reported that she was having headaches 13 to 17 days of each month. Another medication was prescribed to try to prevent the headaches.

**74**  When next seen by Dr. Squire on May 21, 2003, Ms. Bittante reported that she had had "fantastic results" with the new medication, although taking it in a dose lower than is common. She had had only three minor headaches in the previous month, and was not experiencing any side effects from the new medication.

**75**  In the three courses Ms. Bittante had taken at SFU in the spring semester of 2003, she got a C-, a C and a B+. She decided to repeat one of the courses in summer school to raise her grade, and was able to raise the C- to a B-. She took two other courses in the summer semester and achieved a B- and a B in those classes.

**76**  Ms. Bittante saw Dr. Squire's colleague, Dr. Janzen, on July 4, 2003 and August 20, 2003. Ms. Bittante reported that the most recent medication she had been prescribed was working very well, but that she sometimes needed additional treatment for her headaches.

**77**  Dr. Squire and Ms. Bittante testified about the variety of medications that had been prescribed for Ms. Bittante over the course of the six years between the accident and trial. In most cases, Ms. Bittante reported having experienced unpleasant side effects with almost all of the medications prescribed for her, and she often discontinued the medication after taking it only once or on a few occasions.

**78**  In July 2003, Ms. Bittante worked a few shifts as a server at a pub. In August 2003, Ms. Bittante met the man who is now her partner, Mark Hansford, and the couple began dating seriously soon after. At time of trial, Mr. Hansford was 27 years old. He works as a business manager for an automotive company.

**79**  Despite Ms. Bittante's efforts to raise her grade point average, Ms. Bittante's application to SFU's Business Administration program was again rejected in the summer of 2003. By this time, Ms. Bittante had taken all the prerequisite courses available to her. She decided not to return to university in the fall of 2003 and to find a job that would give her some business experience instead.

**80**  Ms. Bittante found a job working as an assistant to a stock broker in October 2003. She started at a wage of $13 an hour. Although she continued to work there, the job did not turn out to be what she expected. There was a lot of paperwork involved; she had to get lunch for the brokers and fresh flowers for the office; and do errands. She did not find the job mentally challenging. However, after four months she was performing well enough that she was able to persuade her employer to give her a contract for a monthly salary and medical insurance that helped cover the cost of her medications. She continued to have headaches, sometimes severe enough that she would have to call in sick, or leave work early, but she tried hard not to miss work.

**81**  Ms. Bittante saw Dr. Squire on November 20, 2003. She reported that her migraines were increasing in frequency despite the use of her medication. She had now become very sensitive to food smells, which would often make her nauseated. She reported having had 13 headaches in the past month. She also reported having had increasing neck pain, but only in the previous four days. I conclude that this indicates that most of the time, Ms. Bittante's headaches did not occur in association with neck pain.

**82**  Ms. Bittante had gone for massage therapy a week earlier. Dr. Squire found tenderness in the left paracervical muscles and decreased lateral rotation of the neck to the left. Dr. Squire concluded that the neck pain was probably caused by the massage therapy she had had, and she recommended that Ms. Bittante stop the massage treatments.

**83**  After this visit, Ms. Bittante did not see Dr. Squire again for more than a year -- not until December 21, 2004.

**84**  On December 19, 2003, however, Ms. Bittante was seen by Dr. Gordon Robinson, a specialist in neurology and headache disorders. It is important to note that Ms. Bittante told Dr. Robinson that she suffered from migraine headaches that began within days of the accident, although she could not remember how frequently they had occurred. She told Dr. Robinson that she had not experienced aura, had not noticed any association with foods or physical activity and her headaches; but believed that stressful circumstances, exposure to bright sunlight, small amounts of alcohol and perhaps menstruation may be associated with her migraine attacks. She told Dr. Robinson that her maternal aunt and her grandmother had migraines.

**85**  On examination, Dr. Robinson found full range of motion in the cervical spine, although she had tightness with left lateral rotation and complained of pain in her upper neck muscles particularly on the left. She reported that pain was referred into frontal and temporal regions.

**86**  Dr. Robinson's opinion was that Ms. Bittante would have improvement over the three to five years following his first examination; but that he doubted she would become headache free.

**87**  In the spring semester of 2004, Ms. Bittante took a course at SFU via distance education. There was no examination for this course, but Ms. Bittante had to write several papers. She got a B in the course. In April 2004, Ms. Bittante went to Mexico for a holiday with her sister and parents. This is the holiday I referred to earlier in these Reasons during which Ms. Bittante and her sister quarrelled.

**88**  In May 2004, while working full time as a broker's assistant, Ms. Bittante started taking the Canadian Securities Certificate Course. She was interested in banking and thought that the course would help her career and impress her employer. She successfully passed the course in December 2004 on her first attempt.

**89**  Ms. Bittante and Mark Hansford moved into a condominium together in the fall of 2004 and have lived together since that time. They plan to marry. Mr. Hansford testified that he learned about Ms. Bittante's headaches soon after they met in August 2003 and said that she has bad days and good days. He was unable to identify any particular pattern to her headaches, or any events associated with their onset. He said that sometimes Ms. Bittante can feel a headache coming on and that at other times the onset is very rapid. He said that when they were on vacation in Cuba in January of 2007, Ms. Bittante was headache-free for the entire week.

**90**  In the first semester of 2005, Ms. Bittante took another economics course at SFU in an attempt to raise her grade point average, but she received a C in the course. In March 2005, Ms. Bittante resigned her job and moved to a different securities firm, where she was offered a higher salary. She felt she was still not ready to go back to school. At this job she worked alone quite often, and could watch TV and do homework while at work. In the fall of 2005 she took another course at SFU. She decided that she should finish her degree in Economics in case she was unable to get into Business Administration. By this time, she had decided she did not want to be a broker and felt that because of her health problems she would not be able to handle the demands of that type of job.

**91**  Dr. Robinson's prediction in December 2003 that Ms. Bittante's headaches would gradually improve over a period of three to five years has not proved to be accurate. If anything, Ms. Bittante's testimony suggests her headaches have become worse over time. Sometimes they last for days and all medications tried are ineffective. In December 2006, shortly after she was given an injection of a nerve block by Dr. Vincent, she had a headache so severe that she went to the hospital hoping to get an injection of Demerol.

**92**  At various times, various doctors have attempted to relieve Ms. Bittante's headaches by injecting medications into her neck that anaesthetize or "block" the nerves that are believed to transmit messages from the neck muscles to the head. These treatments are based on the theory that Ms. Bittante's headaches, although migrainous in nature, are "cervicogenic", or originate in the muscles of her neck and cervical spine. On one occasion, Ms. Bittante reported having got some temporary relief from an injection, but she testified that in general she got no relief from these injections.

**93**  In January 2006, Ms. Bittante returned to SFU and enrolled in four courses. She continued to take courses through the summer of 2006 and then applied and was accepted into the Business Administration program in the fall of 2006. She did well in her first semester in the new program. She attributed this in part to her choice of classes -- choosing those that required term papers rather than examinations, so that she could work around her headaches. She received three B and one C+ in the spring semester of 2006; an A-, two B, and a C+ in the summer semester; and three A- and a B in the fall semester of 2006.

**94**  When Ms. Bittante testified at trial in March 2007, she said she was expecting to graduate with her degree in Business Administration very shortly. She intended to look for a job in marketing with an employer who would be flexible and would accommodate her headache problems.

**THE MEDICAL OPINION EVIDENCE**

**95**  As stated at the outset of these Reasons, the real issue in this case is whether the headaches that Ms. Bittante has experienced and is likely to continue to experience are caused by the motor vehicle accident on March 16, 2001. The onus of establishing causation rests with the plaintiff. The plaintiff must satisfy the court that but for the motor vehicle accident, she would not have had these headaches, or that the headaches would not have been as frequent or severe.

**96**  The parties presented opinion evidence from several medical experts -- some of these were treating physicians, others had been asked to provide opinions only. The weight to be given to the opinions depends on whether, and the extent to which the facts or assumptions relied upon as the basis for the opinions correspond with facts proved or admitted at trial.

**97**  The plaintiff relies on the expert opinion evidence of Dr. Robinson, a neurologist who specializes in headache disorders. Dr. Robinson interviewed and examined Ms. Bittante on December 19, 2003, May 19 and August 24, 2004 and November 20, 2006. In his first report, Dr. Robinson stated his conclusion that Ms. Bittante's headaches have features "... consistent with a diagnosis of chronic post-traumatic headache of a migrainous type." His opinion was that if the accident had not occurred, Ms. Bittante would not have developed headaches more severe than the headaches she had experienced prior to the motor vehicle accident. His opinion was that it was probable that she would continue to have headaches for many years to come; that treatments he suggested could reduce her disability; and that it was also possible that she would improve over the next three to five years.

**98**  The difficulty with Dr. Robinson's first report is that he did not explain why he believed that Ms. Bittante's headaches were the result of trauma, rather than the spontaneous onset of migraine headaches, other than to state that "Headaches related to her neck injury has been present from the outset." Dr. Robinson seems also to have relied on Ms. Bittante's description of her post-accident headaches as "distinct in character" from the headaches she experienced before the accident.

**99**  Having heard Dr. Robinson testify, it appears that he continues to base his opinion primarily on his understanding of the proximate relationship between the accident and the onset of Ms. Bittante's headache symptoms.

**100**  In his second opinion letter, Dr. Robinson elaborated somewhat on his views about Ms. Bittante's pre-accident headaches. He stated that he believes that it is probable that the pre-accident headaches were caused by what he describes as "... her long-standing temporomandibular joint dysfunction ..." In reference to that opinion, however, I note that that diagnosis was not accepted prior to the motor vehicle accident, and it was ruled out by investigations initiated by Dr. Squire after the accident. Dr. Robinson's other possible explanation for the pre-accident headaches is that they may have been "... occasional myofascial symptoms relating to playing sports." Dr. Robinson stated that he does not believe Ms. Bittante's pre-accident headaches would have worsened if the accident had not occurred, but he does not state any rationale for this belief.

**101**  In his November 20, 2006 opinion letter, Dr. Robinson stated that he believes it is probable that Ms. Bittante's condition will remain unchanged indefinitely and that she will have at least mild to moderate headache on a majority of days, with occasional pain severe enough to require a period of rest.

**102**  Ms. Bittante was also referred by her counsel to Dr. Ansel Chu, a specialist in physical medicine and rehabilitation. Dr. Chu examined and interviewed Ms. Bittante on November 3, 2006. Dr. Chu's opinion was based, in part, on information provided to him that Ms. Bittante's headaches "... are almost exclusively related to flare-ups of the left upper mechanical pain in her neck", and he seems to assume that neck pain had been identified as a specific trigger for Ms. Bittante's headaches.

**103**  Ms. Bittante told Dr. Chu that she has "... ongoing continuous left upper neck pain which can flare up to be severe at times triggering the headaches." Dr. Chu recorded that Ms. Bittante told him that she only gets headaches when her left upper neck pain gets worse. This information is not borne out, however, by the clinical records of Dr. Squire; in particular, the information recorded by Dr. Squire that was provided by Ms. Bittante.

**104**  Dr. Chu regarded Ms. Bittante's pre-accident headaches as cervicogenic also, but he believed they were most likely muscle tension headaches, rather than mechanical neck pain induced headaches. He was evidently told that the pre-accident headaches "... went away after she stopped her field hockey playing" and he concluded that the pre-accident headaches were the result of a "... transient sprain/strain to her neck ..." In this regard, Dr. Chu relied on a report from Dr. Squires that Ms. Bittante had not had any neck pain or headaches for six months prior to the motor vehicle accident. This report was inaccurate, as Ms. Bittante had been receiving massage therapy for her headaches and back pain as recently as two days prior to the accident.

**105**  Dr. Chu's opinion was that "... it seems to me that the motor vehicle accident is the direct cause of the mechanical left upper neck pain. This in turn is the cause of her secondary cervicogenic headaches." He opined that the mechanism of pain was an injury to the facet joints as a result of hyperextension of the neck, resulting in chronic mechanical pain.

**106**  Dr. Squire shared Dr. Chu's opinion that Ms. Bittante suffered an injury to the facet joint as a result of the motor vehicle accident, and that the facet joint has been the trigger for her headaches. She described the headaches as "primarily cervicogenic with migrainous features".

**107**  Ms. Bittante also consulted and was treated by Dr. Vincent, a specialist in Anaesthesiology and Interventional Pain Management. Dr. Vincent is one of only a handful of physicians in British Columbia who treats headache with anaesthetic injections using a fluoroscope to accurately target the injections. Dr. Vincent testified for the plaintiff, but his evidence, particularly the testimony he gave in cross-examination, supports the defendant's position that Ms. Bittante's current headaches are not cervicogenic in nature, and do not originate in the muscles or nerves of her neck.

**108**  Although in his report and in his evidence in chief, Dr. Vincent stated his opinion to be that Ms. Bittante's headaches are related to an injury to her neck; he largely resiled from that opinion in cross-examination. Dr. Vincent injected anaesthetic medications into Ms. Bittante's neck on two occasions, using a fluoroscope to accurately pinpoint the injections. The theory behind this method of treatment is that injury to the structure of the neck -- possibly to a structure called the "facet joints" -- causes pain to be transmitted to the head through the trigeminal nerve, resulting in headache that resembles a migraine, but is actually cervicogenic.

**109**  One statement of this theory was put to Dr. Vincent and largely adopted by him. It comes from an article in the Clinical Journal of Pain, written by Dr. Nikolai Bogduk, acknowledged by Dr. Vincent and other expert witnesses to be the authority in this somewhat controversial area of medicine. In his article titled "International Spinal Injection Society Guidelines for the Performance of Spinal Injection Procedures: Part 1: Zygaphophysial Joint Blocks", Dr. Bogduk stated the following Principles:

Blocks of a zygapophysial joint can be performed to test the hypothesis that the target joint is the source of a patient's pain. The hypothesis is tested by anaesthetising the target joint. Provocation of pain from a joint is an unreliable criterion. Relief of pain is the essential criterion.

I diverge here to note that Dr. Vincent stated that it is sufficient if the patient has a 50% of greater relief from pain. Returning to Dr. Bogduk's Principles:

Zygapophysial joints can be anaesthetised either with intra-articular injections of local anaesthetic or by anaesthetising the medial branches of the doral rami that innervate the target joint. If pain is not relieved, the joint cannot be considered the source of pain, whereupon a new hypothesis about the source of pain is required.

**110**  Based on Dr. Vincent's elaboration of Dr. Bogduk's theory, if the injections, correctly administered, relieve the patient's headache, or reduce its severity by at least 50%, it can be concluded that the probable cause of the headache originates in the facet joints, or cervical spinal area. If the injections, correctly administered, do not relieve the headache, the headaches are likely not cervicogenic in nature.

**111**  Neither of the injections of two different anaesthetics administered into Ms. Bittante's neck relieved her headaches. In fact, Ms. Bittante suffered an aggravation of her headache on both occasions after she was treated by Dr. Vincent. On one of these occasions the exacerbation was so severe that she sought treatment at hospital. These results, Dr. Vincent agreed, are inconsistent with a causal relationship between an injury to the structures of the neck and the headaches Ms. Bittante experiences.

**112**  In particular, on April 10, 2006, Dr. Vincent injected an anaesthetic into the left C3 and C4 medial branch of the facet joints in Ms. Bittante's neck. He described her response by saying that she "... did achieve a marginal local anaesthetic response with no long term benefits".

**113**  Ms. Bittante reported and recorded, however, that the day after she was treated by Dr. Vincent, she experienced a headache that was 7 in severity on a scale of 1 to 10. She had headache every day for the next 10 days following Dr. Vincent's injections into the facet joints -- on five of those days she rated the pain as 7/10 or worse.

**114**  Dr. Vincent repeated the injections with a different medication on December 7, 2006. Again, Ms. Bittante received no relief. Her headache got worse as that day wore on, and three days later, on December 10, 2006, she had a headache so severe -- 10/10 by the evening -- that she was taken to the emergency department of the hospital near her parents' home.

**115**  These results, Dr. Vincent agreed, are inconsistent with a causal relationship between an injury to the structures of the neck and the headaches Ms. Bittante experiences.

**116**  Dr. Michael Jones testified as an expert on behalf of the defendant. He is a neurologist. He disagreed with the opinions of the plaintiff's experts, in particular, Drs. Robinson and Chu. His opinion is that Ms. Bittante's headaches are true migraines that have arisen spontaneously and are unrelated to any injury to her neck or cervical spine.

**117**  Dr. Jones elicited no physical findings of neck injury during his examination of Ms. Bittante. He noted that Dr. Robinson had not consistently elicited pain radiating into Ms. Bittante's head by palpating her neck and considered an inconsistent result of this kind to be inconsistent with cervicogenic headache. He pointed to Dr. Chu's report that by palpating Ms. Bittante's neck he could produce neck pain, but not an increase in headache pain.

**118**  Dr. Jones pointed to the absence of any evidence of an ongoing physical injury to Ms. Bittante's neck muscles in the clinical records or the records of the examinations performed by the plaintiff's treating physicians and experts. His view is that the suggestion that the headaches originate with an injury to a facet joint is speculative and that this theory has not yet achieved widespread scientific acceptance. He pointed out that if Ms. Bittante's headaches originate in her neck, then her headaches would be precipitated by activity and relieved by rest, but the clinical records reveal no evidence of this pattern. He pointed out that In Dr. Chu's report, Dr. Chu stated that Mr. Bittante's said she could do all sorts of physical activities without causing her neck pain to flare up, or precipitating headaches. In Dr. Jones' opinion, the fact that neither stress nor neck movements result in headache contradicts Dr. Chu's opinion that Ms. Bittante's headaches originate with a mechanical problem in her neck.

**119**  Although Dr. Jones agreed that relieving headache pain with certain medications is not diagnostic of migraine, he did note that Ms. Bittante's reaction to the various medications she was prescribed has been consistent with the reaction of patients who have migraine that is unrelated to trauma.

**120**  Dr. Jones noted the failure of Dr. Vincent's injections to Mr. Bittante's neck to relieve her headaches, suggesting to him that the origin of the headache was not the facet joints.

**121**  Dr. Jones considered Ms. Bittante's assertion that her headaches are associated with discomfort in her neck. He pointed to the scientific literature and his experience that patients with migraine often report pain radiating from the head into the neck. He referred to one 2002 study that reported that 60% of migraine patients studied had neck discomfort before the onset of a migraine, and 90% had neck discomfort during a migraine headache.

**122**  Dr. Jones noted that Ms. Bittante's headaches are intermittent -- like those of true migraine sufferers, while in his experience, patients with cervicogenic headaches have chronic and continuous headache. He described Dr. Squire's theory -- that if you develop headache, it increases in frequency because it lowers the patient's threshold for developing the next headache -- as conjectural and said there is no support in the literature or research for her theory.

**123**  Dr. Jones noted that Ms. Bittante had normal range of motion in her neck when examined on the day of the accident, and when seen by Dr. Squire a couple of weeks later. When Dr. Squire first diagnosed Ms. Bittante's headaches as migraines -- on December 12, 2001 -- she made no note of any report of neck problems. In Dr. Jones' view, the symptoms of migraine did not emerge until late 2001 or early 2002. Accordingly, he says that the criteria for post-traumatic migraine is not met, because one of the criteria for that diagnosis is that the symptoms of migraine must appear within seven days after the traumatic event. In this regard, Dr. Jones had modified his original opinion that the motor vehicle accident may have caused Ms. Bittante to start to experience migraine headaches earlier than she otherwise might have. He said that a closer review of Dr. Squire's clinical records had led him to understand that the characteristics that caused a diagnosis of migraine had not emerged until approximately nine months after the motor vehicle accident.

**124**  Dr. Jones testified that primary migraine headache is likely vascular in origin.

**125**  He said that it is very common for individuals to develop migraine headache around the age that Ms. Bittante was when her headaches began; and both he and Dr. Robinson testified that about 20 to 30% of all women have migraine headaches. He pointed to Ms. Bittante's family history of migraine and the fact that there appears to be a genetic predisposition to migraine, although many sufferers, including himself, have no family history of migraine.

**126**  The various experts were referred to many articles. In particular, several were referred to lengthy passages from the "The International Classification of Headache Disorders", Second Edition; published in Cephalalgia, An International Journal of Headache. This classification was published by the Headache Classification Subcommittee of the International Headache Society. This classification supports Dr. Jones' evidence that a diagnosis of post-traumatic migraine requires that the symptoms of migraine headache manifest within seven days after the traumatic event. Dr. Jones testified that the symptoms of migraine -- sensitivity to light and sound, nausea, et cetera, did not manifest themselves in Ms. Bittante's case until many months after the motor vehicle accident.

**127**  In general, I preferred the testimony of Dr. Jones to that of Dr. Robinson and Dr. Chu. He was able to explain his reasoning fully. He admitted to having initially misread some of Dr. Squire's notes, but explained the change in his opinion after a careful reconsideration of the notes. Dr. Robinson seemed to base his opinion primarily on his view that Ms. Bittante began to experience headaches right after the motor vehicle accident that were different than those she had before the accident. I am satisfied, however, that he did not have all of the information about Ms. Bittante's pre-accident medical problems. As a physician, he accepted Ms. Bittante's description of her condition before and after the trauma. As a judge, I must assess her testimony more carefully.

**128**  To a certain extent, Dr. Chu and Dr. Robinson had different theories about the possible causal relationship between the accident and Ms. Bittante's subsequent development of headaches with migrainous features. Both appeared, however, to believe that Ms. Bittante's headaches were usually associated with flare-ups of neck pain. The evidence and the clinical records do not demonstrate this relationship; and in fact contradict it.

**ANALYSIS AND CONCLUSIONS**

**129**  I have not attempted, in the brief summary of the expert evidence set out above, to reproduce the entire testimony of the experts, in particular, their testimony in relation to the scientific literature to which they were referred.

**130**  Having carefully considered all of the testimony of the experts, the other witnesses, and in particular, the testimony of Ms. Bittante, I am satisfied that the motor vehicle accident did cause an exacerbation of the headaches that Ms. Bittante had been experiencing in the year prior to the accident. I am also of the view, however, that those headaches had largely resolved, and Ms. Bittante had returned to her pre-accident state of health, within approximately 10 months following the accident. I conclude that in late 2001 and early 2002, Ms. Bittante began to experience migraine headaches that arose spontaneously, and that it is more probable than not that she would have had the headaches that she has been experiencing since early 2002 even if the accident had not happened. In other words, Ms. Bittante has failed to prove, on a balance of probabilities, that the headaches she continues to experience are caused by injuries received in the motor vehicle accident on March 16, 2001.

**131**  To the extent I can summarize the most important of the factors I have taken into account in reaching these conclusions, they are as follows: 1. Ms. Bittante was not an entirely persuasive witness, and there were problems with some aspects of her testimony. Although she was adamant that the headaches she had after the motor vehicle accident were different than the headaches she had before, she was vague about the headaches she had before; and appeared to be attempting to minimize the severity of her pre-accident symptoms. She disagreed with information recorded by almost all of the doctors in their clinical records and reports. In the case of Dr. Jones, she denied having provided much of the information he recorded in his records.

**132**  Dr. Vincent recorded that Ms. Bittante told him she had had no history of headaches before the motor vehicle accident. This clearly was not accurate.

**133**  Ms. Bittante gave answers at trial that were inconsistent with answers she had given on examination for discovery. The answers given on discovery tended to suggest that her migraine headaches did not develop right after the motor vehicle accident but came on gradually. At trial, her evidence suggested that the migraines started right after the accident. In her evidence at trial, she also appeared to be attempting to minimize the symptoms consistent with migraine headache, and suggested that bright lights did not aggravate her headaches, but that she simply liked to be in the dark when she has a headache.

**134**  These inconsistencies suggest that Ms. Bittante's present recall of her symptoms in the days, weeks and months immediately following the accident is unreliable. Her testimony about the severity of her symptoms is inconsistent with her reports to Dr. Squire, the infrequency of her visits to her doctor, and the lack of impact her injuries had on her activities -- school, work, and social -- in the weeks and months after the accident.

**135**  Her reports that her headaches always coincided with flare-ups of neck pain are also inconsistent with the clinical records.

**136**  2. The motor vehicle accident did not involve a major impact. Although Ms. Bittante is reported to have said that the vehicles were travelling at a speed of 60 kph at impact, I consider this highly unlikely. The defendant's vehicle had just pulled out of a parking lot and is therefore unlikely to have accelerated to 60 kph. The plaintiff anticipated the impact and had time to respond by braking, stepping on the clutch and bracing for impact. Those actions suggest that the impact did not occur at high speed. Photographs indicate that Ms. Bittante's vehicle received minimal damage. She was able to get out of the vehicle right after the collision and she was able to drive home after exchanging information with the other driver and a bystander/witness. Neither driver thought the matter serious enough to call the police or an ambulance.

**137**  While the severity (or lack thereof) of a collision does not directly correlate with injuries to the vehicle occupants, it is a factor that can be considered when the claimed results of a minimal impact appear to be so disproportional to the likely forces involved in the impact.

**138**  3. When seen by a physician on the evening of the day of the accident, Ms. Bittante had full range of motion in her neck. Although it is true that it sometimes takes a day or two for an injury to produce muscle stiffness, the evidence indicates that Ms. Bittante was able to return to classes without missing any school; work as a server in a pub without missing any work; and participate in her usual social activities in the days and weeks immediately after the accident. She did not consult her family doctor for two weeks after the collision, suggesting that discomfort from her injuries was not significant enough for her to seek earlier medical intervention. Although I accept that the plaintiff was having some headaches during the weeks and months after the motor vehicle accident, these appear to have been much milder than those she developed in late 2001 and early 2002 and has suffered from on an increasing basis since.

**139**  Ms. Bittante's best friend, Ms. Whibley, has no recall of the plaintiff's injuries having an impact on her life from March 16 until their holiday in June 2001, despite the fact that the two friends saw or spoke to each other daily and socialized often. It is clear that Ms. Bittante's headaches were not debilitating during this period.

**140**  4. When Ms. Bittante saw Dr. Squire two weeks after the accident, she did not complain of neck pain; her complaint was of upper thoracic pain. Dr. Squire found normal range of motion, and no tenderness or trigger points in the neck. She did diagnose strain to the upper back and neck, but described it as "mild". Although Ms. Bittante was reporting headache, she had been suffering from headaches before the accident, as well as neck and back pain, for which she had been having massage therapy treatments for 10 months.

**141**  5. Although Ms. Bittante reported headaches to Dr. Squire on subsequent visits, the clinical records do not record any reports of the headaches coinciding with or being associated with the neck pain. In other words, neither Dr. Squire nor Ms. Bittante reported that the headaches occurred when Mr. Bittante was having neck pain; or that the severity of her headaches was related in any way to the severity of her neck discomfort. On August 10, 2001, Dr. Squire found normal range of motion in the cervical spine, and was unable to palpate any neck tenderness or spasm. At this point, Dr. Squire thought it only "possible" that the headaches were cervicogenic.

**142**  6. In January 2002, Ms. Bittante started seeing a physiotherapist. On January 15, she completed a "Neck Disability Index Questionnaire" provided to her by her physiotherapist. Under the heading "Pain Intensity", she checked off the statement, "The pain is very mild at the moment" and wrote the word "stiffness" underneath that statement. She agreed with the statement that she could lift heavy weight without extra pain, and that she would read as much as she wanted with no pain in her neck, and that she could concentrate fully when she wanted with slight difficulty. She indicated she could do as much work as she wanted, could drive her car without any neck pain, had no trouble sleeping, was able to engage in all recreational activities with no neck pain at all, and rated the severity of her neck pain as "1" on a scale of 1 to 10. When asked to choose a statement about headaches, however, she chose "I have severe headaches which come frequently". The answers given by Ms. Bittante to this questionnaire indicate that there was no relationship between her neck symptoms and her headaches.

**143**  7. When Dr. Squire saw Ms. Bittante on August 10, 2002, she concluded that there had been significant improvement in Ms. Bittante's neck problem, but the headaches had become much worse and were now severe and completely impairing. This report causes me significant doubt about the alleged causal relationship between the neck strain and the headaches. In general, if the headaches originated with the neck injury, one would expect the headaches to improve, or at least not to worsen as the neck strain resolved. In Ms. Bittante's case, the headaches have become more frequent and severe as time has elapsed.

**144**  8. The symptoms associated with the headaches have changed and increased, over time -- at first Ms. Bittante was not sensitive to either light or sound, but over time developed sensitivity to both; as well as nausea, and other symptoms typically associated with migraine headache. The frequency, duration and severity of the headaches also increased over time. For example, Ms. Bittante testified that her headaches were worse for a period of several months late in 2006 -- more than five years after the accident. This pattern is inconsistent with a causal relationship between a mild strain to the neck muscles and the headaches.

**145**  9. The fact that headache could sometimes, but not consistently, be produced by pressing on Ms. Bittante's neck belies the suggestion that it is cervicogenic. Dr. Chu, for example, found he could induce neck pain, but that doing so did not make Ms. Bittante's headache worse, and palpating the facet area did not cause pain to radiate into her head or eye.

**146**  10. The negative response to injections of various kinds suggests that the headaches are not cervicogenic. In particular, the fact that the injections administered by Dr. Vincent failed to provide relief weighs against the theory that the headaches are cervicogenic. I note that Dr. Squire recorded that Imitrex injections in October 2006 provided absolutely no benefit and had no effect on the migraine headaches. Trigger point injections done to the interspinous ligament at C7, T2 and T4, as well as to trigger points in the left rhomboid, trapezius, splenius capitis muscles, and left lateral occipital nerve made no difference to Ms. Bittante's migraine headaches.

**147**  11. The headaches appear unrelated to activities that would tend to aggravate the neck. Ms. Bittante identified no relationship between physical activities and the onset or severity of headache. She has taken several long trips by air -- to Bali, to England, South Africa and Cuba -- since the accident. These long trips might be expected to cause neck pain and strain, and induce headache, if the headache is related to the neck injury. Ms. Bittante did not report an increase in headache during or immediately following these flights. Ms. Whibley testified that the headaches Ms. Bittante had in Bali did not start until a few days after they arrived there. Ms. Bittante testified that on the flight to South Africa she was even able to study for exams.

**148**  She and her partner testified that while in Cuba she had no headaches at all.

**149**  12. Many migraine sufferers have one-sided headache, as Ms. Bittante does, so the fact that her headaches are on the left side does not prove cervicogenic headache.

**150**  13. Many migraine sufferers have neck pain associated with migraine headaches, although no history of trauma. Of the few reports that associate Ms. Bittante's headache with corresponding neck pain (Dr. Naran's clinical record, for example), the reports suggest that the pain radiated from the head to the neck and not the reverse.

**151**  For the reasons summarized above, I am of the view that Ms. Bittante has failed to prove, on a balance of probabilities that the headaches she has experienced since early 2002 are caused by the motor vehicle accident. I consider it to be probable that the accident initially exacerbated the problem with headaches she had been experiencing for the previous year, that exacerbation had largely been resolved within a year. I conclude that the headaches that Ms. Bittante currently has, and has had since early 2002, are primary migraine headaches that she would have developed in any event. The fact that the headaches have worsened over time, with increased symptoms, frequency, duration and severity, support this conclusion. I note that in the weeks and months right after the accident, when the injuries would be expected to be most severe, the people closest to Ms. Bittante do not appear to recall the symptoms to be as noticeable as they later were. Mrs. Bittante testified, for example, that the family became more aware over time of the severity and frequency of Ms. Bittante's headaches -- testimony that suggests the symptoms worsened rather than improved.

**152**  The defendant does not dispute that Ms. Bittante had an exacerbation of her headaches after the accident that are causally related to the accident. She had bruising to her chest and left shoulder (Dr. Squire described it as "severe" on the night of the accident) as a result of having been restrained by her vehicle seatbelt. This discomfort resolved fairly quickly. She had thoracic back pain and some neck pain and continues to have occasional episodes of neck pain. These are not debilitating, but do cause discomfort and interfere with Ms. Bittante's enjoyment of life.

**153**  I am not persuaded that Ms. Bittante's academic performance in the balance of the 2001 spring semester, or any subsequent semester was adversely affected by the symptoms from the accident injuries. None of the injuries caused by the motor vehicle accident have incapacitated Ms. Bittante and she has lost no work as a result of the accident injuries. I am also not persuaded that the accident injuries prevented her from pursuing her education and achieving her educational goals as quickly as she had intended.

**154**  I have already said that in my view, the headaches she has experienced since early 2002 have not been shown to be caused by the motor vehicle accident, and it is primarily those headaches that have affected her ability to perform to her satisfaction at university.

**155**  The accident injuries did, however, interfere with Ms. Bittante's enjoyment of life. In particular, during her holiday with Ms. Whibley in June 2001, Ms. Bittante's injuries interfered with her enjoyment of some aspects of her holiday. She was not able to enjoy late nights out with her friend as she had expected.

**156**  The plaintiff has not proved any past loss of income caused by the accident injuries, and has not established that the injuries have impaired her capacity to earn income in future. To the extent that her career opportunities are limited, they are limited by her migraine headaches, which I have concluded have not been shown to be caused by the accident.

**DAMAGES**

**157**  The plaintiff has not established entitlement to damages for past loss of income, future loss of the capacity to earn income, or that she will require future care as a result of the accident injuries. She is entitled to an award for special damages and for general damages.

**SPECIAL DAMAGES**

**158**  The plaintiff is seeking an award of $11,000 in special damages from the date of the accident to close of trial. Because of the manner of presentation of the evidence of special damages, it is not possible to calculate the damages for a specific period. In relation to the summary of mileage, for example, the plaintiff presented a schedule indicating the number of visits to various medical practitioners, but not the specific dates related to those visits.

**159**  I am going to provide the following directions to counsel in the hope that they will be able to agree on the quantum of special damages. In the event they are unable to do so, they may provide further submissions in writing regarding the issue of quantum and I shall provide further Reasons.

**160**  The plaintiff is entitled to be reimbursed for the payments she made for massage therapy, physiotherapy, and acupuncture for the period of one year after the motor vehicle accident, or until March 16, 2002. She is also entitled to be reimbursed for medications prescribed for her, or purchased over the counter by her for the same period. I have already said that I have concluded that by the end of 2001 or early 2002, her headache symptoms were largely the result of the development of primary migraines not related to the accident. However, there was probably some overlap of symptoms resulting from the motor vehicle accident that continued during the first part of 2002, and the plaintiff should be compensated for out-of-pocket expenses during this period.

**161**  It follows that the plaintiff is entitled to be reimbursed for mileage expenses incurred during the one year period as well. If there are other expenses included in the special damages brief that were incurred up to March 16, 2002, the plaintiff is also entitled to recover these amounts.

**GENERAL DAMAGES**

**162**  I have already noted that following the accident, Ms. Bittante had pain in her left shoulder, and bruising across her shoulder and chest. She had thoracic pain and neck pain. She missed a social engagement the evening of the accident. The neck pain and headaches interfered with her enjoyment of her holiday in Bali. She had an exacerbation of her pre-accident headaches, and neck and back problems, that continued for perhaps a year after the accident. She has had occasional episodes or flare-ups of neck pain in the subsequent five years, continuing to date of trial.

**163**  I am satisfied that while she might have had some neck and back problems in any event, it is probable that the mild strain she experienced in the accident has contributed to those symptoms.

**164**  Because the trial focused on Ms. Bittante's headaches and the impact those headaches have had on her life, the evidence was less complete than might be hoped with respect to the impact the neck symptoms have had. I am satisfied that the neck symptoms alone have not been debilitating or incapacitating, but they have contributed to a loss of enjoyment of life. I conclude that it is likely that she will have occasional episodes of neck pain in future resulting from or contributed to by the accident injuries.

**165**  Ms. Bittante testified that the combination of health problems she has had have contributed to the adoption of a more sedentary lifestyle. She has also experienced weight gain that has had an impact on her self-esteem and her confidence. She leads a less active social life than she once did. While that is primarily the result of her migraine headaches, and the unpredictability of those headaches, I am satisfied that her occasional symptoms of neck discomfort have sometimes contributed to her lack of interest in social gatherings.

**166**  I award Ms. Bittante the sum of $45,000 for general damages.

**COSTS**

**167**  Counsel for the plaintiff submitted that costs should follow the event and I see no reason why the plaintiff should not have her costs, on Scale B. If there are factors not previously brought to the court's attention that should be taken into account in award costs -- offers of settlement for example -- and counsel are unable to agree on the effect such factors should have on the award of costs, counsel may arrange with the Registry to make oral submissions, or may submit written submissions.

W.G. BAKER J.

**End of Document**

[***Bohmer v. White, [2009] B.C.J. No. 935***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M29X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.F. Kelleher J.

Heard: March 25-27, 2009.

Judgment: May 8, 2009.

Docket: M070365

Registry: Vancouver

**[2009] B.C.J. No. 935** | 2009 BCSC 622

Between Aaron Bohmer, Plaintiff, and James White, Defendant

(29 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Action for damages for injuries resulting from motor vehicle accident dismissed — Plaintiff was driving his motorcycle behind defendant's van — Plaintiff claimed that the van was moving slowly and suddenly made a left turn even though the right signal was on — Defendant claimed that he did not have his right signal on as there was no reason for him to turn right — Defendant's evidence accepted — Plaintiff could see van from a considerable distance but did not slow down or take corrective action, and was 100 per cent at fault.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — Action for damages for injuries resulting from motor vehicle accident dismissed — Plaintiff was driving his motorcycle behind defendant's van — Plaintiff claimed that the van was moving slowly and suddenly made a left turn even though the right signal was on — Defendant claimed that he did not have his right signal on as there was no reason for him to turn right — Defendant's evidence accepted — Plaintiff could see van from a considerable distance but did not slow down or take corrective action, and was 100 per cent at fault.**

**Counsel**

Counsel for the Plaintiff: E.J. McNeney, Q.C., J.D. Barnes.

Counsel for the Defendant: D.M. Smart.

**Reasons for Judgment**

|  |
| --- |
| **S.F. KELLEHER J.** |

**1**   This action arises from a motor vehicle accident which took place on June 6, 2005. It occurred at the intersection of Cedar Drive and Lincoln Avenue in the City of Port Coquitlam.

**2**  These proceedings address the issue of liability only.

**3**  The defendant was driving north on Cedar Drive. The plaintiff was behind him, driving his motorcycle in the same direction. There was a collision in the intersection at Lincoln Avenue and the plaintiff was injured.

**4**  Mr. Bohmer was on his way to the home of his girlfriend, Karen Wilkinson. She lives some two blocks north of the accident scene. He said the traffic was light, the roads were dry and the weather was fair.

**5**  Mr. Bohmer testified he was proceeding north on Cedar Driver at or just below the 50 km/h speed limit. His motorcycle was on the right side of the road, where the left wheels of a northbound automobile would normally be. Cedar Drive has one lane in each direction.

**6**  As he approached Lincoln Avenue, he testified he saw a van ahead of him near the right curb, proceeding very slowly, with its right turn signal activated. When he first noticed it, the van was two car lengths short of the intersection. The right tires of the van were very close to the sidewalk.

**7**  He testified that he observed the van begin a right turn onto Lincoln Avenue. He continued proceeding north. Suddenly the van changed direction to turn left.

**8**  The plaintiff testified he had no time to brake. He tried to manoeuvre to the right to avoid the van. He said he hit the left side of the rear of the van. His legs, side, shoulder and ribs all came in contact with the van.

**9**  Mr. Bohmer was certain the van's right turn signal was still on when the vehicle turned left.

**10**  Mr. Bohmer said he had consumed some alcohol before driving. He said he had three cans of Coors Lite beer after dirt work and over dinner, then two cans of Budweiser beer while at Scott Baker's home.

**11**  In cross-examination he described the van as executing a sharp left hand turn. At the moment of impact, the van was at an approximately 45 degree angle, completely blocking the right lane. He maintained the vehicle was in the crosswalk at the south side of the intersection.

**12**  The defendant's evidence is that he had travelled the route where the accident occurred on numerous occasions before the accident. He was driving his friend Dan Stringhetta to his home in that neighbourhood. He was proceeding north on Cedar Drive and was turning left at Lincoln Avenue.

**13**  Mr. White testified he had no reason to turn to the right at that intersection, He emphatically denies that he signalled for a right turn, pulled over to the right, or began a turn to the right. He testified that he was driving very slowly as he approached the intersection because his van is large and not very manoeuvrable. He put on his left turn signal in advance of the turn. He has no reason to believe his turn signals were not working properly. He did not see the plaintiff's motorcycle before the impact, and did not hear it until the impact.

**14**  Mr. White's evidence is that he had just begun his left hand turn. The front of his vehicle was at or near the center dividing line. After the impact, he saw the motorcycle on the ground in or near the crosswalk.

**15**  There was damage to the left rear quarter panel of his van as a result of the accident. The damage was to the rear and not the side of the van.

**16**  Mr. Stringhetta's evidence is that he was sitting in the front seat of Mr. White's van. He confirmed that Mr. White had driven him home on many occasions. He testified that the defendant's vehicle did not move or turn to the right at all.

**17**  He said that after the accident he got out of the van and saw the motorcycle for the first time. It was on the ground in or near the crosswalk. He saw a man, not the plaintiff, later wheel the motorcycle off the road.

**18**  Mr. Bohmer provided a blood sample at Eagle Ridge Hospital. Carolyn Kirkwood gave opinion evidence about the hospital's analysis of this blood sample. Her qualifications as an expert were not challenged. Her opinion is that the analysis indicates he ingested more than five cans of beer and that Mr. Bohmer's driving ability was impaired by alcohol.

**Engineering Evidence**

**19**  Robin Brown is an engineer who prepared a report that the plaintiff submitted. In his report, Mr. Brown outlines the two different versions described by the plaintiff and the defendant.

**20**  His conclusion is that it was Mr. Bohmer's body, and not the motorcycle, which came into contact with Mr. White's vehicle. His analysis discloses that the pre-impact speed of the motorcycle was likely between 46 and 54 km/h.

**21**  He concludes from this that Mr. Bohmer's version of events is more likely than Mr. White's.

**22**  Jean-Francois Goulet is also an engineer. He prepared an opinion which was tendered by the defendant. His view is that Mr. White's evidence is consistent with what the RCMP describes as the point of impact. Based on his analysis of the physical evidence, it seemed unlikely to him that Mr. White began to turn right before turning left.

**Analysis**

**23**  I accept Mr. White's evidence that he was not in the right hand portion of the northbound lane and that he did not signal or commence a right turn. This evidence is consistent with the surrounding circumstances. There was no reason for him to turn right.

**24**  Mr. White knew exactly where he was going. He had travelled this route many times before. Mr. Stringhetta corroborated this testimony.

**25**  Both witnesses gave evidence in a straightforward fashion. Both tried hard to recollect honestly what occurred.

**26**  Furthermore, according to Mr. Bohmer's version of the events, the damage to Mr. White's vehicle should have been to the driver's side of the van, not the rear of the van.

**27**  I conclude that Mr. White was slowly negotiating a left turn. His vehicle could be seen from a considerable distance. Mr. Bohmer did not slow down or take corrective action as the vehicle turned in front of him. Perhaps that was because of alcohol impairment.

**28**  I conclude that Mr. White did nothing improper or negligent. In all of the circumstances the plaintiff is 100% at fault.

**29**  The plaintiff's action is dismissed.

S.F. KELLEHER J.

**End of Document**

[***F.W. Hearns/Actes - A Joint Venture v. University of British Columbia, [2000] B.C.J. No. 1238***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61WX-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.T. Edwards J.

Heard: April 9, 2000.

Judgment: June 20, 2000.

Vancouver Registry No. C965740

**[2000] B.C.J. No. 1238** | 2000 BCSC 946 | 97 A.C.W.S. (3d) 570 | [2000] B.C.T.C. 434

Between F.W. Hearn/Actes - A Joint Venture Ltd., plaintiff, and The University of British Columbia, defendant, and Architectura Waisman Dewar Grout Carter Inc., Status Electrical Corporation, Eltec Elevator Ltd., Glotman Simpson Consulting Engineers, D.W. Thomson Consulting Engineers, Mulvey & Banani International Inc., Brown Strachan Associates, Levelton Engineering Ltd., John-Charles Ltd., Martell Brothers Sheet Metal Ltd., and Marine Roofing & Sheet Metal Ltd., defendants by counterclaim and third parties, and Taf Construction Ltd., Wesbridge Steelworks Limited Formerly Dan-Can Manufacturing Co. Ltd., Alpha Mechanical Contracting Ltd., Kal Sprinkler Co. Ltd., BCE Holdings Ltd., formerly Blueline Drywall Ltd., defendants by counterclaim, and Agra Earth & Environmental Limited, formerly known as HBT Agra Limited, Diamond Masonry (1990) Ltd., Lam Metal Contracting Ltd., Coyote Glass Ltd., Gastaldo Concrete Ltd., Gastaldo Finishing & Placing Ltd., and N.A.P. Building Products, a division of Aluminart Products Limited, third parties and proposed defendants by counterclaim, and Hi-Signs Manufacturing Ltd., Saturn Construction Systems Ltd., Con-West Contracting Ltd., Benson Industries Limited, Shanahan's Limited, Lafarge Concrete, a division of Lafarge Canada Inc., the Guarantee Company of North American and La Guarantie D'Assurance de L'Amerique de Nord, proposed defendants by counterclaim

(50 paras.)

**Case Summary**

**Practice — Parties — Adding or substituting parties — Adding or substituting defendants — Circumstances when allowed.**

|  |
| --- |
| Application by the University of British Columbia to add various subcontractors and a guarantor as defendants by counterclaim in its action against a building contractor. The University claimed that the contractor and its guarantor on a performance bond failed to correct deficiencies. A significant issue was whether there was undue delay in completing the project. The University contended that it had discovered that the subcontractors might have been responsible for some of the delay and that they were necessary and proper parties. Some of the subcontractors argued that they shipped materials on time and supplied no labour, and therefore were not proper parties. The guarantor claimed the University was out of time with its claim under the bond.  HELD: Application allowed.  The subcontractors and the guarantor were added as party defendants on the counterclaim. The balance of convenience favoured avoiding a multiplicity of lawsuits where it was more convenient to decide liability within one action. The guarantor was actively involved in the litigation at all stages. It would suffer no prejudice by having the limitation issue decided at trial. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 15(5) and 24(1).

**Counsel**

Michael A. Skene, for F.W. Hearn/Actes - A Joint Venture Ltd. D. Bruce Gleig and Allyson L. Baker, for the University of British Columbia.

|  |
| --- |
| **J.T. EDWARDS J.** |

Notice of Motion

**1**  The University of British Columbia ("UBC") by notice of motion dated October 29, 1999 seeks an order under Rules 15(5)(a) and 24(1) that:

1. Agra Earth & Environmental Limited, formerly known as HBT Agra Limited, Diamond Masonry (1990) Ltd., Lam Metal Contracting Ltd., Coyote Glass Ltd., Gastaldo Concrete Ltd. and Gastaldo Finishing & Placing Ltd., N.A.P. Building Products, a division of Aluminart Products Limited, Hi-Signs Manufacturing Ltd., Saturn Construction Systems Ltd., Con-West Contracting Ltd., Benson Industries Limited, Shanahan's Limited, Lafarge Concrete, a division of Lafarge Canada Inc. and the Guarantee Company of North America La Guarantie D'Assurance de L'Amerique du Nord each be added as Defendants by Counterclaim in this matter.
2. the style of cause in this matter to be amended to read as follows:

|  |  |
| --- | --- |
| No. C965740 |  |
| Vancouver Registry |  |

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  | F.W. HEARN/ACTES - A JOINT VENTURE LTD. |  |  |
|  |  |  | PLAINTIFF |  |
|  | AND: |  |  |  |
|  |  | THE UNIVERSITY OF BRITISH COLUMBIA |  |  |
|  |  |  | DEFENDANT |  |
|  | AND: |  |  |  |

ARCHITECTURA WAISMAN DEWAR GROUT CARTER INC., STATUS ELECTRICAL CORPORATION, ELTEC ELEVATOR LTD., GLOTMAN SIMPSON CONSULTING ENGINEERS, D.W. THOMSON CONSULTING ENGINEERS, MULVEY & BANANI INTERNATIONAL INC., BROWN STRACHAN ASSOCIATES, LEVELTON ENGINEERING LTD., JOHN-CHARLES LTD., MARTELL BROTHERS SHEET METAL LTD., MARINE ROOFING & SHEET METAL LTD., AGRA EARTH & ENVIRONMENTAL LIMITED, FORMERLY KNOWN AS HBT AGRA LIMITED, DIAMOND MASONRY (1990) LTD., LAM METAL CONTRACTING LTD., COYOTE GLASS LTD., GASTALDO CONCRETE LTD., GASTALDO FINISHING & PLACING LTD., N.A.P. BUILDING PRODUCTS, A DIVISION OF ALUMINART PRODUCTS LIMITED, AND THE GUARANTEE COMPANY OF NORTH AMERICA LA GUARANTIE D'ASSURANCE DE L'AMERIQUE DU NORD

|  |  |  |  |
| --- | --- | --- | --- |
|  |  | DEFENDANTS BY COUNTERCLAIM |  |
|  |  | AND THIRD PARTIES |  |
|  | AND: |  |  |

TAF CONSTRUCTION LTD., WESBRIDGE STEELWORKS LIMITED

FORMERLY DAN-CAN MANUFACTURING CO. LTD., ALPHA MECHANICAL

CONTRACTING LTD., KAL SPRINKLER CO. LTD., BCE HOLDINGS

LTD., FORMERLY BLUELINE DRYWALL LTD., HI-SIGNS

MANUFACTURING LTD., SATURN CONSTRUCTION SYSTEMS LTD.,

CON-WEST CONTRACTING LTD., BENSON INDUSTRIES LIMITED,

SHANAHAN'S LIMITED AND LAFARGE CONCRETE, A DIVISION OF

LAFARGE CANADA INC.

DEFENDANTS BY COUNTERCLAIM

1. that UBC be at liberty to file an Amended Statement of Defence and Further Amended Counterclaim in the form attached as Schedule "A" to the Notice of Motion.

**2**  Rule 15(5)(a) provides that:

At any stage of a proceeding, the court on application by any person may

1. ...
2. order that a person who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
3. order that a person be added as a party where there may exist between the person and any party to the proceeding, a question or issue relating to or connected

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (A) | with any relief claimed in the proceeding, | or |  |

1. with the subject matter of the proceeding.

which in the opinion of the court it would be just and convenient to determine as between the person and that party

**3**  In the event that the motion under Rule 15(5)(a) is granted, the applicant relies on Rules 24(1) and (5) which read as follows:

24(1) A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court, and, subject to Rules 15(5) and 31(5)

1. once without leave of the court, at any time before delivery of the notice of trial or hearing, and
2. at any time with the written consent of all the parties.
3. Unless the court otherwise orders, where an amendment is granted during a trial or hearing, an order need not be taken out and the amended document need not be filed, delivered or served.

BACKGROUND

**4**  UBC contracted the design and building of the Thunderbird Student Housing residence (the "Project") to a joint venture known as the F.W. Hearn/Actes - A Joint Venture Ltd. ("Hearn/Actes").

**5**  The contract price of the Project was $26,360,000. UBC raised a number of deficiencies but Hearn/Actes declined to attend to the deficiencies and brought this action with respect to "delay claims".

**6**  UBC denies Hearn/Actes' claim and responded by claiming for losses due to delay and deficiencies.

**7**  The Project was substantially completed in or about May of 1995, approximately eight to nine months after the contractual completion date.

**8**  UBC, after further review, determined that some additional contractors and subcontractors may have caused or contributed to the delayed completion of the Project, namely, Hi-Signs Manufacturing Ltd., Saturn Construction Systems Ltd., Con-West Contracting Ltd., Benson Industries Limited ("Benson"), Shanahan's Limited ("Shanahan's") and Lafarge Concrete, a division of Lafarge Canada Inc. ("Lafarge").

**9**  UBC's position is that the identified contractors and sub-contractors are necessary and proper parties to this litigation and ought to have been joined as parties. UBC argues that the participation of the proposed defendants by counterclaim is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon. In addition UBC argues that there is a question or issue related to the subject matter of the proceeding.

**10**  Some time after the Project was substantially completed, UBC became aware that the building leaked. UBC applied to amend its pleadings to counterclaim for damages for faulty design and construction.

**11**  At the end of March, 1999, UBC received a report concerning the leakage of the building envelope (the "Report"). After reviewing the Report which identifies errors in design and construction materials, the defendant UBC amended its claim against Hearn/Actes claiming for the losses resulting from the water problems. In addition UBC added Levelton Engineering Ltd. ("Levelton") which was retained by Architectura Waisman Dewar Grout Carter Inc. and Hearn/Actes to inspect the building envelope during the course of construction. In its field reviews, Levelton identifies problems with construction of the building envelope on the part of John Charles Ltd. ("Charles"), Martell Brothers Sheet Metal Ltd. ("Martell") and Marine Roofing & Sheet Metal Ltd. ("Marine"). Charles, Martell and Marine were then added as defendants by counterclaim.

**12**  On April 9, 1999, I ordered that Status Electrical Corp, Eltec Elevator Ltd., TAF Construction Ltd., Wesbridge Steel Works Limited (formerly Dan-Can Manufacturing Ltd.) ("Wesbridge"), Alpha Mechanical Contracting Ltd., Kal Sprinkler Co. Ltd., BCE Holdings Ltd. (formerly Blueline Drywall Ltd.), Glotman Simpson Consulting Engineers, D.W. Thomson Consulting Engineers, Mulvey & Banani International Inc. and Brown Strachan Associates be added as defendants by counterclaim:

**13**  Hearn/Actes has now identified additional sub-contractors involved in the construction of the building envelope. As a result of allegations in third party notices, Diamond Masonry (1990) Ltd., Lam Metal Contracting Ltd., Coyote Glass Ltd., Gastaldo Concrete Ltd., Gastaldo Finishing & Placing Ltd. and N.A.P. Building Products and Agra Earth & Environmental Limited should be added as defendants by counterclaim.

**14**  The Guarantee Company of North America ("Guarantee") issued a performance bond in July of 1993 in the amount of $13,180,000 agreeing as surety it would address, in accordance with the bond's terms, any default by Hearn/Actes under its contract with UBC. None of the outstanding deficiencies, including the building envelope failure were addressed to Guarantee in accordance with the terms of the bond.

**15**  Despite notice of the alleged default, Guarantee has failed to remedy the deficiencies in accordance with the bond. It is UBC's position that as a result of Guarantee's failure to address the deficiencies, Guarantee should be added as a defendant by counterclaim.

**16**  UBC takes the position that all parties involved in the design and construction of the building envelope ought to be joined as parties in the claim for damages arising from the water problems. UBC further submits that the participation of the proposed defendants by counterclaim is necessary to ensure that all matters in the proceedings be effectually adjudicated upon.

**17**  UBC claims that the following companies are involved in either the claim for delay or building envelope deficiencies and should be added by the exercise of the court's discretion under Rule 15(5)(a)(ii) and (iii).

Agra Earth & Environmental Limited, formerly known as HBT

Agra Limited;

Diamond Masonry (1990) Ltd.;

Lam Metal Contracting Ltd.;

Coyote Glass Ltd.;

Gastaldo Concrete Ltd.;

Gastaldo Finishing & Placing Ltd.;

N.A.P. Building Products, a division of Aluminart

Products Limited;

Hi-Signs Manufacturing Ltd.;

Saturn Construction Systems Ltd.;

Con-West Contracting Ltd.;

Benson Industries Limited;

Shanahan's Limited;

Lafarge Concrete, a division of Lafarge Canada Inc.;

The Guarantee Company of North America Le Guarantie

D'Assurance de L'Amerique du Nord.

**18**  The following parties have delivered written submissions resisting UBC's attempt to name them as defendants by counterclaim.

Shanahan's Limited;

Lafarge Concrete, a division of Lafarge Canada Inc.;

Benson Industries Limited;

and

The Guarantee Company of North America La Guarantie

D'Assurance de L'Amerique du Nord.

PARTICULARS OF OPPOSITION

Shanahan's Limited

**19**  Shanahan's provided some of the finish hardware on the project but supplied no labour. Some of the hardware supplied to the site was lost, stolen, damaged and mistreated on site. The submissions of Shanahan are to the following effect:

1. The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Rule 1(5);
2. There are no absolute and untrammelled rights under the Rules. Every right under the Rules being a procedural right is subject to the overbearing power of the Supreme Court to prevent its procedure from being offensive to any person. Penderville Properties Ltd. [*(1990), 43 B.C.L.R. (2d) 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61J4-00000-00&context=) (C.A.);
3. The court has inherent jurisdiction to ensure that justice is done between the parties.

**20**  Shanahan's says that the claim cannot succeed on the facts as Shanahan's provided no labour and shipped in a timely fashion all hardware it had agreed to provide. It says also that the claims cannot succeed in law. It is alleged that the claim is one for pure economic loss not normally recoverable under the laws of ***negligence*** in Canada. Rivtow Marine Ltd. v. Washington Iron Works, [*[1974] S.C.R. 1189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B087-00000-00&context=).

**21**  It should be noted that UBC's application is made under both 15(5)(a)(ii) and 15(5)(a)(iii). The court must determine under 15(5)(a)(iii) whether there is a question or issue between the respondent and any party in the suit relating to the relief, remedy or subject matter of the proceedings and whether it is just and convenient to determine that issue in the proceedings in question.

**22**  The overriding consideration, in my view, on an application of this nature is whether it would be just and convenient to allow the application. This is not a case of joinder of two or three parties but one of multiple additions. It is, in my view, a balance of convenience to avoid spawning of multiple number of lawsuits where it is more convenient to decide the liabilities within the framework of one action.

**23**  UBC submits that an application under Rule 5(5)(a) need not be supported by an affidavit in any particular format or where the proposed pleadings have been appended to the motion materials affidavit material may not be necessary at all. The proposed parties to be added cannot then rely on alleged failure to make specific reference in supporting material.

**24**  UBC submits that the court is not required to decide whether it is likely that UBC will be able to prove its allegations on a balance of probabilities, or to any other degree beyond the necessity to show that there may exist an issue, or question, to be decided between the applicant and the parties sought to be joined.

**25**  With respect to determination of whether the addition of the parties is "just and convenient" within the meaning of Rule 15(5)(a)(iii), the B.C. Court of Appeal in Tri-Line Expressways v. Ansari [*(1997), 143 D.L.R. (4th) 100*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S324-00000-00&context=) at 106 (B.C.C.A.) stated this:

There is a consistent line of authority to the effect that in the determination of what is "just and convenient" under Rule 15(5)(a)(iii) all relevant factors should be considered but no single factor is necessarily determinative.

**26**  Before addressing this argument I will review the authorities under Rule 15(5)(a).

**27**  In Robson Bulldozing v. Royal Bank of Canada [*(1985), 62 B.C.L.R. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21FR-00000-00&context=) (S.C.), McLachlin J. (as she then was) interpreted Rule 15(ii) and (iii) at 270:

Rule 15(5)(ii) is to be construed disjunctively so that the applicant need only establish one of the two situations stipulated: "Ought to have been joined as a party" as interpreted as referring to situations where a party might properly have been joined, not as a matter of necessity but as a matter of convenience. "Necessary to ensure that all matters have been adjudicated upon" in the second situation has been interpreted as applying only if the existing parties cannot be adjudicated between them unless a neutral party is added. Cominco Ltd. v. Westinghouse Canada Ltd. [*(1978), 7 B.C.L.R. 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3GM-00000-00&context=) (C.A.).

For subs. (iii) to apply two conditions must be met: (1) an issue between the party sought to be joined and another party to the suit relating to the relief, remedy or subject matter of the suit; (2) which it is just and convenient to determine in the same proceedings. If those criteria are satisfied the court may order joinder under subs. (iii) regardless whether subs. (ii) is satisfied. Dayco Dev. Ltd. v. Norman Lewis Co., [*(1982), 33 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3F7-00000-00&context=) (C.A.) The power conferred upon the court to join a party is discretionary, to be exercised upon the proper evidence being produced. Ent. Realty v. Barnes Lake Cattle Co. [*(1979), 13 B.C.L.R. 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F2F4-G1JJ-00000-00&context=) (C.A.).

...

The discretion should be generously exercised so as to enable effective adjudication upon all matters in dispute without delay, inconvenience and expense of separate actions and trials. Nor. Construction Co. v. B.C. Hydro and Power Authority (1970), 72 W.W.R. 455 (S.C.).

**28**  In Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc., [*[1999] B.C.J. No. 2796*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22YF-00000-00&context=), (7 December 1999) Vancouver, C981969 (S.C.), Mr. Justice Macaulay referred to MacMillan Bloedel Limited v. Binstead [*(1981), 29 B.C.L.R. 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1P0-00000-00&context=) (C.A.) where McFarlane J.A. said:

It seems to me clear that one of the functions of the chambers judge hearing an application under this rule must be to decide whether there may exist between the appropriate parties a question which can be answered or an issue which can be decided by a court of law or by a judge exercising jurisdiction in a judicial capacity and to see, through whatever means, and not necessarily affidavits, that the question or issue is a real one in the sense that it is not entirely frivolous and would result in the courts wasting judicial time.

|  |  |
| --- | --- |
| (emphasis added) |  |

McFarlane J.A. went on to point out that the court is not required to determine on any kind of balance that the proposed claim would succeed and that the plaintiff need not demonstrate anything more than that there may exist a question or issue.

**29**  In Quintette Coal Ltd. v. Bow Valley Resource Services [*(1986), 6 B.C.L.R. (2d) 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FBN1-20T9-00000-00&context=) the court held that the test under this subrule requires no assessment of the relevant chances of success other than determining that the claim is not entirely frivolous.

**30**  Discretion to permit amendments is unfettered, subject only to the general rule that it be exercised judicially. Considerations are: the length of delay; reasons for the delay, prejudice to the respondents; and the overriding question of what is just and convenient: Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. [*(1996), 19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (C.A.).

**31**  The authorities seem clear that the test for adding parties under subrule (iii) should be interpreted generously but judiciously. The chambers judge need not determine whether the claim against the proposed defendant will succeed: He or she need only be satisfied that the claim is not entirely frivolous.

**32**  UBC's claim here seems to be one for damages for economic loss arising from the alleged ***negligence*** of the proposed defendants by counterclaim. Based on the authorities provided I believe it is fair to say that the courts have not prohibited recovery for pure economic loss in all cases. Whether such a claim can succeed in this case is arguable and, therefore, not entirely frivolous.

**33**  And in Winnipeg Condominium Corp. v. Bird Construction Co., [*[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=), the Supreme Court of Canada held that a sub-contractor will

owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where ***negligence*** is established and such defects manifest themselves before damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.

**34**  In Canadian National Railways Co. v. Norsk Pacific Steamship Co. Ltd. [*(1992), 91 D.L.R. (4th) 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6070-00000-00&context=) (S.C.C.), a leading case in Canada on the issue of economic loss, the Supreme Court of Canada held that the door to recovery for economic loss was not closed nor is there a prohibition against recovery of economic loss where no physical damage may be demonstrated.

**35**  At trial, the Federal Court of Canada held that C.N.R. was entitled to recover noting in passing that there was no longer an exclusionary rule against recovery for economic loss in Canada although the trial judge, did not attempt to enunciate a rule for recovery in all cases of pure economic loss he did find the following factors relevant to the determination:

1. Knowledge of the specific person who is likely to suffer damage (as opposed to a class of persons);
2. Foreseeability of the precise nature of the loss; and
3. Sufficient proximity between the act and the injury to permit objectively the conclusion that the tort feasor is "morally bound" to compensate the victim.

**36**  That decision was upheld on appeal, [*[1990] F.C.J. No. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M411-JNCK-21VT-00000-00&context=), and further upheld on appeal to the Supreme Court of Canada although the court was divided. All judges, however, confirmed the court's previous rejection of a blanket prohibition on recovery for pure economic loss in all cases.

**37**  I believe it is fair to say that the categories of ***negligence*** into which may fall some form of recovery for economic loss are not closed. For instance, McLachlin J. in Norsk refers at page 58 to "... the vexed question of the extent to which damages for pure economic loss may be recovered at common law". It is clearly an open category and within the tests required under Rule 15(5)(a).

**38**  In my view the balance of convenience may allow economic loss to be recoverable in the case at bar.

**39**  The University submits as a result of Norsk and subsequent decisions of Canadian courts that it is arguable that the University has a claim against Shanahan's for its role in the delayed completion of the Project.

Lafarge

**40**  Lafarge, by letter dated January 11, 2000, states:

Lafarge adopts the written submission dated January 10, 2000 which has been filed on behalf of the Proposed Defendant by Counterclaim, Shanahan's Limited. UBC's claim against Lafarge is in all material respects the same as the claim against Shanahan's. Both are claims by UBC against material suppliers who UBC suspects may have delayed Hearn/Actes in completing the project but who are not alleged to have caused property damage or even defects in the work. Even if UBC were to succeed in showing that Lefarge delayed Hearn/Actes, UBC would have no cause of action against Lefarge and it is neither necessary nor just that UBC should be allowed to drag Lefarge into this already complex and unwieldy litigation at this late stage.

Benson Industries

**41**  Benson Industries Ltd., a proposed defendant by counterclaim, states as follows:

The submissions have already been made to oppose the joinder. Benson supports and adopts the submissions made by the other intended defendants.

Wesbridge

**42**  Wesbridge is a defendant by counterclaim. It opposes being named as a defendant by counterclaim on the basis that to maintain an action for ***negligence*** it must be shown that there was a duty owed to the plaintiff and that the defendant negligently performed that duty. It is not enough for the plaintiff to allege merely that the defendant acted negligently. The statement of claim must state the facts upon which the supposed duty is founded. Bullen & Leake Precedents of Pleadings, 12th edition p. 685.

**43**  Wesbridge says paragraph 50 of the amended counterclaim alleges a duty of care to the plaintiff but provides no facts to establish this duty. It is not clear whether the duty arises by virtue of a contract which has not been pleaded or some larger duty which is similarly not pleaded.

**44**  And further paragraph 51 of the amended counterclaim alleges that the duty was breached by negligently failing to exercise all reasonable skill, care, diligence and competence to ensure the Project was completed by the completion date. There are no particulars of any breach of duty from which the proposed defendant by counterclaim would be informed of what material facts give rise to the alleged breach. The pleading must contain all of the material facts on which a party relies. Rule 19(1), Supreme Court Rules.

**45**  Wesbridge, in summary, submits that the present pleadings are not sufficient to disclose a proper cause of action against the proposed defendant by counterclaim and should not be allowed. If Wesbridge is right in its allegations it will be entitled to raise those allegations at trial.

THE GUARANTEE COMPANY OF NORTH AMERICA

**46**  Under the construction contract between the University and Hearn/Actes, Hearn/Actes was required to provide a performance bond, which was done in the form of a bond issued by Guarantee. In light of Hearn/Actes' failure to remedy the building envelope failure which developed following substantial completion of the Project, UBC says that brings Guarantee within the principles which underlie Rule 15(5)(a).

CLAIM AGAINST GUARANTEE - LIMITATION PERIOD UNDER THE BOND

**47**  In the case at bar the bond provides that where Hearn/Actes fails to comply with its obligations under the contract with UBC Guarantee will remedy the default. The bond further provides that "any suit under the bond must be instituted before the expiration of two years from the date on which final payment under the contract falls due". The question in this case is "when did the final payment fall due under the agreement between UBC and Hearn/Actes"? Guarantee never issued a Certificate of Total Performance nor certified that the remaining funds be paid out to Hearn/Actes. Hearn/Actes held back in excess of $128,0000 for deficiencies and UBC, in its statement of defence filed March 6, 1997 at paragraph 16, denies that the deficiencies have in fact been remedied.

**48**  There would seem to be little prejudice to Guarantee to add them as a party as Guarantee has been indirectly involved throughout these proceedings. In the circumstances where Guarantee was actively involved in the litigation at all stages and there is a possible issue of expiry of limitation period it is probably just and convenient that the issues relating to time limitations of Guarantee be accomplished by adding Guarantee as a defendant by counterclaim and leave open the option to add Guarantee without prejudice to its rights to raise the limitation defence at trial.

CONCLUSION

**49**  In conclusion there will be an order under Rules 15(5)(a) and 24(1) that those named in the notice of motion each be added as defendants by counterclaim in these proceedings and that the style of cause in this matter be amended as set out in the notice of motion.

**50**  Costs may be spoken to.

J.T. EDWARDS J.

**End of Document**

[***Harris v. Sweet, [2005] B.C.J. No. 1520***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X153-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Master Scarth

Heard: May 5, 2005.

Judgment: July 5, 2005.

Vancouver Registry No. S020633

**[2005] B.C.J. No. 1520** | 2005 BCSC 998 | 140 A.C.W.S. (3d) 437

Between William James Harris, plaintiff, and Todd Sweet and City of New Westminster and Todd Matsumoto, defendants

(32 paras.)

**Case Summary**

**Civil procedure — Discovery — Collateral use of discovery information — Examination for discovery — Order to reattend — Production and inspection of documents.**

|  |
| --- |
| Application by the defendants Sweet and the City of New West Minster for production of the transcripts of an examination for discovery in another action brought by the plaintiff Harris. Application by Harris for an order compelling a representative of the City to reattend at examinations for discovery to answer objections and for an order requiring the City to produce documents relating to another action. Harris sued the City for damages for assault and batter, and false arrest resulting form the conduct of the defendant Sweet, a police officer. The City sought the discovery transcripts from another action brought by Harris on the ground that the other action was connected to the present action by reason of Harris' belief in the prior action that Sweet was liable for a smoke bomb detonated at Harris' property on the date of the incident giving rise to the present action. The other action arose out of an incident only two days prior to the incident in the present action. The City claimed that Harris' discovery in the other action was relevant to determine his mind set on the date of the present incident, to show his aggressive behaviour and the internal chaos in his personal life. Harris sought the representative of the City, an inspector in charge of patrol division, to answer whether the use of weapons by police was appropriate in this case and whether the duty officer or chief constable should have been notified immediately of Harris' injuries. The inspector refused to answer the questions because they solicited an opinion on the ultimate issue. Harris sought the discovery transcripts of another action involving a claim for assault and battery against Sweet.  HELD: Applications allowed.  It was appropriate to order Harris to produce the discovery transcripts from his other action involving Sweet. The defendants in the other action were to be given notice. Only those portions of the discovery evidence relating to the events of the incident in the present action were ordered produced. The inspector was ordered to answer both questions. The questions related to the use of force by police. The inspector performed duties specifically related to the use of force. He was involved in his capacity as a representative of the city in matters to which the questions related. Harris was entitled to obtain information relating to the use of excessive force by police officers and the City's treatment of complaints regarding them. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 26, Rule 27, Rule 27(22), Rule 27(25)

Criminal Code, [*R.S.C. 1985, c. C-46, s. 129*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B7M1-F1WF-M0R0-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: B. Stock

Counsel for the Defendants: J.R. Singleton, Q.C.

|  |
| --- |
| **MASTER SCARTH** |

1. NATURE OF APPLICATIONS

**1**  The matters which remain at issue following the hearing of this application are as follows:

1. the defendants seek an order pursuant to Rule 27 for the production of examination for discovery transcripts from another action by this plaintiff, Harris v. Porter et al, New Westminster Action No. S63222 (the "Porter action");
2. the plaintiff seeks an order, also pursuant to Rule 27, that the representative of the City of New Westminster, Inspector David Jones, be compelled to re-attend an examination for discovery to answer questions objected to at his discovery on March 9, 2005; and
3. the plaintiff seeks an order, pursuant to Rule 26, that the defendants produce documents relating to Kuemper v. Sweet et al, Vancouver Registry No. C994958 (the "Kuemper action"), including examination for discovery transcripts.

**2**  This action arises out of the alleged assault and battery and false arrest and imprisonment of the plaintiff by Constables Sweet and Matsumoto on October 31, 1999, while they were on duty as municipal constables employed by the City of New Westminster.

**3**  Particulars of the alleged ***negligence*** and battery are that the defendant Constable Sweet committed an assault and battery upon the plaintiff by:

1. physically blocking or preventing the plaintiff from walking northbound on 2nd Street;
2. threatening to spray the plaintiff with a toxic substance;
3. physically restraining the plaintiff from proceeding northbound on 2nd Street;
4. knocking the plaintiff to the ground, choking and restraining him;
5. striking the plaintiff about the head and shoulders while the plaintiff was on the ground; and
6. handcuffing the plaintiff.

**4**  In addition, the plaintiff claims the defendant, Constable Matsumoto, committed an assault and battery upon the plaintiff by grabbing the plaintiff's arms from behind and handcuffing the plaintiff.

**5**  The plaintiff also claims against the City of New Westminster on grounds of vicarious liability and in ***negligence***. The ***negligence*** claim is set out in paragraph 7 of the amended statement of claim as follows:

1. failing to adequately train its personnel;
2. failing to adequately supervise its personnel;
3. the Defendant City of New Westminster knew or ought to have known that the Defendant Todd Sweet was prone to using excessive physical force and to committing assault and battery or excessive physical force and to committing assault and battery or other violent, unlawful behaviour in the course and scope of his duties as a municipal constable, and yet failed to take steps to correct his behaviour or remove him from his duties;
4. failing to provide adequate education, skill development and counselling in anger management to its employees;
5. employing persons with a capability and capacity for physical force and violent behaviour, and in not taking safeguards to prevent the excessive or unreasonable use of same; and
6. permitting, encouraging or failing to discourage police officers from the use of excessive and unnecessary force.

**6**  The defendants deny liability to the plaintiff. The amended statement of defence states that the plaintiff was found committing the offence of obstruction of a peace officer, contrary to Section 129 of the Criminal Code, B.S.C. 1985, c. C-47, and committing a breach of the peace and that he was lawfully arrested by Constable Sweet with assistance from Constable Matsumoto, using no more force that was necessary to affect the arrest. The City admits that it is statutorily liable for torts committed by the Constables but denies that any torts were committed as alleged or at all. The defendants deny that the City is liable for any independent tort of ***negligence*** and say that the City acted reasonably and in accordance with applicable standard of care. They deny that the plaintiff has suffered any damage, loss or injury as alleged and plead contributory ***negligence***.

1. APPLICATION BY THE DEFENDANTS FOR DISCOVERY TRANSCRIPTS FROM THE PORTER ACTION

**7**  The defendants seek an order permitting them to obtain a copy of the transcripts of examinations for discovery conducted in the Porter action. The application is pursuant to Rule 27(25) which provides that:

An examination for discovery shall be taken down in the form of question and answer, and copies of the transcript may be obtained on payment of the proper fee by any party of records, the person examined or by any other person as the court for special reason may permit.

**8**  In the Porter action, the plaintiff seeks damages for arson, alleging that the defendants set fire to his garage and vehicles on October 29, 1999. The defendants here submit that the Porter action is connected with this action by reason of the plaintiff's belief that the defendants in the Porter action were also responsible for a smoke bomb which was detonated at the plaintiff's property two days later, October 31, 1999. The plaintiff's pursuit of the individuals who detonated the smoke bomb, as they fled in a van, ended with the incident between the plaintiff and the defendant Constables. The van was stopped by the police. The defendants' version of events of October 31, 1999 is that the plaintiff refused to accept instructions from Constable Sweet to remain in his car when he drew up to where the van was stopped; that the plaintiff was in an excited, irritated state of mind and that any effort to subdue him was reasonable.

**9**  The defendants submit that the onus of establishing a "special reason" under Rule 27(25) is met if it is established that there is sufficient connection between the two actions in terms of the parties, their interests and the broad issues between them, so that it can be said that the actions are related. They submit that the overall question is whether the evidence given by the witness at discovery in the earlier action "may have some bearing or relevance, directly or indirectly" on the evidence he or she may give in the second action: Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd. [*(1998), 27 C.P.C. (4th) 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M0YF-00000-00&context=) (B.C.S.C.).

**10**  The defendants submit that what the plaintiff said on his discovery in the Porter action is relevant to the matters at issue in this action for the following reasons:

1. the plaintiff's mindset at the scene of the October 31, 1999 incident is critically important;
2. the occurrences over the previous two days set the stage for the incident on October 31, 1999;
3. the plaintiff's medical condition is relevant, i.e. his aggressive behaviour which was treated with medication; and
4. the internal chaos in the plaintiff's personal life is relevant.

**11**  In addition the defendants submit that the discovery evidence of the defendants in the Porter action may deal with the events of October 31, 1999, as they were witnesses at the scene of the incident between the plaintiff and the defendant Constables. Given the interrelation of the matters involved in the two actions, the defendants submit that the test under Rule 27(25) is satisfied.

**12**  The plaintiff does not oppose the relief sought. It is the defendants' submission that because the plaintiff has the transcripts in his possession, they are not required to give notice to the defendants in the Porter action.

**13**  In my view, it is appropriate to make the order sought. However, given the implied undertaking of confidentiality applying to discovery evidence, the order will be subject to notice being given to the defendants in the Porter action, with liberty to apply. In addition, it has not been established to my satisfaction that, as regards the discovery of those defendants, anything more than the portions relating to the events of October 31, 1999 are relevant and need be produced. The order will go in those terms.

1. PLAINTIFF'S APPLICATION FOR ANSWERS TO QUESTIONS ON DISCOVERY OF INSPECTOR JONES

**14**  The plaintiff applies for an order requiring that Inspector Jones answer questions to which objection was taken on his examination for discovery. The application is pursuant to Rule 27(22) which provides that:

Unless the court otherwise orders, a person being examined for discovery shall answer any questions within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and is compellable to give the names and address of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

**15**  The following summary of Inspector Jones' evidence as to his qualifications is taken from the plaintiff's chambers brief:

Inspector Jones is an inspector in charge of the patrol division within the New Westminster Police Service, a position which he has held for just over five years. He has been employed by the City of New Westminster since September, 1986. Inspector Jones underwent his police training at the Justice Institute of British Columbia commencing in 1986. He has trained other police officers in the area of drug investigations, interviewing, motor vehicle impoundment, leadership and strategic planning. He has also been trained in the use of force. Inspector Jones is required to update his training in the use of force on an annual basis.

After completing his recruitment training, Inspector Jones was assigned to the Patrol Division as a constable. He then worked in the Special Operations Unit which was assigned to the criminal investigation division, a higher level target team to target criminal activity. He has been assigned to the Drug Investigation Unit and has worked in the joint forces drug section between New Westminster Police and the RCMP. He has worked and been on the road as a corporal, road supervisor. He has been assigned to the community services division as well as the street crime unit as a supervisor. He has been a watch commander and obtained the rank of inspector, which is a managerial position in charge of a division of the police service.

**16**  The questions remaining at issue following the hearing of the application are numbers 58 and 120.

**17**  Question 58 follows on a series of questions regarding the continuum of tactics used by the police to subdue individuals, from physical presence through verbal directions and ending with the use of weapons. The following is the transcript relating to question 58:

|  |  |  |  |
| --- | --- | --- | --- |
| 57 |  | Use of weapons would not be simply guns but batons or flashlights? |  |

1. Then you have what we call - you start getting up the scale. You get to impact weapons which could be a baton, a flashlight.

|  |  |  |  |
| --- | --- | --- | --- |
| 58 |  | When is it appropriate in your view to resort to the use of those kinds of things? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Mr. Singleton: |  | I don't think he has to answer to those kinds of questions. He's not here to give opinion evidence. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mr. Hinkson: | I don't agree, Mr. Singleton. |  |

**18**  The following is the transcript relating to question 120:

|  |  |  |  |
| --- | --- | --- | --- |
| 116 |  | Now, at page 20 of this document, there's a portion that I wanted to ask you about. It's entitled "Use of Force Incident Causing Death or Injury." And then the first subheading is "Deadly Force." Is this portion of the policy, as you understand it, related only to circumstances or injuries caused from the use of deadly force or is it in any situation where an injury occurs as a result of any measure of use of force by any member of the New Westminster Police? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Mr. Singleton: |  | This is talking about an incident where there has been death or serious injury and how you use it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mr. Hinkson: | That's what I'm trying to ascertain. |  |

Mr. Singleton: Sorry. Okay.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | The Witness: |  | This deals with an incident where a police officer uses force. |  |

117 Any kind of force?

1. Any force that results in the death or serious bodily injury to a person.

|  |  |  |  |
| --- | --- | --- | --- |
| 118 |  | Okay. And part of it, part of the policy, then, is if there is a serious personal injury, the duty officer and chief constable will be immediately notified? |  |

1. The duty officer or the chief constable. Not both.

|  |  |  |  |
| --- | --- | --- | --- |
| 119 |  | And did that occur as a result of the interaction between Cst. Sweet and Mr. Harris on October 31st, 1999? |  |

1. Not that I'm aware.

|  |  |  |  |
| --- | --- | --- | --- |
| 120 |  | Okay. I'm reluctant to upset Mr. Singleton, but I'm going to ask you: based upon your knowledge of the injuries Mr. Harris sustained, should it have occurred? |  |

Mr. Singleton: Don't answer the question.

|  |  |  |  |
| --- | --- | --- | --- |
|  | The Witness: | Okay. |  |

**19**  The plaintiff submits that question 58 and question 120 are appropriate questions given the broad scope of Rule 27. The plaintiff submits that the court should apply the exception to the general rule prohibiting questions on discovery which solicit an opinion set out in Shickele et al. v. Rousseau (1966), 55 W.W.R. 568, at p. 570 (B.C.C.A.).

**20**  The defendants do not dispute that the question 58 and 120 are relevant to matters in issue in the action. It is their submission that the questions solicit opinion on the ultimate issue. They submit that Inspector Jones' professional competence is not being challenged in this action and therefore the exception to the general rule regarding opinion evidence does not apply.

**21**  Question 58 is part of a series of questions regarding tactics used by the police to subdue individuals. Question 120 - as to whether or not the incident involving the plaintiff should have been reported to the chief constable or the duty officer - in essence seeks Inspector Jones' opinion as to whether there was a breach of the reporting procedures in relation to the incident. Both questions relate to the use of force by the police. It is fair to conclude that Inspector Jones performs duties specifically related to the use of force, using skills acquired through his training and experience as a police officer, instructor and inspector. In my view, both questions relate to matters in which Inspector Jones is involved in his capacity as a representative of the City. I conclude that it is appropriate to require him to answer both question 58 and question 120: Shickele, supra; Westcoast Transmission Company Limited v. Canadian Phoenix Steel & Pipe Ltd., [*[1971] 1 W.W.R. 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-625N-00000-00&context=), at p. 245 (B.C.C.A.); and Teachers' Investment & Housing Co-operative (Trustee of) v. Jennings [*(1991), 61 B.C.L.R. (2d) 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X33B-00000-00&context=) (C.A.).

1. APPLICATION BY THE PLAINTIFF FOR PRODUCTION OF THE KUEMPER FILE

**22**  The plaintiff, on notice to the parties in the Kuemper action, applies for an order requiring the defendants to produce copies of all documents relating to that action, including the examination for discovery transcripts. In his action, commenced on September 24, 1999, Mr. Kuemper alleged that, on March 27, 1999, Constable Sweet committed an assault on him and applied excessive force, leading to injuries.

**23**  On a previous application by the plaintiff for an order requiring production of documents, it was the plaintiff's submission that he was entitled to production of documents that touch upon any allegations of use of excessive force by the defendant Constables, whether found to be valid or not, as being directly relevant to the knowledge of the City and to the question whether the City ought to have taken better steps to supervise or control the defendant police officers: Harris v. Sweet et al, [*[2001] B.C.J. No. 681*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2VC-00000-00&context=), [*2001 BCSC 504*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2VC-00000-00&context=). Master Joyce (as he then was) heard the application and, on April 3, 2001, ordered that the defendants deliver to the plaintiff a supplementary list of documents disclosing:

1. the employment of Constable Sweet and Constable Matsumoto by the City of New Westminster;
2. training manuals;
3. procedures manuals;
4. equipment that was issued to the constables on October 31, 1999;
5. documents that relate to any excessive use of force by the constables where such excessive use of force has been substantiated by internal investigation, discipline proceedings or by findings of fact in civil proceedings; and
6. any "use of force" reports that may exist.

**24**  As to documents in category (e) above, Master Joyce stated at para. 14 that:

I am of the opinion that the production of mere unfounded allegation would be going beyond what is required under Rule 26. It is one thing to suggest that the City might be put on notice to take steps to deal with an officer who has been shown to have used excessive force. I think it is quite another to suggest that the City ought to have taken steps of some sort to deal with what may be mere unsubstantiated allegations that might have been made by one or more disgruntled citizens. In making these comments I wish to emphasize that there is no evidence that in fact there are any such records in existence but if there are I conclude they need not be produced.

**25**  On October 14, 2003 plaintiff's former counsel received copies of the pleadings in the Kuemper action from counsel for Mr. Kuemper. The plaintiff submits that, given that the existence of the Kuemper action was not before Master Joyce, it is appropriate for the court to re-hear the application and to make a new order. He submits that the requested documents touch upon issues raised by the amended statement of claim and are directly relevant to the knowledge of the City and to the question whether the City ought to have taken better steps to supervise or control the defendant police officers.

**26**  The plaintiff also relies on the decision in Baiden v. Vancouver (City) Police Department, [*[2003] B.C.J. No. 2032*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20NY-00000-00&context=), [*2003 BCSC 1341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20NY-00000-00&context=), in which Romilly J. ordered production by the city police of a police officer's employment records, manuals and disciplinary records on the basis that the records may, directly or indirectly, be evidence of:

1. previous conduct inconsistent with the statement of defence;
2. credibility of the police officers; and
3. similar fact evidence.

**27**  The plaintiff also submits that the documents sought are relevant to the claim of punitive damages.

**28**  The defendants submit that the application should be dismissed because the issue has been properly determined by Master Joyce and the materials sought do not fall within the scope of his order, the allegations not having been found to be substantiated. In addition, the defendants submit that the documents are not relevant, on the basis that the Kuemper incident is not so similar to the subject matter of this action that documents pertaining to it might constitute similar fact evidence. They submit that to allow the production sought will result in the re-opening of the Kuemper action which has now been dismissed by consent.

**29**  I am satisfied that it is appropriate to re-hear the plaintiff's application. The general view is that res judicata does not apply to procedural interlocutory applications such as this, although it appears that the court retains the discretion to decline to conduct a re-hearing where the process is frivolous or vexatious: Talbot v. Ocean Oil Corp., [*[1977] A.J. No. 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-DXPM-S146-00000-00&context=) (C.A.); Pocklington Foods Inc. v. The Queen in Right of Alberta [*(1995), 123 D.L.R. (4th) 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-DY33-B471-00000-00&context=) (Alta. C.A.); see also Paterson v. Reeves, [*[2002] B.C.J. No. 2120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-6046-00000-00&context=), [*2002 BCSC 1341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-6046-00000-00&context=). The renewed application is neither frivolous nor vexatious, in my view, but is based on material of which the plaintiff did not become aware until after Master Joyce made his order. Although the defendants were aware of the Porter action, having filed the appearance in October 1999, the Porter action was not brought to the attention of Master Joyce at the hearing of the plaintiff's application.

**30**  As to the merits of the application, the plaintiff is entitled to obtain information relating to matters in issue, which include the use of excessive force by Constable Sweet and the City's treatment of complaints regarding the same. The court has held that "proper discovery could develop evidence of a system or pattern of conduct which might be admissible": F. v. A Psychiatrist [*(1984), 53 B.C.L.R. 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2RV-00000-00&context=) (S.C.), at page 221, in which the court ordered production of complaints against the defendant similar to that made by the plaintiff, without reference to their disposition. As the plaintiff submits, the court in Baiden, supra, applied F. v. A Psychiatrist on facts similar to those here and ordered broad disclosure of the defendant police officers' files. See also Ribeiro v. The City of Vancouver et al (2 November 2004), Vancouver No. C992466 (B.C.S.C.), allowing the appeal from the decision of Donaldson, M., [*[2004] B.C.J. No. 738*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B29C-00000-00&context=), [*2004 BCSC 492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B29C-00000-00&context=). Both Baiden and Ribeiro were decided after Master Joyce's order of April 3, 2001.

**31**  The documents sought by the plaintiff relate to a complaint of use of excessive force by Constable Sweet, a complaint similar to the one made by the plaintiff in this action. Whether evidence relating to the Kuemper action is admissible as similar fact evidence at trial - the issue raised by the defendants - is a matter for the trial judge and is not to be decided on this application. I am satisfied, based on the decision in F. v. A Psychiatrist, supra, that the plaintiff is entitled to production of the documents sought, subject to any claim of privilege.

1. COSTS

**32**  No submissions were made as to costs. The issue of costs may be set down for hearing at a time convenient to counsel and the court.

MASTER SCARTH

**End of Document**

[***Horvath v. Thring, [2000] B.C.J. No. 131***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1WT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.R.A. Edwards J.

Heard: January 13, 2000

Judgment: January 21, 2000

Vancouver Registry No. B950319

**[2000] B.C.J. No. 131** | 2000 BCSC 123 | 94 A.C.W.S. (3d) 451

Between Ygola Horvath (also known as Jules Horvath), plaintiff, and Douglas Walter Thring, General Motors of Canada Limited, Reid Tate, Al Luelo, Bruce Askew, Her Majesty the Queen in Right of Canada, defendants

(32 paras.)

**Case Summary**

**Crown — Torts by and against Crown — Actions against Crown, defences, bars or exclusions — Recovery of statutory disability or death pension.**

|  |
| --- |
| Application by Canada to amend the statement of defence and for summary dismissal of the claim. The plaintiff Horvath was an RCMP officer. He was seriously injured when the motorcycle he was riding collided with a van driven by the defendant Thring owned by the defendant General Motors. Horvath was advised by Veterans Affairs Canada that he qualified for a pension under the Pension Act and Royal Canadian Mounted Police Superannuation Act on discharge from the RCMP. He brought an action against named RCMP officers and Canada as their employer on the basis of contributory ***negligence***. The trial judge appointed joint and several liability equally between Thring, General Motors and Canada. The action against the named officers was dismissed. On this application, Canada relied on section 9 of the Crown Liability and Proceedings Act and Section 11(2) of the Royal Canadian Mounted Police Superannuation Act as statutory bars on the ground that Horvath was entitled to the pension upon discharge. Canada claimed that it had only recently learned about the pension.  HELD: Application allowed in part.  The application by Canada to amend certain paragraphs of the statement of defence was dismissed, but allowed with respect to the unopposed amendments. The application for summary dismissal of the claim against Canada was dismissed. It was not open to one judge of the court to rectify an alleged jurisdictional error with respect to the interpretation of statutory provisions in an order entered by another judge after trial. The material in support of the application amounted to evidence that Horvath would be entitled to a pension with respect to the injuries. |

**Statutes, Regulations and Rules Cited:**

Canada Pension Plan Act, s. 44.

Crown Liability and Proceedings Act, s. 9.

Government Employees Compensation Act, ss. 4, 12.

Pension Act, s. 111.

Royal Canadian Mounted Police Superannuation Act, ss. 11(2), 32(1), 34(1).

**Counsel**

Albert M. Roos, for the plaintiff (respondent). Robert C. Brun, for the defendants (respondents), Thring and General Motors of Canada. Helen J. Roberts, for the defendant (applicant), Her Majesty the Queen in Right of Canada.

|  |
| --- |
| **E.R.A. EDWARDS J.** |

**1**   The applicant applies to amend her Statement of Defence and for summary dismissal of the claim against her.

**2**  The key amendments sought amount to an assertion of Crown immunity in light of s. 9 of the Crown Liability and Proceedings Act, ss. 11(2), 32(1) and 34(1) of the Royal Canadian Mounted Police Superannuation Act, ss. 4 and 12 of the Government Employees Compensation Act, s. 111 of the Pension Act and s. 44 of the Canada Pension Plan Act.

**3**  The basis for the applications is that "defence counsel only recently became aware that the plaintiff had been approved for a pension under the Pension Act and had received, or was eligible to receive, other moneys from the Federal Crown, and therefore that the plaintiff is statutorily barred from bringing a claim against HMTQ."

**4**  The applications come very late in the day. The plaintiff has already been granted judgment against HMTQ after a trial which determined liability. A second trial to determine quantum of damages is scheduled for April 2001.

**5**  The plaintiff was seriously injured when the motorcycle he was riding collided with a van owned by the defendant General Motors Canada Ltd. ["GM Canada"] and driven by the defendant Thring. The plaintiff was on duty as an RCMP constable and the defendant Thring was a Commonwealth Games volunteer. Both were engaged in setting up and securing a portion of the Pat Bay Highway as a bicycle race track during the games, when the collision occurred.

**6**  The plaintiff sued named RCMP officers and HMTQ as their employer, alleging the officers had negligently permitted Mr. Thring to proceed against the normal flow of traffic, whereupon the head on collision occurred.

**7**  In reasons for judgment dated April 8, 1999, Hardinge J apportioned joint and several liability equally between Mr. Thring and GM Canada together and HMTQ. Hardinge J dismissed the action against the named officers because they could not be identified as those who gave Mr. Thring permission. Judgment was formally entered on May 26, 1999. No appeal was taken.

**8**  Counsel for HMTQ at trial, who was not counsel on this application, conceded at the trial, as Hardinge J noted at paragraph 62 of the reasons for judgment, that "the Crown would be vicariously liable for any damage caused or contributed to by" the RCMP officers negligently granting Mr. Thring permission to proceed.

**9**  Trial Counsel for HMTQ deposed in an affidavit that he was not aware that the plaintiff had applied and been approved for a pension under the Pension Act, stating "this information was not provided to me by my contact with the RCMP".

**10**  An affidavit filed by the plaintiff exhibited correspondence between counsel including a letter dated 23 April 1996 from Veterans Affairs Canada advising the plaintiff he qualified for a pension under the Pension Act and RCMP Superannuation Act on discharge from the RCMP. This letter was sent to HMTQ's trial counsel, in response to his request, by plaintiff's counsel on 13 January 1997, more than two years before the trial.

**11**  I infer that while trial counsel for HMTQ had the means of knowledge of the fact that the plaintiff had been approved for this pension, he must have overlooked that fact or did not appreciate the possible significance of that fact.

**12**  That significance is that the plaintiff may be discharged before normal retirement from the RCMP as a result of his injuries and thereafter be paid a pension.

**13**  Section 9 of the Crown Liability and Proceedings Act, which HMTQ now seeks to plead and rely on provides:

1. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

**14**  Section 11(2) of the RCMP Superannuation Act provides:

11.(2) A contributor who is compulsorily retired from the Force by reason of having become disabled is entitled to a benefit determined as follows:

. . .

(b) if he has to his credit ten or more years of pensionable service, he is entitled to an immediate annuity.

**15**  Section 4(1)(a)(i) of the Government Employees Compensation Act provides:

4.(1) Subject to this Act, compensation shall be paid to

1. an employee who
2. is caused personal injury by an accident arising out of and in the course of his employment, . . .

**16**  Section 111 of the Pension Act provides:

1. No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death.

**17**  Section 44 of the Canada Pension Plan Act provides:

1. Subject to this Part,

. . .

(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

1. has made contributions for not less than the minimum qualifying period,

. . .

**18**  The applicant's position is that these sections act as a statutory bar to any action by the plaintiff to obtain compensation and by the co defendants to obtain a contribution from HMTQ.

**19**  The applicant's counsel argued that bar arose because of the plaintiff's entitlement to funds which the plaintiff has received or may receive from four sources. The first is the full pay and medical coverage he received while recuperating from his injuries. I was advised he received these benefits under RCMP policy. The second is his entitlement to a pension as determined prior to trial. The third is disability benefits he may receive under the Canada Pension Plan. There is no evidence that the plaintiff has applied for these benefits. The fourth is the plaintiff's potential entitlement to compensation under the Government Employees Compensation Act, although it is acknowledged he never applied for such compensation.

**20**  I suggested to counsel that the reason the plaintiff had not applied for the latter compensation is that he may not have qualified for it in light of the fact that he had lost no pay and incurred no direct medical expense. Counsel were unable to state definitively whether the plaintiff would qualify for compensation under the Government Employees Compensation Act or not.

**21**  The material in support of the present application amounts to evidence that the plaintiff will be entitled to a pension in respect of the injuries on which his claim is based if he is discharged early from the RCMP on account of those injuries. That is, the plaintiff may be paid that pension as a result of his injuries.

**22**  There is no evidence any pension or compensation has yet been paid to the plaintiff under the Pension Act, the Government Employees Compensation Act or the Canada Pension Plan.

**23**  For reasons which follow, I need not decide whether possible prospective payment of any of the pensions, compensation or benefits mentioned triggers the application of s. 111 of the Pension Act on the basis that "a pension is or may be awarded" the plaintiff in this case or of s. 9 of the Crown Liability and Proceedings Act.

**24**  As I understand the position of counsel for the applicant, it is that the requested amendments to the Statement of Defence relating to the various statutory provisions quoted above are not strictly necessary. That is because, she argued, the court is obliged to take judicial notice of these provisions and apply them ex mero motu even though they were not formally pleaded or, as she acknowledged, brought to the attention of the judge presiding at the trial.

**25**  Put another way, the position is that Hardinge J lacked the jurisdiction to make the order he did against HMTQ in light of these statutory provisions. The Dominion Canners Ltd. v. Costanza, [*[1923] S.C.R. 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G1DW-00000-00&context=) at 62 (per Anglin J) is support for this position.

**26**  For purposes of this application I assume, without deciding, that Hardinge J lacked the jurisdiction to find HMTQ liable, notwithstanding the concession made at trial to which I have referred.

**27**  The application to amend the Statement of Defence now, provides the basis for the application for summary dismissal of the claims against HMTQ.

**28**  I am unaware of any authority, and none was brought to my attention by counsel, which provides a judge of this court with jurisdiction to reverse an entered order made by another judge after a trial, on the basis that order was made without jurisdiction.

**29**  In the absence of any binding or persuasive authority, I have concluded I cannot confer that jurisdiction on myself by granting amendments to the pleadings which the applicant's counsel acknowledges were not necessary to put the relevant statutory provisions into play during the trial.

**30**  Even if Hardinge J erred in finding liability against HMTQ, and I make no finding that he did, I have concluded that it is not open to one judge of the court rectify an alleged jurisdictional error made by another which is reflected in an entered order, except as regards an error covered by Rule 41(24). See Canada Trust Co. v. Sundist Holdings Ltd., [*[1981] 29 B.C.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1P2-00000-00&context=).

**31**  For one judge to alter an entered order made by another on the basis the order was made without jurisdiction would amount to one judge of the court exercising a superintending jurisdiction over another, akin to that which this court exercises over "inferior" tribunals. Such a superintending jurisdiction does not exist. I cannot interpret Rules 24 (1) and 18A as creating such a jurisdiction.

**32**  The application of HMTQ to amend her Statement of Defence by adding paragraphs 11 through 17 in the draft Amended Statement of Defence which accompanied the motion is dismissed. The application is granted in respect of those other proposed amendments which were unopposed. The application for summary dismissal of the claim against HMTQ is dismissed. The respondents are awarded costs on scale 3.

E.R.A. EDWARDS J.

**End of Document**

[***Keen v. Surrey (City), [2004] B.C.J. No. 2161***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S369-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Burnyeat J.

Heard: July 21 - 23 and August 18, 2004.

Judgment: October 20, 2004.

New Westminster Registry No. S061959

**[2004] B.C.J. No. 2161** | 2004 BCSC 1161 | 134 A.C.W.S. (3d) 503

Between Annette Keen, plaintiff, and City of Surrey, defendant

(30 paras.)

**Case Summary**

**Municipal law — Actions against municipality — Conditions precedent, notice of action or accident — Notice of accident or action, excuse for failure to give.**

|  |
| --- |
| Action by the plaintiff Keen against the defendant City for damages for personal injuries arising when Keen stepped on a sprinkler head while playing soccer in a City park on November 28, 1999. Keen suffered a partial tear of her anterior cruciate ligament. She underwent surgery two years later. On December 8, 1999, Keen phoned the City regarding the incident. In March 2000, Keen's counsel informed the City they were retained with respect to the accident. The letter did not set out a description of the accident, that damages would be claimed, and was not addressed to the City Clerk. Keen did not provide evidence about her knowledge of the written notice requirement or when she obtained legal advice in order to obtain knowledge.  HELD: Action dismissed.  There was no incapacity, any uncertainty as to whether the City was involved, or any injury that was not apparent within the 60-day notice period. There was no evidence to support a finding that Keen was lulled into a false sense of security that led her to believe that it was not necessary to provide the City with written notice. Giving oral notice was not a reasonable excuse for not giving written notice. |

**Statutes, Regulations and Rules Cited:**

Local Government Act, R.S.B.C. 1996, c. 323, ss. 6.5, 198, 286, 286(1).

Occupiers' Liability Act, *R.S.B.C. 1996, c. 337*.

**Counsel**

Counsel for the Plaintiff: W.A. Campbell

Counsel for Defendant: R.G. Hildebrand

|  |
| --- |
| **BURNYEAT J.** |

**1**   On November 28, 1999, Ms. Keen was playing soccer at Bakerview Park in Surrey. Ms. Keen stepped on what she described as a "previously unseen sprinkler head below ground level" and suffered an injury to her left knee. Pursuant to the Occupiers' Liability Act, *R.S.B.C. 1996, c. 337*, Ms. Keen claims that the ***negligence*** of the City caused her injuries as the City failed to take any reasonable care to ensure that she would be reasonably safe in using the field, to take any reasonable care to prevent injury from the unusual danger constituted by the sprinkler head, to make sure that the field was not in a defective and dangerous condition and a danger and a trap to persons lawfully using the field, and to take any adequate measures by way of examination, inspection or otherwise to ensure that the field was in reasonably safe condition or to ensure that the sprinkler heads on the field were not dangerous.

**2**  In addition to denying that it was negligent and in addition to submitting that it took all reasonable steps to see that Ms. Keen and all others using the field were reasonably safe when she was on the field, the City denies liability on the basis that notice in writing to the City Clerk was not made within two months and that Ms. Keen did not commence this action against the City within six months, all pursuant to s. 286 of the Local Government Act, *R.S.B.C. 1996, c. 323* (the "Act").

INJURIES OF MS. KEEN

**3**  After being assisted off the field, Ms. Keen remained to watch the remainder of the game then went to the Emergency Department of Langley Memorial Hospital. The X-ray taken indicated no fractures or dislocations. Ms. Keen was advised to immobilize the knee and ice it and was provided with a "straight leg splint".

**4**  Ms. Keen went to her family doctor the next day and his clinical notes indicate: "4+ medial pain". As a result of continuing problems and despite a negative MIR obtained in July, 2000, Ms. Keen was referred to an orthopaedic surgeon. An arthroscopy revealed: "... a partial tear of her anterior cruciate ligament".

**5**  After she was given general anesthetic, the left knee of Ms. Keen was operated on March 1, 2001 and there was a reconstruction of the anterior cruciate ligament. A small staple was used to secure the reconstruction.

**6**  In his May 6, 2004 medical legal report, the orthopaedic surgeon stated:

At this point in time she has some complaint of aching in the knee with increased activity but I could not demonstrate any significant pathology. The anterior cruciate ligament appears to be stable and on x-ray there was no degenerative change noted. There is some tenderness over the staples and this may be responsible for some of her complaint but I doubt it.

I do not see any valid reason as to why the staples have to be removed but they could be removed quite easily if she desired this.

NOTIFICATION TO THE CITY

**7**  On December 8, 1999, Ms. Keen telephoned the City and was put in contact with Mr. Dan Nielsen of the City regarding the incident 10 days earlier. Mr. Nielsen provided the following notation in an e-mail transmission to Mr. Norris who was the Athletic Field Coordinator for the City in charge of implementing the maintenance program for the sports fields within the City:

On the weekend of November 26, 1999 she tripped on irrigation head that was sunk into the field at Bakerview Park. She stated that she has torn ligaments in her knee. Could you please inspect the irrigation heads at the field to ensure they are safe. The one she tripped on was just outside the 18-yard box on the end of the field closest to the park entrance.

**8**  After receipt of that e-mail, employees of the City in charge of the maintenance of the field then went out to inspect the field and to take measurements relating to the sprinkler heads located on the field.

**9**  In a March 13, 2000 letter to the Legal Services Department of the City, counsel for Ms. Keen stated: "We have been retained on behalf of Annette Keen with respect to an accident she was involved in on or about November 28, 1999 on the premises of the City of Surrey and in particular the soccer field at Bakerview Park". As that letter did not set out a description of how the accident occurred, that damages would be claimed, and was not addressed to the City Clerk, the City submits that this letter does not qualify as proper notice under the Act.

**10**  In a March 29, 2000 letter to the City, counsel for Ms. Keen advised regarding the accident but did not advise the City that any claim was being made against the City. The City also submits that this letter is insufficient notice under the Act.

**11**  The City submits that the first notice which completely complies with the Act was received on August 28, 2000 when the City Clerk was served with the Writ of Summons and Statement of Claim.

WHAT NOTICE IS REQUIRED?

**12**  Section 286 of the Act states in part:

286(1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.

286(3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes:

1. there was reasonable excuse, and
2. the defendant has not been prejudiced in its defence by the failure or insufficiency.

**13**  Pursuant to s. 6.5 of the Act, the notice in writing required by s. 286(1) can be effected if the notice is provided to the "local government officer assigned responsibility under s. 198 [of the Act]". For the City, the officer authorized to receive notices served under the Act is the City Clerk.

**14**  Section 186 of the Act constitutes a statutory bar to liability if Ms. Keen has failed to meet the criteria set out under s. 286(1) or is not in a position to satisfy the Court not only that she had a reasonable excuse why she did not give written notice but also that the City has not been prejudiced in its defence by the failure or insufficiency of the notice.

**15**  The City does not and could not take the position that it has been prejudiced as a result of the failure to provide written notice. As a result of the telephone conversation that Ms. Keen had with Mr. Nielsen, the City was advised very quickly that Ms. Keen had fallen so that the City employees were able to investigate the conditions on the field at Bakerview Park shortly after the accident.

**16**  The City employees were in a position to assess whether the field was in a dangerous state, to ascertain whether there had been any failure to maintain the field in a reasonably safe manner, and to inspect the sprinkler heads to see whether they were installed and maintained in accordance with the guidelines that the City employees were operating under regarding the depth of the sprinklers in relation to the level of the grass and soil on the field. Accordingly, the question is whether Ms. Keen had a reasonable excuse for not providing the written notice required under s. 286(1) of the Act.

**17**  The onus is on Ms. Keen to prove that she had a "reasonable excuse" for not giving the notice within two months: Bates v. Olson, [*[1992] B.C.J. No. 3032*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24RB-00000-00&context=) (B.C.S.C.); Lloyd v. Richards, [*[1985] B.C.J. No. 2823*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21J3-00000-00&context=) (B.C.S.C.); and Griffith v. New Westminster (City), [*2001 25 M.P.L.R. (3d) 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3VV-00000-00&context=) (B.C.S.C.).

**18**  The City submits that Ms. Keen has not provided any direct evidence to support her submission that there was reasonable excuse and submits that none should be inferred based on the evidence presented. Specifically, the City submits that Ms. Keen presented no evidence to the effect that she was ignorant of the requirement to give written notice or that she relied in any way on the telephone discussion that she had in early December, 1999.

**19**  In Teller v. Sunshine Coast (Regional District) [*(1990), 43 B.C.L.R. (2d) 376*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-21K4-00000-00&context=) (B.C.C.A.), Southin J.A. on behalf of the Court concluded that "ignorance of the law" must be "taken together" with other factors in determining whether the plaintiff had shown that there was "reasonable excuse":

In my opinion, ignorance of the law is a factor to be taken into account. So for that matter is knowledge of the law. But all matters put forward as constituting either singly or together a reasonable excuse must be considered. (at p. 388)

**20**  The fact that Ms. Keen did not give the written notice required under the Act does not then allow me to conclude that she was not aware of that requirement. As there was no evidence from Ms. Keen about her knowledge or about when she obtained legal advice in order to obtain knowledge, I can not find that ignorance of the law is one of the factors that I should take into account in determining whether there was a reasonable excuse for not providing the necessary written notice.

**21**  It is clear that ignorance of the law alone will not constitute reasonable excuse: Griffiths, supra; Lloyd v. Richards, [*[1985] B.C.J. No. 2823*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21J3-00000-00&context=) (B.C.S.C.); Holland v. Oak Bay (District) [*(1978), 84 D.L.R. (3d) 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-62B5-00000-00&context=) (B.C.S.C.); Schmidt v. Prince Rupert (City) [*(1960), 24 D.L.R. (2d) 443*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3M3-00000-00&context=) (B.C.C.A.); and O'Connor v. Hamilton (City) [*(1905), 10 O.L.R. 529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBT1-F7ND-G44Y-00000-00&context=) (Ont. C.A.). In Griffiths, I stated:

If the time provisions set out in s. 286(1) of the Act are to have any meaning at all then it cannot be the case that only ignorance of the section is sufficient excuse to bring into play the two fold test set out in s. 286(3) of the Act. The Legislature long ago decided that municipalities should be given notice of potential claims long prior to the expiry of the limitation periods for actions relating to those claims. That decision having been taken by the Legislature, is not for the court to remove the effectiveness of the notice provisions where a plaintiff can only rely on his or her ignorance of s. 286. (at para. 31)

**22**  In determining the issue of whether there was a reasonable excuse, British Columbia Courts have taken into account a number of other factors in addition to the knowledge of a claimant about the law. Those factors include whether there is uncertainty as to whether a municipality was involved or not, whether a potential plaintiff is incapacitated and not in a position to provide the notice, where the gravity of the injury did not become apparent until after the notice period had lapsed, the mental condition and age of the complainant, or whether the potential claimant has been lulled into a false sense of security as a result of actions or inactions on behalf of the municipality.

**23**  There is nothing which would allow me to conclude that there was any incapacity, any uncertainty as to whether a municipality was involved, or any injury which was not apparent within the 60-day period.

**24**  On the question of whether Ms. Keen was lulled into a false sense of security, Ms. Keen relies on two decisions of this Court. In Archer v. Powell River, [*[1982] B.C.J. No. 464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-60T6-00000-00&context=) (B.C.S.C.), after giving verbal notice to the Deputy Clerk of the District, the Plaintiff was advised that the District would look into the matter and the Plaintiff was subsequently visited by an insurance adjuster. In De Rousie v. The Corporation of the North Vancouver, (unreported), C822193 (Vancouver Registry) September 19, 1985, (B.C.S.C.), the mayor had attended the scene of flooding and had led the plaintiff to conclude that the City was looking after the problem. Cummings J., as he then was, stated:

On the evening of the flood the mayor of the municipality visited the area in response to a call from one of the plaintiffs and, in subsequent conversations with Mrs. Bates, which she reported to her co-plaintiffs, she said he assured her that the district would look after the problems which had been caused. The occurrence was notorious in the district, and the plaintiffs, understandably, concluded that the district would look after their problem. In these circumstances, I have no hesitation in concluding that this is an appropriate case in which to waive the bar created by [what is now s. 268 of the Act], .... (at pp. 13-14)

**25**  In both Archer and De Rousie, there was no need to provide the statutory notice as assurances were received by the plaintiffs that the problems which had caused the damages alleged would be attended to. Unfortunately, Ms. Keen did not testify about her conversation with Mr. Nielsen. As well, Mr. Nielsen did not testify. Accordingly, there is no direct evidence from either about what was said to Mr. Nielsen or by Mr. Nielsen regarding what the City would do or about what Ms. Keen should do, including the question of whether Ms. Keen was advised that she should provide written notice to the City if she wished to pursue a claim against the City. Only the e-mail transmission that Mr. Nielsen sent to Mr. Norris after Mr. Nielson had spoken to Ms. Keen is in evidence.

**26**  From the evidence, I can no facts which would support a finding that Ms. Keen was lulled into a false sense of security that led her to believe that it was not necessary to provide the City with the notice required by s. 286(1) of the Act. I am satisfied that the only question which arises is whether the giving of oral advice to a municipality is alone reasonable excuse for not providing the written notice required under s. 286 of the Act.

**27**  Counsel for Ms. Keen was not able to draw any such authorities to my attention. In fact, the decisions in Griffiths, supra, and Schmidt v. Prince Rupert (City [*(1960), 24 D.L.R. (2d) 443*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3M3-00000-00&context=) (B.C.C.A.), are to the contrary. In Griffiths, friends of the plaintiff had provided oral advice to the staff at the ice arena, but such advice did not eliminate the requirement of written notice and was not found to constitute reasonable excuse. In Schmidt, the husband of the plaintiff had made an oral complaint to the mayor within the required time period for notice but the Court found that this did not constitute a reasonable excuse.

**28**  I can not be satisfied that it is appropriate to extend the circumstances which would provide Ms. Keen with a reasonable excuse for not giving written notice by finding that the giving of oral notice is enough so that written notice is not required. In the absence of evidence about the conversation that Ms. Keen had with Nielsen, there is no evidentiary basis to conclude that Ms. Keen could reasonably believe that the written notice required under s. 286 of the Act was not required. The Legislature has required written notice as the format of how a municipality is to be notified and has required that this written notice be provided to the local government official assigned this responsibility under s. 198 of the Act. I am satisfied that mere ignorance of those requirements and the possibility of a mistaken belief that the provision of oral advice eliminates the necessity of following the procedures set out in s. 286 of the Act should not constitute reasonable excuse.

**29**  I adopt the reasoning of O'Halloran J.A. in Schmidt in this regard:

There may be good reasons why lack of prejudice to the city may rationally be good grounds for excusing omission to give the two-months' notice in writing, but if so, it is for the legislature to so amend sec. 736. The court itself cannot rewrite the statute. (at para. 18)

**30**  I find that Ms. Keen has not met the onus of showing that she had a reasonable excuse for failing to provide the notice required under s. 286(1) of the Act. Even though the City could show no prejudice as a result of the failure of Ms. Keen to provide written notice, the Act is clear as to what must be done. No written notice of any sort was provided to the City until almost four months after her fall and nothing was received by the City Clerk until almost nine months after her fall. In those circumstances, the claim of Ms. Keen should be dismissed. The City will be entitled to Party and Party (Scale 3) costs.

BURNYEAT J.

**End of Document**

[***Leung v. Hui, [2000] B.C.J. No. 1696***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22TF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Drossos J.

Heard: November 1, 2 and 3, 1999, and April 28, 2000.

Judgment: August 21, 2000.

Vancouver Registry No. B974924

**[2000] B.C.J. No. 1696** | 2000 BCSC 1254 | 98 A.C.W.S. (3d) 1331

Between Suet Man Leung a.k.a. Judy Suet Man Leung, plaintiff, and Kenneth Ka Yuen Hui, defendant

(42 paras.)

**Case Summary**

**Torts — Trespass - Assault and battery — Burden of proof — *Negligence* — Motor vehicles, standard of care of driver — Damages — Loss of insurance premium discount.**

|  |
| --- |
| Action by Leung against Hui for damages for assault, and for the loss of her motor vehicle road sense insurance premium discount that she would suffer as a result of damage to her motor vehicle caused by Hui. After a night of drinking with friends, Leung attempt to drive away in her vehicle. Hui told her that she was too drunk to drive. While exiting the vehicle, Leung told Hui that she could manage on her own, so he removed his support and Leung fell to the ground and suffered a minor injury. She claimed that Hui's action of physically removing her from the vehicle caused her to fall. After the alleged incident, Leung agreed to allow Hui to drive her car home. While on the way, Hui, who was intoxicated and speeding, was involved in a single-vehicle accident that totalled Leung's vehicle. Leung claimed that he should be held accountable for her loss of an insurance premium discount.  HELD: Action allowed in part.  Leung was awarded $4,500 for the loss of her insurance premium discount. Leung failed to establish that Hui assaulted her or committed wilful acts against her will or without her consent in physically removing her from the car. It was more than likely that Leung fell to the ground of her own accord. However, Hui was negligent in causing the accident and consequent damage to Leung's vehicle. He was liable for Leung's loss of the insurance premium discount. |

**Counsel**

Alastair Rees-Thomas, for the plaintiff. Robert Seto, for the defendant.

|  |
| --- |
| **DROSSOS J.** |

**1**   The plaintiff, Judy Leung, claims damages against the defendant, Kenneth Hui, for personal injuries that she suffered from his alleged wilful acts, i.e. is an assault to her person, and for the loss of her motor vehicle road sense insurance premium discount that she will incur as a result of the collision and damage to her motor vehicle caused by the defendant on or about the early morning of August 2, 1997, in the City of Richmond, Province of British Columbia. The two claims arise out of two separate incidents early that morning.

**2**  The issues will be more readily appreciated by first outlining the facts and circumstances leading to the two incidents.

FACTS:

**3**  At about 10:00 p.m. on August 1, 1997, the plaintiff arrived in her BMW vehicle at the Melody Shake Karokee Bar in Richmond for a social evening with her friend Jimmy Chang and his younger brother, Frank Chang, who had recently arrived in Canada and had known the plaintiff for about a month. The plaintiff had driven to the Bar alone in her BMW and Jimmy Chang together with his two friends and his young brother had driven to the Bar in his vehicle. They met the plaintiff outside the Bar and on entering saw the defendant, Ken Hui, about to leave. He had gone to the Bar earlier, around 9:00 p.m., to a friend's birthday party. Jimmy Chang, Judy Leung and Ken Hui knew each other and Ken Hui had on earlier occasions been at the plaintiff's home once or twice and had dated her a few times. The plaintiff lives with her parents and the defendant with his parents. The plaintiff and the defendant and the Chang brothers are young people and were at the time in their mid to late teens and early twenties.

**4**  It was decided that Ken Hui would join the plaintiff's group and they gathered in a karokee room for an evening of fun, drink and socializing. Mr. Jimmy Chang's two friends soon tired and left early, but the others carried on. During the course of karokee and playing Chinese games beer was periodically ordered. The evidence establishes that beer was the only type of alcoholic beverage ordered and consumed that evening. The plaintiff testified that she drank no beer and had nothing to drink in the way of alcoholic beverage or liquor before arriving at the Bar or while at the Bar and further that she is allergic to alcohol. The defence contends that she not only drank beer throughout while at the Bar, but did so to the point of excess with consequent impairment or drunkenness.

**5**  At approximately midnight, the plaintiff and defendant and the Chang brothers left the Karokee Bar. I find that the plaintiff proceeded to her vehicle first in the parking lot and then the defendant and the Chang brothers followed.

**6**  The defendant testified that he noticed the plaintiff was slumped over the wheel of her car and that she did not initially respond to his questions. A discussion ensued amongst the three young men over the plaintiff's condition to drive her vehicle and Mr. Hui gave his opinion that the plaintiff was too drunk to drive and that he should drive her home. Mr. Hui testified that when he was able to rouse the plaintiff and told her that she was in no condition to drive, she said okay and proceeded to get out of her car, but was initially unable to do so as something appeared to be holding her back. When with added effort she was almost out of the car and it appeared that she was going to fall out, the defendant stepped forward and helped to support her. Pursuant to exiting the car and the plaintiff telling the defendant that she could stand on her own and did not need his support, he let go and the plaintiff fell down. He tried to stop her from falling, but was unable to do so. Jimmy Chang and his brother, Frank, then assisted the plaintiff, who was crying, to the backseat of her car where she was joined in the backseat by Frank Chang. In the meantime, the defendant had entered the driver's seat of the car and Jimmy Chang had proceeded to his vehicle. Both vehicles then left the bar parking lot with one following the other but since the defendant was not that familiar with the route, he lost his way and he and Jimmy Chang stopped at the Steveston Fisherman's Street Pier.

**7**  The plaintiff gives a very different version of the event in the Bar parking lot. She testified that on leaving the Karokee Bar the defendant told her she was drunk which she denied and told him he was drunk. He tried to prevent her from going to her car by pulling her arm, but she shook it off and entered her car, buckled up and locked the door. She started to drive her car out of the parking stall (she had backed in) and was about out when the defendant ran in front of her car to stop it. She stopped and rolled her window down and told him to step aside. He ran to her door, unlocked and opened it and unlocked her seatbelt. He then grabbed the back of her collar and dragged her out of the car causing the belt buckle to hit her lower back and her bottom to land hard on the ground. She started to cry. Jimmy Chang then carried her to the backseat of her car and his younger brother, Frank Chang, also went to be backseat next to her to help. The defendant, Ken Hui, then drove off with Jimmy Chang following in his vehicle. The plaintiff said she was yelling and crying for the defendant to stop and to let her drive, but he would not do so and said you're drunk.

**8**  After the vehicle stopped at the Steveston Pier, I am satisfied that all four got out of the vehicles and some discussion took place. The plaintiff did not want to be driven home by the defendant to face the disapproval of her mother because of her drinking and letting someone else drive her car. I accept that it was decided to drive to the Aberdeen Shopping Mall since Jimmy Chang had previously arranged to pick up two friends at the Mall and where they could telephone the plaintiff's boyfriend to pick her up until it was opportune for her to return home.

**9**  The two vehicles then left the Pier for the Aberdeen Mall with the defendant in the lead continuing to drive the plaintiff's BMW with Frank Chang as a passenger. Jimmy Chang followed in his vehicle with the plaintiff, who had changed vehicles, as his passenger. On reaching the Aberdeen Mall, the defendant approached the Mall parking lot turn-off from the highway at an excessive rate of speed causing him to swing wide off the road and to crash. The BMW was a total write-off. Fortunately, no one was injured in the crash.

**10**  The police attended the accident scene and took written statements from the plaintiff and defendant and the two Chang brothers. The defendant was charged with impaired driving, but the charge was stayed and not proceeded with.

**11**  The plaintiff's insurer has paid the collision coverage for the damaged vehicle. There is, however, no claim, either subrogated or by the plaintiff, against the defendant for compensation for the damages to the vehicle.

ANALYSIS

**12**  The credibility and dependability and weight to give to the testimony of the plaintiff and the defendant and the Chang brothers, let alone a consideration of faulty recollection and perception because of the effects of alcohol and the late hour, are major factors on determining the issues in this case.

**13**  I reject the plaintiff's testimony that she drank no alcoholic beverages and find that she joined in fully with the others in socializing and drinking beer while at the Karokee Bar until they left around midnight. I am also satisfied that the evidence fails to establish that the defendant unlawfully and improperly, or wilfully against the will and without the consent of the plaintiff, removed her physically, or by force, from her motor vehicle or assaulted her causing her to fall to the ground with consequent injuries.

**14**  The written statements of August 2, 1997, of the plaintiff and the Chang brothers to the police make no mention of the defendant, Kenneth Hui, touching the plaintiff before she entered her vehicle in the parking lot, or after she entered of driving it forward and the defendant stepping in front of the vehicle to stop it. Further, and significantly, even though the plaintiff and the Chang brothers acknowledged in their testimony that they were aware that an assault is a serious matter, there is no mention of the defendant manhandling or assaulting the plaintiff when she exited the driver's seat of her vehicle and took a seat in the back of her vehicle nor that she objected to the defendant driving her car.

**15**  To the contrary, Frank Chang in his statement at page 1 and page 3 stated, reading in part:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | p. 1 |  | A. |  | We went to drink beer with Ken, and Judy, my brother, and my friends total five people. We went to Melody Shake to drink. We finished and we got out and Judy was drunk, Ken was already drunk too. Ken did not say he was drunk. Judy had to go home because she had her car there. |  |
|  | p. 3 |  | Q. |  | How did Ken the keys to Judy's car? |  |

1. Judy started the car and we wouldn't let her drink (sic) so Ken drove.

**16**  The word "drink" is obviously an error and should read "drive".

**17**  Pages 1 and 2 of the plaintiff's statement to the police reads, in part, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | p. 1&2 A.1 |  | Before the car accident ... we drank some alcohol. Ken (the driver of my car) had a lot to drink. We drank at Melody Shake Karokee Restaurant. He said he was fine I'm drunk so my friend don't let me drive the car. Ken just got into my drive and drive, we follow him - I was in back of my car with Ken driving. Jimmy the other guy following us. I was still in the backseat with Frank the first time. We went No. 1 and Steveston. I wanted to wait - my mother would not be happy with me - I didn't want to go home. Then we changed seats. Ken and Frank sat in the front seat of my car (Ken driving). I went in Jimmy's and we came here.... |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | p. 2 Q2 |  | Why did you let Ken drive your car when you knew he had been drinking? |  |

A2 Ken said he was fine and my friend trust him.

It is reasonable to infer that the word, 'drive', in the above phrase, A.1, fifth line, "Ken just got into my drive" was intended to mean "my drivers seat."

**18**  The defendant, pursuant to stating in effect at page 1 of his statement to the police that the plaintiff had drunk more beer than him, said:

When we went to leave Judy got behind the wheel of her car and was going to drive. I asked her if I should drive. She gave me permission to driver (sic) her car. I helped her out of the car. While she was getting out of her car she fell down. I got in her car and drove it.

**19**  The plaintiff's testimony of what occurred between her and the defendant before she entered her vehicle at the Karokee Bar parking lot and after she entered and had taken the driver's seat that the defendant opened the door and grabbed her by the collar is not supported by the testimony of Jimmy Chang and Frank Chang. Their evidence in this respect tends to support that of the defendant where they say that he took her by the hand and Frank also mentioned her arm. Also, they make no mention whatsoever of what the plaintiff said occurred between her and the defendant before she entered her vehicle. Jimmy Chang stated under cross-examination that he did not hear any discussion between the plaintiff and the defendant that she said don't drive my car.

**20**  I also find that while the plaintiff was still in the driver's seat of her vehicle in the Karokee Bar parking lot, there was a discussion amongst the three young men on whether the plaintiff, because of her condition, should drive her motor vehicle and pursuant to that, the defendant persuaded the plaintiff to leave the vehicle and let him drive. Her efforts in her testimony to explain away her statement to the police concerning her drinking and why she let the defendant drive were, from my observations of her in the giving of her testimony, unconvincing. Further, there is no evidence to support or corroborate that she was allergic to alcohol.

**21**  It is apparent from the plaintiff's own statement to the police and the other evidence and the arrangements to drive to the Aberdeen Mall to telephone her boyfriend to pick her up that the plaintiff did not wish to be driven home to face her mother because of her drinking. Such not only support that she in fact was drinking but also that any objection that she had to the defendant driving her car related not to his driving it but that he not drive her home and when it was resolved to drive to the Aberdeen Mall to telephone her boyfriend she switched cars and had no objection to the defendant driving her vehicle.

**22**  On the question of whether the defendant manhandled or assaulted the plaintiff, or drove her vehicle without her consent, not only do the statements of the plaintiff and the Chang brothers to the police, as already mentioned, make no mention of such, but I am also satisfied that if in fact it had occurred, Jimmy Chang would have immediately intervened, either alone, or together with his brother, on behalf of the plaintiff to protect her. He would have voiced objection to the defendant driving the plaintiff's vehicle and not have let her accompany the defendant in the vehicle.

**23**  From my observations of Jimmy Chang and Frank Chang in the giving of their testimony, they were favouring the plaintiff where able, especially her friend Jimmy Chang, and reluctant to tell all. They were not fully candid with the court.

**24**  Accordingly, where the evidence of the plaintiff and the Chang brothers conflicts with that of the defendant concerning what transpired when the plaintiff left the driver's seat of her vehicle and the defendant took over the driving of her vehicle, I prefer that of the defendant. I find that she left her vehicle on her own accord with some assistance, when she was having difficulty, from the defendant and when she told the defendant she could manage on her own, he removed his support and she fell to the ground on her own accord.

RESOLUTION:

Personal Injury Claim

**25**  The plaintiff has failed to meet the civil onus of proof to establish that the defendant assaulted her or committed wilful acts against the plaintiff's will or without her consent of physically removing her from her vehicle thereby causing her to fall to the ground with consequent injury. The court finds that after the plaintiff exited and was standing by her vehicle and by her own request dispensed of any further assistance from the defendant, she fell to the ground by her own accord and injured herself. In brief, she was the author of her own misfortune.

**26**  The plaintiff's claim against the defendant for personal injuries is accordingly dismissed.

**27**  In the event that I am in error on finding no liability against the defendant for the plaintiff's injuries, I am satisfied that she did in fact suffer some injuries from her fall after she exited her motor vehicle. Her injuries can properly be described as consisting of a mild to moderate, closer to mild, sprain of her lower back region and sacroiliac with some minor bruising of her forearms.

**28**  The plaintiff is a young person who will be 22 years of age on August 29th. She was in reasonably good health before the accident. Her injuries were not severe. Pursuant to the accident, she was able to manage and continued to attend for her school studies. It was not until September 27, 1997, almost two months after the accident, that she first saw her family doctor for assessment and treatment because of ongoing soreness and discomfort of varying intensity to her lower back area. There was nothing of any significance to prevent her from seeing her doctor earlier.

**29**  Medication and exercise were prescribed and a series of physiotherapy treatments were commenced on October 3, 1997, involving some twelve treatments initially taken twice a week. She next saw her doctor on October 9th, 1997.

**30**  The plaintiff testified that the real bad part of her pain and discomfort lasted for about a month and by the seventh or eighth physiotherapy treatment in late October, 1997, she felt 50% improvement and by the end of the treatments 75% recovered and by November/December, she felt much better and almost there except for some lingering residuals which were more bothersome than disabling. The physiotherapy treatments were discontinued on December 10, 1997, when the plaintiff experienced no discomfort after returning to her normal daily activities. There were some subsequent flare-ups resulting in three further physiotherapy treatments in late May, 1998, with good results. Since June 30, 1998, there have been no further physiotherapy treatments or treatment given. The prognosis is for full recovery. In this respect, the medical/legal report of July 14, 1998 of the plaintiff's doctor sets out the following at page 4, paragraph 9:

I believe Judy's injury carries a favourable prognosis for recovery. As mentioned before age is on her side. The other positive factors are that Judy is an active person, and though somewhat hampered by her discomfort she has generally worked through it and not allow (sic) it to stop her from getting on with her daily living. However she may still continue to experience some mild symptoms on and off yet before she recovers from the injury. I believe that the possibility of a permanent type of disability is remote.

**31**  Plaintiff's counsel submits that the plaintiff is not going beyond the first year post accident on her injuries claimed which I find, in any event, reasonable on the evidence.

**32**  I am satisfied on the whole of the evidence that the plaintiff had largely recovered from her injuries by the end of December, 1997, and completely by the end of a year post accident with minimal expectation of any future problems. She was able to function throughout, albeit initially with some pain and discomfort, and although some of her social and recreational activities were initially curtailed, and then limited, she was after a year able to carry on.

**33**  Accordingly I set her non-pecuniary damages for personal injuries at $10,000.

1. Loss of Road Sense Premium Discount:

**34**  As a result of the collision and damage to her motor vehicle, the plaintiff lost her ICBC road sense discount from her yearly motor vehicle insurance premiums. The material shows the plaintiff's annual discount at $1,661 when she buys a motor vehicle of similar type and value. Her discount loss for deduction against her yearly premiums will decrease at annual increments of 10% so that after 10 years her discount will be restored in full.

**35**  At the conclusion of the trial on April 28, 2000, the plaintiff testified that she has not as yet purchased a replacement motor vehicle and therefore has paid no motor vehicle insurance premiums thereby suffering no premium discount loss to date. About six months after the August 2, 1997, motor vehicle accident, the plaintiff's mother bought a vehicle in her own name and received the full benefit of the premium discount in her own right as owner of the vehicle against her motor vehicle annual insurance premiums.

**36**  The defence contends that they are therefore not liable for any loss of premium discount. However, the plaintiff further testified that her mother was returning to Hong Kong for an extended period of time leaving her and her brother in Canada and that her mother was either selling her vehicle or transferring it to the brother. In any event, the plaintiff intended to buy, as soon as able, another motor vehicle in the same price range as her previous vehicle on which the present premium and discount figures are postulated.

**37**  I accept that the plaintiff intends to buy another motor vehicle in the not too distant future and is motivated to do so.

**38**  No authority on point was presented by counsel of where a third party who damages an owner's motor vehicle was held liable in damages for lost premium discount resulting from the collision coverage being brought into play. However, I am satisfied that where a third party negligently damages another's motor vehicle with consequent loss of insurance premium discount to the owner, that such loss is reasonably foreseeable and on the general principles of ***negligence*** the third party is liable therefore.

**39**  In the present case, the defendant by his excessive speed in failing to observe and make his turn in sufficient time into the Aberdeen parking lot was clearly negligent in causing the collision and consequent damage to the plaintiff's motor vehicle and loss of the plaintiff's insurance premium discount.

**40**  The defendant is accordingly liable in damages for the loss of the plaintiff's discount. On the basis of the evidence and information before the court, the determination of such loss with any precision is difficult. However, on allowing for the annual 10% increment deduction and for the contingencies of when and where the plaintiff will purchase a replacement vehicle and whether she may again lose her discount because of an accident, or otherwise, and discounting to present value as best one can on the present material, the court sets the amount at $4,500.

SUMMARY

**41**  The plaintiff's claim for personal injuries is dismissed but her claim for loss of her road sense premium discount is granted by judgment in the sum of $4,500.

**42**  As success has been divided between the parties, there will be no costs to either party.

DROSSOS J.

**End of Document**

[***Manavi v. Cascadia Apartment Rentals Ltd., [2017] B.C.J. No. 218***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MW0-J9P1-JPP5-21S2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Master C.P. Bouck

Heard: January 24, 2017.

Judgment: February 6, 2017.

Docket: S164264

Registry: Vancouver

**[2017] B.C.J. No. 218** | 2017 BCSC 190

Between Ali Manavi and Naghmeh Hesmati, Plaintiffs, and Cascadia Apartment Rentals Ltd., Defendant

(15 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Adding or substituting — Application by the plaintiffs Manavi and Hesmati to add Nacel and CR Eleven as defendants dismissed — The action concerned alleged damages and loss resulting from a break and enter into the plaintiffs' apartment — The tenancy agreement named Nacel as landlord and CR Eleven was the owner of the building — The nexus between the lease agreement and a cause of action against either proposed party was not sufficiently articulated so as to justify adding either entity.**

**Landlord and tenant law — Proceedings — Practice and procedure — Parties — Application by the plaintiffs Manavi and Hesmati to add Nacel and CR Eleven as defendants dismissed — The action concerned alleged damages and loss resulting from a break and enter into the plaintiffs' apartment — The tenancy agreement named Nacel as landlord and CR Eleven was the owner of the building — The nexus between the lease agreement and a cause of action against either proposed party was not sufficiently articulated so as to justify adding either entity.**

**Statutes, Regulations and Rules Cited:**

Occupiers' Liability Act, *RSBC 1996, c 337*,

Residential Tenancy Act, *S.B.C. 2002, c. 78*,

Supreme Court Civil Rules, Rule 6-2(7)

**Counsel**

Counsel for the Plaintiffs: A. Soliman, S. Karim (Articled Student).

Counsel for Defendant and proposed defendants Nacel Properties Ltd. ("Nacel") and CR Eleven Holdings Ltd ("CR Eleven"): A. Sabur.

**Reasons for Judgment**

|  |
| --- |
| **MASTER C.P. BOUCK** |

**Introduction**

**1**  This action concerns alleged damages and loss resulting from a break and enter into the plaintiffs' apartment.

**2**  The plaintiffs seek orders to add Nacel and CR Eleven as defendants as well as amend the notice of civil claim (the "new NOCC") to plead, among other things, reliance on the *Occupiers' Liability Act*.

**3**  The proposed defendant Nacel objects to being added to the proceeding. While the proposed defendant CR Eleven concedes that it is a proper party to the proceeding, it takes issue with some of the content of the draft amendment NOCC.

**Facts**

**4**  The incident in question occurred on September 29, 2015. The plaintiffs were then occupying the apartment pursuant to a tenancy agreement naming Nacel as landlord. Shortly after entering to the agreement, and before occupying the apartment, the plaintiffs were advised in writing that the "Landlord's management company name has been changed from Nacel to Cascadia". A condition inspection report executed by the plaintiffs names Cascadia as the landlord.

**5**  CR Eleven is the owner of the building in which the apartment is situate. Cascadia and the proposed defendants are inter-related companies.

**6**  In their NOCC filed on May 11, 2016, the plaintiffs make the following pleas:

...

1. The defendant, Cascadia Apartment Rentals Ltd., previously known as Nacel Properties Ltd., has a place of business at #200 555 West 8lh Avenue, Vancouver BC, V6B 1C6 (the "Defendant").
2. At all material times the Defendant is in the business of operating a strata company.
3. The Plaintiffs rented a unit at a building on 1107 - 1221 Homer Street, Vancouver BC, V6B 1C5 operated by the Defendant from April 1, 2014 to November 30, 2015 (the "Residence").

...

1. The Defendant failed to meet its obligations to secure the building.

...

**Part 3: LEGAL BASIS**

1. The Defendant committed the tort of ***negligence***.
2. The Plaintiffs' claim is against the Defendant for damages for ***negligence*** that caused loss and injury to the Plaintiffs.
3. The Defendants (sic) is responsible for the maintenance and security of the building.
4. The Defendant failed its obligations. The Plaintiffs suffered loss and damages as a result.

**7**  The response to civil claim has been amended on one occasion with those amendments best described as wholesale replacement of the initial pleading. In the amended response, the defendant Cascadia denies owing any duty of care to the plaintiffs and rejects the claim entirely.

**8**  The new NOCC is attached as Schedule "A" to these reasons. As can be seen, the specific pleas regarding Nacel and CR Eleven are found in paras. 14 through 16 and 21c. Under Legal Basis, the plaintiffs claim that the "Defendants" were negligent and breached their statutory duty of care. Neither CR Eleven nor Nacel are identified as defendants in Part 1 of the proposed amended notice of civil claim.

**9**  No notice of trial has been taken out.

**Discussion**

**10**  In their notice of application, the plaintiffs identify the sole legal basis for the application as "Rule 6-2(7)". That Rule provides:

**Adding, removing or substituting parties by order**

1. At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
2. order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
3. order that a person be added or substituted as a party if
4. that person ought to have been joined as a party, or
5. that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
6. order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
7. any relief claimed in the proceeding, or
8. the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

**11**  The notice of application does not make clear which sub-rule is relied upon but it must be either (b) or (c). The object of these sub-rules and considerations for the exercise of the court's discretion is described in *Alexis v. Duncan*, [*2015 BCCA 135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60HK-00000-00&context=) at paras. 14-17, and *Terasen Gas Inc. v. TNL Construction Services Ltd.*, [*2011 BCSC 1345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62C9-00000-00&context=) at paras. 6-9.

**12**  While the considerations under Rule 6-2(7) (b) and (c) are distinct, there must be some basis in the evidence and in the pleadings upon which the court can exercise its discretion: *Backer v. Backer*, [*2005 BCSC 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S189-00000-00&context=) at paras. 38-39. In this case, the plaintiffs acknowledge that the new NOCC is flawed. Among other problems, the draft pleading does not identify the proposed defendants in the statement of facts nor, it appears to me, provide a factual basis on which a claim in either ***negligence*** or breach of statutory duty could be made out against either Nacel or CR Eleven. Indeed, paragraph 14 of the draft pleading would appear to absolve Nacel from any liability for the plaintiffs' losses. It is appreciated that the plaintiffs rely on the evidence of the lease agreement but the nexus between the lease agreement and a cause of action against either Nacel or CR Eleven is not sufficiently articulated so as to justify adding either of these entities pursuant to *SCCR* 6-2(7).

**13**  The proposed defendant CR Eleven is willing to be added to the proceeding but only if the new NOCC claim is modified. It is not up to the court to direct how the plaintiffs' pleadings should be re-drawn to support the relief sought or meet the position taken by CR Eleven. In any event, if CR Eleven agrees to being added as a defendant based on a further draft amended notice of civil claim, the parties can proceed with that relief by way of a consent desk order.

**14**  Having no proper basis on which to exercise my discretion, the application for relief sought in paragraphs (1) and (3) of the plaintiffs' notice of application is dismissed with liberty to re-apply upon filing further affidavit material, if deemed necessary by the applicant, and a revised draft amended notice of civil claim attached as Schedule "A" to the new notice of application.

**15**  Given this result, together with the sparsity of the legal basis content in the notice of application, the defendant Cascadia shall have its costs fixed at $750 in any event of the cause, not payable forthwith.

MASTER C.P. BOUCK

\* \* \* \* \*

**Schedule "A"**

AMENDED MOTICE OF CIVIL CLAIM

**This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

1. File a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
2. Serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

1. File a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
2. Serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff,

1. If you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
2. If you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
3. If you were served with the notice of civil claim anywhere else, within 49 days after that service, or
4. If the time for response to civil claim has been set by order of the court, within that time.

**Claim of the Plaintiff**

**Part 1: STATEMENT OF FACTS**

1. The plaintiff, ALI MANAVI, is a Realtor and has an address of 2206-388 Drake Street, Vancouver BC, V6B 6A8.
2. The plaintiff, NAGHMEH HESHMATI, is a retail sales associate at Sears Canada and has and address of 2206-388 Darke Street (collectively with Ali Manavi, the "Plaintiffs").
3. The Defendant, Cascadia Apartment Rentals Ltd. ("Cascadia"), [previously known as Nacel Properties Ltd.,] has a place of business at #200 555 West 8th Avenue, Vancouver BC, V6B 1C6 [(the "Defendant")]. [Editor's note: Text in brackets is struck out in the original.]
4. At all material times, Cascadia was in the business of operating a strata residential management company.
5. The Plaintiff had rented a unit at a building on 1107 - 1221 Homer Street, Vancouver BC, V6B 1C5 from April 1, 2014 to November 30, 2015 (the "Residence").

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [6. |  | On or about Tuesday September 29, 2015 the Residence was broken in to and the Plaintiffs' valuables were stolen.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [7. |  | The Plaintiffs called the RCMP police to report the theft and the RCMP police made an investigation.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [8. |  | The RCMP police's investigation report concluded that the building's security system was inadequate.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [9. |  | The responsibilities of the Defendant defendants include maintenance and security.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [10. |  | The Defendant defendants failed to meet its obligations secure the building.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [11. |  | The Residence was broken into as a result of the Defendant's defendants' failure to secure the building.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [12. |  | The Plaintiffs' valuables were stolen and have not been recovered.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [13. |  | The Plaintiffs no longer felt safe in the Residence and as a consequence had to move to a new more secure building.]  [Editor's note: Text in brackets is struck out in the original] |  |

1. The Residence was located within a building, originally operated by Nacel Properties Ltd. ("Nacel"), but which was later managed by Cascadia, and which continued to be managed by Cascadia at the relevant time.
2. The Residence is owned and was owned at all material times by the Defendant, CR Eleven Holdings Ltd. (the "Landlord"), whose registered and records office is located at #200 555 West 8th Avenue, Vancouver BC, V6B 1C6.
3. The Plaintiffs plead and rely on the *Occuplers Liability Act*, *RSBC 1996, c 337* and the *Residential Tenancy Act*, *S.B.C. 2002, c. 78*, and state that the Defendants were both "occupiers" of the complex within which the Residence was located, and further, that the Landlord was an "occupier" of the Residence itself, for purpose of ensuring the Residence was reasonably safe and secure.
4. On Tuesday September 29, 2015, the Residence was broken in to and a significant amount of valuables belonging to the Plaintiffs were stolen.
5. The Plaintiffs called the police to report the theft and the police conducted an investigation.
6. The police's investigation report concluded that the building's security system was inadequate, in that:
7. There was no security camera system covering any part of the building, apart from the lobby area.
8. The lock providing entrance to the Residence was either picked, or alternatively, the master key was provided to the assailants who accessed the Residence.
9. There was no access control system to obtain access to the elevators, or specific floors within the building.
10. An exterior fire escape door was unlocked, and provided easy access to the building by criminals.
11. The Plaintiffs state that the Defendants owed the Plaintiffs a positive, affimativ duty of care to take reasonable steps, so as to ensure the Residence itself was in a state of repair which ensured reasonably safety to the occupants, and further, a duty of care, so as to ensure the common areas and all points of entry to the building and all areas which lead to the Residence and which were not physically occupied by the Plaintiffs or other tenants and owners, were reasonably secure, so as to prevent crime from taking place in such areas, and to prevent criminals from using those areas to gain access to the Residence.
12. The Plaintiffs plead and rely on the *Occupiers Liability Act*, *RSBC 1996, c 337* and the *Residential Tenancy Act*, *S.B.C. 2002, c. 78*, and without limiting the geerality of the foregoing
13. Plead that the Landlord eas an occupier of the Residence, including all points of entry and exits, for purposes of ensuring they were reasonably safe from all froms of danger, including the danger of loss through theft or unauthorized entry, and to this end owed a duty of care to the Plaintiffs, as tenants and to all persons visiting the leased premises, to ensure they were reasonably safe.
14. Plead that Cascadia owed the same duties to the Plaintiff as the Landlord, in regard to the common areas surrounding the leased premises, including a duty to have proper methods of access control, emergency alarms, security cameras and/or monitoring systems;
15. Plead that Nacel owed the same duties to the Plaintiffs as the Landlord, in regard to the common areas surrounding the leased premises, including a duty to have proper methods of access control, emergency alarms, security cameras and/or monitoring systems
16. Plead that the Defendants knew, or ought to have known, that the Resident, including the common areas are places where criminal activities, and specifically theft, have been committed in the past and would be likely to occure in the future, and. the cost of installing security cameras and/or monitoring systems, or employing security personnel, or using safety equipment, such as fencig and access control systems, on their premises, was not excessive, and would have been a deterrence and significantly enhanced the Plaintiffs' reasonable safety while on the premises, including the safety of theirbelongings, and in fact, would have prevented the theft from occurring.
17. The Defendants failed to meet their common law duty of care and statutory obligations in the above regards, nd as a result thereof the Residence was breached and valuables belonging to the Plaintiffs were stolen.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 22. |  | The Plaintiffs no longer felt safe in the |  |  |
|  |  | Residence and as a consequence had to move to a | new |  |
|  |  | more secure building. |  |  |

1. The Plaintiffs have suffered general and special damages as a results thereof, in an amount to be quantified prior to trial.

**Part 2: RELIEF SOUGHT**

1. General Damages;
2. Specific Special Damages;
3. Interest under the *Court Order Interest Act*, *RSBC 1996, c.79*;
4. Costs; and
5. Such further and other relief as this Honourable Court may deem just.

**Part 3: LEGAL BASIS**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [1. |  | The Defendant committed the tort of negilgence,]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [2. |  | The Plaintiffs' claim is against the Defendants for damages for ***negligence*** that caused less and injury to the Plaintiffs,]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [3. |  | The Defendants is responsible for the maintenance and security of the building.]  [Editor's note: Text in brackets is struck out in the original] |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | [4. |  | The Defendant failed its obligations. The Plaintiffs suffered loss and damages as a result.]  [Editor's note: Text in brackets is struck out in the original] |  |

1. The Defendants were negligent, in that they breached the duty of care owed to the Plaintiffs, and further, failed to fulfil their duties as landlord and as "occupier", as contemplated in the *Occupiers Liability Act*, *RSBC 1996, c 337* and the *Residential Tenancy Act*, *S.B.C. 2002, c. 78*, in that they did not take reasonable steps to ensure the Residence and the common areas and building were reasonably safe and free from access points for criminals.
2. As a result of the aforementioned breach, the Residence was breached and the Plaintiffs' belongings were stolen.
3. At a minimum, the Defendants ought to have known that due to their inadequate security measures, this was likely to have occurred.
4. The Plaintiffs' claim is against the Defendants for damages for ***negligence*** and breach of statutory duty that caused loss and injury to the Plaintiffs.

Address for service of the Plaintiffs

Ali Manavi & Naghmeh Hesmati: [c/o Adam Soliman]

[Soliman & Associates]

[7340 Westminster Hwy, Suite 210]

[Richmond BC, V6X 1A1]

Email address for service: [Adam.Soliman@legalcounsels.ca] [Editor's note:

Text in brackets is struck out in the original]

Lonsdale Law

1200 Lonsdale Avenue, Suite 304

North Vancouver, BC V7M 3H6

c/o Adam Soliman

Email address for service: 604 980 5079

The address of the registry is: 800 Smithe Street, Vancouver BC V6Z 2E1

Date: [11 May 2016] [Editor's note: Text in brackets is struck out in the original] 19/Jan/2017

Signature of lawyer for Plaintiffs

Adam Soliman

[ ] aclass action

[ ] maritime law

[ ] aboriginal law

[ ] constitutional law

[ ] conflict of laws

[x] none of the above

[ ] do not know

the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*

MASTER C.P. BOUCK

**End of Document**

[***Ogden v. Gulf Log Salvage Co-operative Assn., [2005] B.C.J. No. 61***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0WJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Ralph J. (In Chambers)

Heard: July 29 - 30, 2004.

Judgment: January 17, 2005.

Vancouver Registry No. S026001

**[2005] B.C.J. No. 61** | 2005 BCSC 56 | 136 A.C.W.S. (3d) 410 | [2005] B.C.T.C. 56

Between Philip Ogden, plaintiff, and Gulf Log Salvage Co-operative Association and Her Majesty The Queen In Right Of The Province of British Columbia, defendants

(58 paras.)

**Case Summary**

**Civil procedure — Class or representative actions — Certification — Common interests — Tort law — *Negligence* — Duty of care.**

|  |
| --- |
| Application by Ogden for certification of a class action proceeding. Ogden was a salvor of logs who sold his logs to the Gulf Log Salvage Co-Operative Association pursuant to a statutory requirement. Ogden commenced an action on behalf of himself and other salvors alleging that Gulf Log breached the duty of care it owed to the salvors to obtain the best possible price for the logs. Ogden also sued the province of British Columbia for failing to enforce the statute that required Gulf Log to dispose of the logs at the highest price reasonably obtainable. Gulf Log and the Province argued that the determination of the breach of duty of care was not suitable for a class action, as every transaction between Gulf Log and each salvor needed to be analyzed individually.  HELD: Application dismissed.  The claims of class members raised individual issues, as each sale transaction was governed by many factors. The issue to be determined was whether Gulf Log failed to obtain the highest price possible in each transaction. Individual hearings were necessary for the determination of loss as a component of liability and of damages. The determination of any common issues would have been of little assistance in advancing the action. Due to the significant impact of proof of liability in individual claims, prosecution of small claims by individual actions or consolidation of a small number of individual actions was more practical for resolving the claims than a class action. |

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, [*R.S.B.C. 1996, c. 50, ss. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=), 4(1), 4(2)(a), 7(a).

Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241*.

**Counsel**

Counsel for the plaintiff: Mark G. Underhill and Mike Murphy.

Counsel for the defendant Gulf Log Salvage Co-operative Association: David F. McEwen, Q.C. and Hillary Stephenson, Articled Student.

Counsel for the defendant, Her Majesty The Queen In Right Of The Province Of British Columbia: T. Leadem, Q.C. and Heidi Hughes.

|  |
| --- |
| **RALPH J.** |

Introduction

**1**  Mr. Ogden is a log salvor and brings this action against the defendants under the Class Proceedings Act, *R.S.B.C. 1996, c. 50* (the "Act"). He says that he and the proposed class members have suffered damage and loss as a result of the failure of the defendants to meet their obligations to ensure that salvaged logs sold by the salvors in the Vancouver Log Salvage District ("VLSD") were disposed of for the best price reasonably obtainable.

**2**  In this application Mr. Ogden seeks to have the proceeding certified as a class proceeding pursuant to s. 4 of the Act. Section 4 of the Act provides:

4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of 2 or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff who
6. would fairly and adequately represent the interests of the class,
7. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
8. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Background and the Positions of the Parties

**3**  In my Reasons for Judgment of January 16, 2004, (Ogden v. Gulf Log Salvage Co-Operative Assn., [*[2004] B.C.J. No. 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-618T-00000-00&context=), [*2004 BCSC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-618T-00000-00&context=)) ruling on the plaintiff's application to add Her Majesty the Queen in Right of British Columbia (the "Province") as a defendant in the proceeding, I described the log salvaging scheme as follows:

[para3] The log salvaging scheme which gives rise to this action is established under the Forest Act, *R.S.B.C. 1996, c.157* ("the Act"), which authorizes the Minister to establish a log salvage district and to regulate salvaging activity within it. Section 151(2)(c) of the Act empowers the Lieutenant Governor in Council to make regulations respecting log salvaging. Under this authority the Log Salvage Regulation for the Vancouver Log Salvage District, [*B.C. Reg. 220/81*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F5KY-B029-00000-00&context=) ("the Regulation") was enacted.

[para4] In general terms, the Act and the Regulation provide a statutory arrangement which authorizes the Minister to establish a salvage district, to issue permits to persons who intend to salvage logs in the district, and to issue a licence to a person to accept the delivery of the logs salvaged by the permit holders.

[para5] A licence holder must dispose of the logs according to provisions in the Act and the Regulation. If a licensee fails to comply with the licence, the Act or the Regulation, the Minister may suspend or cancel the licence.

[para6] The Vancouver Log Salvage District is the only log salvage district that has been established under the Act and Regulation. Gulf Log Salvage holds the only licence that has been issued.

[para7] A person must not salvage logs in the log salvage district without a log salvage permit and a permit holder may only dispose of salvaged logs in the manner provided in the Regulation. Mr. Ogden estimates that a total of approximately 4900 permits have been issued since the Regulation was made, of which 500 or 600 have been issued in the past ten years. He estimates that there are currently 300 active log salvors.

[para8] The Regulation divides salvaged logs into two categories: salvaged logs for which an owner may be identified, and other logs for which no owner can be identified. If the owner in the first category claims the logs, a sale to the owner is negotiated or arbitrated. If the owner fails to claim the logs within three working days then the licensee is deemed to be the owner and is required to dispose of the logs at "the highest price reasonably obtainable." Similarly, in cases where an owner cannot be identified, the licensee is also required to dispose of the salvaged logs at "the highest price reasonably obtainable."

**4**  Mr. Ogden asserts that Gulf Log Salvage has consistently failed to dispose of the logs at the highest price reasonably obtainable and to base the salvors' compensation on the best price reasonably obtainable. He also asserts that the Province has consistently failed to require Gulf Log Salvage to do so. It is his position that these alleged failures constitute a breach of the duty of care giving rise to a claim in ***negligence*** and also a breach of a fiduciary duty.

**5**  Mr. Ogden says that the proposed class should be defined as:

All persons in the province of British Columbia who hold or, at any time since October 30, 1992, have held valid log salvage permits pursuant to the Vancouver Log Salvage District Regulation and who have delivered logs under such permits.

**6**  As noted above, Mr. Ogden has estimated that there are currently approximately 300 active log salvors.

**7**  Mr. Douglas Cooper, the general manager of Gulf Log Salvage, has deposed that approximately 40% of the total volume of logs salvaged in the Vancouver Log Salvage District is handled by the salvor making direct sales of salvaged logs to buyers at prices negotiated between the salvor and buyer. Some of these salvors do not deliver any logs to either of Gulf Log Salvage's two receiving stations. Mr. Cooper estimates that in the period from October 1, 1996, to August 31, 2003, there were 204 permittees who made at least one delivery of logs to the receiving stations. Some permittees delivered their logs solely to the Howe Sound Receiving Station, some solely to the Fraser River Receiving Station and some to both stations.

**8**  I note that in respect of "direct sales" by salvors to buyers, the Regulation nevertheless requires that payment be made to the salvor through Gulf Log Salvage. Gulf Log Salvage says, however, that it is does not interfere with the negotiated price between salvors and buyers and this statement is not disputed by the plaintiff.

**9**  Mr. Cooper has deposed that Gulf Log Salvage has sold logs by three different methods since 1996. From 1996 to approximately 1998, saw logs and pulp logs delivered to the receiving stations were sold on an individual boom basis by negotiation with prospective purchasers. From 1998 to May 2002, saw logs continued to be sold using the same method but pulp booms were sold pursuant to negotiated agreements with the only two end-users. Since May 2002, the selling method for logs other than pulp logs has been changed to a tender process by which groups of eight to ten booms are offered to all log buyers known to Gulf Log Salvage. Mr. Cooper produced a list of 43 potential buyers.

**10**  For a number of years, Gulf Log Salvage has periodically published a list of valuation rates for salvaged logs. The plaintiff says that the lists have become a "proxy" for what constitutes "the highest price reasonably obtainable." It is the plaintiff's submission, however, that the price lists do not reflect the best price reasonably obtainable for salvaged wood and, as a result, salvors are receiving less compensation than they would be entitled to if the Regulation was complied with.

**11**  As "a comparison", Mr. Ogden appended to his affidavit what are known as the "Vancouver Log Market" selling prices for July 1997 and Gulf Log Salvage's "Valuation Rates for Salvaged Logs" for the same time period.

**12**  Mr. Ogden also deposed that log salvors on the mid-coast outside of the Vancouver Log Salvage District, and therefore not subject to the Regulation, receive substantially more money for salvaged logs per grade than he receives from Gulf Log Salvage. There were, however, errors in Mr. Ogden's evidence on this matter and his counsel appropriately did not seek to give this evidence any weight.

**13**  Mr. Ogden also exhibited to his affidavit a copy of an internal audit report prepared by the Office of the Comptroller General in the Ministry of Finance for the Ministry of Forests in September 2001, which noted that, "in the opinion of three log buyers operating in the Vancouver Forest Region", salvaged logs should normally sell for between 70 and 90% of the price of non-salvaged logs. The three log buyers were not identified and the basis for their opinion was not provided in the report. The audit report stated that in a comparison of receiving station sale prices to Vancouver Log Market prices, it was found that salvaged logs were sold at a discount of between 33 and 58% depending on the species.

**14**  The report also commented on Gulf Log Salvage's use of price lists. In testing Gulf Log Salvage's compliance with its obligation to pay the highest price reasonably obtainable over a 21-month period ending June 30, 2001, the auditors found that the use of the price lists "on average" undervalued by 10% the actual sale prices received for the logs.

**15**  Mr. Stuart Messenger is a scaling manager with the Ministry of Forests, Coast Region. In an affidavit filed in this application, Mr. Messenger described the process by which average market values, often referred to as the Vancouver Log Market selling prices, are derived. He deposed that, although many sales transactions are reported to the Ministry, a mathematical process must be applied to the information in order to derive market values for each species and grade.

**16**  Mr. Messenger says, however, that the sampled individual sale transactions may be made up of a number of species and grades assembled into different "sorts", frequently based upon the specifications of purchasers. He states that for pricing purposes, sort specifications are more important than grading. He deposed:

Because of the variation in the "sort" description given to a parcel or boom, the different grades assigned to the logs, and the fluctuation in the prices, the AMVs [average market values] are not representative or typical of the actual prices.

**17**  Mr. Messenger stated further that marine log salvage presents additional complexities that impact the marketing and pricing of salvaged logs. He says that the quality of logs varies significantly over periods of time. Potential purchasers recognize several risk factors that are associated with marine salvaged logs. Receiving stations are smaller scale operations and their "sorts" may not be comparable to the full range of domestic sorts recognized by traders.

**18**  Mr. Douglas Cooper, the general manager of Gulf Log Salvage, further elaborated on the diversity of the log sorts and the variety of ways in which logs are delivered to the receiving stations by salvors. As an example, Mr. Cooper deposed that a delivery by Mr. Ogden in December 2003 was made up of 69 logs that were placed in eight different sorts, placed in eight different booms and sold through eight different transactions.

**19**  Mr. Cooper also deposed that, in 2003, the highest net value of total deliveries paid to a single salvor was $102,034 and the lowest net payment to a salvor was $229. From October 1, 1996 to September 25, 2003, Mr. Ogden received $58,439 for the logs he delivered to the receiving stations in the Vancouver Log Salvaging District.

**20**  In advancing his submission that salvors are receiving less compensation than they would be entitled to if the Regulation was complied with, the plaintiff intends to draw upon information relating to the price for non-salvaged wood contained in the Vancouver Log Market selling prices. It is Mr. Ogden's submission that salvaged wood should normally sell at an ascertainable percentage of the price of non-salvaged wood, depending on the species and grade. He says that determination of the differential is likely to be the subject of expert evidence.

Issues

**21**  While not confining their submissions to them, the parties agree that the issues central to the determination of this application are the questions of whether the claims of the class members raise common issues and whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. While I have concluded that this application can be determined on the basis of the analysis of these two questions, I will also comment on the other requirements of s. 4(1) of the Act.

Do the Pleadings Disclose a Cause of Action?

**22**  Some comment should be made regarding the submissions of the parties on whether the pleadings disclose a cause of action. Both defendants assert that no cause of action has been disclosed. For the purposes of the hearing of this application, counsel for the Province accepted that my ruling of January 16, 2004, to add the Province as a party determined the duty of care issue. The Province has filed an application in the Court of Appeal to seek leave to appeal this result and has reserved the right to contest whether there is a proper cause of action on appeal of any certification order. Counsel for the plaintiff accepted this position.

**23**  Counsel for Gulf Log Salvage has taken the position that Mr. Ogden has no cause of action against the association. Given my January 16, 2004 ruling, counsel stated that he would not argue this point at the hearing and, if this matter proceeds to appeal, Gulf Log Salvage has reserved the right to argue this point at that level. Counsel for the plaintiff disputed Gulf Log Salvage's entitlement to do so.

**24**  In my opinion, the pleadings disclose a cause of action.

Is There an Identifiable Class?

**25**  The Province says that, in seeking to include in the class permittees who have never sold logs to Gulf Log Salvage, the class definition is unnecessarily broad. In its submission, the plaintiff has not established the necessary evidentiary foundation for maintenance of a class action complaint against the defendants.

**26**  I conclude that there is an identifiable class of two or more persons. The class is that identified by the plaintiff but narrowed to include only those salvors who delivered logs to either of Gulf Log Salvage's two receiving stations. The purpose of this modification is to exclude those salvors who only sell their logs by direct sale.

Do the Claims of Class Members Raise Common Issues?

**27**  The plaintiff says that the action raises a limited number of questions. One question of law is whether a failure to base the compensation to salvors on the best price reasonably obtainable constitutes a breach of fiduciary duty or the duty of care owed by Gulf Log Salvage to the class members. A second question of law is whether any failure by the Province to enforce the Regulation constitutes a breach of fiduciary duty or a private duty of care owed to the class members. A further question is whether either of the defendants has acted in a manner deserving of punitive damages. The plaintiff submits that all of these issues are necessary for the resolution of each proposed class member's claim and are therefore appropriate common issues.

**28**  It is the plaintiff's position that it will be necessary for the court to decide how the market value of salvaged logs should be determined, a question that he says will be necessary to resolve for the entire class, and that can be determined without reference to the specific circumstances of individual class members. Put another way, the plaintiff says that "the fact of loss" can be proven on a class-wide basis.

**29**  The plaintiff identifies a second common factual issue of whether the Province failed to enforce the Regulation against Gulf Log Salvage.

**30**  The plaintiff recognizes that ultimately it will be necessary to determine the loss each salvor has suffered. In the reply argument, counsel for the plaintiff stated:

Once the standard of care has been established through the common issues trial (i.e. what is the appropriate discount for salvaged wood), the determination of individual damages will largely be a mathematical exercise.

**31**  In the submission of the defendant, Gulf Log Salvage, whether each sale was carried out reasonably must be assessed on an individual basis. For that reason, it says there are few, if any, common issues of fact in assessing for each individual permittee whether logs delivered were sold at the highest price reasonably obtainable.

**32**  Gulf Log Salvage says further that there is no evidence to support the contention that the application of a theoretical model such as that proposed by the plaintiff could apply across the class. It also submits that, more fundamentally, the use of a relative comparison of sale prices based upon the grades of logs fails to recognize that it is the sort of the logs at the time of sale which will have a significant effect upon the price obtained. It notes that log sort specifications have also changed over time in response to changes in demand for logs and manufactured products.

**33**  The Province says that the claimed common issues of whether a duty of care was owed and whether it was breached are at "the highest level of abstraction" and give an artificial air of commonality which is not met in fact. It says that there is no common factual underpinning that would allow a common answer to these legal questions for all class members. For example, the Province says that it has made many decisions relating to log salvage over the past 12 years. Some decisions may be relevant to certain class members; others will not. In addition, the court may find that some decisions breached the duty of care and others did not.

**34**  The Province also makes a similar submission to that of Gulf Log Salvage that because there were thousands of individual market transactions governed by a panopoly of factors, it will be necessary for the court to assess the reasonableness of the price paid for each log delivery by each class member.

**35**  In my opinion, absent a duty owed to the permittees by Gulf Log Salvage and a breach of that duty, there can be no breach of a duty to them by the Province. This circumstance has considerable importance for any litigation plan and has not been addressed in any detail by the plaintiff. One implication of this observation is that the issue of whether there are common issues relating to the liability of the Province does not arise for consideration unless there are common issues relating to the liability of Gulf Log Salvage.

**36**  To assist a more practical analysis of the common issues proposed by the plaintiff in relation to the duty of Gulf Log Salvage, I think the proposed issues may be fairly restated in the following question: Was the defendant, Gulf Log Salvage, negligent or in breach of a fiduciary duty in failing to dispose of the logs delivered to it by permittees at the highest price reasonably obtainable?

**37**  In addressing the need for supporting evidence for applications for class certification in Hollick v. Toronto (City), [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), McLachlin C.J. stated at [paragraph] 22:

The 1990 report of the Attorney General's Advisory Committee is perhaps a better guide. That report suggests that "[u]pon a motion for certification ... the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely" (emphasis added [in Hollick]): see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p.33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

**38**  At [paragraph] 25 the Chief Justice continued:

In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists. [References omitted]

**39**  As I have stated above, the plaintiff proposes to prove that a duty existed and was breached by referring to Vancouver Log Market selling prices and expert evidence, which would enable the court to determine what his counsel has described as "the appropriate discount for salvaged wood." That this approach is intended, is confirmed by the plaintiff's submission that "the determination of individual damages will largely be a mathematical exercise."

**40**  The only "evidence" referred to by the plaintiff that may be said to support the validity of his intended approach to determining price is the reference in the audit report prepared for the Ministry of Forests which states the bare opinion of three unnamed log sellers. Mr. Messenger, however, sets out in considerable detail the manner in which the Vancouver Log Market selling prices are determined, their reference to pricing on the basis of species and grade, and his opinion that for pricing purposes sort specifications are more important than grading.

**41**  In Koo v. Canadian Airlines International Ltd., [*[2000] B.C.J. No. 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25Y-00000-00&context=), [*2000 BCSC 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X25Y-00000-00&context=), the plaintiffs sought certification of their action as a class proceeding on behalf of passengers who had been "bumped" from flights for which they had been issued tickets. The court found that the ticket contract could be construed to obligate the airline to use its best efforts to transport its passengers with reasonable dispatch. That being the case, a determination of whether the airline used its best efforts in any individual case would require an examination of a number of factors. The court stated that such a determination would yield no helpful information as to whether it breached its obligation in relation to any other passenger.

**42**  In my view, a determination of whether Gulf Log Salvage breached a duty in any given sale absent information about the nature of the sort in which the sale transaction takes place would similarly yield little helpful information as to whether Gulf Log Salvage failed to obtain the highest price reasonably attainable in a different transaction. As a result, individual hearings would be necessary not only for the assessment of damages of individual salvors, but also for the proof of loss as a component of liability. I conclude, therefore, that proof of the liability of Gulf Log Salvage could not be determined on a trial of the common issues but would be required to be addressed as an individual issue.

**43**  The effect of this conclusion is to reduce the potential for common issues arising from whether Gulf Log Salvage owed a duty of care and a fiduciary duty to the proposed class members, as well as the possibility of punitive damages. It correspondingly increases the range of what would need to be determined as individual issues.

**44**  In Mouhteros v. DeVry Canada Inc. [*(1998), 41 O.R. (3d) 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1MM-00000-00&context=) at 73, [*22 C.P.C. (4th) 198*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1MM-00000-00&context=) (Ont. Sup. Ct. J.), Winkler J. stated:

The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such an [sic] class action would be completely unmanageable.

**45**  Section 4(2)(a) of the Class Proceedings Act states:

4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

1. whether questions of fact or law common to the members of the class predominate over any question affecting only individual members;...

**46**  Section 7(a) of the Act states:

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

1. the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues...

**47**  In Hollick, supra, McLachlin C.J. stated at [paragraph] 30:

The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues.... I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context.

**48**  Because I have found that proof of liability cannot be determined on a trial of the common issues, I conclude that the remaining common issues of duty of care, breach of fiduciary duty, and punitive damages, assuming such damages to be a common issue, not only do not predominate over questions affecting only individual members, but are of little assistance in advancing the action. Each claim would continue to require an examination of the circumstances and factors which were present at the time of each sale of delivered logs.

Would a Class Proceeding be the Preferable Procedure for the Fair and Efficient Resolution of the Common Issues?

**49**  The plaintiff asserts that, in addition to the presence of common issues, a class action is the preferable procedure in this case. He says that such a proceeding meets the three goals of improved access to justice, judicial economy and modification of behaviour. In his submission, the administration of the class proceeding will not present greater difficulties than those likely to be experienced if relief were sought by other means.

**50**  The defendant, Gulf Log Salvage, says that given the discrete nature of each transaction between each of the class members and Gulf Log Salvage, and the multitude of factors that determine the price paid for each log salvaged over a period of more than twelve years, resolution of the issues cannot be accomplished efficiently or appropriately in a class action proceeding.

**51**  In arguing that the class action is not the preferable procedure, Gulf Log Salvage also submits that the class action is not the most efficient procedure. In particular, it says that the plaintiff's projection of a ten-day trial grossly underestimates the length of time required to hear the evidence on the individual claims of the class members. It says that it will be necessary to consider the price paid to each salvor in each transaction to properly determine whether each class member suffered a loss. In its submission, such a requirement would fail to achieve the judicial economy that the plaintiff asserts would be a benefit in certifying this proceeding as a class proceeding.

**52**  The Province says that a class action is not the preferable procedure since each class member's case turns on individual issues that would predominate over the common issues. The Province argues that, despite this, the plaintiff has not offered any plan as to how the factual complexity required to determine if each class member was fairly treated in each transaction could be managed within the class action structure. Moreover, in the Province's submission, complex individual trials will be required regardless of how the class proceeding is structured.

**53**  For that reason, the Province states that there are other more practical and efficient means of resolving the claims, particularly as they relate to claims against the Province, including: pursuing the claim against the Province under the Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241*.; proceeding with the action as a test case; taking a small claims action in relation to some individual claims; and joinder of a small number of individual cases.

**54**  As stated above, I have concluded that liability cannot be determined as a common issue. In light of the significant impact of the proof of liability being an individual matter, prosecution of claims by individual action or consolidation of a small number of individual actions are likely to be a more practical means of resolving the claims.

**55**  In considering the application of s. 7(a) of the Act to these proceedings, it is my view that the concern in this application is not simply that damages claimed would require individual assessment after determination of the common issues. The concern rather is that the need to determine whether a loss has been proved must be carried out on an individual basis. It is this need which makes the class proceeding an inappropriate procedure for this action.

Disposition

**56**  For these reasons I find that, despite the presence of some common issues, a class proceeding is not the preferable procedure for the fair and efficient resolution.

**57**  As a result of this conclusion, it is not necessary for me to determine if Mr. Ogden would be a suitable representative plaintiff.

**58**  In the result, the plaintiff's application for certification is dismissed.

RALPH J.

**End of Document**

[***Petersen v. Stadnyk, [2003] B.C.J. No. 3173***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G09B-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Martinson J. (In Chambers)

Oral judgment: May 20, 2003.

Released: October 27, 2004.

New Westminster Registry No. S067591

**[2003] B.C.J. No. 3173** | 2003 BCSC 2012

Between Gary Lynn Petersen, plaintiff, and Kevin Stadnyk, Winchester's Café Ltd. and Her Majesty the Queen in Right of the Province of British Columbia, defendants

(67 paras.)

**Case Summary**

**Torts — Occupiers' liability or *negligence* for dangerous premises — Duty of occupier, foreseeability — Liability of occupier for acts of third party — Invitees, liability of particular occupiers (including duty and standard of care) — Dance halls, clubs and bars — Practice — Judgments and orders — Summary judgments — Bar to application, existence of issue to be tried.**

|  |
| --- |
| Application by the defendants, Stadnyk, Winchester's Cafe and the Crown, for summary judgment dismissing Petersen's claim against them. Application by Petersen for summary judgment against the defendants. Winchester's was a restaurant. On the night of the alleged incident involving Petersen and Stadnyk, Winchester's had live music. Petersen brought an action against Stadnyk and Winchester's for damages for injuries caused after Stadnyk allegedly assaulted him. Stadnyk was off-duty from his job as a police officer. Petersen was disturbing another patron and Stadnyk intervened. Stadnyk argued that Petersen struck the first blow and Petersen argued that he struck Stadnyk once in self-defence. Petersen argued that Winchester's was liable because it put on entertainment, which encouraged the patrons to drink more than normal for the restaurant and that it failed to have appropriate security measures in place. Petersen sought to introduce evidence from a security officer.  HELD: Application by Winchester's allowed.  Applications by Stadnyk, the Crown and Petersen dismissed. The court was unable to make the findings of fact necessary to decide the matter as between Stadnyk and Petersen. There were many conflicting statements. However, Winchester's had no reason to foresee the risk of harm to Petersen. It was not foreseeable that there would be violence at the restaurant. The evidence offered by the security officer was not admissible as expert opinion evidence. The matters to which he would testify were not outside the realm of the ordinary knowledge of a judge or juror. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A, 18(11)(a).

Occupier's 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=), 3(1), 3(2).

**Counsel**

Counsel for the Plaintiff: M. Menkes

Counsel for the Defendant K. Stadnyk: S. Price

Counsel for the Defendant Winchester's Café Ltd.: L. Folick

|  |
| --- |
| **MARTINSON J. (orally)** |

INTRODUCTION

**1**  This is a Rule 18A summary trial application. The defendants ask the court to dismiss the plaintiff's claim. The plaintiff asks the court to grant judgment against both defendants, finding them jointly and severally liable.

**2**  The claim arises as a result of an incident at Winchester's Café Ltd. ("Winchester's) on a Friday evening in July 1999. Mr. Petersen says that Mr. Stadnyk assaulted him, causing serious injury, and that Winchester's, as occupiers, failed to take reasonable steps to ensure his safety. They are, it is argued, jointly and severally liable.

**3**  Counsel agree that, with respect to the claim against Mr. Stadnyk, there are significant credibility issues to be determined. They, however, submit that the court can assess credibility based on the extensive evidence presented. They argue that the affidavit evidence presented at this summary trial can be tested against statements given at the time and the evidence given at the criminal trial of Mr. Petersen.

**4**  Certain matters are not in dispute. Winchester's is a restaurant. It has a liquor licence that only permits it to serve liquor when food is also being served. 62% of its income comes from food and 38% from alcohol. There were no fights before this incident and have been none since.

**5**  On the evening in question, Winchester's decided to offer entertainment for the first time in the form of a live blues band. It was a bit of an ad hoc group. They did not advertise widely.

**6**  Mr. Stadnyk is a police officer. He was off duty on this evening. Both Mr. Petersen and Mr. Stadynk were regular customers and known to the manager, Ms. Bradley. They were both considered welcome customers. They did not know each other before this incident happened.

**7**  It is also not in dispute that leading up to this incident, Ms. M., a restaurant employee, was sitting on a bar stool, taking a break, and Mr. Stadnyk was seated beside her. Mr. Petersen touched Ms. M.'s hair and she told him to stop. He did it again. She told him to stop again. Mr. Stadnyk said to Mr. Petersen: what part of no' don't you understand? Mr. Petersen says that he did not hear the first "no". Mr. Stadnyk says that it was loud enough for anyone to hear.

**8**  It is not in dispute that Mr. Petersen's ankle was seriously injured. If liability is found, damages are to be assessed later.

**9**  I will first consider the question of the liability of Mr. Stadnyk and whether that question can be determined on a summary trial application based on affidavit evidence.

**10**  I will then consider the liability of Winchester's.

LIABILITY OF MR. STADNYK

Mr. Petersen's Position

**11**  Mr. Petersen argues that the injury happened during an unauthorized ejection where more force than necessary was used. Mr. Stadnyk says that Mr. Petersen struck the first blow, that the blow took place near the beginning of the altercation, and that there was a second blow. However, Mr. Petersen says that a careful analysis of the evidence of all the witnesses shows that it is more likely that Mr. Petersen only hit Mr. Stadnyk once, later, and only for the purpose of defending himself from the unauthorized ejection.

**12**  Mr. Petersen disagrees with the testimony of Ms. Bradley that he deliberately placed his feet where they were located before he went to the ground.

**13**  Mr. Petersen says that Mr. Stadnyk was intoxicated.

**14**  Mr. Petersen points to the self-defence provisions of the Criminal Code to support his argument that Mr. Stadnyk was not authorized to do what he did and that Mr. Petersen was entitled to defend himself.

**15**  He says the fact Mr. Stadnyk left the premises amounts to post-offence conduct, showing a guilty mind.

**16**  He says that his own previous convictions are of little assistance and in any event, they are old.

Mr. Stadnyk's Position

**17**  I now turn to Mr. Stadnyk's arguments.

**18**  Mr. Stadnyk says that Mr. Petersen's touching of Ms. M. was an assault, and may have been a sexual assault. He acted reasonably in intervening and used no more force than was necessary. Mr. Petersen struck the first blow.

**19**  Mr. Stadnyk says that Mr. Petersen was intoxicated.

**20**  He points to numerous inconsistencies in the various versions of events given by Mr. Petersen as well as inconsistencies between what he says and the evidence of other witnesses. He submits that when looking at any inconsistencies between the versions he himself has given, the court should consider the context in which they were given and the kinds of questions that were asked.

**21**  He says that there is nothing that can be characterized as post-offence conduct. It was reasonable for him to return home after the incident to clean up the blood and then to return to the restaurant.

**22**  He submits that Mr. Petersen's three previous assault convictions go to propensity to commit assault.

SUMMARY TRIAL

**23**  On a Rule 18A application, the court may grant judgment based on Rule 18A(11)(a):

Judgment

1. On the hearing of the 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.

**24**  Inspiration Management Ltd. v. McDermid St. Lawrence Ltd., [*[1989] B.C.J. No. 1003*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X23K-00000-00&context=), (C.A.) ("Inspiration Management") is still the leading case on the interpretation of Rule 18A. It says, in essence, that it is open to a judge to make findings of facts based on conflicting affidavits.

**25**  In this case, I have had the opportunity to consider various forms of evidence including the various affidavits, discovery transcripts, police statements, and criminal trial transcripts. Rule 18A allows me to grant judgment, unless I am (i) 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 (ii) of the opinion that it would be unjust to decide the issues on the application.

**26**  The Court, in Inspiration Management, makes it clear that the Court can make a finding of fact or law, even with conflicting affidavit evidence, if there is "other admissible evidence [that] will make it possible to find the facts necessary for judgment to be given". In other words, the Court must determine whether the evidence in its entirety is such that the judge is able to distinguish between the conflicting affidavits. The case law and common sense indicates that a judge cannot make a finding of fact based solely on conflicting affidavits. It can, however, prefer one affidavit over the other on the basis of the entirety of the admissible evidence including affidavits from independent witnesses, other trial transcripts, discovery transcripts, police statements and the like.

**27**  Inspiration Management reiterates that the Court's ability to prefer one conflicting affidavit over another (in order to make an appropriate finding of fact) depends on "the nature and quality of the materials before him [or her]". In other words, the Court must examine the peculiar nature of the evidence before it to determine whether a summary trial pursuant to 18A would be appropriate. A judge should be careful, but not timid in this respect.

**28**  I considered all of the evidence and have come to the conclusion that I am unable to make the findings of fact necessary to decide this matter. I do not come to that conclusion lightly. However, there are so many different statements and so many contradictions that a judge must actually see and hear the witnesses and consider how they respond to the various contradictions to ensure that a just result can be reached.

**29**  One option open to the court is to have the various people who have sworn affidavits come before me to be cross-examined on their affidavits. In this case, I do not think that will solve the deficiencies in the process. Hearing all of the evidence in court and at one time is the most appropriate solution. I therefore adjourn the claims against Mr. Stadnyk to the trial list. Counsel has leave to apply for an early trial date.

LIABILITY OF WINCHESTER'S

**30**  I will now consider the liability of Winchester's.

Mr. Petersen's Position

**31**  Mr. Petersen says that on this evening the establishment was analogous to a pub or cabaret because it provided entertainment that carried on after the normal dinner hour. There was a dance floor, and a predominant bar and a full-time bartender. The standard required by establishments of that sort should be applied.

**32**  By offering live entertainment and an open area throughout a Friday evening, the restaurant offered an invitation to patrons to stay and drink alcohol and have a good time throughout the evening. This is a situation which is clearly different from a mere restaurant environment, where a reasonable adult may be expected to consume anywhere from zero to three alcoholic beverages during the course of a meal, and then leave within two hours of arriving.

**33**  Mr. Petersen argues that it is reasonably foreseeable that, by creating a bar-like environment, risk of events more common to intoxicated persons, including a fight, can occur. He submits that the restaurant offered no case law in which a restaurant with a liquor licence is in any way distinguished from a bar or pub in terms of its duties to its patrons.

**34**  Mr. Petersen presented a report by a security expert, Camil Dubuc. He argued that it is admissible because it deals with matters outside the experience of the trier of fact and a judge cannot take judicial notice of the role security staff play or ought to play in this situation. In particular, the trier of fact has no experience or expertise in how these common problems involving alcohol consumption are effectively dealt with beyond mere lay observations.

**35**  Mr. Dubuc has been in the security field for 20 years, and for the past five years, has been president of a company which provides event security. His opinion was that this was a special event and that though the security practises were reasonable for a restaurant generally, they were not in the context of a special event offering live musical entertainment. He was of the view that it would have been prudent to hire security staff, including at least one guard posted at an elevated location and one guard in a high traffic area. This would have effectively managed "crowd control".

**36**  Mr. Petersen points to the layout, with the tiers of seats descending below the bar area, which is directly adjacent to the door. He says that an ideal location for even a single security guard is near the entrance, a high traffic area, which oversees the bar area and offers an elevated view of the rest of the restaurant.

**37**  Mr. Petersen argues that Winchester's did not do enough to intervene before injury occurred. It had a duty to intervene. Yet, he argues, there was no person present on staff with any training or experience in security. He notes that it is not the length of the incident but the ability of the occupier to react to it which gives rise to the issue of occupier's liability. Mr. Dubuc offered the opinion that the security person could have intervened at an early stage and that would likely have prevented any injury.

**38**  Mr. Petersen also says that Penny v. Fort Nelson Hotel (1974) Ltd., [*[1988] B.C.J. No. 2506*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4HV-00000-00&context=) (S.C.) ("Penny"), the main case relied upon by Winchester's, has been distinguished on a number of occasions and should be distinguished in this case as well. He says that I should be guided by the approach taken in Montgomery v. Black, [*[1989] B.C.J. No. 1800*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B0FK-00000-00&context=) (S.C.) ("Montgomery") and Jeffrey v. Commodore Cabaret Ltd., [*[1995] B.C.J. No. 1997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1P8-00000-00&context=) (S.C.) ("Jeffrey").

Winchester's Position

**39**  Winchester's agrees it is an occupier for the purpose of the Occupiers Liability Act, *R.S.B.C. 1996 c. 337* (the "Act"). It says this incident happened suddenly and without warning and was therefore not foreseeable. In addition, it intervened in a timely way.

**40**  It says that a different standard applies to pubs and cabarets because all they do is sell liquor. Problems can be expected in those establishments, but the same cannot be said of restaurants that service alcohol.

**41**  All the cases in this area deal with pubs and cabarets. In those cases, establishments have been found not liable when incidents are not foreseeable. There are no cases even dealing with restaurants, let alone finding them liable.

**42**  Taken to its logical conclusion, any eating establishment that has entertainment, like a blues bar, would have to hire security personnel. There is no requirement to do that, no practice of doing that, and it does not make sense because, unlike bars and cabarets, the prospect of harm is not high.

**43**  People come to restaurants to eat at all sorts of times, not just the "dinner hour".

**44**  Winchester's had no reason to think the incident would happen as both men were known and welcome patrons. When the incident happened staff and patrons intervened to separate them and acted reasonably in doing so.

**45**  Winchester's objects to the admissibility of the expert's report on the basis that it does not meet admissibility tests. Relying on a recent Court of Appeal case, Homolka v. Harris, [*[2002] B.C.J. No. 831*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0VN-00000-00&context=), [*2002 BCCA 262*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0VN-00000-00&context=) ("Homolka"), it says that the report provides information that the court would already know, and it purports to decide the ultimate issue, and in doing so, usurps the role of the court. If it is admissible it is entitled to no weight.

Conclusion - Expert Evidence

**46**  I must deal first with the admissibility of the evidence of Mr. Dubuc as expert evidence.

**47**  Homolka has helpfully reviewed the criteria for the admissibility of expert evidence.

**48**  The Court, of course, referred to the leading case of 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=) ("Mohan"), for the proposition that "the purpose of expert opinion evidence is to assist the trier of fact by providing specialized knowledge that an ordinary person would not know, thereby assisting the trier of fact to understand the circumstances." (para. 12)

**49**  In determining whether the evidence of Mr. Dubuc should be admissible as expert opinion, I start with the basic admissibility criteria set out in Mohan at para. 17, that is: "a) relevance; b) necessity in assisting the trier of fact; c) the absence of any exclusionary rule; and d) a properly qualified expert." In the instant case, the evidence is clearly relevant (opinion as to security arrangements of Winchester's), there is no exclusionary rule in operation, and Mr. Dubuc is a properly qualified expert (vast experience in security).

**50**  What remains in issue is whether Mr. Dubuc's expert report meets the criteria of "necessity in assisting the trier of fact." The case law provides guidance as to what constitutes necessity. The essential element of necessity is that the expert opinion "be necessary in the sense that it provide information which is likely to be outside the experience and knowledge of a judge or jury'": (Mohan at para. 22. The "purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know": Regina v. J-L.J. [*(2000), 192 D.L.R. (4th) 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M461-00000-00&context=) (S.C.C.) ("J-L.J.").

**51**  As I see it, the evidence offered by Mr. Dubuc is not "likely outside the experience and knowledge of a judge or jury." Although Mr. Dubuc clearly has extensive experience in providing security and is an expert in such matters in comparison to the average judge or juror, the basic concepts regarding provision of security are not outside the experience and knowledge of the ordinary person.

**52**  I would distinguish Mr. Dubuc's expertise from that of more scientific or technical experts, because the provision of security and the expertise derived from extensive experience relates essentially to concepts of vigilance, positioning, diplomacy and physical force by security personnel in preventing, detecting, and reducing physical conflicts that potentially threaten the safety of patrons. These concepts are within the ordinary experience and knowledge of the average judge or juror.

**53**  The evidence of Mr. Dubuc should not be admitted as expert opinion evidence in this case. To allow such evidence would "usurp the functions of the trier of fact": Mohan, at para. 24, J-L.J.

Conclusion - Liability

**54**  Section 3 of the Act is as follows:

Occupiers' duty of care

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.

1. The duty of care referred to in subsection (1) applies in relation to the
2. condition of the premises,
3. activities on the premises, or
4. conduct of third parties on the premises.

...

[emphasis added]

**55**  Section 3 of the Act creates a statutory duty for the occupier of premises to take reasonable steps, in the particular circumstances of each case, to ensure the safety of patrons. Included in this duty is the requirement to take reasonable steps, in the particular circumstances of each case, to prevent patrons from being injured by the actions of third parties on the premises.

**56**  The duty of care on occupiers created by section 3 of the Act very closely resembles the duty of care imposed on occupiers through the common law principles of ***negligence***. As such, much of the case law on ***negligence*** applies to the statutory duty of care imposed on occupiers by the Act, particularly in regard to what constitutes the standard of care.

**57**  As per section 3 of the Act, what constitutes reasonable conduct by the occupier in protecting the safety of its patrons varies depending on the circumstances and context of each case. The case law on ***negligence*** confirms this principle, as the burden on occupiers to take steps to prevent harm must be balanced with the actual risk of harm present in each case. Rieberger v. J.C. Olsen Ltd., [*[1994] B.C.J. No. 2717*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0B0-00000-00&context=) (S.C.).

**58**  Further, the common law requires the occupier to take reasonable steps to prevent harm, but only when that harm is reasonably foreseeable. That is, the occupier is only required to take reasonable steps to prevent harm that is foreseeable, not to take steps to prevent all harm, regardless of how unlikely or insignificant. The occupier is not an insurer who will be held liable for every instance of harm to its patrons, but only when the occupier did not act reasonably in preventing a foreseeable risk. See Stewart v. Pettie, [*[1995] 1 S.C.R. 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GV-00000-00&context=); Ferguson v. Quock, (9 October 1997), Prince Rupert 9632 (B.C.S.C.); McLeish v. Richard's on Richards Cabaret Ltd., [*[1992] B.C.J. No. 1000*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0T7-00000-00&context=), (S.C.).

**59**  In this case, Winchester's owes a duty of care to Mr. Petersen to take reasonable steps, in the particular circumstances of the case, to prevent harm to Mr. Petersen by Mr. Stadnyk (a third party). It agrees that it has such a duty. However, the standard of care required by Winchester's depends on the particular circumstances of the case.

**60**  The facts of this case can be distinguished from the cases relied upon by Mr. Petersen because in this case there was no foreseeable risk of harm. The risk of violence was not foreseeable. Because Winchester's is not an insurer, it had no obligation to take steps to eliminate all harm, regardless of how improbable, but only that harm that was reasonably foreseeable.

**61**  I reach that conclusion for these reasons.

**62**  In this case, unlike the cases relied upon by Mr. Petersen, there was no foreseeable risk that patrons would be injured through physical violence. Although Winchester's did have a prominent bar, earned some monies from the sale of alcohol, and did have a blues band playing on the night in question, Winchester's retained its character as a family restaurant. It was not reasonably foreseeable that violence would erupt. It is therefore different from a pub or bar.

**63**  Although there was a band and there may have been a dance floor set up, the band's music was mellow. The band was hired on a volunteer basis. It appeared that Winchester's allowed the band to play more as a favour to the band than to draw in patrons who did not normally frequent the establishment.

**64**  It is agreed that both patrons were regulars and welcome patrons. There was no evidence that the presence of the blues band in any way increased the patrons' propensity to fight. They were both at the restaurant for several hours before the fight took place. No fight took place either prior to or after this incident, making the risk of harm very unlikely.

**65**  In my opinion the manner in which Winchester's staff intervened was reasonable.

**66**  I, of course, did not consider the evidence of Mr. Dubuc in reaching this conclusion. I note, however, that even if I had concluded that the evidence was admissible, that evidence would not have changed my conclusion.

**67**  The claim against Winchester's is therefore dismissed. Costs will follow the event.

MARTINSON J.

**End of Document**

[***Sharbern Holding Inc. v. Vancouver Airport Centre Ltd., [2005] B.C.J. No. 347***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3Y3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Wedge J.

Heard: November 22 - 26, 2004.

Judgment: February 24, 2005.

Vancouver Registry No. S033260

**[2005] B.C.J. No. 347** | 2005 BCSC 232 | 137 A.C.W.S. (3d) 682

Between Sharbern Holding Inc., plaintiff, and Vancouver Airport Centre Ltd., Larco Hospitality Management Inc. and MM&R Valuation Services, Inc. doing business as HVS International - Canada and HVS International - Canada, defendants, and Larco Enterprises Inc., Vancouver Airport Centre Ltd. and Larco Hospitality Management Inc., third parties

(189 paras.)

**Case Summary**

**Civil procedure — Parties — Class or representative actions — Certification — Common interests.**

|  |
| --- |
| Application by the plaintiff, Sharbern Holding, to have its action certified as a class proceeding. Sharbern, along with many other investors, bought strata units in the Airport Hilton hotel pursuant to a prospective, the offering memorandum and disclosure statement issued by the developer of the property, the defendant Vancouver Airport Centre. The defendant, Larco Hospitality Management, managed the hotel. It also managed the adjoining Marriott hotel, which was also developed by Vancouver Airport. The offering memorandum contained financial projections based on projected room rates and occupancies prepared for Vancouver Airport by the defendant MM&R Valuation Services. It also contained a statement that there were no material conflicts of interest. The hotel had not performed as projected. There were 215 strata lots sold. Sharbern brought the within action alleging breach of fiduciary duty and negligent and fraudulent misrepresentation. Sharbern had obtained the formal support of 210 owners of 126 units. The proposed class was limited to unit owners who purchased units under the offering memorandum. A multi-plaintiff action had been launched by several of the unit owners.  HELD: Application allowed.  The claims raised common issues as the trust and fiduciary duty issues were common to the proposed class. Central to the litigation was the question of whether the statements in the offering memorandum were true. The answer to that issue would bind all owners. A class proceeding was the preferable procedure for the fair and efficient resolution of the common issues. The common issues were fundamental to the resolution of the claims advanced and were not overwhelmed by individual issues. Sharbern was an appropriate representative of the proposed class. The unit owners constituted an identifiable class. Administration of the class proceeding would present fewer difficulties than those likely to be experienced in the multi-plaintiff action. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(24).

Class Proceedings Act, [*R.S.B.C. 1996, c. 50, ss. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=), 4(1)(a), 4(1)(b), 4(1)(c), 4(1)(d), 4(1)(e), 4(2), 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d), 4(2)(e), 6(2), 8(1)(f), 8(1)(g), 27(3)(b).

Condominium Act, [*R.S.B.C. 1996, c. 64*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61N1-00000-00&context=).

Real Estate Act, R.S.B.C. 1996, c. 397, s. 75(2).

Real Estate Services Act, S.B.C. 2004, c. 42, s. 146.

Securities Act, *R.S.B.C. 1996, c. 418*.

Strata Property Act, [*S.B.C. 1998, c. 43, s. 294*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B0YF-00000-00&context=).

**Counsel**

Counsel for the Plaintiff: S.R. Schachter, Q.C. and G.B. Gomery

Counsel for the Defendants Vancouver Airport Centre, Larco Hospitality Management Inc. and Larco Enterprises Inc.: R.J.R. Hordo, Q.C., M.A. Lakhani and E. Swartz

Counsel for the Defendants MM&R Valuation Services and HVS International - Canada: G. Nijman and C. York

[Editor's note: A corrigendum was released by the Court March 14, 2005. The correction has been made to the text and the corrigendum is appended to this document.]

|  |
| --- |
| **WEDGE J.** |

1. INTRODUCTION

Nature of Application

**1**  Sharbern Holding Inc. ("Sharbern") applies to have its action certified as a class proceeding.

Overview

**2**  Sharbern, along with many other investors, bought strata units in the Airport Hilton in Richmond, B.C. They did so pursuant to a prospectus, the Offering Memorandum and Disclosure Statement (the "Offering Memorandum"), issued in 1998 by the developer of the property, the defendant Vancouver Airport Centre Ltd. ("VAC").

**3**  VAC developed the Airport Hilton about a year after developing the Airport Marriott, an adjoining hotel in the same complex. Both hotels are managed by an affiliate of VAC, the defendant Larco Hospitality Management, formerly known as HMS Hospitality Management Services Ltd ("HMS").

**4**  The Offering Memorandum contained certain financial projections concerning the Airport Hilton strata units, including a projected average annual cash return of 16.6%. Those projections were based on projected room rates and occupancies prepared for VAC by the defendant MM&R Valuation Services ("MM&R").

**5**  The Offering Memorandum disclosed that VAC had entered into similar agreements with the Airport Marriott purchasers, and knew of no material conflicts of interest arising from its involvement in the two projects.

**6**  The Airport Hilton has not performed financially as projected by VAC in the Offering Memorandum. Sharbern brought this action, alleging breach of fiduciary duty by VAC and HMS, negligent and fraudulent misrepresentation by VAC, and negligent misrepresentation by MM&R.

**7**  Sharbern now seeks certification of its action on behalf of owners of the Airport Hilton units (the "Owners").

Positions of the parties

**8**  Sharbern submits that the action is grounded substantially in the alleged fiduciary relationship between VAC/HMS and the Owners arising from the Offering Memorandum. It argues that there are common issues arising out of a common set of documents, and that the determination of those issues will materially advance the litigation. It emphasizes that the claim involves misrepresentations made in a prospectus to a relatively small and well-defined group of investors, rather than multiple representations made by different sources at different times.

**9**  Sharbern says the central questions arising from the pleadings are first, whether the financial projections in the Offering Memorandum were negligently prepared and second, whether the statements concerning conflict of interest were true. Sharbern submits the answers to those questions will affect every Owner in the same manner, and while they may not end the litigation, will advance it in a meaningful way.

**10**  The defendants argue that claims involving fiduciary duty and misrepresentation are generally not suitable for certification due to the inherently individualistic nature of inquiries that must be conducted on issues such as duty of care, reliance and materiality, and remedies such as rescission and damages. In this case, they say, the individual issues will overwhelm the common issues such that little judicial economy will be achieved by determining the common issues.

**11**  Further, say the defendants, a balance must be struck between efficiency and fairness. They say certification of this action would severely curtail discovery rights and result in unfairness to those defending the claims.

Issues

**12**  It is common ground that the narrow issues arising in this application are the following:

1. Do the claims raise common issues?
2. If so, would a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues?

**13**  For the reasons that follow, I have concluded the answer to both questions is "yes." The action should proceed as a class proceeding.

1. FACTS

**14**  VAC, a subsidiary of Larco Investments Ltd., is a real estate developer that has developed three hotels in Richmond: the Richmond Inn, the Airport Marriott and the Airport Hilton. The Airport Marriott and Airport Hilton are strata-titled hotels. Each contains 237 strata units that were sold as a public offering to investors by VAC. The Airport Marriott units were sold in 1996 and the Airport Hilton units in 1998. The Marriott adjoins the Hilton on the same city block and the two hotels share certain retail amenities.

**15**  VAC manages the Airport Marriott under a hotel asset management agreement. Operational management was subcontracted to a third party, DMS Limited, commencing October 1, 1996. DMS was part of the Delta Group which was sold to CP Hotels Ltd, a competitor of the Marriott Group, in 1998. As a result, Marriott required VAC to change its operational management. Effective September 14, 1998, management of the Airport Marriott was transferred to Larco Hospitality Management Inc., (formerly "HMS"). HMS is an affiliate of VAC. Both are wholly owned subsidiaries of a common parent. For that reason, VAC and HMS are often referred to collectively as the "Larco Defendants".

**16**  The Airport Marriott project was sold by VAC pursuant to an offering memorandum issued under the Real Estate Act, [*R.S.B.C. 1996, c. 397*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5DR-206Y-00000-00&context=), as rep. by Real Estate Services Act, S.B.C. 2004, c. 42, s. 146. The Airport Marriott offer included a guarantee to purchasers of a 12% annual return on their investment for five years. The offer disclosed the management terms, which included a management fee of 5% of "gross rental revenue" (a defined term) and an incentive management fee. The Airport Marriott became operational in 1998.

**17**  The Airport Hilton project was sold by VAC pursuant to the Offering Memorandum, which was issued under the Securities Act, *R.S.B.C. 1996, c. 418* and the Real Estate Act. The Offering Memorandum included excerpts of a market study prepared for the developer by MM&R, including projected room rates and occupancies for the first five years of operation. VAC prepared a Statement of Projected Net Income, which included the following statements:

These assumptions and hypotheses were derived in consultation with MM&R Valuation Services Inc. .., an independent consulting company with experience in the hotel industry. To the best of the Developer's knowledge and belief, the Projection reflects plausible results of operations and net income and Annual Cash Return to sample individual strata lot owners for the period covered by the Projection.

**18**  On the basis of the projected occupancies and room rates, VAC projected a five year average annual cash return to investors of 16.6%, using as an averaging period the years 2000 to 2004 inclusive.

**19**  All Owners of Airport Hilton units were required to enter into a Hotel Asset Management Agreement (the "HAMA") with VAC. The terms of the HAMA are similar to the management agreement that VAC entered into with the Marriott owners. Under the terms of the HAMA, VAC and HMS (as subcontractor) have the right to manage the Airport Hilton for twenty years. In both cases, VAC and HMS have the exclusive right to manage the day-to-day operations of the hotel.

**20**  There are, however, some differences in the two management agreements. VAC receives a management fee calculated as a percentage of gross rental revenues with respect to both hotels, but the percentage of the fee stipulated in the Airport Marriott agreement is larger than that provided in the HAMA agreement. Further, in the Airport Marriott management agreement, there is an incentive fee payable for successful results. There is no such fee payable for the management of the Airport Hilton.

**21**  A review of the Offering Memorandum discloses another difference between the terms governing the unit owners at the Marriott and the Hilton. While the average annual cash return projected for Hilton unit owners in the Offering Memorandum was 16.6%, that return was not guaranteed. Airport Marriott owners were guaranteed a 12% rate of return.

**22**  These differences in the financial incentives to VAC and HMS in the operation of the two hotels were not contained in the Offering Memorandum distributed in the marketing of the Hilton units. The Offering Memorandum did, however, disclose that VAC was developing the Airport Marriott project, and that Airport Marriott purchasers had entered into agreements with VAC similar to those offered to the Airport Hilton investors. The relevant provisions are Articles 4.9(i) and 4.11, which state as follows:

1. Liabilities and Obligations of the Developer.

The developer is currently developing the Vancouver Airport Marriott, a 237 room full service hotel, on the Parent Property. The Vancouver Airport Marriott is scheduled for completion in or about June of 1998. In this regard, the Developer has entered into purchase agreements, ancillary documents similar in form and substance to the Agreements, and certain additional agreements with purchasers of strata lots comprising the Vancouver Airport Marriott, all of which give rise to certain liabilities and obligations of the Developer which could impact upon its ability to perform its obligations under the Agreements.

4.11 Conflicts of Interest

The developer is not aware of any existing or potential conflicts of interest among the Developer, the directors and officers of the Developer, Larco Investments Ltd. as the shareholder of the Developer or those persons providing professional services to the Developer that could reasonably be expected to materially affect the purchaser's investment decision .... [Emphasis added]

**23**  Sharbern is a private company owned by two individuals, Robert Wood and Arend Hofman. It received a copy of the Offering Memorandum in March 1998, and paid a deposit at that time. The Affidavit of Mr. Wood was filed in support of the certification application. In cross-examination on his Affidavit, Mr. Wood acknowledged that when he and Mr. Hofman attended to sign their purchase contract, they discussed the fact that the Marriott agreement included a guaranteed investment return while the Hilton agreement did not. Mr. Wood recalled looking at the Offering Memorandum, and discussing it with Mr. Hofman, but did not recall reading details. He acknowledged that before completing the purchase of one of the Hilton units, he was aware there was to be a sharing of resources between the Marriott and the Hilton. That did not raise any concern at the time.

**24**  Sharbern completed the purchase of its unit on June 23, 1999. At that time, it executed an agreement in the terms of the HAMA, appointing VAC as its agent for the management and operation of the hotel. Every Owner signed the same agreement.

**25**  The Hilton opened in June of 1999. After receiving inquiries from owners who had not appreciated that they had given up their rights to elect a strata council, HMS called for volunteers to serve on an investors' committee to receive information concerning the Hilton's financial performance. Mr. Wood became the chair of the committee, which met with hotel management every four months or so. Minutes of the meetings were prepared and mailed to all unit owners.

**26**  The financial performance of the Hilton was, according to Mr. Wood, "dismal." Sharbern's investment return was -10% rather than the 16% return projected in the Offering Memorandum. Mr. Wood became increasingly dissatisfied with what he felt was inadequate financial disclosure from VAC and HMS. Other members of the committee were also unhappy. In 2002, a majority of the Owners formed a litigation group for the purpose of retaining counsel to advise them and demand further information from the Larco Defendants.

**27**  On June 16, 2003, following correspondence between legal counsel, this action was commenced against the Larco Defendants. Document lists were exchanged. On January 14, 2004, Sharbern amended its statement of claim, joined MM&R as a defendant, and applied for certification of the action as a class proceeding.

**28**  On February 2, 2004, counsel for Sharbern commenced separate proceedings in which each Owner who had joined the litigation group, including Sharbern, was named individually as a plaintiff (the "Multi-Plaintiff Action"). In total, 210 owners of 126 units were named in the Multi-Plaintiff Action.

**29**  In its amended statement of claim, Sharbern advanced claims against the Larco Defendants, both on its own behalf and on behalf of the proposed class of the Owners. Sharbern's claims against VAC have been summarized as follows:

1. VAC owes Sharbern and the other owners fiduciary duties as their agent and proxy;
2. VAC is a trustee for the owners of funds received and expended in the operation of the Airport Hilton;
3. HMS is VAC's sub-agent and owes the owners the same fiduciary duties as are owed by VAC;
4. VAC and HMS are in a conflict of interest by virtue of their conflicting fiduciary duties to advance the conflicting interests of the Hilton and the Marriott owners. The conflict is exacerbated by VAC's financial incentive to prefer the interests of the Marriott owners to the interest of the Hilton owners;
5. The Offering Memorandum failed to disclose material facts in relation to the Larco Defendants' conflict of interest, which failure constitutes fraudulent misrepresentation;
6. The Offering Memorandum negligently misrepresented projected annual cash returns to the Hilton purchasers.

**30**  Against VAC, Sharbern seeks rescission and damages for the negligent or fraudulent misrepresentations contained in the Offering Memorandum.

**31**  Against the Larco Defendants, Sharbern seeks damages and an accounting, for breach of fiduciary duty and breach of trust, in the management and operation of the Hilton.

**32**  Sharbern seeks damages from MM&R for negligent misrepresentation, on the basis that MM&R prepared the projections concerning occupancy rates and room rates which were incorporated in the Offering Memorandum and used to prepare the projected cash returns.

**33**  MM&R, in its statement of defence, says that it only provided projections to VAC's parent, Larco Enterprises Inc., and did not consent to their use by VAC and their inclusion in the Offering Memorandum. It says it made no representations to the Hilton owners, and denies that it was negligent.

**34**  MM&R has issued a third party notice against the Larco Defendants.

**35**  The defence of MM&R includes the assertion that if the investors suffered losses as alleged, they were caused or contributed to by various factors, including poor management of the hotel and diversion of customers by HMS from the Airport Hilton to the Airport Marriott.

**36**  Sharbern and the Larco Defendants plead that the MM&R projections were incorporated into the Offering Memorandum with MM&R's permission.

**37**  The size of the proposed class is not in issue. According to the materials filed in the application, there were 215 strata lots sold to members of the public at prices ranging from $119,000 to $223,900. The number of members of the proposed class is larger than 215, because some of the strata units were purchased by more than one person (although there were also persons who bought more than one unit). The exact number of class members was not in evidence, and it was not argued that the number is significant.

**38**  It is common ground that all of the strata lots sold to investors were sold by VAC pursuant to the Offering Memorandum, and that all investors signed common documentation agreeing to be bound by the HAMA (the text of which is included in the Offering Memorandum). The litigation does not involve secondary purchasers.

1. CERTIFICATION: GENERAL LEGAL PRINCIPLES

**39**  Applications for certification are governed by section 4 of the Class Proceedings Act, *R.S.B.C. 1996, c. 50* (the "Act"). Section 4 provides as follows:

1. The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
2. the pleadings disclose a cause of action;
3. there is an identifiable class of 2 or more persons;
4. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
5. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
6. there is a representative plaintiff who
7. would fairly and adequately represent the interests of the class,
8. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
9. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
10. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
11. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
12. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
13. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
14. whether other means of resolving the claims are less practical or less efficient;
15. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**40**  The Act must be construed generously, particularly at the certification stage. It permits the Courts to deal efficiently and on a principled basis with cases involving large -- often vast -- numbers of parties and complex legal issues, some of which are common issues, others not (Hollick v. Toronto (City), [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) [Hollick cited to S.C.R.]).

**41**  In Collette v. Great Pacific Management Co. *(2004), 26 B.C.L.R. (4th) 252*, *2004 BCCA 110*, our Court of Appeal summarized the criteria discussed in Hollick as follows:

... Chief Justice McLachlin, in a unanimous judgment, recognized that class proceedings offer important procedural advantages. They serve judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis. They improve access to justice by combining claims that would not be economical to pursue individually. They serve efficiency and justice by ensuring that wrongdoers face the full consequences of harm caused and modify their behaviour accordingly. These advantages are reasons to apply class proceedings legislation flexibly and expansively (at para. 25).

**42**  In Samos Investments Inc. v. Pattison [*(2002), 216 D.L.R. (4th) 646*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-2534-00000-00&context=), [*2002 BCCA 442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-2534-00000-00&context=), Prowse J.A., discussing the policy underpinnings of the Act as canvassed by the Court in Hollick, quoted McLachlin C.J.C.'s comment:

In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters (at para. 23).

**43**  The certification stage is not meant to test the merits of the plaintiff's claim (Hollick at paras. 16 and 37).

The certification criteria

Section 4(1)(a) - Cause of Action

**44**  The pleadings must disclose a cause of action. The test is the same as is applied under Rule 19(24) of the Supreme Court Rules (Gregg v. Freightliner Ltd. [*(2003), 35 C.C.P.B. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G04B-00000-00&context=), [*2003 BCSC 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G04B-00000-00&context=) at paras. 22-24).

Section 4(1)(b)- Identifiable Class

**45**  There must be a recognizable class of two or more persons, and it must be defined by reference to objective criteria (Hollick at para. 17).

**46**  Section 6(2) of the Act requires that a class including persons not resident in British Columbia must be divided into subclasses and the Court must consider whether the non-resident subclass requires separate representation. Members of the non-resident subclass may not be included automatically in the action, but may be offered the right to opt in (s. 8(1)(g)), while resident members may be offered the right to opt out (s. 8(1)(f)).

Section 4(1)(c) - Common Issues

**47**  Under s. 4(1)(c) the inquiry is confined to whether common issues of fact or law exist. At this stage, the process does not involve the weighing of common issues against individual issues (Harrington v. Dow Corning Corp. [*(2000), 193 D.L.R. (4th) 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=), [*2000 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=) at para. 23 [Harrington]).

**48**  Central to the inquiry under this section is whether a class action proceeding will avoid duplication of fact-finding or legal analysis. Hollick requires the Court to ask the following questions in order to determine whether issues are common issues:

1. Is the resolution of the issue necessary to the resolution of the claim of each class member?
2. Is the issue a substantial ingredient of each of the class members' claims?

**49**  With respect to the first factor, an issue will be common only where its resolution is applicable to all who are to be bound by it. The requirement of commonality means that "success for one is success for all" (Metera v. Financial Planning Group *(2003), 332 A.R. 244*, *2003 ABQB 326* [Metera], per Slatter J. at para. 54).

**50**  The second factor is satisfied if the resolution of a common issue, for or against the class, will move the litigation forward and is capable of extrapolation to all members of the class. Resolution of the common issues need not be determinative of liability (Harrington at paras. 20 to 24; Campbell v. Flexwatt Corp. [*(1997), 44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) at paras. 52-53, [*98 B.C.A.C. 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) [Campbell cited to B.C.L.R.]).

**51**  In Carom v. Bre-X Minerals Ltd. [*(1999), 44 O.R. (3d) 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1XP-00000-00&context=) at p. 197, [*35 C.P.C. (4th) 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1XP-00000-00&context=) [Bre-X] Winkler J. observed at p. 197 that a common issue must have sufficient significance to the claim asserted that its resolution will advance the litigation in a meaningful way:

The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which have to be made at individual trials, not can it be based on an assumption to circumvent the necessity for the individual inquiries.

**52**  Further, as noted by the Court in Tiemstra v. I.C.B.C. [*(1997), 149 D.L.R. (4th) 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0R6-00000-00&context=), [*38 B.C.L.R. (3d) 377*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0R6-00000-00&context=) at para. 15, the common issues must be "dispositive of a significant feature" of the claim.

Section 4(1)(d) - Preferability

**53**  Section 4(2) of the Act describes the factors the Court may take into account when determining the issue of preferability. The factors, as listed, are not exhaustive, and no single factor trumps the others (Elms v. Laurentian Bank of Canada [*(2001), 90 B.C.L.R. (3d) 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=), [*2001 BCCA 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=)).

**54**  The question of preferability must take into account the importance of the common issues in relation to the claims as a whole. One factor to consider is whether the common issues predominate over any questions affecting only individual members of the class. However, as noted by the Court in Hollick, that question cannot be determined in a vacuum. The common issues must be considered in context: Given all of the circumstances of the particular claim, would a class action be preferable to other methods of resolving these claims?

**55**  In Campbell, Cumming J.A., for the Court, stated that a chambers judge "must do something in the nature of a cost/benefit analysis in deciding whether to certify a proceeding" (at para. 66). That concept was expanded upon by Finch C.J. in Hoy v. Medronic, Inc. [*(2003) 14 B.C.L.R. (4th) 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3GV-00000-00&context=), [*2003 BCCA 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3GV-00000-00&context=) at para. 54:

... in my respectful view the cost/benefit analysis is not of the nature described by the defendants, i.e. it is not an accounting exercise to determine economic viability. The analysis, rather, involves an assessment of whether a class proceeding would advance the claims in any meaningful way. If resolution of the common issues goes a considerable measure towards obtaining relief for the plaintiffs, then the benefit of proceeding by way of class action, as opposed to individual actions, is a factor in favour of certification.

**56**  When addressing preferability, then, the Court must consider the common issues in context and the alternatives to certification, and determine whether a class proceeding will be a fair, efficient and manageable way of advancing a claim. In doing so, the Court must construe the statute generously, keeping in mind the objective of access to justice and judicial economy.

Section 4(1)(e) - Representative Plaintiff

**57**  The Court must be satisfied that there is a representative plaintiff who meets the requirements of the Act in that the plaintiff:

1. would fairly and adequately represent the interests of the class, including subclasses;
2. has produced a workable plan for advancing the proceeding and notifying class members; and
3. does not have, on the common issues, a conflict of interest with other class members.

**58**  Sharbern proposes that it be appointed to represent the resident and non-resident subclasses. The defendants raised no issue with respect to the suitability of Sharbern as the representative.

**59**  I am of the view that Sharbern is an appropriate representative of the proposed class. It has formally obtained the support of 210 owners of 126 units. The principals of Sharbern, Robert Wood and Arend Hofman, have participated in an investors' committee since its inception in 1999, and have taken a leading role in organizing the group for litigation. Conflicts of interest are neither alleged nor apparent.

**60**  Sharbern has provided a plan for proceeding which, while it may require some modification, provides a workable means of advancing the litigation and notifying the proposed class members.

1. ANALYSIS

**61**  It was common ground among the parties that the causes of action disclosed by the pleadings are well-known to the law. Section 4(1)(a) of the Act is satisfied.

**62**  Section 4(1)(b) requires a recognizable class of two or more persons, defined by reference to objective criteria. The proposed class is limited to those unit owners who purchased units under the Offering Memorandum. It does not include any secondary purchasers.

**63**  There may be a small number of unit owners who do not reside in British Columbia. As required by s. 6(2) of the Act, Sharbern proposes that the class be divided into a resident subclass and a non-resident subclass. It proposes that these subclasses comprise the class, and that the class be defined as follows:

The "Owners" are the owners and former owners of strata lots in the Vancouver Airport Hilton Hotel (the "Hotel") who purchased their strata lots from the defendant, Vancouver Airport Centre Ltd. ("VAC"), pursuant to an Offering Memorandum and Disclosure Statement dated February 3, 1998 (as amended July 8, 1998) (the "Offering Memorandum") or are the assignees of such a purchaser. The Resident Subclass comprises all Owners resident in British Columbia who do not opt out of this proceeding.

The Non-Resident Subclass comprises all Owners not resident in British Columbia who opt into this proceeding ....

**64**  The Owners constitute an identifiable class. The class membership is limited and is determined by an objective test.

**65**  As earlier noted, Sharbern is an appropriate representative plaintiff such that s. 4(1)(e) is satisfied.

**66**  The central issues in dispute concern the requirements of subsections (c) and (d) of s. 4(1), and are as follows:

1. First, do the claims raise common issues?
2. Second, if so, is a class action the preferable manner of proceeding?
3. Do the claims raise common issues?

**67**  To reiterate, the Act requires that

... the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members.

**68**  Sharbern's proposed list of common issues is appended to these reasons (Appendix 1). I will deal first with the alleged trust and fiduciary obligations.

Alleged Trust Obligations and Fiduciary Duty (VAC and HMS)

**69**  Sharbern proposes the following common issues with respect to the alleged trust and fiduciary obligations:

Trust obligations of VAC and HMS

1. Are VAC and HMS trustees of the Gross Rental Revenue (as defined in the HAMA) collected pursuant to the HAMA for the benefit of the Owners?
2. If so, what is the scope of the obligation of VAC and HMS to account to the Class for trust funds received and expended in the management of the Hotel, and is the obligation limited in the manner alleged by these defendants?

Breach of fiduciary duty by VAC and HMS

1. Do VAC and HMS owe fiduciary duties to the Class in respect of the operation of the Hotel?
2. If so, are they in a position where their fiduciary duties to the Class conflict with their interests in respect of the Airport Marriott or their duties to the unit owners of that hotel?
3. Have VAC and HMS breached their fiduciary duties to the Class?

**70**  With respect to the claim that VAC and HMS are trustees of the rental revenues collected under the HAMA for the benefit of the unit owners, Sharbern seeks an accounting of the revenues received and expended in the management of the Airport Hilton, the return of management fees, and a declaration that Sharbern is entitled to inspect certain documents in the possession of VAC and HMS concerning the management of the Airport Hilton.

**71**  VAC and HMS admit the HAMA but deny they are trustees in respect of management fees. In the alternative, they plead that their obligation is limited to VAC providing reasonable accounting information as stipulated in the HAMA.

**72**  Sharbern says the lawsuit is grounded substantially in the alleged fiduciary relationship, and that the proposed common issue of fiduciary duty arises on the pleadings. The relationship is alleged to have arisen from the language of the HAMA to which all Owners are party. It is alleged that VAC owes the Owners fiduciary duties by reason of VAC's appointment as their agent to manage the Airport Hilton in their stead. As unit owners, they would otherwise have had the powers afforded strata unit owners under the Condominium Act, [*R.S.B.C. 1996, c. 64*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61N1-00000-00&context=), as rep. by Strata Property Act, [*S.B.C. 1998, c. 43, s. 294*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B0YF-00000-00&context=). The Owners allege HMS owes them fiduciary duties by reason of its appointment as VAC's sub-agent.

**73**  Sharbern pleads further that the fiduciary duties of VAC and HMS conflict with the duties they owed to the unit owners of the Airport Marriott. VAC and HMS earn greater compensation, as a percentage of gross rental revenue, under the Airport Marriott management agreement than under the HAMA. Sharbern says the exposure under the Airport Marriott guarantee provides VAC and HMS with further incentive to divert customers from the Airport Hilton to the Airport Marriott.

**74**  VAC and HMS oppose the characterization of these issues as common issues. They say the existence of a fiduciary relationship, if any, will depend on the nature of the particular dealings and relationship which VAC and HMS may have had with the respective investors. They rely on 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 para. 14, [*117 D.L.R. (4th) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3FN-00000-00&context=) [Hodgkinson cited to S.C.R.] in which La Forest J. cited with approval the observation of the trial judge that "in construing a relationship as fiduciary, everything turns on the particular facts of the relationship."

**75**  VAC and HMS argue they must examine each of the intended class members to determine if their individual dealings with these defendants constitute the special circumstances necessary to justify characterizing their relationships as fiduciary rather than simply contractual. That examination would entail inquiries into the differing degrees of sophistication of the Owners as investors, their varying levels of reliance, and the degree to which each Owner participated in the management activities of VAC and HMS.

**76**  Are the issues of trust and fiduciary duty issues common to the proposed class? I am satisfied they are common issues. My reasons for declining to accept the arguments of the Larco Defendants are as follows.

**77**  First, the issue at this stage of the proceeding is whether the pleadings give rise to an allegation of fiduciary duty common to the class, as distinct from whether that issue is likely to succeed at trial. In other words, the question here is whether the existence or non-existence of a fiduciary duty is an issue common to the class. Whether, as the defendants contend, the HAMA is contractual in nature, and whether the standard of conduct required under the HAMA is commercial reasonableness (as opposed to a duty to act in the best interests of the owners) are central issues to be determined on a hearing of the merits. They cannot be argued as a bar to certification.

**78**  Second, the claim disclosed by the pleadings is that VAC's duty to act in the best interests of the Owners arose from the specific language of the HAMA. Sharbern does not allege that the fiduciary duty arose from individual dealings between VAC (or its agents) and the Owners. To the extent that other factors may also give rise to a fiduciary duty, Sharbern does not rely on them.

**79**  I accept that the fiduciary duties alleged in the pleadings are duties alleged to arise out of a presumptively fiduciary relationship, created by the HAMA, of principal and agent or trustee and cestui que trust. In Hodgkinson at 407, the Court made these comments on the issue of presumptively fiduciary duties arising from contractual relationships:

... I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations.

**80**  At 409, the Court made a similar observation:

... 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 interest of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal.

**81**  In Elms v. Laurentian Bank of Canada [*(2000), 73 B.C.L.R. (3d) 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X059-00000-00&context=), [*2000 BCSC 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X059-00000-00&context=), [Elms] Maczko J. certified an action involving alleged breaches by investors of fiduciary duties they claimed were owed to them by a land developer, a law firm and a bank. In that case, the defendants argued that fiduciary relationships are individualistic and their existence must be determined on a case-by-case basis. Mr. Justice Maczko concluded at para. 17 that the defendants' argument overstated the proposition:

If I accepted the defendants argument there could never be a class action where a breach of fiduciary duty is alleged. However, there have been at least three cases in which class actions have been certified where a breach of fiduciary duty has been alleged. What is relevant is the nature of the duty alleged to have been breached.

**82**  In Elms, as in the present case, the plaintiffs alleged that the documents reflecting the transaction were identical for each member of the class. The plaintiffs did not allege any individual circumstances that would change the nature of the relationship with the defendants. They also argued their claim did not require proof of reliance by the investors.

**83**  The decision of the trial judge to certify the claim in Elms was appealed, but certification was upheld by our Court of Appeal (Elms v. Laurentian Bank of Canada [*(2001), 90 B.C.L.R. (3d) 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=), [*2001 BCCA 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63N4-00000-00&context=)). On the question of whether breach of fiduciary duty was properly determined to be a common issue, the Court said the following at para. 44:

The investors' characterization of their claim suggests that the issues of whether there is a duty of care, the scope of that duty, and whether there is a fiduciary duty are issues that are capable of extrapolation to each member of the class or subclass. The investors' argument is that Oliver had a duty, in the absence of reliance, based on the relationship Oliver had with all investors. Because the investors claim that any individual differences do not affect the nature of Oliver's duty to each of them, the resolution of this issue would be applicable to all members of the class. Similarly, the investors argued that the Bank had the same duty to each of them regardless of a particular investor's individual circumstances. They note that the documents by which each of them opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly.

**84**  Sharbern has confined its claim, by virtue of the pleadings, to a claim of fiduciary duty arising from the HAMA. As counsel for Sharbern argued, it is not for the defendants to expand the plaintiff's claim in order to defeat certification. If the Owners succeed in their argument that the language of the HAMA creates fiduciary duties with respect to them, there will likely be no greater need to examine the individual circumstances than there would be in the case of a trustee or agent. At this point in the proceedings, it is sufficient that the issue is a common issue by virtue of the pleadings.

**85**  I am satisfied the issues of trust and fiduciary relationship are common issues arising from the pleadings. The relationship is alleged to have arisen under the HAMA, an agreement to which all Owners are party. At a minimum, determination of the existence of fiduciary duty as a common issue will assist in narrowing the scope of individual discoveries. More broadly, its determination is necessary to both the successful prosecution of the claim and its defence. As such, its resolution will move the litigation forward significantly.

Misrepresentation

**86**  Sharbern proposes the following common issues with respect to the claim of misrepresentation against VAC:

1. Did VAC owe a duty of care to the Class in respect of representations contained in the Offering Memorandum?
2. Did the Offering Memorandum materially misrepresent:
3. the conflict of interest and the agreements between VAC and the unit owners of the Vancouver Airport Marriott Hotel as alleged in the amended statement of claim?
4. that the financial projections contained in the Offering Memorandum were based on reasonable assumptions, as alleged in the amended statement of claim?
5. If so, was VAC negligent or fraudulent?
6. Subject only to any individual defences and any individual issues of reliance, is VAC liable for negligent misrepresentation?

**87**  As against VAC, Sharbern alleges that it owed the Owners a duty of care in respect of certain representations contained in the Offering Memorandum. It says that duty of care was breached because the Offering Memorandum materially misrepresented first, the lack of conflict of interest and second, the financial projections.

**88**  Sharbern's plea of fraudulent misrepresentation (and, alternatively, negligent misrepresentation) rests on the statement in the Offering Memorandum that VAC was not aware of any material conflict of interest arising from its obligations to the Airport Marriott unit owners. The plea of negligent misrepresentation is based on the financial projections (that is, the projected average annual cash return of 16.6% in the first five years of the investment).

**89**  With respect to MM&R, Sharbern proposes the following common issues:

1. Did MM&R owe a duty of care to the Class in respect of representations contained in the Offering Memorandum?
2. Did MM&R materially misrepresent to the Class that the financial projections included in the Offering Memorandum were based on reasonable assumptions?
3. If so, was MM&R negligent?

**90**  Sharbern's claim against MM&R is that it was negligent in the preparation of the financial projections, which were published by VAC in the Offering Memorandum. MM&R denies any ***negligence***, and pleads that VAC included materials prepared by MM&R in the Offering Memorandum without its consent.

**91**  All of the defendants take the position that claims of misrepresentation, whether negligent or fraudulent, are not suitable to be considered as common issues. Principally, their position rests on three arguments.

**92**  First, they say duty of care in misrepresentation cases, particularly the issue of proximity of the relationship, must be determined on an individual or case by case basis. Duty of care is therefore not a common issue.

**93**  Second, they say misrepresentation claims require proof of actual reliance on the alleged misrepresentations, and this proof requires a case by case analysis which is inherently individualistic. As such, the individual issues in this case will overwhelm any common issues there may be. They point to the various promotional materials provided to the prospective investors, and the various promotional statements made to them by VAC or its agents in meetings and individual discussions. They also point to the fact that some investors may not have placed any reliance on the Offering Memorandum. The investors may have had a spectrum of reasons for investing in the project other than the projected rate of return on their money.

**94**  Thirdly, they say the materiality of the alleged misrepresentations cannot be determined without individual discovery of each investor because the question of whether a representation was material is, at least in part, a subjective inquiry involving the particular investor's circumstances, level of sophistication, investment objectives and the like. Again, this inquiry will overwhelm the common issues.

**95**  Sharbern's responses were as follows. First, the existence of a duty of care is a common issue arising on the pleadings. The amended statement of claim contains the allegation that the strata lots were sold to the owners under the Offering Memorandum. That allegation, in turn, lays the foundation for the allegations that VAC retained MM&R to prepare the projected annual cash returns by projecting occupancy rates and average daily room rates over a five-year period, which projections were alleged to have been included in the Offering Memorandum with MM&R's consent. It is alleged that through the inclusion of these reports, MM&R represented to the unit owners that the projections were reasonable.

**96**  Thus, says Sharbern, the material facts said to give rise to the alleged duty of care with respect to the negligent misrepresentation claim involve these common facts: VAC's retainer of MM&R, and MM&R's consent to include its report in the Offering Memorandum. The Offering Memorandum was distributed to a limited class of persons for the initial sale of units in the Airport Hilton. There is no issue of reliance by secondary purchasers.

**97**  Sharbern emphasizes that the claim of fraudulent misrepresentation is a narrow one. The plea involves only the allegation that VAC falsely represented that there were no material conflicts of interest. The question is whether the existence of the management fee and guarantee contained in the Airport Marriott agreement, and the joint management of the two hotels by HMS, created a conflict of interest that ought to have been brought home to the Owners in the Offering Memorandum.

**98**  Are the misrepresentation claims common issues in this case? I must have regard to the pleadings and to the common issues that arise from those pleadings. The owners advance claims based on two distinct representations, both contained in the Offering Memorandum: first, the statement that there were no material conflicts of interest and second, the statement that the financial projections were reasonable.

**99**  Central to the litigation is the question of whether the statement about conflict of interest in the Offering Memorandum is true. The answer to that question will bind all Owners, as all are identically situated in relation to this allegation. If the statement is true, the fraudulent (or negligent) misrepresentation claim based on the statement will fail without further inquiry. As such, the issue is a common one, the resolution of which will necessarily move the litigation forward in a meaningful way.

**100**  Whether the financial projections contained in the Offering Memorandum were reasonable is also central to the litigation. The answer to that question, too, will bind all of the Owners and move the litigation forward.

Duty of Care

**101**  The next question is whether duty of care can properly be characterized as a common issue.

**102**  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=), [*146 D.L.R. (4th) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VR-00000-00&context=) [Hercules Management] the Court described the criteria for establishing a duty of care in a negligent misrepresentation action. A prima facie duty of care will arise where first, the defendant ought reasonably to have foreseen that the plaintiff would rely on the representation and second, where reliance by the plaintiff would be reasonable in the particular circumstances of the case.

**103**  The Court in Hercules Management also stipulated that there must be no policy considerations weighing against the imposition of a prima facie duty of care. In that case, there was a concern with respect to indeterminate liability.

**104**  Whether duty of care is a common issue depends on the pleadings in each case. In CIBC v. Deloitte & Touche [*(2003), 33 C.P.C. (5th) 127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JGHR-M0CX-00000-00&context=), [*172 O.A.C. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDK1-JGHR-M0CX-00000-00&context=) (Ont. Div. Ct.) [CIBC cited to C.P.C.], the plaintiff sought to certify an action on behalf of sixty-nine financial institutions which had loaned more than $1 billion to Philip Services Inc. Deloitte was Philip's auditor. The plaintiff pleaded that the lenders relied on Philip's financial statements containing significant misrepresentations resulting from a negligent audit on the part of Deloitte. The trial judge (in CIBC v. Deloitte & Touche [*(2002), 25 C.P.C. (5th) 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-FJDY-X1SW-00000-00&context=), [*[2002] O.T.C. 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-FJDY-X1SW-00000-00&context=)) declined to certify, finding in part that Deloitte's duty of care must be determined on a case-by-case basis.

**105**  The Divisional Court allowed the appeal on that point. Swinton J., giving judgement for the Court, had this to say on the issue of duty of care:

The Supreme Court of Canada has held that a duty of care can be owed to a class of plaintiffs. In Haig v. Bamford [*[1977] 1 S.C.R. 466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24PY-00000-00&context=) (S.C.C.) Dickson J. determined that where an accountant who was to prepare audited financial statements for a corporation had actual knowledge of a limited class who would use and rely on the information, the accountant had a duty of care to members of that class (at 476-7). In that case, the plaintiff was an investor who had not been identified at the time that the financial statements were prepared, but the accountant was aware that the financial statements were to be used to attract equity investment for the company from a limited number of potential investors (at 478) (para. 34).

**106**  The Court determined that the manner in which negligent misrepresentation was pleaded made the duty of care a common issue. The pleadings alleged that Deloitte knew of a class of lenders who would rely on financial statements it prepared, and did rely on those statements. While the Court concluded that reliance was an individual issue, it nevertheless concluded that duty of care was a common issue. On that point, Swinton J. observed the following:

Given Haig and Hercules [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=) (S.C.C.)], and the way in which negligent misrepresentation has been pleaded, the issue of the duty of care is a common issue, since the plaintiffs base their claim on the fact that there was a class of plaintiffs known to Deloitte, to whom the financial statements would be shown for purposes of obtaining financing.

The respondents also argued that there was an individual issue of reliance that must be considered in determining whether there was a duty of care because of a covenant in the 1997 Credit Agreement. In that covenant, the lenders undertook to complete an independent investigation and promised that they would not rely on information provided to them by the Administrative Agent, CIBC.

There is no question that the issues of reliance and contributory ***negligence*** are individual issues. The effect of the provision of the Credit Agreement will be an issue at trial when the judge determines reliance and contributory ***negligence***. However, the existence of this provision does not turn the issue of duty of care into an individual issue, given the way in which the duty of care has been pleaded in the Amended Statement of Claim (paras. 38-41).

**107**  In Kripps v. Touche Ross & Co. [*(1997), 33 B.C.L.R. (3d) 254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B12X-00000-00&context=), [*35 C.C.L.T. (2d) 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B12X-00000-00&context=) [Kripps cited to B.C.L.R.], our Court of Appeal discussed the issue of proximity as it relates to duty of care in a negligent misrepresentation case involving a prospectus. The Court agreed with the conclusion of the trial judge that the defendant auditors owed a duty of care to investors on the basis of "likely reliance" by the investors on audited statements:

... [B]ecause the auditors knew that the purpose for which they were engaged to audit the ... financial statements ... was to facilitate the sale of debentures to the public through the distribution of the company's prospectus containing their report, there was a proximity of relationship between them and an identifiable class of persons who would obtain a copy of the prospectus upon which they would likely rely. The proximity was clearly sufficient to give rise to a duty of care (para. 37).

**108**  The Court cannot, of course, resolve the merits of the duty of care issue on the certification application. At this stage, the question is whether the plaintiff has alleged the existence of a duty of care in a manner that gives rise to a common issue.

**109**  I have concluded that duty of care as pleaded in this case is a common issue. The material facts said to give rise to the alleged duty of care arise on common facts. The alleged negligent misrepresentation of the financial projections involve common facts, which are VAC's retainer of MM&R and MM&R's alleged consent to the inclusion of its report in the Offering Memorandum. The Offering Memorandum was distributed to a limited class of persons for the purpose of promoting units in the Airport Hilton for their initial sale. There is no issue of reliance by secondary purchasers.

**110**  The alleged misrepresentation (that is, that there was no conflict of interest) arises, once again, from the Offering Memorandum. The gist of the pleading is that VAC knew of a class of investors who would rely on this representation in the Offering Memorandum. The pleadings allege the existence of a duty of care in a manner giving rise to common issues that will substantially move the litigation forward.

Materiality

**111**  The defendants argue that even if the issue of whether the representations were true or reasonable are common issues, there remains the question of whether the representations were material. They say the materiality of the financial projections and the statement concerning conflict of interest are individual issues requiring discovery of each Owner.

**112**  In response, Sharbern asked how either representation could be anything other than material, given the nature of the investment and the obligation to issue a prospectus disclosing all facts material to that investment. With respect to the statement concerning conflict of interest, Sharbern invited consideration of the converse proposition - that is, a statement in the Offering Memorandum that VAC and HMS would be in a conflict of interest in managing the hotel for the next 20 years. Such a disclosure would surely be material to any prospective investor. Sharbern says this is a case where the materiality of the representation can be determined on the face of the document, without considering the individual circumstances of the investors.

**113**  Sharbern submits that materiality is an issue quite distinct from inducement or reliance. In support of that proposition, it relies on the following excerpt from Spencer Bower and Turner, The Law of Actionable Misrepresentation 3rd ed. (London: Butterworths, 1974) at paras. 124-6:

Materiality is a thing distinct from inducement. Each is a question of fact, and each must be separately proved.

A representation is material when its tendency, or its natural and probable result, is to induce the representee to enter into the contract or transaction which in fact he did enter into, or otherwise to alter his position in the manner in which he did in fact alter it.

... For the purpose of determining the question of materiality in any case, as distinct from inducement, the view of either of the parties are ... of no importance whatever. If in any ordinary case a representation was not material, the fact that the representee thought at the time, or says at trial, that it was, cannot make it so; on the other hand, the fact that the representee at the time considered a material representation to be immaterial, does not negative its materiality, though of course it destroys all prospect of establishing actual inducement.

**114**  Sharbern accepts that reliance (with the possible exception of deemed reliance under the Real Estate Act) raises individual issues which may be resolved in whatever procedure the Court decides is appropriate after the determination of the common issues.

**115**  I accept Sharbern's argument that the materiality of a representation is an issue distinct from inducement (and that inducement relates to the reliance issue). The materiality of the representation that there were no conflicts of interest can be determined on the face of the Offering Memorandum. Whether the statement induced the Owners to purchase their units is a separate issue.

**116**  The materiality of the financial projections, which were based on room rates and occupancy rates, raises the same issue. The Offering Memorandum describes the ownership of units in the Airport Hilton as an investment opportunity, and projects an average annual return of 16.6% over five years. I do not accept (as argued by MM&R) that the projected room and occupancy rates ought to be viewed separately from the financial projections. The latter are directly tied to the former. The materiality of these projections is apparent from the Offering Memorandum itself, and do not require individual discovery of the investors. Whether the projections induced the investors to act as they did is another question which may require individual inquiries.

Reliance

**117**  In addition to the proposed common issues described earlier, Sharbern proposes as common issues the following:

Liability of VAC and MM&R based on Misrepresentation

1. Are the members of the Class deemed to have relied on the representations contained in the Offering Memorandum pursuant to s. 75(2) of the Real Estate Act, [*R.S.B.C. 1996, c. 397*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5DR-206Y-00000-00&context=) and the common law?
2. Subject only to any individual defences and any individual issues of reliance, is VAC or MM&R liable to the Class for misrepresentation, and, if so, what individual defences remain for determination?

**118**  As noted by all of the defendants, reliance is an essential ingredient in the tort of negligent misrepresentation: 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=), [*99 D.L.R. (4th) 626*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=). In that case, Iacobucci J. described the ingredients of a successful negligent misrepresentation claim:

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 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.

**119**  Similarly, reliance is an ingredient of fraudulent misrepresentation. In BG Checo Int. Ltd. v. B.C. Hydro, [*[1990] 3 W.W.R. 690*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61WS-00000-00&context=), [*44 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJ6S-61WS-00000-00&context=) (C.A.). Southin J.A. described the constituent elements of the tort as follows:

1. There was a false representation;
2. The defendant did not have an honest belief in the representation;
3. The plaintiff relied on the false representation to his or her detriment; and
4. The defendant intended to deceive the plaintiff.

**120**  The defendants argue that each member of the class must prove actual reliance on the alleged misrepresentations, based on the individual circumstances of each investor. For that reason, misrepresentation is not suitable to be considered as a common issue.

**121**  As against VAC, Sharbern has amended its statement of claim to include a plea involving the statutory cause of action arising under s. 75(2) of the Real Estate Act. The Offering Memorandum was a prospectus issued under Part 2 of the legislation. Part 2 requires developers in certain circumstances to make material disclosures by way of a prospectus. Where a prospectus contains a material misstatement, the Real Estate Act describes a regimen for statutory relief against the developer and other persons who authorized the issuing of the prospectus.

**122**  Section 75(2) provides in part the following:

If a prospectus has been accepted for filing by the superintendent under this Part,

1. every purchaser of any part of the subdivided land ... to which the prospectus relates is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not, and
2. if any material false statement is contained in the prospectus,

...

1. every person who is a developer ...

...

is liable to compensate all persons who have purchased the subdivided land ... for any loss of damage those persons may have sustained, unless it is proved

1. that, with respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, the person had reasonable grounds to believe and did, up to the time of the sale of the subdivided land ... believe that the statement was true, [and]
2. that, with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from or report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy or extract from a report or valuation, but the ... developer or person who authorized the issue of the prospectus is liable to pay compensation as aforesaid if it is proved that he, she or it had no reasonable grounds to believe that the person making the statement, report or valuation was competent to make it ...

**123**  The section creates, for the benefit of purchasers pursuing a statutory claim, a presumption of reliance on the prospectus even where the purchaser did not receive the prospectus.

**124**  As against VAC, Sharbern's amended pleadings disclose a common law claim and a claim for a statutory remedy under the Real Estate Act. Sharbern acknowledges that these deemed reliance provisions do not apply to MM&R.

**125**  The operation of the deemed reliance provisions arising from the statute was examined in Hass v. Tung Nan Enterprises Ltd., [*[1997] B.C.J. No. 127*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S306-00000-00&context=) (S.C.). The plaintiffs bought a condominium pursuant to an offering memorandum, which contained an estimate of future maintenance fees. The estimate was accurate when it was made, but by the time the plaintiffs bought the condominium the developer knew the fees were understated by approximately $60 per month. The trial judge allowed the plaintiff's action on a summary trial and awarded damages. The plaintiffs had not seen the offering memorandum at the time they agreed to buy the condominium as it was delivered to them only after they entered into to purchase agreement. However, that fact made no difference to the claim due to the presumption of reliance under the Real Estate Act.

**126**  Whether Sharbern can succeed in its statutory claim against VAC is an issue to be determined at trial, as is the question of whether the deeming provisions of the Real Estate Act apply to a common law claim of misrepresentation. If Sharbern does not succeed on either of those issues, actual reliance will become an issue, as it is in the claims against MM&R. As already noted, the defendants say actual reliance can be determined only on a case by case basis and is, by necessity, an individual issue.

**127**  At least one of the Owners, a company known as Tevan Trading Ltd., purchased ten units in the Airport Hilton. By operation of a regulation to the Real Estate Act, VAC may be exempt from the requirement to provide Tevan with a copy of the Offering Memorandum. In that case, a subclass consisting of Tevan may be required to prove actual reliance as well.

**128**  The Court in Kripps cited (at para. 98) one of its earlier decisions concerning fraudulent misrepresentation, Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd. [*(1990), 4 C.C.L.T. (2d) 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2FB-00000-00&context=) in which Anderson J.A. held the following at p. 68

In my opinion, once the plaintiff has proved a false representation of a material fact, the evidentiary burden shifts to the defendant to clearly show that the plaintiff was not induced by the false representation.

**129**  The majority in Kripps also concluded that proof of reliance in negligent misrepresentation cases should not be any different than it is in cases of fraud.

**130**  As noted, reliance may or may not be an individual issue with respect to the allegations against VAC. At this stage of the proceedings, however, whether the deemed reliance is available to the Owners is a common issue.

**131**  In the event the deeming provisions of the Real Estate Act are not available to the Owners, reliance may or may not be inferred with respect to VAC.

**132**  This case, like most cases in which certification is sought, involves some individual issues. With respect to MM&R, reliance is one of them. It may also be an individual issue with respect to VAC. However, the relative significance of the common and individual issues is a matter that must be examined in the context of the preferability analysis, to which I will turn in due course.

Remedies

**133**  Sharbern proposes the following common issues with respect to remedies:

1. Subject only to any individual defences, and any individual issues of reliance, is the Class or are the members of the Class entitled to the following remedies as a result of the defendants' breach of fiduciary duty, breach of trust or misrepresentation and ***negligence***:
2. (i) rescission of their purchases?

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | \* |  | (ii) |  | damages, including statutory compensation? |  |

1. If the Class or the individual Owners are entitled to damages, what is the measure of the damages and how are they to be calculated?
2. If the measure of damages depends in whole or in part on the fair market value of the strata lots in the Hotel at a given time, what was the fair market value of the strata lots at the relevant time(s)?
3. Are VAC and HMS liable to the Class on an accounting? If so, does their liability include:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | \* |  | (i) |  | liability for the return of management fees taken by them from the Hotel's revenues? |  |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | \* |  | (ii) |  | liability for the return of any other financial benefits obtained through breaches of fiduciary duty? |  |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | \* |  | (iii) |  | liability arising out of the failure by VAC and HMS to lawfully allocate expenses between the Hotel and the Airport Marriott: |  |

**134**  It was not disputed by VAC and HMS that their potential liability on an accounting was a common issue.

**135**  The rescission remedy as against VAC arises from the allegations of misrepresentation and breach of fiduciary duty consequent upon the purchase of the Airport Hilton units. Whether a particular class member is entitled to the remedy will depend on individual defences that may be raised. For example, the availability of rescission as a remedy will depend on when individual Owners became aware of the alleged breaches.

**136**  Sharbern acknowledges that whether the Court will be able to address damages as a common issue is unclear at this stage in the proceedings. It says damages may be a common issue, citing Kerr v. Danier Leather Inc. [*(2004), 46 B.L.R. (3d) 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-FC6N-X4JF-00000-00&context=), [*23 C.C.L.T. (3d) 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-FC6N-X4JF-00000-00&context=) (O.S.C.), where damages were dealt with as a common issue in a misrepresentation action involving the sale of shares under an offering memorandum.

**137**  Where the case of misrepresentation or breach of fiduciary duty has been established in respect of the purchase of real property, the measure of damages is the difference between the purchase price and the fair market value of the property at the date the purchaser could reasonably have known the facts giving rise to the claim: Begusic v. Clark Wilson & Co. [*(1991), 82 D.L.R. (4th) 667*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60GK-00000-00&context=), [*57 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60GK-00000-00&context=) at paras. 63-68 (C.A.). In this case, the Owners will seek damages based on the difference between the value of the units and the purchase price.

**138**  The units differ in size and location within the hotel. Sharbern proposes that the market value of the units be determined by reference to the value of a representative unit, with adjustments, to be addressed through expert evidence. It suggests this issue is amenable to determination at a common issue trial, where the valuation experts would be required to testify only once.

**139**  The date of valuation may not be a common issue. The Court must be able to determine the earliest and latest dates on which an Owner might have been expected to know the facts giving rise to his or her claim. Sharbern proposes that in the trial of the common issues the Court hear evidence and determine how market values have fluctuated through the various possible dates that may be determined individually. In other words, the Court would fix the valuation period on the common issues trial, and on subsequent individual trials determine individual values within that period.

**140**  I accept that the issue of an accounting remedy is a common issue. However, whether the Court will be in a position to address rescission and damages as common issues is not clear at this stage. The nature and scope of these remedial matters will depend, at least in part, on the outcome of the other common issues. In my view, while some of the remedial issues may be common issues as proposed by Sharbern, their consideration ought to be put in abeyance until after the trial of the common issues on liability.

Summary: Common Issues

**141**  In summary, I conclude that the following issues are common issues, subject to further discussion and submissions by counsel as to the precise framing of the issues:

1. Trust Relationship:
2. Whether VAC and HMS are trustees of the revenues collected under the HAMA; and
3. If so, the scope of the obligation of VAC and HMS to account for the trust funds received and expended in the management of the Hotel;
4. Fiduciary Duty:
5. Whether VAC and HMS owe fiduciary duties to the Class in respect of the operation on the Hotel and, if so, whether their fiduciary duties conflict with their interests with respect to the Airport Marriott or their duties to the unit owners of that hotel;
6. Whether VAC and HMS have breached their fiduciary duties to the Class;
7. Misrepresentation - VAC
8. Whether VAC owed a duty of care to the Class in respect of the impugned representations contained in the Offering Memorandum;
9. Whether the impugned representations in the Offering Memorandum were material misrepresentations and, if so, whether VAC was negligent or fraudulent;
10. Whether the members of the Class are deemed to have relied on the impugned representations of VAC pursuant to s. 75(2) of the Real Estate Act;
11. Whether, subject to individual issues of reliance and individual defences, VAC is liable for negligent or fraudulent misrepresentation;
12. Misrepresentation: MM&R
13. Whether MM&R owed a duty of care to the Class in respect of representations in the Offering Memorandum;
14. Whether MM&R materially misrepresented to the Class that the financial projections in the Offering Memorandum were reasonable and, if so, whether MM&R was negligent;
15. Whether, subject to individual issues of reliance and individual defences, MM&R is liable for misrepresentation.

**142**  The precise nature and scope of the individual reliance issues and individual defences ought to be determined following the trial of the common issues.

**143**  While some remedial issues will likely be common issues, their characterization ought to await the conclusion of the common issues trial.

1. Is a class action the preferable procedure?

**144**  To reiterate, s. 4(2) of the Class Proceeding Act provides that when determining whether a class proceeding would be the preferable procedure, the Court's consideration must include the following:

1. whether common issues predominate over individual issues;
2. whether a significant number of class members have a valid interest in individually controlling the prosecution of separate actions;
3. whether the proceeding would involve claims that are the subject of other proceedings;
4. whether other means of resolving the claims are less practical or efficient;
5. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**145**  The principal submissions of all defendants are twofold. First, they say resolution of the common issues will not sufficiently advance the litigation, given the significance of individual issues of duty of care, reliance and materiality to claims of negligent and fraudulent misrepresentation. The individual issues, say the defendants, will overwhelm the common issues.

**146**  Second, the defendants submit that a class action proceeding is not designed to shift the balance in commercial litigation by preventing the defendants access to procedures they need to defend the action and move the litigation forward. They say that in this case, in particular, postponement of their discovery rights with respect to the individual Owners on the issues of reliance and materiality will result in unfairness to them.

**147**  The defendants say the preferable procedure is the Multi-Plaintiff Action. That proceeding was filed on behalf of 210 owners of 126 units (of the 215 units sold to the public).

**148**  I have already addressed the issues of duty of care and materiality. Both, in my view, are common issues that do not require individual inquiries. As already noted, however, the reliance issues will require individual inquiries, at least with respect to the negligent misrepresentation claim against MM&R, and possibly with respect to the misrepresentation claims against VAC.

**149**  Sharbern's response to the defendants' arguments is as follows. Fundamentally, it says, this is a prospectus case, not a case involving multiple representations. There is no plea that would engage individual inquiries as to what might have been said to each of the Owners by realtors or others. The Owners do not advance claims based on any representations that may have been made by VAC in promotional materials, meetings or one-on-one discussions with prospective investors. To the extent that VAC made representations not found in the Offering Memorandum, the owners do not advance claims based on them.

**150**  Sharbern says the fact that this is a prospectus case goes a long way to addressing the defendants' arguments concerning reliance and materiality. One must simply ask "Why is a prospectus required?" The law requires a prospectus in transactions such as the one currently in issue because purchasers must be apprised of all facts material to their decision to invest. It is presumed that investors will rely on the prospectus when making their investment decision. The prospectus protects not only the purchaser but the developer, who can point to the prospectus in the event the purchaser claims he or she was not made aware of all facts material to the transaction.

**151**  Simply put, says Sharbern, there is no air of reality to the argument that reliance is the most significant issue in a prospectus case, or that reliance as an individual issue will overwhelm the common issues. In a prospectus case, the most significant issue is whether the material facts contained in the prospectus are true. That issue is a common issue, the answer to which will either end the dispute or significantly move the litigation forward.

Section 4(2)(a) Predominance of Common Questions

**152**  As noted earlier, in the context of preferability, the statute requires the Court to consider the relative significance of the individual issues to the common issues. While there is no requirement that the common issues predominate, the Act directs the Court to consider as one criterion whether common issues predominate over issues affecting only individual members of the class.

**153**  As against VAC, there may or may not be individual issues of reliance with respect to most investors. The deeming provisions of the Real Estate Act do not apply to MM&R such that individual issues of reliance are bound to arise. Depending on the circumstances of the case, it may fall to the Owners to prove reliance.

**154**  On the other hand, depending upon the findings of fact at trial, reliance may be inferred such that it falls to the defendants to rebut the inference. In Kripps, at para. 103, Finch J.A. (as he then was) concluded the following:

It is sufficient ... for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. I am also of the view that where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor.

**155**  In CIBC the Court concluded that although reliance was a significant individual issue in the action, certification was appropriate. That was because a significant number of issues were properly characterized as common issues on the pleadings, including the existence of a duty of care, the appropriate standard of care, whether there were material misstatements and whether the misstatements were made negligently. Determination of all these issues would significantly advance the litigation. Swinton J. observed:

Here, there are two sets of representations found in the two financial statements. While the reliance of each Original Lender on those representations will have to be determined at some point, it will only be after a determination of significant common issues with respect to liability - particularly the existence of a duty of care to the Original Lenders, the standard of care for auditors, the determination whether there were material misstatements in the financial statements, and whether the misstatements were made negligently or recklessly. All of these are significant common issues, requiring extensive documentary and oral evidence and, with respect to the standard of care issues, expert evidence .... Resolution of these issues is very important to the course of the litigation, as success in respect of the common issues will significantly advance the litigation for the proposed class members, while if those issues are decided in favour of the defendants, the litigation will come to an end (para. 41).

**156**  The defendants argue that misrepresentation claims such as the ones disclosed in this case are not suitable for a class proceeding because the individual issues, and particularly the reliance issues, will inevitably overwhelm the common ones. One of the decisions on which they rely is Moyes v. Fortune Financial Corp. [*(2002), 61 O.R. (3d) 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M38X-00000-00&context=), [*32 C.P.C. (5th) 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M38X-00000-00&context=) (S.C.), aff'd [*(2003), 67 O.R. (3d) 795*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3RW-00000-00&context=), [*38 C.P.C. (5th) 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGY5-M3RW-00000-00&context=) (Div. Ct.) [Moyes]). In Moyes, duty of care was also found to be an individual issue, but the Court focussed principally on the issue of reliance. At para. 32, the Court said the following:

Common issues #4 and #5 theoretically could be determined on a class-wide basis insofar as the statements are determined to be false, misleading or inaccurate. But that determination alone does not determine the issue of liability. Central to the liability issue in this regard are the determinations of whether any given class member received the statements and, if so, whether they relied upon them and, if so, whether that reliance caused any damage. In other words, the determination of the accuracy of the statements may start you along the road to the ultimate destination, that is the determination of liability, but it appears there would be many miles left to travel before arriving there. This point is made by Winkler J. in Carom v. Bre-X Minerals Ltd., supra, at p. 241 O.R.:

Reliance is not established by a mere showing that a plaintiff was a recipient of a representation. Rather, the representation must have caused the recipient to act in a certain manner. In these actions, this means that not only will the details of the actual representations made to the individual class members have to be analyzed, but that the action taken by the class members after each representation was made will have to be scrutinized as well.

**157**  Moyes involved a plaintiff who sought to certify claims against a former investment advisor to a proposed class of investors. The advisor's dealings with the investors involved a series of representations made at various meetings at different times. Some representations were made by the promoter, while others were made by an intermediary. There was no offering memorandum or prospectus. The Court concluded, among other things, that a finding of misrepresentation on the part of the intermediary, as distinct from the promoter, would not necessarily mean success for all members of the class on that issue.

**158**  Sharbern, on the other hand, relies on Metera. In that case, four plaintiffs applied for certification of an action on behalf of 85 investors against Financial, as well as a mutual fund dealer and related corporations. The investment offered by Financial was limited partnership units in an apartment complex in Las Vegas. The units were marketed under a prospectus exemption provided by the Alberta securities legislation. The claims against the defendants included ***negligence***, negligent misrepresentation, breach of fiduciary duty and conflict of interest.

**159**  In Metera, Slatter J. discussed at some length the issue of whether proceedings ought to be certified where there are significant individual issues in addition to the common issues. The Court observed that both British Columbia and Alberta class proceeding legislation recognize there will be cases where common issues ought to be decided as a class proceeding even though numerous individual issues will remain to be decided. As it was put by Slatter J. at para. 68, "Even where the individual issues overwhelm the common issues, the court must still ask How is it best to decide those common issues?'."

**160**  Slatter J. went on to say the following at para. 69:

It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are.

**161**  The Court in Metera discussed the Moyes decision at some length. Slatter J. noted that in Moyes, concern was expressed that a decision on the common issues would only begin the inquiry, and would be only theoretical until the individual issues were decided. Citing cases such as Bre-X, the Court observed that a determination of the common issues need not necessarily result in a determination of liability:

... the common issues do not have to embrace the entire cause of action. So just because an issue like reliance is an individual issue does not preclude other aspects of a misrepresentation claim from raising common issues. ... [T]he better formulation of the test is how the common issues can best be decided .... This test can be met even if the common issues are somewhat "preliminary" (para. 71).

**162**  The decision of Bauman J. in Samos Investments Inc. v. Pattison [*(2001), 22 B.L.R. (3d) 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-619P-00000-00&context=), [*2001 BCSC 1790*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-619P-00000-00&context=) [Samos], provides a helpful overview of cases involving proposed class actions for misrepresentation and breach of fiduciary duty arising primarily from investments. Mr. Justice Bauman observed at para. 78 of Samos that from a review of the cases in which certification was granted one could extract certain common themes, which he described as follows:

1. The first point that emerges is that in each case the central allegation concerned essentially a single transaction (at para. 81);
2. The second point that emerges from these cases is really a reflection of the first: the proposed class in each case was largely homogeneous; the same fraud or misrepresentation was made to all and that triggered each of their losses - although the quantum of each loss might not have been similar (at para. 91);
3. The third point is in turn a reflection of the second: each class member's loss was easy to quantify, that is, amount invested less amount realized when the fraud/misrepresentation became generally known (at para. 92).

**163**  After reviewing the cases in which certification was denied, Bauman J. noted the following:

What emerges from these cases is evidence of a marked reluctance to certify actions where there would be the need to resolve a number of issues individually, where there are differences in the claims or conflicts of interest between the proposed class members, and where, in misrepresentation cases, there is no commonality as to the representation received or the timing of receipt (para. 107).

**164**  Samos concerned an alleged conspiracy involving a series of corporate transactions undertaken by directors of Westar, a widely traded public company, over a period of several years. The action, initiated by a minority shareholder in the company, involved allegations of fraudulent misrepresentation and breach of fiduciary duty. The proposed class of plaintiffs was shareholders who held shares in the company during several different time periods.

**165**  In Samos, the Court refused to certify the action, principally for two reasons. First, as a result of the active trading of Westar shares during the several time periods in question, the allegations involved different representations made to different shareholders during various periods of time, potentially inducing a spectrum of reactions from investors. Consequently, there were few, if any, common issues. Second, and perhaps more importantly, the fact of different representations at different times within each of the time periods created actual conflicts between members of the class.

**166**  In Western Canadian Shopping Centres Inc. v. Dutton, [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), the Court permitted certification of an investor's action where the individual circumstances of the investors were quite diverse. The essence of the claim was that the defendants and their advisors breached their fiduciary duties to the investors by mismanaging or misdirecting their funds. Writing for the Court, McLachlin C.J. held as follows at paras. 53-54:

The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, though different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess recessionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

**167**  In the case of Kerr v. Danier Leather [*(2001), 19 B.L.R. (3d) 254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-FCYK-21TF-00000-00&context=), [*14 C.P.C. (5th) 292*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-FCYK-21TF-00000-00&context=) [Kerr cited to C.P.C.], the Court certified a claim for misrepresentations contained in a prospectus issued under the Ontario securities legislation for an initial public offering. At the certification hearing, it was unclear whether the damages issues could be determined as common issues. The Court nevertheless held that certification was warranted. At paras. 60-62, the Court concluded as follows:

There is an arguable issue in respect of damages that properly cannot, and should not, be determined at this point. This is an issue for the judge that tries the common issues. The CPA is sufficiently flexible such that if it is ultimately determined that the damages issues must be dealt with on an individual basis this can be done ....

Although a resolution of the common issues as to misrepresentation may not end the litigation because it is ultimately determined that the question of damages must [be] dealt with as individual issues, the resolution of the conceded common issues in favour of the defendant would undoubtedly conclude the matter. On the other hand, a resolution of the conceded common issues in favour of the plaintiff class would advance the progress of the litigation. [Emphasis in original]

**168**  In cases where common issues have been identified that would move the litigation forward, the existence of significant individual issues has not been regarded as an obstacle to certification. In Harrington, a products liability case involving silicone breast implants, the Court identified as a single common issue the question of whether the implants were reasonably fit for their intended purpose. The Court acknowledged that individual issues of causation, allocation of fault, limitation defences and damages remained to be determined following the trial of the common issue. The action was nevertheless certified on the basis that the resolution of the common issue would significantly advance (or end) the litigation.

**169**  Another products liability case, Hoy v. Medtronic, Inc. [*(2001), 94 B.C.L.R. (3d) 169*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6143-00000-00&context=), [*2001 BCSC 1343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6143-00000-00&context=), aff'd [*[2003] 7 W.W.R. 681*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3GV-00000-00&context=), [*2003 BCCA 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3GV-00000-00&context=), involved the manufacture and sale of allegedly defective pacemaker leads. The identified common issues were duty of care, breach of standard of care and punitive damages. There were many more individual issues than common issues, all of which were likely to arise at the trials of the individual claims, including the issue of damages. Nevertheless, the common issues were such that their resolution would advance the litigation in a meaningful way, and the numerous individual issues were not a bar to certification.

**170**  A similar result was reached in Rumley v. British Columbia, [*[2001] 3 S.C.R. 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), which involved allegations by former residents of the Jericho School for the Deaf that they had been the victims of systemic sexual abuse. The common issue was whether the defendant was negligent or in breach of fiduciary duty in failing to take reasonable measures to protect students from sexual misconduct. Again, the action was certified despite the numerous individual issues such as causation and injury that would remain to be litigated following the common issues trial.

**171**  Returning to s. 4(2)(a) of the Act as it relates to the circumstances of the present case, I am persuaded that the relationship between the common and individual issues is one that favours certification. This is a prospectus case. The alleged representations were made in one set of documents, at one time, to a finite group of investors. The common issues are fundamental to the resolution of the claims advanced, and are not overwhelmed by individual issues such as reliance. I accept the submission of Sharbern that with respect to the allegations of both misrepresentation and breach of fiduciary duty, the central question is whether the impugned statements in the Offering Memorandum are true. If the answer is "yes", the defendants will defeat both the misrepresentation and breach of fiduciary duty claims. If the answer is in whole or in part "no", the litigation will have been advanced significantly. In view of the manner in which the action has been framed by the pleadings, I am satisfied that the common issues of fact and law will predominate over the issues affecting only individual members.

Section 4(2)(b) Separate Actions

**172**  The proposed class action is supported by a majority of the members of the class. There was no evidence to suggest that any of the class members wished to proceed individually.

Section 4(2)(c) Other Proceedings

**173**  The Multi-Plaintiff Action was launched in February of 2004 to preserve the rights of individual plaintiffs against the possible expiry of the limitation period. In the event that Sharbern's action is certified, the Multi-Plaintiff Action will be stayed.

Section 4(2)(d) Other Means of Resolving the Claims

**174**  The defendants argue that the Multi-Plaintiff Action is a more practical and efficient means of determining the claims than the proposed class action. They say there is no evidence that the class proceeding would promote access to justice, particularly as individual claims of this magnitude are commonly handled as normal commercial lawsuits. According to the defendants, class actions were intended only to assist those claimants with small "non-commercial" claims, such as product liability claims, where relatively small claims would not otherwise proceed. In those cases, particularly given the size of the claims, there is no expectation of (or necessity for) significant discovery of individual claimants.

**175**  In the present case, the average price of an individual unit was approximately $155,000. However, in some cases, several Owners pooled their resources to buy one unit. In other cases, one Owner purchased one or more units. Thus, the size of the investment varies from Owner to Owner.

**176**  While one policy underpinning of the Act is undoubtedly to promote access to justice for those litigants bringing claims with limited individual economic recovery, the legislation is not limited to that objective. In CIBC, for example, the Ontario Divisional Court held that a class action would be the preferable procedure to address the claims of sixty-nine financial institutions with respect to losses on loans exceeding $1 billion. The preferability criteria, while encompassing the objective of access to justice, do not limit class proceedings on that basis.

**177**  The defendants also argued that the Act was not designed to alter the balance in commercial litigation where there is an expectation of significant discovery early in the proceedings. They say substantial unfairness will result if they are denied access to full and timely discovery of all 210 owners currently involved in the litigation.

**178**  While there will be postponement of discovery rights, the Act contemplates that result once an action is certified, pending resolution of the common issues. That is the inevitable result of certification in most instances. However, it will be open to the Court to give directions as to the manner and scope of discovery under s. 27(3)(b) of the Act, and to establish special rules for the trial of the individual issues, if warranted.

Section 4(2)(e) Administration of the Class Proceeding

**179**  I have already concluded that individual inquiries such as those contemplated by the Multi-Plaintiff Action do not constitute the preferable procedure in this case, given the number of common issues and the advantages of having those common issues decided first. Once the common issues are decided, individual issues such as reliance and individual defences that are available against members of the class can be tested.

**180**  The alternative to certification is the Multi-Plaintiff Action, filed as a precautionary measure on behalf of 210 owners of 126 units. Every plaintiff will be subject to discovery on every issue. In Reid v. Ford Motor Co., [*[2003] B.C.J. No. 2489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0G8-00000-00&context=), [2004] B.C.W.L.D. 295, [*2003 BCSC 1632*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0G8-00000-00&context=), Gerow J. made the following observation which, in my view, is applicable to the circumstances in the present case:

Judicial economy will also be enhanced because the class members do not need to participate in the initial discovery process or the common issues trial. If the defendants are successful at the common issues trial, the court and the class will be saved from having to manage and participate in such individual procedures. If the plaintiff is successful, any procedures necessary to resolve the individual litigation will be no more complex than they would have been within individual litigation, and given the many management tools available in class proceedings, should be simpler (para. 100).

**181**  In short, the administration of the class proceeding will present fewer difficulties than those likely to be experienced if the matter proceeded in the form of the Multi-Plaintiff Action. The identical issues would have to be considered in that action, but in a less controlled and efficient manner.

**182**  The defendant MM&R argued that the third party claim it has brought against the Larco Defendants poses practical problems for the certification application. MM&R submitted that while liability in the third party claim will not crystallize until the Owners' claims have been determined, facts relevant in the claim include those relevant in the Owners claim against all defendants. Thus, it argues, the interests of judicial economy would not be served by dealing with the third party claim after the Owners' claims are resolved.

**183**  At this point in the proceedings, it is not clear why the third party claim cannot be tried during the common issues trial, or immediately after. All issues specific to the third party claim are common to all Owners. The Larco Defendants will be participating in the common issues trial such that no prejudice will accrue to them.

**184**  There are a number of options available to deal with the third party claim, including the ordering of a separate trial (Aylsworth v. Richardson Greenshields of Canada Ltd. [*(1987), 20 B.C.L.R. (2d) 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FCCX-60NH-00000-00&context=) (S.C.)). It is open to the defendants to make further submissions on this point before the trial on the common issues. At this point, I do not view the third party proceedings as an impediment to certification of Sharbern's action.

Summary on the issue of preferable procedure

**185**  In light of the criteria described in s. 4(2) of the Act, I am satisfied that a class proceeding is the preferable procedure in this case. The class is limited and well-defined. There are substantial common issues which are significant in relation to the claims as a whole. The resolution of those issues will advance the claims in a meaningful way.

Proposed Plan for Proceeding

**186**  Sharbern's proposed plan for proceeding is appended to its notice of motion. Detailed submissions concerning the plan were not made in the course of the certification hearing and, certainly, at that point such arguments would have been premature. A case management hearing ought to be convened at the earliest convenience of the parties and the Court for the purpose of dealing with the litigation plan.

1. SUMMARY OF CONCLUSIONS

**187**  I have concluded the following:

1. The claims of Sharbern raise several significant common issues, the resolution of which will either end the lawsuit or advance it in a meaningful way. Framed generally, the common issues are the following:
2. Trust obligations of VAC and HMS
3. Breach of fiduciary duty by VAC and HMS
4. Liability of VAC for misrepresentations (fraudulent and negligent) in the Offering Memorandum (including the issue of deemed reliance under the Real Estate Act);
5. Liability of MM&R for negligent misrepresentation in the preparation of the financial projections;
6. Remedial issues such as rescission and damages may or may not be individual issues. Their characterization should await the conclusion of the common issues trial.

|  |  |  |  |
| --- | --- | --- | --- |
| 2 |  | A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. |  |

**188**  Accordingly, I make the following orders:

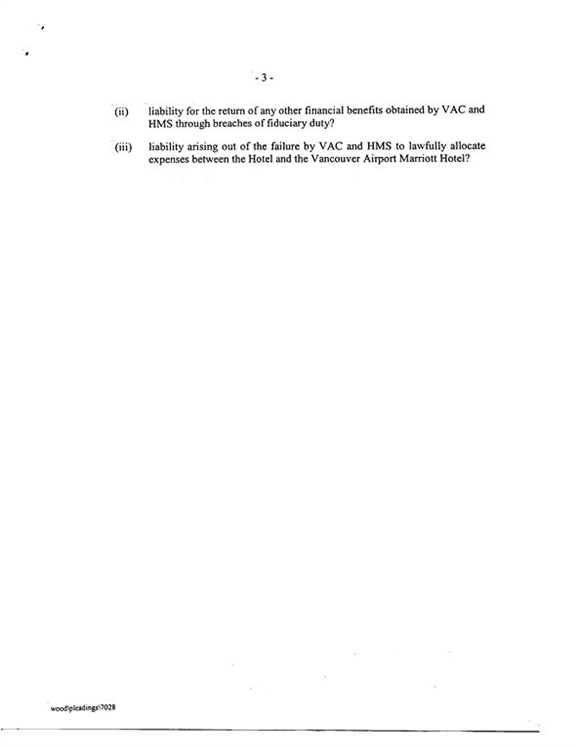
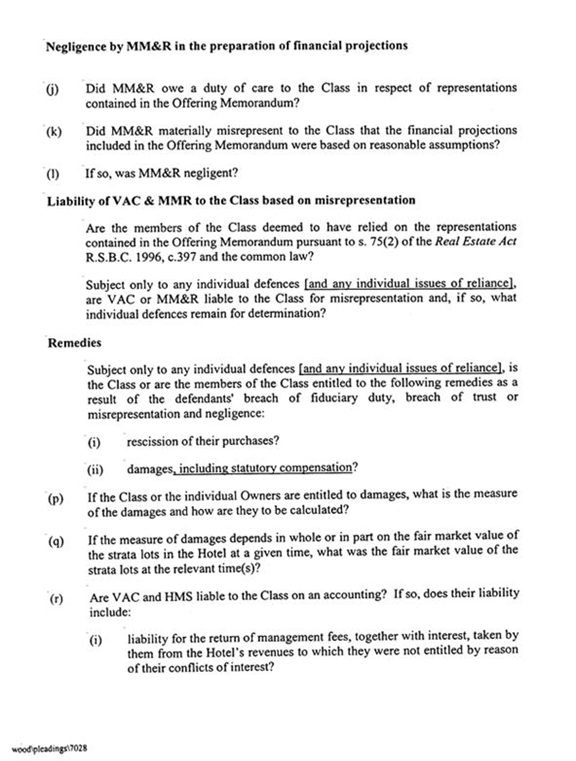
1. The action will be certified as a class proceeding;
2. The Class is described as proposed in Sharbern's notice of motion, subject to further submissions by counsel on additional subclasses (such as a subclass consisting of Tevan);
3. The notice requirements and opting out provisions are as proposed by Sharbern;
4. The plaintiff Sharbern will be the representative plaintiff;
5. The common issues of fact or law are as described in para. 140 above, subject to discussion and further submissions by counsel;
6. The plan of proceeding proposed by Sharbern will be subject to discussion and further submissions by counsel.

**189**  A case management conference will be convened at a date agreeable to counsel.

WEDGE J.

\* \* \* \* \*

APPENDIX 1



\* \* \* \* \*

CORRIGENDUM

Released: March 14, 2005.

[1] This is a corrigendum to my Reasons for Judgment dated

February 24, 2005. The citation was listed as Sharbern

Holdings Inc. v. Vancouver Airport Centre Ltd., et al.

The proper citation should be Sharbern Holding Inc. v. Vancouver

Airport Centre Ltd. et al.

WEDGE J.

**End of Document**

[***Skytrac Systems Ltd. v. Mares, [2009] B.C.J. No. 1641***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6255-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

T.R. Brooke J. (In Chambers)

Heard: July 20, 2009.

Oral judgment: July 21, 2009.

Docket: 82787

Registry: Kelowna

**[2009] B.C.J. No. 1641** | 2009 BCSC 1121 | 2009 CarswellBC 2175 | 181 A.C.W.S. (3d) 776

Between Skytrac Systems Ltd., Plaintiff, and Mircea Mares, Defendant

(14 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Injunctions — Interlocutory or interim junctions — Preservation of property — Mareva injunctions — Application by plaintiff for Mareva injunction restraining defendant from disposing of his assets in British Columbia dismissed — Plaintiff, the defendant's former employee, sued defendant for *negligence* and breach of fiduciary duty — Defendant's only major asset was the family home — No real risk of the dissipation of the house or the proceeds of the sale of the house.**

|  |
| --- |
| Application by the plaintiff for a Mareva injunction restraining the defendant from disposing of his assets in British Columbia. The principal asset was the family home, which the defendant owned with his wife as joint tenant. The home was now for sale. The defendant was a former employee of the plaintiff. The plaintiff alleged that the defendant breached his duty of good faith owed to the plaintiff and was negligent in the performance of his job duties, causing over $200,000 in damages to the plaintiff. The defendant admitted possibly moving to Eastern Canada if he was unable to find employment on British Columbia.  HELD: Application dismissed.  There was no real risk of the dissipation of the house or the proceeds of the sale of the house. If the defendant moved to Ontario or Quebec, reciprocal enforcement of judgments was available there. |

**Counsel**

Counsel for the Plaintiff: T. Kent.

Counsel for the Defendant: D. Frechette.

**Oral Reasons for Judgment**

|  |
| --- |
| **T.R. BROOKE J. (orally)** |

**1**   The plaintiff seeks a *Mareva* injunction restraining the defendant from selling or otherwise disposing of his assets in British Columbia. The principal asset is the family home, which the defendant owns with his wife as joint tenant. The home is now for sale, and while the defendant deposes that he intends to purchase a condominium in the Kelowna area, he says that he may be obliged to move to Eastern Canada, where his employment prospects as a professional engineer, with skill and experience in the design and assembly of devices which connect aircraft navigation systems to satellites, may be in greater demand.

**2**  By way of background, the defendant worked at a senior level for the plaintiff for three years until he resigned effective April 2009. The plaintiff says that after his departure, it became apparent as a result of an e-mail survey that the defendant was developing technology on his own account and for his own benefit rather than for the benefit of his employer, to whom he owed a duty of good faith. The plaintiff sues in contract relying upon a confidentiality and non-disclosure agreement, as well as in tort, alleging gross ***negligence*** in the performance of a duty to correct and repair defective interface panels, as a result of which the plaintiff has suffered loss and damage of in excess of $200,000. The plaintiff also asserts that the defendant owed a fiduciary duty to the plaintiff which he has breached.

**3**  A consent order was made April 20, 2009, restraining the defendant from using or disseminating confidential information and from competing with the plaintiff for 18 months from the date of his resignation on March 18, 2009.

**4**  The defendant says that he has no present intention to leave the Kelowna area, though he acknowledges that if he is unable to earn a living in the Okanagan Valley, he will have to consider moving to Eastern Canada where he has greater job opportunities. He denies any breach of his contractual obligations to the plaintiff and he denies any acts of ***negligence***. Moreover, he says that if he owes any fiduciary duties to the plaintiff that he is not in breach of those duties. He submits as well that while the plaintiff says it has suffered loss and damage in excess of $200,000, it has provided no particulars of that loss or damage.

**5**  At this juncture, the parties have not completed discoveries. There has been no demand for or delivery of lists of documents, and the litigation is at an early stage with no trial date taken out.

**6**  The parties agree that the seminal decision on *Mareva* injunctions in Canada is *Aetna Financial Services Ltd. v. Feigelman*, [*[1985] 1 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-235W-00000-00&context=), but the parties differ on the application of *Aetna* in British Columbia. The plaintiff says that it must show a strong *prima facie* case (para. 30 of *Aetna*) or a good arguable case (para. 54, *Tracy v. Instaloans Financial Solutions Centres*, [*2007 BCCA 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1JW-00000-00&context=).

**7**  I am satisfied that the plaintiff has made out at least a good arguable case. Moreover, the parties seems to concur that the plaintiff must show that there is a real risk the defendant will remove his assets from the jurisdiction or dissipate those assets to avoid judgment (para. 30, *Aetna*). The plaintiff relies upon *Insurance Corp. of British Columbia v. Patko*, [*2008 BCCA 65*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1JW-00000-00&context=), a second decision of the British Columbia Court of Appeal, where the Chief Justice of British Columbia says at para. 26:

The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach ... In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted" ... Thus, though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a *Mareva* injunction in British Columbia.

**8**  Applying this proposition to the facts before me, I am not satisfied that there is a real risk of the dissipation of the house or the proceeds of the sale of the house. It is the defendant's principal asset, as nearly as I can find. He shares ownership with his wife, and while it has some of the qualities of an investment, it is his home. He says that if he and his wife are able to sell, he expects to purchase a condominium in the Okanagan. He says that it is only if his "start-up" of a green energy company does not succeed that he would consider relocating to Eastern Canada, where his prospects for employment are greater.

**9**  Ontario and Quebec are parts of this country and reciprocal enforcement of judgments legislation is available. I read from the headnote of *Aetna*:

One factor considered below was the intention of appellant to transfer assets to Quebec. Assets exceeding the value of assets affected by the order under appeal are in Ontario, a province with which Manitoba has arrangements for the reciprocal enforcement of judgments. As well, Quebec accords a means of enforcement of Manitoba judgments rendering ineffective any argument that the respondent would be exposed to some inevitable or irreparable loss if the assets of appellant were transferred from Manitoba to Quebec. In addition, respondent had extensive and easily enforceable rights under the *Bankruptcy Act* and the *Canada Business Corporations Act* in the event of an attempt to defraud creditors through a business default or a winding up of the company.

**10**  This is not a case where the respondent has liquid and easily moveable assets, where a risk has been raised of the removal of the assets from the jurisdiction of this court. The asset here is, as I have said, the home the defendant shares with his wife. I also wish to point out that the damages or losses the plaintiff claims to have sustained have not only not been proven, that will take a trial, but no particulars have been given, and I am not able to assess the likelihood of the damages, in fact, flowing from the defendant's acts or absence of action.

**11**  In the result, the plaintiff's application is dismissed with costs to the defendant, which I set at Scale B, and those will be to the defendant in any event of the cause.

[DISCUSSION RE ABILITY TO BRING A NEW APPLICATION]

**12**  THE COURT: Well, perhaps not so much further and better, but if circumstances changed --

**13**  MR. KENT: Yes, that is what I mean.

**14**  THE COURT: -- if the facts upon which I relied no longer exist, then of course there may be a basis for a fresh application. Yes, so it is without prejudice to that.

T.R. BROOKE J.

**End of Document**

[***Strata Plan BCS 1589 v. Nacht, [2018] B.C.J. No. 517***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5S18-5CC1-JJ1H-X026-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.S. Funt J.

Heard: February 22, 2018.

Judgment: March 21, 2018.

Docket: S179994

Registry: Vancouver

**[2018] B.C.J. No. 517** | 2018 BCSC 455

Between The Owners, Strata Plan BCS 1589, Appellant, and Jeffrey Nacht and Gail Nacht, Respondents

(42 paras.)

**Case Summary**

**Administrative law — Judicial review and statutory appeal — When available — Error of law — Leave to appeal — Application by strata corporation for leave to appeal decision of Civil Resolution Tribunal allowed — Tribunal determined respondent unit holders were not liable to appellant for insurance deductible as based on its reading of appellant's bylaws, appellant would need to show respondents were negligent — In interests of justice and fairness to grant leave — Questions of law raised, regarding interpretation of bylaws, s. 158 of Strata Property Act and application of stare decisis, were of sufficient importance that it would benefit from being resolved by court to establish precedent — Strata Property Act, s. 158(2).**

**Real property law — Proceedings — Appeals and judicial review — Application by strata corporation for leave to appeal decision of Civil Resolution Tribunal allowed — Tribunal determined respondent unit holders were not liable to appellant for insurance deductible as based on its reading of appellant's bylaws, appellant would need to show respondents were negligent — In interests of justice and fairness to grant leave — Questions of law raised, regarding interpretation of bylaws, s. 158 of Strata Property Act and application of stare decisis, were of sufficient importance that it would benefit from being resolved by court to establish precedent — Strata Property Act, s. 158(2).**

|  |
| --- |
| Application by the strata corporation for leave to appeal decision of the Civil Resolution Tribunal. There was a water leak in the respondents' strata unit that caused $87,000 in damage. The costs of the damage were covered by the appellant's insurance, except for a $25,000 deductible. The Tribunal determined the respondents were not liable to the appellant for the deductible as based on its reading of the appellant's bylaws, the appellant would need to show the respondents were negligent in order to recover the deductible. The Tribunal relied on Strata Plan LMS 2446 v. Morrison.  HELD: Application allowed.  Whether the appellant's bylaws could narrow the scope of s. 158 of the Strata Property Act was a matter of statutory interpretation and a question of law that was determined by the correct legal test. The proper interpretation of the appellant's bylaws was also a question of law that was independent of the facts at bar and engaged the correct legal test. The proper application of stare decisis and whether Morrison was wrongly decided were also questions of law. It was in the interests of justice and fairness to grant leave. The questions were of sufficient importance that it would benefit from being resolved by the court to establish a precedent. |

**Statutes, Regulations and Rules Cited:**

Civil Resolution Tribunal Act, [*S.B.C. 2012, c. 25, s. 3.6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VBY-2V21-F2TK-21YV-00000-00&context=)(1), s. 51, s. 56.5, s. 56.5(1), s. 56.5(4), s. 56.5(5)

Human Rights Code,

Strata Property Act, [*S.B.C. 1998, c. 43, s. 158*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JGBH-B0S1-00000-00&context=), s. 158(2)

|  |
| --- |
| **Appeal From:**  As to an appeal of a decision of the Civil Resolution Tribunal the Owners, Strata Plan BCS 1589 v. Nacht, 2017 BCCRT 88. |

**Counsel**

Counsel for the Appellant: S. Todesco.

Counsel for the Respondents: N. Shirazian.

Counsel for the Civil Resolution Tribunal: V. Ryan.

**Reasons for Judgment**

|  |
| --- |
| **G.S. FUNT J.** |

**1. INTRODUCTION**

**1**  The appellant, a strata corporation, seeks leave to appeal a decision of the Civil Resolution Tribunal (the "CRT"): 2017 BCCRT 88.

**2**  To be granted leave, the appellant must show that there is a question of law arising from the CRT decision and that it is in the interests of justice and fairness for the Court to hear the appeal.

**3**  The facts are not in dispute. Briefly stated, there was a water leak in the respondents' strata unit which caused approximately $87,000 in damage to the respondents' strata unit, other strata units, and common property.

**4**  The costs of the damage were covered by the appellant's insurance, except for a $25,000 deductible. The appellant paid the deductible and then sought reimbursement from the respondents. The respondents refused to pay.

**5**  The appellant then brought its claim to the CRT. The CRT heard the matter and ruled in favour of the respondents.

**6**  For the proposed appeal, the appellant is not asserting that the respondents were negligent.

**7**  In my view, the questions of law may be framed as follows:

1. Can the by-laws of a strata corporation serve to narrow the application of s. 158(2) of the *Strata Property Act*, *S.B.C. 1998, c. 43* (the "*SPA*")?
2. What is the correct interpretation of by-law 4.4 of the appellant's by-laws?
3. Should the decision of the Provincial Court in *Strata Plan LMS 2446 v. Morrison*, [*2011 BCPC 519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60XC-00000-00&context=) have application?

**8**  For the reasons that follow, I will grant the appellant leave to appeal.

**2. THE CIVIL RESOLUTION TRIBUNAL**

**9**  At hearing and in written materials, Mr. V. Ryan, counsel for the CRT, provided the Court with impartial and helpful submissions, including a description of dispute resolution before the CRT. I have reviewed the *Civil Resolution Tribunal Act*, *S.B.C. 2012, c. 25* ("*CRTA*") and will adopt Mr. Ryan's description of dispute resolution before the CRT, which reads:

**The Civil Resolution Tribunal**

1. The Civil Resolution Tribunal (the "CRT") is British Columbia's first online tribunal. *The Civil Resolution Tribunal Act* mandates the CRT to provide dispute resolution services in a manner that is accessible, quick, economical, flexible and informal, with a focus on electronic communication and cooperative dispute resolution.
2. The CRT currently has two areas of jurisdiction: small claims disputes totaling $5,000 and under, and certain strata property claims under the *Strata Properly Act*.
3. The CRT does not have jurisdiction to decide constitutional questions, and has limited jurisdiction over the application of the *Human Rights Code*.
4. With respect to strata property disputes, section 3.6(1) of the *Act* sets out the areas over which the CRT has jurisdiction, including:

"(a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that *Act*;

1. the common property or common assets of the strata corporation;
2. the use or enjoyment of a strata lot;
3. money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that *Act*;
4. an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
5. a decision of the strata corporation, including the council, in relation to an owner or tenant;
6. the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting."
7. The *Act* also contains a list of *SPA* provisions over which the CRT does not have jurisdiction.
8. The CRT's dispute resolution process can be categorized into two categories:
9. the "Case Management" phase, and
10. the "Tribunal Hearing" phase.

**The Case Management Phase**

1. A party seeking to resolve a dispute through the CRT must first use the "Solution Explorer", an online interactive question and answer application that provides free legal information and a range of tools for dispute resolution. Parties must use the Solution Explorer before proceeding further in the CRT's dispute resolution process.
2. The Solution Explorer collects information from a potential applicant and compiles a "Summary Report", which serves two functions: firstly, it provides free legal information and tools for parties to resolve the dispute outside the CRT, and secondly, it contains a link to the CRT's application for dispute resolution.
3. In the case of a strata property dispute, a party must also first request a hearing with the relevant strata council before proceeding to dispute resolution, unless the CRT waives this requirement.
4. If a party chooses to proceed with the CRT's dispute resolution process, it must complete an application for dispute resolution and pay a fee. The CRT provides the applicant with a "Dispute Notice Package", which the applicant must serve on all other parties. The applicant must also provide a "Proof of Notice Form" to the CRT within 10 days of providing notice to the other parties.
5. Once all relevant parties have responded, the dispute enters the "Negotiation" process. The dispute is assigned to a facilitator, and the parties are provided an opportunity to negotiate a resolution to the dispute.
6. If negotiation fails, the facilitator begins the "Facilitation" process. The Facilitation process is a flexible, contextual process, but usually involves:
7. Clarifying the claim;
8. Mediation;
9. An exchange of evidence; and
10. In the event facilitation is unsuccessful, preparation for adjudication.

**The Tribunal Hearing Phase**

1. If the Negotiation and Facilitation stages have been unsuccessful, a party can request that the dispute be advanced to the "Tribunal Hearing Phase", an adversarial process that produces a binding decision from a CRT Tribunal Member.
2. The CRT has wide discretion over its own procedure, including the discretion to conduct a hearing by written submissions, telephone, or email. Only in extraordinary circumstances will the CRT conduct an in-person hearing.
3. The Tribunal can accept and admit any evidence it considers necessary, and is not bound by the rules of evidence.
4. The Tribunal must provide reasons for its decision, and must make any order the Tribunal considered necessary to give effect to the decision.
5. The CRT has broad powers to make an order with respect to a strata property claim, including the following:
6. An order requiring a party to do something;
7. An order requiring a party to refrain from doing something;
8. An order requiring a party to pay money.
9. In addition, the CRT has the authority to make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.
10. Section 51 of the *Act* grants the CRT the ability to amend a final decision, or an order giving effect to that direction, for the purposes of clarifying the decision or order.

[Footnotes omitted.]

**3. Key statutory provisions**

1. **Leave to Appeal**

**10**  Section 56.5 of the *CRTA* provides for an appeal to the Court. Section 56.5 reads:

56.5(1) Subject to this section, a party that is given notice of a final decision in a strata property claim may appeal to the Supreme Court on a question of law arising out of the decision.

1. A party may appeal to the Supreme Court only if
2. all parties consent, or
3. the court grants leave to appeal.
4. A party may not file an appeal under subsection (1) later than 28 days after the party is given notice of the final decision.
5. The court may grant leave to appeal under subsection (2) (b) if it determines that it is in the interests of justice and fairness to do so.
6. When deciding whether it is in the interests of justice and fairness to grant leave, the court may consider the following:
7. whether an issue raised by the claim or dispute that is the subject of the appeal is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent;
8. whether an issue raised by the claim or dispute relates to the constitution or the *Human Rights Code*;
9. the importance of the issue to the parties, or to a class of persons of which one of the parties is a member;
10. the principle of proportionality.
11. On appeal, the court may do one of the following:
12. confirm, vary or set aside the decision of the tribunal;
13. refer the claim back to the tribunal with the court's directions on the question of law that was the subject of the appeal.

[My emphasis.]

**b) *Strata Property Act*** **Provisions**

**11**  For the matter at bar, the key provision of the *SPA* is s. 158. Section 158 addresses the recovery of an insurance deductible by a strata corporation from the owner of the strata unit responsible for the loss or damage. Section 158 reads:

158 (1) Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).

1. Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.
2. Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159.

[My emphasis.]

**12**  There are no applicable regulations.

**13**  The law is settled that, under s. 158(2) of the *SPA*, ***negligence*** is not required for an owner to be responsible for the loss or damage that gives rise to the claim: *Wawanesa Mutual Ins. Co. v. Keiran*, [*2007 BCSC 727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21CP-00000-00&context=); *Mari v. Strata Plan LMS 2835*, [*2007 BCSC 740*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21CS-00000-00&context=).

**4. KEY BY-LAW**

**14**  The appellant's key relevant by-law reads:

4.4 (a) An owner must indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, limited common property, common assets or to any strata lot by the owner's act, omission, ***negligence*** or carelessness or by that of an owner's visitors, occupants, guests, employees, agents, tenants or a member of the owner's family, but only to the extent that such expense is not reimbursed from the proceeds received by operation of any insurance policy. In such circumstances, and for the purposes of Bylaws 4.1, 4.2 and 4.3, any insurance deductible paid or payable by the strata corporation shall be considered an expense not covered by the proceeds received by the strata corporation as Insurance coverage and will be charged to the owner.

1. Bylaw 4.4(a) does not limit, in any way, the ability of the strata corporation to sue an owner pursuant to section 158(2) of the Act.

**15**  The CRT held that, based upon its reading of by-law 4.4, the appellant would need to show the respondents were negligent in order for the appellant to recover the $25,000 insurance deductible from the respondents.

**5. ANALYSIS**

1. **Question of Law**

**16**  The matter is one of a statutory appeal to the Court and not one of judicial review: *CRTA*, s. 56.5(1). The appeal is limited to a "question of law arising out of the [CRT] decision" and it must be "in the interests of justice and fairness" for the Court to hear the appeal: *CRTA*, ss. 56.5(1) and (4).

**17**  A question of law is a question about the "correct legal test". As the Supreme Court of Canada in *Canada (Director of Investigation and Research) v. Southam Inc.*, [*[1997] 1 S.C.R. 748*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3SR-00000-00&context=) at para. 35 stated (in part):

... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "***negligence***" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of ***negligence***, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

[My emphasis.]

**18**  In the matter at bar, the facts are not in dispute and are common and straightforward. Without ***negligence*** of the owners of a strata unit, water escaped from their strata unit, causing water damage to it, as well as to the units of other owners and common property of the strata corporation. The strata corporation had insurance coverage beyond an agreed deductible.

1. **The Appellant's Questions of Law**

**19**  The appellant, in its notice of application, set forth the questions of law as follows:

1. The Appellant submits that the CRT Tribunal member erred in law on the following grounds:
2. By relying on the decision of *The Owners, Strata Plan LMS2446 v. Morrison*, [*2011 BCPC 519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60XC-00000-00&context=), which the Appellant submits was wrongly decided;
3. Determining that the Strata Corporation's bylaws (the "Bylaws") are paramount and can narrow the statutory rights and remedies to sue an owner for recovery of an insurance deductible, pursuant to section 158(2) of the *SPA*;
4. Holding that the Strata Corporation required a bylaw with similar wording to section 158(2) to hold an owner to the standard of "reasonable" [responsible];
5. By failing to properly interpret the provisions of the *SPA* and the wording of the Bylaws;
6. By interpreting the *SPA* and the Bylaws such that it ignored the plain wording of bylaw 4.4(b) which expressly protected the right of the Strata Corporation to sue pursuant to section 158(2), of the *SPA* which includes the standard of "responsible"; and
7. By attempting to determine the "intent" of the Strata Corporation in passing its bylaws instead of interpreting the words on a plain reading of the *SPA* and the Bylaws.

**20**  The appellant, in its written submissions, condensed these questions as follows:

1. The errors of law of law set out in the Strata Corporation's Notice of Application can be condensed to the following issues:
2. the issue of *stare decisis* and the failure of the Adjudicator to follow the higher court authorities;
3. the error by the Adjudicator is determining that section 158(2) could be overridden by the Bylaws; and
4. interpreting section 158(2) in two ways: one way for the purposes of the legislation and in a different matter in the context of the Bylaws.

**21**  I note that the appellant refers to errors of law. The *CRTA* refers to whether there is a "question of law". A question of law is independent of the parties although arising out of the CRT decision. Once the law is determined, whether there has been an error in its application can then be determined.

**22**  As may be seen above, in order to distill matters for the hearing judge, I have framed the questions of law as follows:

1. Can the by-laws of a strata corporation serve to narrow the application of s. 158(2) of the *Strata Property Act*, *S.B.C. 1998, c. 43*?
2. What is the correct interpretation of by-law 4.4 of the appellant's by-laws?
3. Should the decision of the Provincial Court in *Strata Plan LMS 2446 v. Morrison*, [*2011 BCPC 519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60XC-00000-00&context=) have application?

**23**  With respect to the second question, this question comes into play if it is determined that, as a matter of law, a strata corporation's by-laws may narrow the application of s. 158(2) of the *SPA*. The CRT interpreted by-law 4.4 as requiring the respondents to have been negligent before the appellant could recover against them.

**24**  With respect to the third question, this question covers the issues of *stare decisis* and whether *Morrison* was wrongly decided as set forth by the appellant.

**25**  Whether a strata corporation's by-laws can narrow the scope of s. 158 of the *SPA* is a matter of statutory interpretation and, accordingly, a question of law which is determined by the correct legal test. The proper interpretation of by-law 4.4 of the appellant's by-laws is also a question of law which is independent of the facts at bar and engages the correct legal test. Finally, *stare decisis* is a legal principle and its proper application is a question of law engaging the correct legal test, as is whether a particular decision (*Morrison*) was wrongly decided.

**26**  I rule that each of the foregoing questions is a question of law.

1. **Interests of Justice and Fairness**

**27**  As noted, s. 56.5(4) of the *CRTA* provides that the court is to determine whether "it is in the interests of justice and fairness" to grant leave. Section 56.5(5) sets forth four non-exhaustive factors. Without going beyond the listed factors, I am readily satisfied that each of the three questions warrant leave to be granted.

**28**  Each question is of such importance that it would benefit from being resolved by this Court to "establish a precedent". The questions are of importance to the parties and may affect the future relations of the appellant and the strata unit owners.

**29**  With respect to the first and third questions, this Court's answers would be of importance generally to strata unit owners and strata corporations. The escape of water from a particular strata unit causing damage is, unfortunately, a common event with, as contemplated under s. 158(2) of the *SPA*, insurance in place necessitating the need to address the funding of the insurance deductible. With respect to the second question, the answer may also have general importance in that the meaning given to by-law 4.4 may serve as a precedent for others.

**30**  The answer to each of the questions is fundamental or important to the proper resolution of the matter.

**31**  In sum, I am satisfied that leave should be granted with respect to the three questions of law.

1. **Arguable Merit**

**32**  At hearing and in written submissions, there was discussion as to whether an "arguable merit" test is applicable to leave applications under the *CRTA*.

**33**  For completeness, I set forth the CRT's concern with an arguable merit test from Mr. Ryan's written submissions:

1. The provision requiring leave to appeal is similar to provisions in the *Arbitration Act*, [*R.S.B.C. 1996 c. 55, s. 31*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-JSXV-G1HH-00000-00&context=) and the *Securities Act*, [*R.S.B.C. 1996, c. 418, s. 167*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JTNR-M2C4-00000-00&context=), but there are important differences that impact the manner in which courts assess whether leave to appeal ought to be granted.
2. The first two cases where leave to appeal was sought in the context of a CRT decision, *Watson v. The Owners, Strata Plan BCS 1721*, [*2017 BCSC 763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NJH-4X81-F5KY-B3ST-00000-00&context=) and *McKnight v. Bourque*, [*2017 BCSC 2280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R61-GMR1-JG02-S4PY-00000-00&context=), both framed the test for whether leave to appeal ought to be granted as one of "arguable merit". In doing so, the court was adopting an aspect of the leave to appeal jurisprudence under the *Arbitration Act*: *Watson* at para. 6
3. With respect, the question of "arguable merit" is a principle governing whether leave to appeal ought to be granted in the context of preventing a miscarriage of justice (see *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, [*2016 BCSC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HYH-NGC1-F5T5-M2HR-00000-00&context=) at paras. 60-63), which is one of the considerations set out in section 31(2) of the *Arbitration Act*. While statutory appeals under the [*CRTA*] and the *Arbitration Act* are similarly limited to questions of law, the "arguable merit" considerations imported from the *Arbitration Act* jurisprudence are of limited assistance in cases where leave to appeal a CRT decision is sought.
4. Beyond the fact that the provisions of the [*CRTA*] do not require the court to assess whether an appeal is necessary to prevent a miscarriage of justice, there is another justification for avoiding the principle of "arguable merit" at the leave to appeal stage of proceedings. The assessment of "arguable merit" necessitates a preliminary assessment of the standard of review which is to be applied to the potential appeal. While this may not be a prejudicial analysis in the commercial arbitration context, where the standard of review "is almost always" reasonableness (*Sattva Capital Corp. v. Creston Moly Corp.*, [*2014 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FXJ-PSX1-JNJT-B0JG-00000-00&context=) at para. 75), the standard of review applicable to final decisions of the CRT has only been judicially considered once.
5. In order to avoid relying on a principle of law that is not incorporated into the enumerated factors this court must consider under the [*CRTA*], and in order to avoid prejudicing future analysis regarding the applicable standard of review, "arguable merit" should not be considered when determining the interests of justice and fairness in this case.
6. The principles that should guide the court are those explicitly set out in section 56.5(5) of the [*CRTA*]. If the court finds it must rely on factors beyond those set out in the [*CRTA*], the court ought to review the factors set out in *Queens Plate Development Ltd*. [*v. Vancouver Assessor, Area 09* [*(1987), 16 B.C.L.R. (2d) 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K054-G1DM-00000-00&context=) (C.A.)] and avoid the consideration of "arguable merit".

[Footnotes incorporated.]

**34**  I did not need to engage in an arguable merit test. In the interests of justice and fairness, I am satisfied that each of the three questions warrant leave to be granted. Each question raises live and important issues

1. **Standard of Review**

**35**  In *McKnight v. Bourque*, [*2017 BCSC 2280*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R61-GMR1-JG02-S4PY-00000-00&context=), Justice Masuhara, in considering whether to grant leave with respect to questions of law arising out of a CRT decision, stated:

[33] In terms of the standard of review, there is disagreement about whether the standard of review ought to be considered in this analysis and, if so, what it is. While the standard of review is clearly relevant to an assessment of the merits (*Sattva* at para. 75), in my view, given the absence of case law on the issue and its importance to the substance of the appeal, it would be better that the standard of review be determined by the judge in the appeal.

**36**  The CRT also asked me not to consider the standard of review at this stage.

**37**  I have followed Justice Masuhara's sensible approach.

**38**  I have noted the reasons of Justice Pearlman in *The Owners, Strata Plan BCS 1721 v. Watson*, [*2018 BCSC 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RM0-4931-DXPM-S33M-00000-00&context=), a decision released after Justice Masuhara's reasons in *McKnight*. In *Watson*, Justice Pearlman found that the standard of review was one of reasonableness.

**39**  In the matter at bar, I understand that on the hearing of the questions of law, Mr. Todesco, counsel for the appellant, wishes to argue that the applicable standard is correctness, not reasonableness. I do not wish to pre-judge or foreclose argument at this stage in light of the early nature of the jurisprudence. As noted, counsel for the CRT also asked me not to consider the standard of review at this stage of determining whether leave to appeal should be granted.

**6. CONCLUSION**

**40**  The Court grants leave with respect to the three questions of law.

**41**  I ask counsel to arrange through Supreme Court Scheduling a 9 a.m., 55-minute hearing in order that the form and procedure for the hearing of the appeal may be addressed and directions given.

**42**  Costs will be in the cause.

G.S. FUNT J.

**End of Document**

[***Suveges v. Martens, [2000] B.C.J. No. 1037***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61M2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Warren J.

Heard: November 15 - 19, 1999 and January 6 - 7, 2000.

Judgment: May 24, 2000.

Vancouver Registry No. B991742

**[2000] B.C.J. No. 1037** | 2000 BCSC 810 | 97 A.C.W.S. (3d) 247 | [2000] B.C.T.C. 343

Between Mary Suveges, plaintiff, and Frank Martens, defendant

(67 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicles, rules of the road — Making turns, left turns — Damage awards — Injury and death — Body injuries — Back — Pentaplegia — Damages — General damages — General damages for personal injury — Age.**

|  |
| --- |
| Action to determine liability and damages in respect of a motor vehicle accident which occurred in 1999. The plaintiff Suveges was 86 years old at the time of the accident. She was proceeding westbound when the Martens vehicle made a left-hand turn in front of her vehicle causing a collision. As a result, Suveges suffered an injury to her vertebrae and was rendered a pentaplegic. She was unable to breath without the assistance of a ventilator and she required 24-hour attention. She was moved to Toronto so that her daughter could look after her full-time and expenses were claimed in connection with that move and the daughter's care. Suveges claimed general damages and cost of future care, both of which raised the issue of future life expectancy as well as her pre-accident health. Prior to the accident, Suveges had reduced visual acuity, cataracts surgery, some deafness and other difficulties but continued with her activities. The main special damages in dispute were monthly nursing costs, housing costs claimed of $4,600 per month, transportation costs of $650, counselling to assist the family and case management services. The main future care costs in dispute were the cost of case management services, housing, nursing and transportation costs.  HELD: Action allowed.  Martens was wholly liable for the accident in making the left-hand turn across traffic when it was clearly not safe to do so. There was no evidence that Suveges was travelling too quickly. She found herself facing the Martens' turning vehicle when it was too late for her to take any evasive action. Suveges' visual acuity was not a contributing factor. General damages were assessed at $200,000. Although Suveges had some medical problems before the accident, she was able to lead a relatively active independent life. She was now wheelchair bound, had limited ability to communicate and had to be constantly monitored. She was aware of her condition. It was inappropriate to discount the amount of non-pecuniary damages otherwise awarded for advanced age or life expectancy. The daughter's attendance on the mother was a real benefit to her and should be appropriately compensated including some of the expenses incurred in travelling to Vancouver. The claim of $11,342 was allowed for the Vancouver sojourn, and the daughter was also awarded $100 per day as an in trust claim, less $40 per day which she would have paid for some accommodation in any event for a net amount of $60 per day. The amount of rent claimed in respect of the Toronto rental premises was excessive and reduced to $3,000 per month. The present accommodation was excessive for the mother's current needs. That amount was appropriate for the calculation of future care costs as well. The nursing and case management fees claimed as past expenditures were excessive and reduced in part. The future nursing costs were awarded at the rate of $20,956 per annum and transportation costs were set at $650 per month. That amount was based upon 12 trips a month minus a pre-accident allowance which was appropriate. Counselling was allowed on the basis of $150 per month. |

**Statutes, Regulations and Rules Cited:**

Insurance (Motor Vehicle) Act, [*R.S.B.C. 1996, c. 231, s. 55*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B04P-00000-00&context=).

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 166*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GX-00000-00&context=).

**Counsel**

J. Murphy, Q.C., and L. Baxter, for the plaintiff. J. Baker, Q.C., and C.C. Godwin, for the defendant.

|  |
| --- |
| **WARREN J.** |

Introduction

**1**  The 86-year-old plaintiff, Mary Suveges, was the driver of a vehicle which collided with that driven by the defendant, Frank Martens, on a rainy night on February 19, 1999. As a result of the collision, the plaintiff suffered an injury of the vertebrae at C3, a location which, because of earlier fusions of the cervical spine, took all of the force of the impact. As a result, she was rendered a pentaplegic and she is unable to breath adequately without the assistance of a ventilator. She requires 24 hour attention.

**2**  There are many contentious issues in this case including liability for the plaintiff's injuries, the amount of general damages, the assessment of her life expectancy and a consideration of that life expectancy as it relates to the cost of future care and, finally, many of the present and future care expenses claimed by the plaintiff.

**3**  Prior to the accident the plaintiff was an active senior who lived alone in her Abbotsford condominium which she had shared with her late husband. She had a variety of interests including socializing with her friends, shopping, reading, card playing and attending her church on a very regular basis. She is now confined to a wheelchair or her bed and requires constant attendance by trained personnel. She has been moved by her family from British Columbia to Toronto into a large apartment overlooking Lake Ontario. In addition to the nurses who are there 24 hours a day, the plaintiff's daughter, Gail Revesz, and her 16 year old son have moved into the apartment.

Liability

**4**  One of the plaintiff's sisters was a back-seat passenger at the time of the accident but her evidence is of little assistance in determining the cause of the collision. Another sister who was the front-seat passenger was not called to give evidence. The plaintiff herself cannot give evidence and, accordingly, the evidence on liability rested upon the testimony of the defendant given at his examination for discovery and during this trial. He testified that at the time of the accident traffic was light but the weather was bad with heavy rain. He said that he was familiar with the area as he had been there many times before. The collision was sufficiently severe that his car was irreparable and was written off at a cost of $10,500.

**5**  The defendant testified that he was driving eastbound on Old Yale Road at slightly under the posted speed limit of 50 kmh. He was anticipating a turn into the driveway leading to his brother's apartment parking area. The defendant said that he started to execute the turn at a speed of between 10 to 15 kmh. He said that while he saw the headlights of a car before starting his turn he did not see any lights after he started the turn as he was concentrating on the driveway and the sidewalk area. His evidence was that after he made the turn he did not look again at the approaching vehicle.

**6**  Mrs. Martens, the defendant's wife, testified that as her husband was driving east at about 40 kmh they saw the car. She said that she saw headlights coming and her husband turned into the driveway. She testified that immediately before the impact she saw no headlights and she heard no sound of brakes.

**7**  The defendant argued that his driving actions at the time are governed by s. 166 of the Motor Vehicle Act, *R.S.B.C. 1996, c. 318*, which requires a driver not to turn left off a highway other than at an intersection unless he "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." The defendant concedes that the plaintiff was the dominant driver and entitled to the right-of-way but only so long as her approaching vehicle constituted an immediate hazard to the servient driver, the defendant. If the dominant driver does not pose an immediate hazard to the servient driver, then the servient driver may commence to turn across the oncoming traffic and the dominant driver must yield the right-of-way to the servient driver: see 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.); and Raie v. Thorpe (1963), 43 W.W.R. 405 (B.C.C.A.), particularly the words of Tysoe J.A. at p. 410:

I do not propose to attempt an exhaustive definition of "immediate hazard." For the purposes of this appeal it is sufficient for me to say that, in my opinion, **if an approaching car is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there be some violent or sudden avoiding action on the part of the driver of the approaching car, the approaching car is an "immediate hazard" within the meaning of [the section].** [my emphasis]

**8**  The defendant acknowledges that he had a greater duty as the servient driver than the plaintiff had as the dominant driver, but he argues that the plaintiff must act reasonably carefully and skillfully in order to take advantage of sufficient opportunity to avoid an accident. Here, the weather and driving conditions were less than ideal and both drivers were elderly. Further, and more telling in the submission of the defendant, was the fact that the plaintiff had earlier been prohibited from driving because her visual acuity was 20/50 in her right eye and 20/60 in her left. The plaintiff's doctor testified that if a driver's visual ability was poorer than 20/40 that person would be prohibited from night driving. The plaintiff's condition had been corrected by surgery a year before the accident and an independent examination during the course of the trial indicated that the plaintiff's visual acuity was 20/40. Nevertheless, the defendant argues that when the court considers the "upper limit" of the plaintiff's visual acuity together with the prevailing poor driving conditions it should be clear that the plaintiff's ability to observe and to react to traffic situations was less than perfect. The defendant argues that because he had completed the majority of his turn into the driveway prior to impact, the plaintiff's vehicle did not constitute "an immediate hazard". The defendant argues that the plaintiff either did not see, or did not look to see, the defendant's car turning in front of her and if she had, she would have had sufficient opportunity to avoid the accident. Accordingly, in the submission of the defendant, full or a significant portion of the responsibility for the accident should rest with the plaintiff.

**9**  Plaintiff's counsel argues that there can be no doubt that the plaintiff had the right-of-way. He argues that a careful scrutiny of the photographs of the accident scene shows that the defendant's vehicle had travelled 15 to 20 feet into and across the plaintiff's lane when the collision happened and this fact, when considered with the speed of the defendant's car at roughly 15 kmh, means that the plaintiff had little more than one second to react to the perceived danger and no chance to avoid the accident. Relying upon the decision of Legg J.A. in Pacheco 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=) (C.A.), plaintiff's counsel says that the onus is on the defendant to prove that the plaintiff failed to keep a proper lookout; that the plaintiff failed to take reasonable measures to avoid the accident once she knew, or ought to have known, that the defendant was turning left in front of her; and that there were reasonable evasive measures she could have taken to avoid the accident.

**10**  In answer to the defendant's argument that the plaintiff's eyesight caused or contributed to the accident, counsel for the plaintiff submits that the evidence of the plaintiff's sister was that the plaintiff experienced no difficulties with driving at night. The submission is that the plaintiff's vision is only relevant if it prevented her from perceiving the hazard and taking reasonable steps to avoid it. Here, counsel submits that given the speed of the defendant's vehicle while turning across the path of the plaintiff's oncoming vehicle, his car was moving at between 13.8 and 18.4 feet per second. Counsel submits that there was simply no opportunity for the plaintiff to become aware of any hazard let alone do anything to avoid it.

Liability - Conclusion

**11**  In my view of all of the evidence including speed, distance, driving conditions, and the age and abilities of the drivers there is no doubt in my mind that the cause of the accident was the defendant's act of turning across the path of the plaintiff's oncoming vehicle at a time when it presented an immediate hazard. I am satisfied that the plaintiff was not driving too fast and that she was not able to take any steps to avoid the collision. The only question is whether the plaintiff contributed to her injuries by driving at night knowing that her visual ability was reduced. For the reasons set out above I conclude that the plaintiff's visual acuity of 20/40 was not a contributing factor.

General Damages

**12**  Not surprisingly, counsel are not agreed on the condition of the plaintiff prior to the accident. Counsel for the plaintiff submits that she was a healthy, active, independent 86-year-old woman who was able to operate her own vehicle and who took pride in her appearance and her ability to live on her own. She had travelled with her sister to Europe the summer before the accident and she was planning a return for the summer of 1999.

**13**  The plaintiff's doctor's report described her as quite functional and healthy despite her medical problems which were some reduced visual acuity dealt with surgically; some deafness; Munieres disease which caused some dizziness, particularly upon rising; and heart and circulatory problems. The plaintiff had had abdominal surgery to remove a polyp and the eye surgery to correct the cataracts a year prior to the accident. Her doctor described her as "always lively and happy at her visits to [his] office." The plaintiff's son, Paul Timothy (Tim) Revesz, testified that although his mother had hearing problems she was socially active and belonged to several book clubs. She was an active letter writer and, as well, liked to watch television and bake and cook. He said that the plaintiff's sisters would spend several months visiting with her, and that the plaintiff had other overnight guests.

**14**  Counsel for the defendant submits that the plaintiff is now an 88-year-old woman who is extremely limited in her ability to enjoy and appreciate the amenities of life, both of which ought to work to reduce the award of non-pecuniary damages. Counsel argues that the plaintiff's advanced age works to reduce the non-pecuniary damages: Munro v. Faircrest, [*[1987] B.C.J. No. 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X10K-00000-00&context=) (B.C.C.A.), (23 June 1987), Vancouver CA005245, and Olesik v. Mackin, [*[1987] B.C.J. No. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X1HX-00000-00&context=) (B.C.S.C.), (23 February 1987), Vancouver B860356. Counsel submits that any award of non-pecuniary damages should be dramatically reduced because of the plaintiff's age, her life expectancy of between one and three years, and the number of her health-related difficulties before the accident. Counsel argues that as a result of the decision of the Supreme Court of Canada in 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=) and subsequent decisions, a functional approach should be taken in assessing non-pecuniary damages. As Dickson J. (as she then was) stated in Lindal v. Lindal [*(1981), 34 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 279 (S.C.C.):

Thus the amount of an award for 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.

**15**  Acknowledging that the injuries the plaintiff suffered in the accident are indeed very serious, counsel for the defendant submits that the plaintiff is able to appreciate only the most basic amenities of life, and although vast amounts of money could be expended in the attempt to improve her situation, employing the functional approach to a consideration of her advanced age and the limited use to which the money could be applied, an award for non-pecuniary damages should be extremely limited. The defendant relies upon the decisions of the B.C. Court of Appeal in Knutson v. Farr [*(1984), 55 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F528-G1W4-00000-00&context=) and Wipfli v. Britten [*(1984), 56 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M2WF-00000-00&context=); and more recently the decision of Dorgan J. in Hill v. Palmer, [*[1993] B.C.J. No. 860*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F4NT-X2S8-00000-00&context=) (B.C.S.C.), (5 August 1993), Vancouver B900765.

**16**  In Knutson, supra, the Court of Appeal reduced the award for non-pecuniary damages to $15,000 where the plaintiff had only some awareness of his surroundings and was insensitive to pain and suffering.

**17**  The Court of Appeal in Wipfli, supra, was considering an appeal from a damage award for an infant who had sustained brain damage at birth. There was only some awareness of circumstances on the child's part and there was but a bleak likelihood of any improvement. The majority of the Court, applying a functional approach, held that while a vast sum could be spent in some vain attempt to ease the plaintiff's condition, the money would be used to no avail if the plaintiff had no capacity to appreciate the results. The majority agreed with the trial judge's award of $75,000 for non-pecuniary damages.

**18**  The decision of Dorgan J. in Hill, supra, resulted in an award of $150,000 for non-pecuniary damages for a 63-year-old plaintiff who had suffered severe injuries resulting in cognitive deficiencies and emotional difficulties. The plaintiff had permanent disabilities, left-side paralysis, and impaired hearing, vision and sense of smell, all of which dramatically altered and restricted her lifestyle. Although the plaintiff was able to communicate and complete simple tasks, there was no realistic hope of any improvement and she would always be dependant on others.

**19**  Plaintiff's counsel submits that the current upper level for non-pecuniary damages in catastrophic injury cases is $265,000 and that the injuries his client has suffered are far more severe than many which have been considered to be catastrophic. Plaintiff's counsel, counsel agrees that her age and life expectancy are factors to be considered. Mr. Murphy points to the fact that both medical experts agreed that, save for the accident, the plaintiff's average life expectancy was six years. However, given her health at the time she had a greater life expectancy. The expert called by the plaintiff opined that the plaintiff's life expectancy at the date of the trial was three years. The defendant's expert said that the expectancy was one year but with the possibility of a longer life expectancy. Plaintiff's counsel urged me to accept the higher estimate because of the quality of care the plaintiff was receiving and the "vigilance" of her daughter. In Gogol v. F.W. Woolworth Co., [*[1996] B.C.J. No. 2047*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S0VK-00000-00&context=) (B.C.S.C.), (27 September 1996), Vancouver C943529, Williamson J. agreed with defence submission that advanced age was a factor to take into account but added that "any reduction in damages under this head on account of the advanced age [72] of the plaintiff must be undertaken cautiously." I agree.

**20**  Huddart J.A. writing for the Court in Ha v. Fritzke, [*[1999] B.C.J. No. 2711*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22P5-00000-00&context=), (18 November 1999), Vancouver CA023940 (B.C.C.A.), held that while age and life expectancy were relevant facts to be considered there was no legal principle which required a trial judge to determine the proper award for a young person and to then discount the amount according to the claimant's age or life expectancy.

**21**  The plaintiff lives a life that must be constantly monitored. She is largely bed-ridden but she can be placed in a wheelchair. She can be taken out to church, a significantly important part of her life, but only with difficulty and then by pre-arrangement. The plaintiff after the accident was initially capable of speaking, but sparingly and with difficulty. This ability has waned over time. At the time of the trial the plaintiff's daughter Gail Revesz testified that the plaintiff communicated by nods and facial expressions and her pastimes were prayer, watching television, being read to and receiving guests. She was particularly fond of watching wrestling on television. Other than the nursing staff, her constant companion is her daughter Gail Revesz. The evidence leads me to conclude that the plaintiff has no cognitive deficiencies and that she is well aware of her condition and surroundings.

**22**  In the circumstances of this case, and bearing in mind the principles set out in the above authorities, the plaintiff's mental acuity, the catastrophic nature of her injuries which have resulted in a drastically altered lifestyle, her age and her life expectancy which I consider to be two years calculated from January 2000, I am satisfied that the appropriate amount to fix for the plaintiff's non-pecuniary damages is $200,000.

Special Damages

Overview

**23**  The plaintiff's counsel submits a claim of $179,614.35 for the plaintiff's special damages primarily consisting of case management expenses, nursing care and apartment rent of $4,600 a month.

**24**  The plaintiff also seeks compensation for the expenses incurred by the plaintiff's daughter Gail Revesz when she came to British Columbia following the plaintiff's accident, and further claims for an "in trust" component as well for the efforts made by Gail Revesz toward her mother's care during this period of time. Counsel submits that an appropriate award for these labours should be based upon an hourly rate of $7 or $8 an hour or $100 a day for the approximately 150 days that Gail Revesz was with her mother in Vancouver.

**25**  Part of the monthly care costs were agreed to by counsel prior to the trial. The remaining items in contention are: nursing costs of $20,956.24 a month; housing costs of $4,600 a month; transportation expenses of $650 a month; counselling to assist in the resolution of family conflicts at a cost of $150 a month; case management services for 8 hours a week at a cost of $90 an hour or $3,100 a month; and lastly, maintainenance of the ventilators required to assist the plaintiff in her breathing at a cost of $250 a month. The total of the monthly care costs claimed is $31,667.24.

**26**  The plaintiff also asks for an award to cover "one-time expenses" which consist of the cost of an environmental control system, a commode chair, a bath lift, modification of the bathroom floor, and some minor office furniture. These costs come to a total of $5,500.

**27**  The plaintiff asks that the monthly care costs should be the subject of a structured judgment pursuant to s. 55 of the Insurance (Motor Vehicle) Act, *R.S.B.C. 1996, c. 231*, requiring the defendant to pay these monthly costs during the plaintiff's lifetime.

Gail Revesz' Vancouver Expenses and the "In Trust" Claim

**28**  The plaintiff asks for an order awarding $11,342.95 for expenses incurred by the plaintiff's daughter Gail Revesz while she was tending the plaintiff in Vancouver. The plaintiff also asks for an award of $15,000 for Gail Revesz' past labours on her mother's behalf, a figure calculated on the basis of $100 a day: the "in trust" claim. The total claim under this part was $26,342.95 up to the close of trial with a per diem rate thereafter of $100 for Gail Revesz' services.

**29**  As noted earlier, Gail Revesz has been described by her brothers as unreliable or untrustworthy, and by other accounts she causes some considerable difficulties for the nursing and medical staff caring for her mother. Certainly she can have a "prickly" attitude at times, and during the course of her evidence there was the real prospect that I would have been obliged to conduct an inquiry into her refusal to answer a question which I had directed her to answer. Nevertheless, I am satisfied that she has provided a real benefit for her mother and that she has become an indispensable feature in her mother's life. While she had little physical contact with her mother for the two or three years prior to the accident, she has certainly stepped into the breach and assumed the lion's share of the family's responsibility of providing care and comfort for the plaintiff. In my view, it would be inappropriate to deprive the plaintiff of the solace provided by her daughter. Further, and more germane to the "in trust" claims, it is my view that her attendance in British Columbia shortly after the accident was necessary and appropriate for the plaintiff's recovery. That said, some of her Vancouver expenses do attract the rightful attention of the defence.

**30**  Counsel for the defendant submits that the "in trust" claim for Gail Revesz should be dismissed because any entitlement has been satisfied by the free accommodation Gail Revesz and her son have received since the plaintiff moved to Toronto and because the claim does not meet the criteria set out in the decision of Harvey J. in Brennan v. Singh, [*[1999] B.C.J. No. 520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-222K-00000-00&context=) (B.C.S.C.), (4 March 1999), Vancouver B961315. In Brennan, Harvey J. held that in order to succeed on a claim "in trust" it should be established that any services rendered replaced services necessary for the plaintiff's care; that if the services were rendered by a family member, they were over and above what would normally be expected; and that any quantification should reflect the true and reasonable value of the services performed and take into account the time, quality and nature of the services without any reduction or discount because of the nature of the relationship. Harvey J. held that there was no need to demonstrate that the provider of the service had foregone other income and no need for there to be actual payment for the services.

**31**  Plaintiff's counsel submits that Gail Revesz came to be with her mother within a matter of days of the accident and this provided the critical companionship and comfort that was such an important factor given the terrible injuries the plaintiff suffered. It was Gail Revesz who provided the constant vigil for her mother while she was hospitalized at Vancouver General Hospital until August 1999 following which she was moved to Ontario and into the present accommodation. While the previous employment of Gail Revesz did not yield a significant and constant income, counsel submits that it is not necessary to establish a lost income in order to succeed on an "in trust" claim.

**32**  Turning to the expenses claimed to have been incurred by Gail Revesz during her sojourn in Vancouver, the defendant argues that her claim for meals and food in the amount of $1,500 is not justified. Counsel points to the evidence that many of the receipts submitted by Ms. Revesz were questionable at best, reflecting duplications, and in some instances, the invoices of strangers, included because the original receipts had been lost. Further, the miscellaneous expenses seemed in large measure to be based on unnecessary purchases.

**33**  However, in my view, after the appropriate reductions of the expenses conceded by plaintiff's counsel to bring this claim to $11,342.95, I am satisfied that the proper amount under this head is $11,342.95. I also allow a claim "in trust" at $100 a day for the services rendered by Gail Revesz for her mother from which should be deducted an allowance of $40 a day for accommodation expense. I arrive at this figure based upon the evidence of Gail Revesz that her rent "since the beginning of time has been in the range of $1,200" a month. I consider the free rent to be an appropriate set-off at law and, accordingly, the "in trust" claim for services is allowed at $60 per day.

**34**  I turn now to the balance of the claim for special damages which, because of the defendant's arguments, I will deal with according to the type of claim.

Toronto Rent

**35**  The most contentious item was the cost of the accommodation for the plaintiff. The plaintiff's son Gary Revesz testified that he had attempted to find suitable accommodation in Toronto without success until the search was finally turned over to a real estate agent. He said that the apartment the agent located was perfect for the plaintiff's needs. It had a level ground floor entry with wide doors; easy access for a wheelchair in the lobby; extra space for the nurses' station and supplies; two bathrooms, one of which would be capable of modification for necessary additions; and extra rooms to accommodate his sister Gail Revesz and her teenage son. Gary Revesz testified that while he had concerns about his sister's trustworthiness and reliability, the plaintiff had become very dependent upon his sister, and his sister Gail in turn was always there and a source of great comfort for the plaintiff. He concluded early on that it was obvious that Gail Revesz would have to live with the plaintiff, a realization which was acceptable to him because he was not in a position to help his mother very much.

**36**  Gary Revesz describes his relationship with his sister as "tense" but in front of their mother they act in a way to keep their differences from her. He has serious concerns about his sister's ability to responsibly manage money and to that end he is applying to have an administrator appointed to manage his mother's affairs. In spite of his reservations, Gary Revesz concedes that his sister is the only one who can give the plaintiff the kind of constant attention she both needs and wants. He believes that his sister will have to remain living with his mother until his mother dies. This arrangement would require an apartment with at least three bedrooms in order to accommodate the plaintiff, Gail Revesz, and her son. Gary Revesz is most strongly opposed to moving his mother because she is now stabilized and settled. He believes that any move would be too traumatic for her.

**37**  The defendant submits that the claim for accommodation expense is neither medically necessary nor reasonable and does not take into account the accommodation expenses the plaintiff would have incurred in any event. The defendant submits that an appropriate amount for accommodation would be in the range of $1,800 to $2,000 a month. This would reduce the claim for specials by $2,600 a month for the past nine months for a total reduction of $23,400.

**38**  The rent claimed by the plaintiff is $4,600 a month. The merits of that claim are based upon the evidence of Gary Revesz, Gail Revesz, Jo-Anne Finlay and Sandra Vellone. I have already referred to the evidence of Gary Revesz. There is forceful argument from the defendant that the "vast Toronto condominium occupied by the plaintiff is not medically necessary, nor is it reasonable." The defendant submits that in any event of the accident the plaintiff would have incurred a rental expense of $1,800 to $2,000 a month. Given that the plaintiff had been in Toronto for five months to the conclusion of the trial, counsel submits that an appropriate award would be, at the most, $10,000.

**39**  The evidence of Jo-Anne Finlay, the Vancouver case manager, was that there were several suitable apartments in the Toronto area but they were not acceptable to Gail Revesz who wanted to live in the West End of Toronto. The evidence of Sandra Vellone, the defendant's expert, was that there were some facilities in the Toronto area which could offer suitable facilities for the plaintiff and the evidence indicates that the cost could be significantly reduced from the present level of $4,600.

**40**  It is my conclusion on the evidence that the present accommodation is beyond both the reasonable and the medical needs of the plaintiff. It is my view that the apartment was selected as much for the perceived needs of the plaintiff as the desires of her daughter Gail Revesz. In short, the rental cost is too expensive, and cheaper and equally appropriate accommodation can and could have been rented. Because of the fact that some features of the plaintiff's accommodation requirements are unique and hence more expensive, I conclude that the accommodation allowance for the plaintiff should be set at $3,000 a month.

Bell Canada Toronto

**41**  The defendant submits that this small claim of $229.87 for August and September 1999 represents an expense which the plaintiff would have incurred in any event and that the defendant should not be responsible. I agree that this is an expense which the plaintiff would have ordinarily incurred prior to the accident and it is not allowed.

Vancouver Case Manager - Jo-Anne Finlay

**42**  This claim is presented at a revised figure of $41,073.62 made up of the four invoices submitted by Ms. Finlay: May 21, 1999 for $2,627.45; July 6, 1999 for $6,293.66; August 9, 1999 for $22,145.92 against which the retainer of $6,000 was applied; and September 17, 1999 for $10,006.59. The total under this portion of the Special Damages is $41,073.62.

**43**  The evidence of Ms. Finlay satisfied me that she was a skilled and appropriate case manager during the initial phases of the plaintiff's hospitalization and during the transition from Vancouver to Toronto. The defendant takes exception to what he considers the unreasonable accounts submitted, some of which, it was submitted, would be recoverable only on a Bill of Costs. The defendant says that it was not necessary for Ms. Finlay to travel to Toronto to set up the plaintiff in her current residence, something that could and should have been arranged with an appropriate professional in Toronto, thereby avoiding all of the time and expense of the trip to Toronto. It is my view of that argument that the expenses claimed under this part of Ms. Finlay's bill are appropriate. The plaintiff had been dreadfully injured and traumatized by her injuries. She was entitled to have as smooth a transition from British Columbia to Toronto as could possibly be arranged. I do not find this portion of the invoice inappropriate. Plaintiff's counsel acknowledged that the GST portion of this part of the claim should be corrected.

**44**  The defendant's complaint of the cost of a full fare economy flight to Toronto for Ms. Finlay is however well made. In my view, given the amount of planning that was going into the move to Toronto and the fact that Ms. Finlay had been working with the family since April 1999, I conclude that a less expensive fare could have and should have been obtained. I reduce the expense for airfare to $700.

**45**  The defendant is critical of the hourly charge of $125 for Ms. Finlay's time, saying that it is not reasonable in the circumstances. I disagree. Given her qualifications, I am satisfied that the hourly rate is appropriate.

**46**  The defendant complains of the charges related to an invoice for services rendered between August 7 and September 17, 1999, saying that it was lacking in detail and thereby making it impossible to differentiate between services provided as a case manager and services as an expert witness. My notes do not indicate that these concerns were addressed in cross-examination of this witness. On the contrary, her evidence in direct was to the fact that during this period of time she had worked extensively on the move to Toronto and this evidence is supported by her Report. There is a further concern about a claim of $1,230 in the September 17, 1999 invoice for "research and rotations" but this too is addressed in Ms. Finlay's Report dated September 7, 1999 [see Exhibit 1, Tab 5(f)]. I am satisfied that the research/rotations is adequately defined and explained and this portion of Ms. Finlay's expenses has been made out.

**47**  In sum, I am satisfied that, save for the expense of the airfare, the special damages claimed for Ms. Finlay have been made out.

Toronto Case Manager - Carol Heron

**48**  This cost is submitted at $15,710.37 after deducting the GST cost. The defendant argues that Ms. Heron is inexperienced and unqualified for this position and that a large part of the time charged is for "refereeing" disputes between Gail Revesz and the nurses and for the ordering of supplies, neither of which are properly functions of a case manager. The defendant relies heavily upon the evidence of its expert case manager, Sandra Vellone. The evidence of Ms. Vellone, inter alia, was that once a care service was set up the number of hours required for a case manager ought to be much reduced. She expressed the opinion that initially four hours per week would be appropriate for a case manager at a cost of $90 per hour and that after a lapse of three months the amount of time required of a case manager should be reduced to two hours a week.

**49**  It is my view that there are complexities to the care of the plaintiff not frequently encountered in similar situations and that these have resulted in an increase in the amount of time required for a case manager and in other costs advanced by the plaintiff. Those that are attributable to the unique features of Gail Revesz are not properly the responsibility of the defendant. I find that some two hours a week were attributable to Gail Revesz and an appropriate reduction in this expense should be made.

Nurses

**50**  The plaintiff has claimed for the services of a paramed nurse and except for the GST component the defendant takes no issue with that expense. As the plaintiff has agreed that the GST should be deleted for this item, it is allowed as amended.

**51**  The plaintiff claims for an incurred expense of $30,296 for private nurses during September, October and November, 1999. The defendant rightly objects to this service being charged at $28 per hour when Care Plus nurses were available at a rate of $26.50 per hour. The invoices in support of this claim total 867 hours, which at $26.50 per hour totals $22,975.50 and, accordingly, this portion of the Special Damages is reduced to that amount.

Other Expenses Claimed by the Plaintiff's Children

**52**  The defendant objects to a portion of the expenses claimed by the plaintiff's sons, Tim and Gary Revesz. Insofar as the meal/food expenses are claimed, the defendant says that the claim should be reduced from $806.53 to $500 because it was clear that a portion of the meals claimed were for more than one person. I agree that the evidence supports this argument and there will be a reduction to reflect the uncertainty of some of the expenses claimed.

**53**  As for the gasoline expenses claimed by Tim Revesz for the trips from Whistler to visit his mother, it was clear from his evidence that a good portion of some of these trips was for business purposes or combined business with a visit with his mother and that some of the invoices were for cigarettes and other items. Without performing a forensic accounting of the invoices, it is my view that this expense should be reduced from the $1,433.83 claimed to $1,000.

**54**  There was a claim for $162.12, a minor amount of expenses, for household items purchased by Gail Revesz. The defendant says that this should be reduced to $100 because some of the items purchased were not attributable to the plaintiff. Again, the cost of a forensic audit makes a more detailed analysis of this claim unrealistic and I reduce it by $50.

**55**  Notwithstanding the defendant's objection to the claim for hearing aids in the sum of $180, I am satisfied that this claim for repairs to the plaintiff's hearing aid has been made out and the amount is allowed.

**56**  The defendant objects to the claim for two trips by Tim Revesz to Toronto to visit with his mother in September and November 1999. The defendant argues that there is no justification for an award for special damages under this heading but I am of the view, given the evidence that Tim Revesz would visit with his mother from time to time when she lived in Abbotsford and he was living in Whistler, that this is an appropriate expense. The reason for the plaintiff moving to Toronto is attributable to the injuries she suffered as a result of the defendant's ***negligence***.

Cost of Future Care

**57**  A portion of the future monthly care costs of the plaintiff is not contested by the defendant. These include the cost of bowel and bladder care, tracheotomy supplies, medications, cleaning supplies and housekeeping totalling $1,961.00. Hereafter I will only make reference to those items in dispute, leaving it to counsel to insert into the formal order those costs above agreed upon.

**58**  The contentious items of future care are the cost of case management services, housing/rent expense, nursing care, transportation costs, personal counselling costs and ventilator costs. The total monthly cost for future care claimed is $31,667.24 and the plaintiff urges the Court to err in favour of the plaintiff whose plight is the responsibility of the defendant.

Case Management

**59**  I prefer the approach offered by Sandra Vellone in her report on "Future Care Costs", dealing with case management costs and housing costs. The plaintiff's rehabilitation specialist, Carol Heron, in her opinion dated November 7, 1999, wrote that case management services for the period July 27 to October 29, 1999 had worked out to 12 hours per week but that this might be reduced to 6 to 10 hours per week. This opinion reflects to some degree the unique complicating factors created by the plaintiff's daughter and is somewhat excessive as a result. Ms. Vellone was of the opinion that the costs put forward were excessive. She felt that the requirement should be four hours per week until the end of 1999 and two hours per month thereafter. While I prefer her opinion I feel that in this regard it is somewhat optimistic in assessing case management needs. This plaintiff's requirements are more demanding, in my view, and the appropriate figure for these services should be based on a formula using five hours per week now that a routine has been established. The case management cost is therefor set at five hours per week at an hourly rate of $90 per hour calculated from January 1, 2000. Prior to January 1, 2000 the actual costs incurred are properly attributable to the initial start-up and breaking in period and the plaintiff is entitled to recover them.

Housing costs

**60**  The housing cost claimed by the plaintiff is excessive and I have already set $3,000 a month as the amount which I consider to be appropriate. I appreciate the plaintiff's submission that the amount sought is well below the usual claim for someone as disabled as the plaintiff but there is no need for the purchase of a house to accommodate special needs nor for the cost of expensive renovations to an existing house. Here I am satisfied that there were and are less expensive alternatives to the accommodation arranged for the plaintiff.

Nursing costs

**61**  Ms. Vellone recommended that nursing care be provided through Care Plus, a reliable nursing agency, which could provide coverage at $26.50 an hour. She was also of the opinion that once the plaintiff became a resident of Ontario she would likely qualify for "Complex Care Nursing" funded by the province. The defendant is entitled to benefit from such funding if and when it is provided. The plaintiff's claims are actually less costly based on a lower hourly rate. I agree that the present system need not be changed and the nursing costs are allowed at $20,956.24 per month.

Transportation costs

**62**  The cost of transportation for the plaintiff is advanced as $650 a month based upon 12 trips a month minus an allowance for pre-accident automobile expenses. On the evidence I am satisfied that this figure is not inappropriate. The plaintiff is a devout Christian who likes to attend church. She is also entitled to some trips to get her out of the apartment and of course she must attend on her doctors occasionally and at hospital from time to time. The claim is allowed at $650.

Counselling

**63**  The plaintiff asks that there be a provision for the future cost of counselling. Based upon the tautness of the relationship between the plaintiff and her children and the need of the plaintiff that there be as smooth and stress-free of an atmosphere as possible, I am satisfied that the claim for one hour per month at a cost of $150 is more than reasonable.

Ventilator maintenance

**64**  When the plaintiff moved to Ontario she took with her the ventilator she had acquired in British Columbia. It is an essential piece of equipment and vital for her survival. It does present some complications to the claim for future care because the Province of Ontario will not provide for the maintenance of a ventilator not purchased through its Ventilator Programme. As the plaintiff has not been able to cut through the red tape and obtain a commitment from the Province of Ontario to cover the cost of maintaining this equipment, there is no alternative but to award a sum of $250 a month for its maintenance. Should the province later cover the cost that expense should be deducted.

One-time expenses

**65**  The plaintiff claims for some expenses for one-time-only modifications to the plaintiff's environment. These include an environmental control system, a commode chair, a bath lift or modifications to the bathroom and some office furniture for the nurses and others. The plaintiff has not satisfied me that the cost of an environmental control system which would allow the plaintiff to modify her ambient conditions is necessary or appropriate. She is monitored 24 hours a day and any needs can be handled by her attending nurses or her daughter. The commode chair and the bath lift are appropriate in my view for they provide a most necessary assistance for the comfort of the plaintiff allowing her a minimum of personal convenience. I fix the cost of these two items at $4,300 as presented by the plaintiff. The additional furniture recommended by both experts is also allowed at $500.

Summary

**65a**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages | $200,000.00 |  |

Special Damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Gail Revesz's Vancouver Expenses | 11,342.95 |  |
|  | Tim & Gary Revesz's Meals | 500.00 |  |
|  | Tim Revesz's Gasoline | 1,000.00 |  |
|  | Household Items bought by Gail |  |  |
|  | Revesz | 112.12 |  |

To Date of Judgment:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Agreed monthly care costs | 1,961.00 |  | per month |  |
|  | Gail Revesz's "In Trust" Claim |  |  |  |  |
|  | allowed at | 60.00 |  | per day |  |
|  | Toronto Rent | 3,000.00 |  | per month |  |
|  | Jo-Anne Finlay | 41,073.62 |  | subject to |  |
|  |  |  |  | reduction |  |
|  |  |  |  | for air |  |
|  |  |  |  | fare |  |
|  | Carol Heron | 15,710.37 |  | subject to |  |
|  |  |  |  | reduction |  |
|  |  |  |  | of 2 hrs. |  |
|  |  |  |  | per week |  |
|  |  |  |  | attribu- |  |
|  |  |  |  | table to |  |
|  |  |  |  | Gail |  |
|  |  |  |  | Revesz |  |
|  | Nurses | 22,975.50 |  |  |  |
|  | Hearing Aid Repairs | 180.00 |  |  |  |
|  | Tim Revesz's Two Trips | allowed |  |  |  |

Future Care:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Agreed care costs | 1,961.00 |  |  |  |
|  | Case management | 1,890.00 |  |  |  |
|  | Housing | 3,000.00 |  |  |  |
|  | Nursing | 20,956.24 |  | per month |  |
|  | Transportation | 650.00 |  |  |  |
|  | Counselling | 150.00 |  |  |  |
|  | Ventilator | 250.00 |  |  |  |
|  | One-time expenses: |  |  |  |  |
|  | Commode chair & bath lift | 4,300.00 |  |  |  |
|  | Furniture | 500.00 |  |  |  |

[The Court did not number the summary. Quicklaw has assigned the number 65a.]

**66**  There will be the necessary directions for the payment of the future care costs pursuant to the provisions of sec. 55 of the Insurance (Motor Vehicle) Act. The plaintiff is entitled to Court Order Interest on the past special damages.

Costs

**67**  At the request of counsel the matter of costs may be spoken to or if counsel prefer written submissions may be submitted.

WARREN J.

**End of Document**

[***Thorburn v. British Columbia (Ministry of Public Safety and Solicitor General), [2012] B.C.J. No. 2216***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2FP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.M. Gropper J.

Heard: April 2-4, 2012.

Judgment: October 26, 2012.

Docket: L031752

Registry: Vancouver

**[2012] B.C.J. No. 2216** | 2012 BCSC 1585 | 269 C.R.R. (2d) 148 | 104 W.C.B. (2d) 922 | 36 C.P.C. (7th) 122 | 224 A.C.W.S. (3d) 564

Between Elise Danielle Thorburn and Christopher David Jacob, as representative plaintiffs, Plaintiffs, and Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Public Safety and Solicitor General, City of Vancouver and Vancouver Police Board, Defendants

(129 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Certification — Application by the plaintiffs Thorburn and Jacob to certify their action as a class action dismissed — The plaintiffs alleged that routine strip searches performed at a Vancouver jail violated section 8 of the Charter — The proposed class encompassed individuals who were strip-searched upon their admission between December 2001 and July 2006 — The Charter breach claim did not disclose a reasonable cause of action — The class could be identified but there were no common issues — Certifying the action would result in a breakdown into individual proceedings and the proposed representative plaintiffs did not meet the criteria — Class Proceedings Act, s. 4.**

**Constitutional law — Constitutional proceedings — Practice and procedure — Parties — Application by the plaintiffs Thorburn and Jacob to certify their action as a class action dismissed — The plaintiffs alleged that routine strip searches performed at a Vancouver jail violated section 8 of the Charter — The proposed class encompassed individuals who were strip-searched upon their admission between December 2001 and July 2006 — The Charter breach claim did not disclose a reasonable cause of action — The class could be identified but there were no common issues — Certifying the action would result in a breakdown into individual proceedings and the proposed representative plaintiffs did not meet the criteria — Class Proceedings Act, s. 4.**

|  |
| --- |
| Application by the plaintiffs Thorburn and Jacob to certify their action as a class action. Thorburn and Jacob were arrested for mischief after taking part in a protest. They were taken to a Vancouver jail where they were both strip-searched. In their action, Thorburn and Jacob alleged that the strip searches performed on class members at the jail constituted a violation of their section 8 Charter rights. The proposed class encompassed individuals who were strip-searched upon their admission to detention in the jail, prior to remand, between December 2001 and July 2006. In December 2001, the Supreme Court of Canada found that routine strip searches infringed section 8 of the Charter and were inherently humiliating and degrading. The defendants took the position that the plaintiffs had failed to disclose a reasonable cause of action in their pleadings.  HELD: Application dismissed.  The Charter breach claim did not disclose a reasonable cause of action as the pleading lacked material facts in support of the elements of the claim. The class could be identified but there were no common issues. Furthermore, certifying the action would result in a breakdown into individual proceedings and the proposed representative plaintiffs did not meet the necessary criteria as they simply expressed a willingness to represent the class. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-F2TK-240T-00000-00&context=), s. 4, s. 5, s. 16

Controlled Drugs and Substances Act, [*S.C. 1996, c. 19*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB01-JJSF-220V-00000-00&context=),

Correction Act, RSBC 1996, CHAPTER 74, s. 2, s. 13.1

Correction Act, [*SBC 2004, CHAPTER 46, s. 11*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FGJR-214H-00000-00&context=), s. 13

Correction Act Regulation, B.C. Reg. 58/2005,

Correctional Centre Rules and Regulations, B.C. Reg. 284/78, s. 19

Criminal Code, R.S.C. 1985, c. C-46,

Liquor Control and Licensing Act, [*RSBC 1996, CHAPTER 267*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5MS4-PW61-DYV0-G06J-00000-00&context=),

**Counsel**

Counsel for the Plaintiffs: J.B. Gratl.

Counsel for Defendants Her Majesty the Queen in Right of the Province of British Columbia and the Ministry of Public Safety and Solicitor General: B.A. Carmichael, B.A. Mackey.

Counsel for the Defendants City of Vancouver and Vancouver Police Board: K.F.W. Liang, W. Branch, S.M. Precious.

**Reasons for Judgment**

|  |
| --- |
| **J.M. GROPPER J.** |

**Introduction**

**1**  The plaintiffs Elise Danielle Thorburn and Christopher David Jacob seek an order certifying this action as a class proceeding pursuant to s. 4 of the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* (*CPA*). The proposed class action is in respect of routine strip searches carried out at the Vancouver Jail at 265 East Cordova Street, Vancouver, British Columbia (Jail) after December 6, 2001. On that date, routine strip searches were found to infringe the *Canadian Charter of Rights and Freedoms,* s. 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (*Charter*) and to be inherently humiliating and degrading by the Supreme Court of Canada in *R. v. Golden,* [*2001 SCC 83*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49R-00000-00&context=) (*Golden*).

**2**  Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Public Safety and Solicitor General will be referred to as the Province. The City of Vancouver and the Vancouver Police Board will be referred to as Vancouver.

**3**  For the reasons set out below, I must dismiss this application for certification.

**Overview of the Law for Class Certification**

**4**  The *CPA* was recently reviewed in *Stanway v. Wyeth Canada Inc.*, [*2012 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24CF-00000-00&context=) (*Stanway*). At the outset of the judgment, Justice Kirkpatrick writing for the Court of Appeal observed that the *CPA* is "no longer novel ... [i]t can now be said that certain issues have been settled and guiding principles ... have emerged to answer a key, and often determinative, question in the action - the certification application" (at para. 3). She proceeded to review these principles and their supporting case authority, which I will summarize here.

**5**  Kirkpatrick J.A. noted that class actions offer three important advantages over multiple individual suits, relying on *Hollick v. Toronto (City)*, [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) (*Hollick*) at para. 15. These advantages are judicial economy, access to justice and behaviour modification. Chief Justice McLachlin, writing for the Supreme Court of Canada in *Hollick*, instructed courts to adopt a broader understanding of class proceedings legislation to ensure the benefits foreseen by the drafters were given full effect. McLachlin C.J.C. further elaborated at para. 16 of *Hollick* that the question at the certification stage is not whether the plaintiffs' claims are likely to succeed on the merits but whether the claims in the action can appropriately be prosecuted as a class proceeding.

**6**  For certification, Kirkpatrick J.A. affirmed that the representative plaintiff in a proposed class proceeding must show some "basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action, citing *Hollick* at para. 25 and *Ernewein v. General Motors of Canada Ltd.*, [*2005 BCCA 540*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2D4-00000-00&context=) at para. 25.

**7**  Kirkpatrick J.A. further affirmed that the common issues need not be determinative of liability at the certification stage: "[f]or common issues to be certifiable, they need only be 'issues of fact or law that move the litigation forward'", citing *Campbell v. Flexwatt Corp.*, [*(1977) 44 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=), [*[1998] 6 W.W.R. 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X419-00000-00&context=) (C.A.) at para. 53. It is not necessary for common issues to predominate over non-common issues in order to be certified. Predominance is instead a consideration under the preferability requirement: *Rumley v. British Columbia*, [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=) (*Rumley*) at para. 32.

**8**  Certification of a common issue will turn on whether the class members' claims share a substantial common ingredient to justify a class action, as held in *Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) (*Western Canadian Shopping Centres*) at para. 39.

**9**  In *Rumley*, McLachlin C.J.C. interpreted the *CPA* as providing British Columbia courts with ample flexibility to deal with limited differentiation amongst class members, noting in particular its contemplation of the possibility of subclasses under a number of *CPA* provisions (para. 32). However, she also emphasized that the ends of fairness and efficiency are not served by certifying issues that are common only in the most general of terms (para. 29).

**10**  Kirkpatrick J.A. also referred to *Harrington v. Dow Corning Corp.*, [*2000 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1KF-00000-00&context=) (*Harrington*), which more specifically addressed the issue of the relationship between common and individual issues. *Harrington* held that a question concerning general causation is not too broad to be certified as a common issue (para. 42).

**11**  Kirkpatrick J.A. concluded at para. 14 that it was well-established that the *CPA* was "designed to accommodate limited differentiation amongst class members that are bound together by a common issue or issues."

**12**  In sum, the certification stage does not place an onerous standard of proof on the representative plaintiff. That said, there must be a substantial common ingredient in the proposed class action in order for a court to be satisfied that the ends of fairness and efficiency are best served by class certification.

**Legislation**

**13**  The requirements for class certification are set out in the *CPA* pursuant to ss. 4 and 5:

**Class certification**

**4** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of 2 or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff who
6. would fairly and adequately represent the interests of the class,
7. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
8. does not have, on the common issues, an interest that is in conflict with the interests of other class members.
9. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
10. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
11. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
12. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
13. whether other means of resolving the claims are less practical or less efficient;
14. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**Certification application**

**5** (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

...

1. An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

**Proposed class definition and common issues**

**14**  The plaintiffs seek to certify a class action based on the following claims:

1. the strip searches performed on class members by employees, servants or agents of the defendants constitute a violation of their rights protected under s. 8 of the *Charter* as well as battery and/or assault; and
2. the defendants were negligent in failing to take reasonable measures at the Jail to protect new detainees from strip searches that would violate their *Charter* right.

**15**  The proposed time period for defining the class dates from December 6, 2001 to July 1, 2006 (or the date of certification), encompassing individuals that were strip searched upon their admission to detention in the Jail, prior to remand. The plaintiffs seek to appoint Mr. Jacob as representative plaintiff for class members residing in British Columbia. The plaintiffs propose a subclass of individuals who are not residents of British Columbia, appointing Ms. Thorburn as the representative plaintiff.

**16**  The plaintiffs seek to certify the following common issues:

1. Did the *Correction Act*, [*R.S.B.C. 1996, c. 74*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FGJR-215R-00000-00&context=) (former act) and the *Correctional Centre Rules and Regulations*, B.C. Reg. 284/78 (former regulation) and/or the *Correction Act*, *S.B.C. 2004, c. 46* (*Correction Act*) and the *Correction Act Regulation*, B.C. Reg. 58/2005 (*Correction Act Regulation*) provide the defendants lawful authority to conduct routine strip searches prior to remand at the Jail?
2. Prior to remand, were detainees properly considered to be "mingling with the general population" or found within "the prison context", as set out in *Golden* (at para. 97), thereby establishing lawful authority to conduct routine strip searches at the Jail?
3. Do the "unique circumstances" of the Jail furnish the defendants with lawful authority to conduct routine strip searches?
4. Are there any distinct criteria, pursuant to the common law power of search incidental to arrest, that will in every case provide the defendants with reasonable and probable grounds to strip search a detainee, such as: the defendant being arrested for an offence under the *Controlled Drugs and Substances Act*, [*S.C. 1996, c. 19*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB01-JJSF-220V-00000-00&context=), or arrested for a weapons-related offence or for an offence involving physical violence under the *Criminal Code*, R.S.C. 1985, c. C-46?
5. In respect of the plaintiffs' class, is an order for compensation appropriate? In particular:
6. would monetary payments by the defendants to members of the plaintiffs' class serve the function of compensating the members for humiliation and injury to their dignity?
7. would monetary payment by the defendants to members of the plaintiffs' class serve the function of vindicating the *Charter*?
8. would monetary payment by the defendants to members of the plaintiffs' class serve the function of deterring future breaches of the *Charter*?
9. Are there considerations that, even if the functions of compensation, vindication and/or deterrence are served by monetary payment, would render monetary damages inappropriate or unjust, such as alternative remedies and concerns for good government?

**Evidence on a Certification Application**

**17**  The plaintiffs, as class representatives, must provide this Court with sufficient evidence to support certification. The plaintiffs must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action. The evidentiary threshold is not onerous: *Hollick* at paras. 21 and 25. The defendants may respond with evidence of their own to challenge certification but it is a heavier evidentiary burden: the defendants must show there is no basis in the evidence for the facts asserted by the plaintiffs.

**18**  When considering whether to certify a class action, the court does not decide factual issues in the same manners as a trier of fact: *Lambert v. Guidant Corp.* [*(2009), 72 C.P.C. (6th) 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF71-JWR6-S456-00000-00&context=), 2009 CarswellOnt 2353 (S.C.J.) (*Lambert*) at para. 69, leave to appeal refused [*(2009), 82 C.P.C. (6th) 367*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-F22N-X1WN-00000-00&context=), [*2009 CarswellOnt 6512*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-F22N-X1WN-00000-00&context=) (Div. Ct.). Nor does the court apply a "likely to succeed" test in regard to the plaintiffs' claim: *Lambert* at para. 110.

**Statutory Framework**

**19**  I adopt the description of the statutory framework provided by the Province.

**20**  The Province, through the Corrections Branch (Corrections) and the Ministry of Safety and the Solicitor General (Ministry), formerly operated correctional centres. The Province operated the Jail from August 1999 until April 2006. During the period of provincial control, sentence offenders and prisoners remanded into custody pending trial or sentence were incarcerated at the Jail. The Jail was also operated as a shared facility between the Ministry of Public Safety and the Solicitor General and Vancouver pursuant to s. 13.1 of the former act.

**21**  Until 2005, prisoner searches at the Jail were conducted in accordance with the former act and the former regulation. Section 2 of the former act set out the governing authority for the administration of the *Correction Act* and correctional centres:

**2** (1) There is to be a branch of the Ministry of the Attorney General, to be called the Corrections Branch, over which the minister must preside.

1. Under the direction of the minister, the branch is charged with the administration of this Act and, for the purpose of protecting the community, all matters relating to correctional centres, youth containment centres and the correction and treatment of persons who offend the law.

**22**  The principal provision regarding prisoner searches was found under s. 19 of the former regulation:

**19** (1) On admission of an inmate to a correctional centre the person of the inmate and his possessions shall be searched by an officer of the same gender as the inmate.

1. Once an inmate has been admitted to a correctional centre an officer shall only conduct such further searches where
2. the director so authorizes, or
3. an officer has reasonable and probable grounds to believe that the inmate is in possession of any contraband, in which case the officer shall search the inmate and provide a written report to the director within 12 hours.

**23**  The former act was repealed and replaced by the *Correction Act;* the former regulation was replaced by the *Correction Act Regulation*.

**24**  The revised *Correction Act* was brought into force on February 25, 2005. It authorizes the search of inmates and their possessions while in provincial custody and it allows strip searches to be conducted in accordance with the regulations. The relevant sections are as follows:

**Detention agreements**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **11** |  | (1) On behalf of the government, the minister may enter into an agreement with a municipality for the detention in a correctional centre of persons whose detention is chargeable to the municipality on terms for reimbursement of expenses as may be mutually agreeable. |  |

1. An agreement similar to that authorized under subsection (1) may be made for reimbursing municipalities for the expenses of detention in a municipal lockup of persons from inside or outside the municipality whose detention is chargeable to the government.
2. All persons lawfully acting under an agreement referred to in subsection (1) or (2) have full authority to detain persons and are empowered to do so.
3. Lockups and other institutions used for the purpose of an agreement made under this section are places of detention for the purposes and localities specified in the agreement.

**Search of inmates**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **13** |  | (1) On admission, entry or return of an inmate to a correctional centre, an authorized person must conduct a search of the inmate and any personal possessions, including clothing, that the inmate may be carrying or wearing. |  |

...

1. A search under subsection (1), (2) or (3) may include a strip search conducted in accordance with the regulations.
2. A strip search of an inmate must be conducted by an authorized person of the same sex as the inmate unless the delay that would be caused by complying with this requirement would result in danger to human life or safety.

**25**  In April 2006, Vancouver assumed full control of the Jail. From April 1, 2006 until approximately June 30, 2006, corrections staff had a reduced presence in the Jail but continued to have a role in strip searching new arrivals.

**The Plaintiffs' Evidence**

**26**  Mr. Jacob and Ms. Thorburn have each provided affidavits.

**27**  The plaintiffs depose that on April 1, 2003, they were arrested for mischief after taking part in a peaceful protest outside the US Consulate at 1075 West Pender Street, Vancouver, British Columbia. At that time, both Mr. Jacob and Ms. Thorburn were students residing in Vancouver.

**28**  After their arrest, Mr. Jacob and Ms. Thorburn were taken to the Jail. They were transported by officers of the Vancouver Police Department (VPD). Approximately 15 minutes after their arrival, both were strip searched by Jail staff.

**29**  Mr. Jacob was put into a room with two male employees of the Jail and he was ordered by them to remove his clothing one article at a time until he was completely naked. He was then ordered to turn around and bend over with his hands on his knees so that his anal cavity could be inspected. The search did not reveal anything. Mr. Jacob was then ordered to put some of his clothes back on.

**30**  Ms. Thorburn was put into a room with two female employees of the Jail. She was ordered to open her mouth and stick out her tongue. She was then ordered to remove her clothing one article at a time until she was completely naked. Ms. Thorburn had to remove her menstrual device, face the wall, squat and then cough twice. She was then ordered to stand up, bend over, spread her buttocks apart for inspection and cough again. The search did not reveal anything. Ms. Thorburn was ordered to put some of her clothes back on.

**31**  Neither Mr. Jacob nor Ms. Thorburn consented to the strip searches. They did not possess any weapons or evidence relating to the offence of mischief.

**32**  Mr. Jacob lives in British Columbia; Ms. Thorburn lives in Halifax, Nova Scotia.

**33**  Mr. Jacob, in his affidavit, refers to the "practice of routinely strip searching every detainee upon his or her arrival at Vancouver Jail". He continues:

I understand that every person who is detained in the Vancouver Jail is subject to an automatic strip search upon admittance, except for persons arrested and detained on bylaw offences ("Bylaw Offenders") and those who are arrested and detained for public intoxication ("SIPPS").

**34**  Mr. Jacob also appends a series of documents relating to the practice and procedure at the Jail.

**The Defendants' Evidence**

**35**  Vancouver and the Province each filed affidavits regarding the policies and procedures at the Jail in respect of strip searches. For the purpose of determining whether this action should be certified, I accept the evidence as outlined by the defendants, which I repeat here.

**36**  The operation of the Jail was guided by various policies and procedures. Staff conducted searches of new arrivals at the facility in accordance with the "Vancouver Jail Policy and Procedure Manual" (policy) and to a lesser extent, the Corrections' Adult Custody Manual. From December 6, 2001 until January 12, 2004, individuals were searched upon their arrival at the Jail, in accordance with the policy.

**37**  The purpose of the search was to prevent contraband from entering the Jail and to ensure the safety of staff and inmates. It was not possible to identify prisoners who might be concealing contraband and strip searches were deemed to be the most effective search method for finding such items.

**38**  The safety concerns are compelling: the most common type of weapon found on prisoners was hypodermic needles. Other items that were recovered during prisoner strip searches included pocket knives, scissors, sharpened screwdrivers, scalpels and pepper spray. Additionally, there were items that could not be detected by the metal detectors, such as toothbrushes or pieces of hard plastic that have been fashioned into weapons and plastic credit cards with a sharpened edge. Also, it was common to find drugs when searching new arrivals.

**39**  On several occasions where the searching officers failed to discover the contraband during the search, those prisoners were seriously assaulted by other prisoners seeking to obtain these items.

**40**  During the period when the Jail was under provincial control, new arrivals (not including inmates being transferred from other correctional centres) fell into several categories:

1. individuals in custody for being in a state of intoxication in a public place in contravention of the *Liquor Control and Licensing Act*. [*R.S.B.C. 1996, c. 267*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5MS4-PW61-DYV0-G06J-00000-00&context=) (SIPPS offenders);
2. immigration detainees;
3. individuals arrested on new criminal charges;
4. individuals charged with a by-law offence (by-law offenders);
5. breach of the peace arrests;
6. individuals remanded in custody following an appearance before a judge or justice of the peace; and
7. individuals detained on warrants from other jurisdictions.

**41**  New arrivals were placed in either a pre-hold cell or the "drunk tank" depending upon their reason for attendance at the Jail. A police officer would collect an individual's personal effects and provide the items, along with a jail arrest report (Jail 8), to the corrections officers at the booking desk. The Jail 8 is the police report that provides identification details on the prisoner and information about the charges. The form may also include prisoner alerts as indicated by their arresting officer or their transporting officer.

**42**  When officers were ready to search a prisoner, the officers would review the Jail 8 before retrieving the prisoner. All new arrivals were searched but not all individuals were strip searched as a safety precaution. Generally, SIPPS offenders and by-law offenders were not strip searched unless the staff determined a search was required, having consideration for various factors, including:

1. the prisoner's history of violence;
2. the prisoner's previous history of bringing contraband into the facility; and
3. the prisoner's current presentation and whether it indicated the potential for violence and/or the presence of contraband.

**43**  Generally, SIPPS offenders were pat frisked and, in some cases, a metal detector was used. Whether a more intrusive search, possibly a strip search, was warranted was determined on a case-by-case basis having regard to the factors listed in the paragraph above.

**44**  SIPPS offenders were held in the "drunk tank". This group of offenders did not come into contact with the general jail population, new arrivals going through the search process, prisoners being taken to court or prisoners being transferred to other correctional centres.

**45**  Like SIPPS offenders, by-law offenders were not routinely strip searched. After initially being held in the Jail's prehold cell, by-law offenders would be moved to a search room and pat-frisked. They would then be placed in a holding area to await processing by the VPD officer-in-charge (OIC). These individuals were processed very quickly and after being seen by the OIC they would, in normal course, be released on a "Promise to Appear". As a result, by-law offenders did not come into contact with the general jail population and, consequently, a strip search was not generally required.

**46**  According to the policy, all new arrivals, excluding SIPPS and by-law offenders (remaining arrivals), were subjected to a strip search. The majority of remaining arrivals would move through the facility and have contact with the general jail population. Although ultimately some of the remaining arrivals would not be admitted into the general population, it was not possible to determine this at the time that they were taken from the pre-hold cell to be searched.

**47**  To protect the privacy of detainees being searched, the remaining arrivals were searched in rooms equipped with sliding shutters over the window. These rooms were not equipped with closed circuit cameras.

**48**  Strip searches were conducted by two officers of the same gender as the individual being searched. One of the officers would explain the nature of the search and ask the individual to remove their clothes. If the individual was compliant, there would generally be no physical contact between the officers and individual, other than incidental contact when passing clothing to one of the officers. The other officer would check the clothes for contraband.

**49**  Individuals who were combative, or were otherwise unable to comply with the officers' directions (for the reason of intoxication as an example), were placed in a holding cell until they were able to comply with the directions.

**50**  After being searched, remaining arrivals would then be placed in a holding cell to await booking and the opportunity to contact a lawyer. Subsequently, they would be placed in an area used to house prisoners waiting to go to court.

**51**  On Monday to Friday, when the British Columbia Provincial Court was in session, the Jail served as holding cells for the court. Inmates from other institutions would be transported to the Jail to await court appearances. Remaining arrivals awaiting their first court appearance would be housed in cells with up to six inmates.

**52**  The charges against inmates arriving from other institutions and jurisdictions ranged from minor crimes, such as shoplifting, to serious ones, such as murder. Prisoners were generally not sorted by offence type when placed in cells, unless there was a risk associated with a particular prisoner.

**53**  Significant modifications were made to the policy as a result of the British Columbia Provincial Court decision *R. v. Douglas,* [*2003 BCPC 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60Y9-00000-00&context=) (*Douglas*). It affected the way searches were conducted upon admission. Under the revised policy, whether or not remaining arrivals were searched was determined based on whether they would be released on a promise to appear or otherwise released immediately by the VPD officer in charge.

**54**  If a remaining arrival was charged with a less serious offence and had no history at the Jail, the search would consist of a pat-down frisk and use of a metal detector. The individual was held in a designated area until a decision was made by the VPD officer in charge regarding their release. This required the creation of a new security post and the hiring of five additional correctional officers to staff the post.

**55**  Most of the remaining arrivals were eventually placed in the general jail population and may have been strip searched. There was significant concern among the staff at the Jail regarding the revised policy and the potential for prisoners that had not been strip searched to move through the general population. Staff expressed concerns about officer safety as well as the likelihood of contraband getting into the facility, creating potential harm for inmates.

**56**  Minor revisions were subsequently made and a modified policy was provided to supervisors at the Jail in February 2004 (revised policy) to assist searching officers in the exercise of their discretion. From January 12, 2004 until the VPD assumed control of the Jail in April 2006, searches were conducted in accordance with the revised policy.

**57**  In April 2006, the VPD assumed control of the Jail. Following the change in the control of the Jail, a new policy (new policy) was put in place regarding prisoner searches. This policy has eliminated the practice of routine strip searches of new arrivals. Whether a strip search is conducted is determined on a case by case basis having regard for specific criteria that take into account a number of factors.

**58**  In sum, over the course of six years, the Jail underwent a number of changes in administration. There were also major changes made to the governing legislation and the policy regarding strip searching of new detainees.

**59**  According to the evidence before the Court on this application, there are also numerous categories of new arrivals:

1. inmates transferred from other correctional centres (not included in the application definition as post-remand);
2. SIPPS;
3. by-laws offenders;
4. immigration detainees;
5. breach of the peace detainees;
6. individuals arrested on new criminal charges;
7. individuals who have been remanded (again not included in the application class definition);
8. individuals detained on warrants from other jurisdictions.

**60**  In view of these changes to the policy of strip searching between 2001 and 2006, there is a multiplicity of categories and sub-categories of new arrivals at the Jail during the proposed class period. The plaintiffs fit into timeframe 1, "prisoner class f)" (with further relevant subclasses).

**Analysis**

**61**  The plaintiffs must demonstrate that their proposed class action meets the following five requirements for certification:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of two or more persons;
3. the claims raise common issues;
4. a class proceeding would be preferable for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff that
6. would fairly and adequately represent the interests of the class,
7. has produced a plan for the proceeding that presents a workable method of advancing the proceeding and providing notice to class members and
8. does not have an interest in conflict with the interests of other class members in relation to any of the common issues.

**1. Cause of Action**

**62**  Pursuant to s. 4(1)(a) of the *CPA*, the pleadings must disclose a cause of action. The plaintiffs correctly argue that this requirement is not subject to a high threshold; they submit that it is not plain and obvious that their claims have no chance of succeeding.

**63**  The plaintiffs rely on *Hunter v. Southam Inc.*, [*[1984] 2 S.C.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233J-00000-00&context=) at 161, which held that searches performed without a warrant are presumptively unreasonable. The plaintiffs also rely on *Golden*, which establishes that strip searches performed in a short-term custodial setting, without regard to whether reasonable and probable grounds exist to justify a search, are presumptively unconstitutional. The plaintiffs argue that the strip searches at issue were performed as a matter of routine, without consideration for whether reasonable and probable grounds existed to conduct the strip search, and that each strip search was conducted without objective reasonable and probable grounds.

**64**  The defendants counter that the plaintiffs have failed to disclose a reasonable cause of action in their pleadings.

**65**  In respect to the claim that strip searches performed upon detainees admitted to the Jail constitute a violation of s. 8 of the *Charter*, the defendants argue that this claim rests on the proposition that the mere existence of such a policy renders all strip searches unlawful.

**66**  The defendants say that the jurisprudence makes it clear that a case by case analysis must be undertaken in order to determine whether a search is reasonable and lawful in the circumstances. The policy, whether or not it is flawed, is not at issue; rather, it is the lawfulness of the search that forms the matter of inquiry.

**67**  The defendants further submit that the plaintiffs have failed to appreciate the difference between searches incidental to arrest and searches conducted in a custodial setting to ensure safety and institutional security, a distinction that is set out in *Golden* at paras. 96 and 97. The defendants argue that during the period of provincial control, when the Jail was a "correctional centre" it could hold an array of inmates ranging from convicted murderers awaiting sentence to intoxicated persons being held until they were sober enough to be released. Thus, the safety and security issues referred to in *Golden* were always present and significant at the Jail during that time.

**68**  I note that the defendants also refer to a s. 7 violation, even though it was not plead by the plaintiffs in either their notice of application or their written submissions.

**69**  In regard to the pleadings of assault and battery, the defendants argue that the statement of claim does not allege that the correctional officers conducting the searches made threats to use unlawful force or intentionally created an apprehension of imminent or offensive contact. Nor do the plaintiffs allege that the correctional officers applied any physical force or made any physical contact whatsoever during the course of the search. In making these submissions, the defendants refer to the definition of assault in Allen M. Linden and Bruce Feldthusen's text *Canadian Tort Law*, 8th ed. (Markham: LexisNexis, Buttersworth, 2006) at 46. Linden and Feldthusen define an assault as "the intentional creation of the apprehension of imminent harmful or offensive contact" (I note that it is the same definition in the 9th edition at 46).The defendants rely on the definition of battery as it was set out in *Norberg v. Wynrib*, [*[1992] 2 S.C.R. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=) at 246, as "the intentional infliction of unlawful force on another person."

**70**  The defendants further submit that the statement of claim omits material facts necessary to establish the tort of battery.

**71**  In respect of the plaintiffs' ***negligence*** claim, the defendants argue that this allegation is contingent on the *Charter* breach claim. They point to a similar claim that was considered in *Ward v. Vancouver (City)*, [*2007 BCSC 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61KM-00000-00&context=) (*Ward*) at para. 96. Justice Tysoe (as he then was) found that any duty owed by Vancouver and the Province was a duty owed to the general public; it was not a private law duty owed to the plaintiff. Further, Tysoe J. found there was no evidence submitted by the plaintiff on the applicable standard of care.

**72**  In any event, the defendants argue that the adoption of a policy covering prisoner searches is protected from liability in ***negligence***. The plaintiffs counter that this issue was already addressed in an earlier decision in this matter by Justice Romilly ([*2006 BCSC 1613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2N0-00000-00&context=)). In that decision, Romilly J. had found that the plaintiffs could rely on *Golden* in making their submissions.

**73**  Finally, the defendants point out that the plaintiffs have not pled the component elements of ***negligence***.

***Decision***

**74**  The certification requirement that the pleadings disclose a cause of action is subject to a low threshold: the plaintiff will fail only if the claim is "certain to fail" or if it is "plain and obvious" that the statement of claim discloses no reasonable cause of action. This threshold was set out in *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* at 990-991. The claim will be satisfactory unless it has a radical defect or it is plain and obvious it cannot succeed.

**75**  No evidence is admissible and the material facts pled are accepted as true, unless these facts are patently ridiculous or incapable of proof: *Hollick* at para. 25. The court is to conduct a generous reading of the pleading.

**76**  I find the claim for breach of s. 8 of the *Charter* does not meet this threshold for disclosing a cause of action. The *Charter* pleading lacks material facts in support of the elements of this claim. It is possible that this could be addressed by an amendment, although I agree with the defendants that the statement of claim appears to presume that the policy in place at the time, by not conforming to the decision in *Golden*, was presumptively in breach of the *Charter*. I agree that it is the lawfulness of the search and not the policy itself which must be considered in an action for damages.

**77**  The defendants refer to *Golden* at paras. 96 and 97, where the Supreme Court of Canada found:

[96] It may be useful to distinguish between strip searches immediately incidental to arrest, and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment. However, this is not the situation in the present case. The type of searching that may be appropriate before an individual is integrated into the prison population cannot be used as a means of justifying extensive strip searches on the street or routine strip searches of individuals who are detained briefly by police, such as intoxicated individuals held overnight in police cells: *R. v. Toulouse*, [*[1994] O.J. No. 2746*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCV1-JBM1-M1YR-00000-00&context=) (Prov. Div.).

[97] The difference between the prison context and the short term detention context is expressed well by Duncan J. in the recent case of *R. v. Coulter*, [*[2000] O.J. No. 3452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDC1-FJDY-X0GT-00000-00&context=) (C.J.), at paras. 26-27, which involved a routine strip search carried out incident to an arrest and short term detention in police cells for impaired driving. Duncan J. noted that whereas strip searching could be justified when introducing an individual into the prison population to prevent the individual from bringing contraband or weapons into prison, different considerations arise where the individual is only being held for a short time in police cells and will not be mingling with the general prison population. While we recognize that police officers have legitimate concerns that short term detainees may conceal weapons that they could use to harm themselves or police officers, these concerns must be addressed on a case-by-case basis and cannot justify routine strip searches of all arrestees.

**78**  The Court makes it clear that each case where a person was strip searched at the Jail must be considered on its own facts in order to determine whether the search was reasonable and lawful in the circumstances.

**79**  In respect of the plaintiffs' claims of assault and battery, I find that the statement of claim does not disclose any material facts that would support a finding of assault and battery in connection with the searches. However, it may be that the pleadings can be amended, if indeed there are material facts to support such allegations. I do not consider these claims as "doomed to failure" if the facts support the elements of those pleadings.

**80**  In respect of the plaintiffs' claim in ***negligence*** for breach of the *Charter*, my finding that the plaintiffs' claim of a *Charter* breach is not sustainable as a cause of action is dispositive of this claim. I consider *Ward* to be persuasive: the ***negligence*** claim, even if it was amended, does not affect my conclusion that it is plain and obvious the plaintiffs' claim cannot succeed.

**2. Identifiable Class**

**81**  The plaintiffs propose that the class comprise of all individuals who were strip searched prior to their remand upon their admission to the Jail between December 6, 2001 and July 1, 2006, or the date of certification. The plaintiffs submit that the class can be clearly defined according to objective criteria. The plaintiffs do not know the identity of every member of the potential class, but this deficiency can be surmounted by disclosure from the defendants. The defendants would be required to disclose the names of individuals brought to the Jail and their charges during the relevant time period. The plaintiffs claim that with this information they can easily establish which individuals were strip searched. In this way, the class has clear boundaries and it is not unlimited.

**82**  The defendants argue that the proposed class is not and cannot be sufficiently clearly defined in order to inform all affected stakeholders what legal rights are being affected and in what manner. The defendants rely on *Gariepy v. Shell Oil Co.*, [*[2002] O.J. No. 2766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-FJDY-X1H0-00000-00&context=), [*23 C.P.C. (5th) 360*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-FJDY-X1H0-00000-00&context=) (S.C.J.) at para. 47, which held that the class definition must be one where a person is able to tell with a minimum effort whether they are a member of the proposed class.

**83**  Furthermore, there is no connection between the class definition and the proposed common issues. The proposed class definition is "grossly over broad" as it would include persons whose searches were lawful. It is unclear what is intended by confining the class to those individuals that were searched "prior to remand". In sum, the plaintiffs have offered insufficient evidence of a class with common issues.

***Decision***

**84**  Section 4(1)(b) of the *CPA* requires that the plaintiffs demonstrate the class is identifiable.

**85**  The Supreme Court of Canada addressed the requirement of an identifiable class in *Western Canadian Shopping Centres* at para. 38:

[38] While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria [citations omitted].

**86**  Whether there is an identifiable class depends entirely on the defendant's method of record keeping of persons who were strip searched in the Jail between December 6, 2001 and July 1, 2006, or the date of certification. However, as the Province and Vancouver point out, there are many categories and subcategories of class members arriving at the Jail during the proposed time definition. These proposed class members arrived at different times when different policies were in place, and over this period, these persons were strip searched for various reasons, including the reason of being placed in the general jail population.

**87**  Despite these challenges, I am of the view that the class can be identified, at least for the purpose of certifying the class action. It is not necessary to determine precisely the number and identity of the class members. The class is sufficiently identifiable if its definition allows for an objective determination of whether or not any given individual fits within it: *Boulanger v. Johnson & Johnson Corp.,* [*(2007) 40 C.P.C. (6th) 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JG02-S1D4-00000-00&context=), [*2007 CarswellOnt 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JG02-S1D4-00000-00&context=) (S.C.J.) at para. 17.

**88**  That said, the plaintiffs must also demonstrate that a link exists between the identified class and the claims in order for the class action to be certified. If it is not obvious, the putative representative must show that the proposed class is sufficiently narrow in definition by leading evidence. This requirement was articulated in *Samos Investments Inc. v. Pattison*, [*2001 BCSC 1790*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-619P-00000-00&context=) at para. 166.

**89**  While I have concluded that the plaintiffs clear the hurdle of an identifiable class, for reasons which I will articulate under the heading "Common Issues", this finding does not assist the plaintiffs in determining that the proposed class should be certified.

**90**  In *Hollick*, McLachlin C.J.C. stated at para. 20 that the class must be identifiable by "some rational relationship between the class and common issues." She continued at para. 21:

[21] The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad - that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, *Class Actions in Canada* (1996), at para. 4.205; *Webb v. K-Mart Canada Ltd.* [*(1999), 45 O.R. (3d) 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4J3-00000-00&context=) (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* [*(1998), 41 O.R. (3d) 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1MM-00000-00&context=) (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).

**3. Common Issues**

**91**  The plaintiffs assert that the claims of the class members raise common issues. Adjudication of the proposed common issues 1 through 4 will substantially advance the legal and factual inquiry for each of the members as to whether a *Charter* breach was suffered by the class member and whether the class member is entitled to a remedy for that breach. The legal issues are central to the determination of liability for the infringements of s. 8 of the *Charter.*

**92**  The common issues described in items 5 and 6 raise novel issues concerning whether an individual can claim damages for breach of his or her *Charter* right and, if so, whether a monetary payment serves the function of compensation.

**93**  In resolving the common issues, the court may be required to have a more careful look at the defendant's records to determine whether reasonable and probable ground existed for the search, which may disqualify a potential class member, but the plaintiffs argue this hurdle is easily surmounted as it only amounts to a management issue.

**94**  The defendants assert the plaintiffs' proposed common issues have a fatal flaw: the lack of commonality. The resolution of these common issues will not avoid individual fact finding and legal analysis to answer the same question for each class member.

**95**  The defendants assert that each plaintiff's circumstances must be considered individually to determine whether the search was lawful. Issues that will likely need to be resolved include:

1. whether that individual's arrest was lawful;
2. whether the search was incidental to arrest;
3. whether there was a risk of disposal of evidence;
4. what was the result of the original frisk search;
5. was the search "good or bad"; and
6. was it abusively conducted for humiliation or punishment?

**96**  The defendants point out that the plaintiffs' case will require the assessment of thousands of strip searches to determine which ones were in violation of legal standards. Another layer of complexity is added with the changes to the standards and legal frameworks over the ten year period.

**97**  Changes in the administration in charge of the Jail will have to be studied. The defendants further point out that during the proposed class time period, hundreds of employees have worked at the Jail. These employees made individual assessments of whether a strip search was appropriate in the case of the particular arrested individual, which will also have to be examined.

***Decision***

**98**  Section 4(1)(c) of the *CPA* requires the plaintiffs demonstrate that the claims of the proposed class members raise common issues. For an issue to be a common issue, it must constitute a substantial ingredient of each class member's claim and its resolution must be necessary for the resolution of each class member's claim: *Williams v. Mutual Life Assurance Co. of Canada* [*(2000), 51 O.R. (3d) 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B519-00000-00&context=), [*[2000] O.J. No. 3821*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-F873-B306-00000-00&context=) (S.C.J.) at para. 39 (appeal dismissed [*[2001] O.J. No. 4952*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-F81W-20TD-00000-00&context=), [*17 C.P.C. (5th) 103*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-F81W-20TD-00000-00&context=) (Div. Ct.) and dismissed once again *(2003), 226 D.L.R. (4th) 112*, *[2003] O.J. No. 1160* (C.A.)).

**99**  An issue that has to be decided on an individual basis lacks commonality: *Kafka v. Allstate Insurance Co. of Canada,* [*2011 ONSC 2305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFH1-FBV7-B3H7-00000-00&context=) at paras. 118 and 146. A common issue need not dispose of the litigation; it is sufficient if it is in an issue of fact or law common to all claims and if its resolution will advance the litigation for (or against) the class: *Harrington* at paras. 21 - 23. *Western Canadian Shopping Centres* provides at paras. 39 - 40 that the underlying question of a common issue is whether its resolution will avoid duplication of fact finding or legal analysis. Further, for an issue to be common, it is not essential that the class members be identically situated vis-a-vis the opposing party, or benefit from the successful prosecution of the action to the same extent.

**100**  In British Columbia, the *CPA* expressly precludes the predominance of common issues over individual issues as a factor for consideration in determining the common issues criterion: *Rumley* at para. 33.

**101**  Justice Strathy provides a non-exhaustive list of general propositions in respect of common issues in *Singer v. Schering-Plough Canada Inc.*, [*2010 ONSC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF91-JSC5-M1XG-00000-00&context=) at para: 140:

**A**: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis [citations omitted].

**B**: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution [citations omitted].

**C**: There must be a basis in the evidence before the court to establish the existence of common issues [citations omitted].

**D**: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues [citations omitted].

**E**: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim [citations omitted].

**F**: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class [citations omitted].

**G**: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class [citations omitted].

**H**: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant [citations omitted].

**I**: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis [citations omitted].

**J**: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient" [citations omitted].

**102**  I agree with the defendants' list of practical differences arising out of the plaintiffs' common issues:

1. that the legal tests require individual analysis of each potential plaintiff's case to determine if there was a violation of applicable legal standards;
2. there was a regime change in the proposed class period;
3. that hundreds of employees made individual assessments as to whether a strip search was appropriate in a particular case; and
4. the standards and legal framework have changed over the ten year period proposed.

**103**  Although the plaintiffs revised the common issues to "enhance the fairness and efficiency of the proceeding", the first four common issues continue to raise individual issues, including whether the strip was done prior to remand, what the detainee's circumstances were in terms of mingling with the general jail population, the unique circumstances of the Jail in relation to each detainee, and what criteria were applied in each case to determine whether there were reasonable and probable grounds to strip search the detainee.

**104**  The defendants' point is illustrated by three cases arising from the Jail. The decisions reached different conclusions after a significant review of the circumstances relating to each individual plaintiff. The cases are: *Douglas*, *Ward*, and *R. v. Vixaysongkham*, [*2007 BCSC 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3VJ-00000-00&context=). Regardless of the different outcomes reached in these cases, I note that the focus of each decision was the individual circumstances of the arrest and the strip search.

**105**  I find that these cases effectively demonstrate that the individual issues will likely require resolution which the common issues will obscure.

**4. Preferable Procedure**

**106**  The plaintiffs assert that the common issues of fact and law in this claim predominate over the residual questions affecting individual members. The common issues frame and largely determine liability for the class members. The non-common issues are limited and they may be adjudicated with relative efficiency. Those residual issues involve the facts surrounding the conduct of the strip searches at issue and the potential presence of subjective or objective reasonable and probable grounds for the strip searches conducted after 2006 when changes were made to strip search practice.

**107**  The plaintiffs say the action does not give rise to the concern that a significant number of class members would prefer to proceed individually, a factor of consideration in the preferability analysis that was identified in *Rumley*. In any event, an individual plaintiff in British Columbia could opt out of the class in accordance with s. 16 of the *CPA*.

**108**  The plaintiffs further argue that other means of resolving the claims are impractical and less efficient. It is likely that the claims will produce small awards and may be within the jurisdiction of the small claims division of the Provincial Court of British Columbia. This is a factor intended to be remedied by the *CPA.*

**109**  The plaintiffs say that the administration of a class proceeding would not create greater difficulties than would be experienced if relief were sought by other means. They maintain that a class proceeding is the most efficient and appropriate process for dealing with liability and damages for these "mass strip searches".

**110**  The plaintiffs also put forward an access to justice argument. Since the Jail is located in the downtown eastside of Vancouver, it routinely admits residents of that neighbourhood, many of whom suffer from problems such as homelessness and mental illness. The circumstances of these individuals make it extremely difficult for these individuals to effectively pursue relief.

**111**  Finally, the plaintiffs submit that the class proceeding would not involve claims that are or have been the subject of any other proceedings. The plaintiffs say that there have been very few civil strip search cases before this court, which is likely a result of access to justice barriers. *Ward* was exceptional, the plaintiffs say, because of the tenacity of the plaintiff and the generosity of a friend and colleague who served as plaintiff's counsel. In any event, the plaintiffs submit that *Ward* did not dispose of all the issues proposed for this class action.

**112**  Although the strip search policy at the Jail was addressed in *Douglas*, that decision is not binding on this Court. The plaintiffs do not know of any similar class proceedings arising on the conduct at issue in this case.

**113**  The defendants assert that the goals of the *CPA* would not be served by certifying this class action. It would still produce limited benefits and require individual trials.

**114**  The defendants argue the individual issues heavily outweigh any common issues. These individual issues will dominate these proceedings. The defendants assert that the court will have to consider, in relation to every individual admitted to the Jail during the past ten years (numbering between 75,000 and 150,000) such issues as:

1. was the detainee actually stripped searched;
2. why was the detainee arrested;
3. what was the criminal history of the detainee;
4. was the particular person known to be violent;
5. was the detainee combative;
6. what were the circumstances of the arrest;
7. was the strip search related to that arrest;
8. were there weapons or was there a suspicion of concealed weapons;
9. was the detainee charged with an offence associated with evidence or concealing evidence;
10. what were the considerations relating to the reduction or prevention of harm;
11. was the detainee charged with a drug-related crime;
12. did the detainee display symptoms of drug use or were they found to have been in possession of drugs;
13. how long was the detainee held in jail;
14. in which part of the jail was the detainee found;
15. was the individual going to mingle with the general jail population;
16. what was the policy in place at the time and was it followed;
17. what was the manner of the search;
18. what is expressed in the paper work as the reasons for the search;
19. what were the individual circumstances of the officer; and
20. what were the effects upon that specific individual?

***Decision***

**115**  Section 4(1)(d) of the *CPA* requires this Court consider whether a class proceeding is the "preferable procedure for the fair and efficient resolution of the common issues."

**116**  Section 4(2) list considerations for the preferability requirement.

**117**  Even if I were to find there were certain common issues in the proposed class action, a class proceeding is still not the preferable procedure. The goal of the *CPA* is to be fair to both plaintiffs and defendants. As stated by Vancouver in its written submissions (pp. 17 - 18), "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."

**118**  I find that the plaintiffs fail to meet the first factor, which is whether the questions of fact or law common to the members of the class predominate over questions affecting individual class members.

**119**  *Hollick* describes the proper approach to the preferability requirement in para. 29 and 30:

[29] The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:

The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, *supra*, at para. 4.690. I would endorse that approach.

1. The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia *Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.

**120**  I find the defendants have amply demonstrated how the court would be required to hear evidence from the individual class members in relation to a number of features of their experience at the Jail. As several other authorities point out, a class proceeding will not satisfy the requirement that it is the preferable procedure if the common issues are overwhelmed or subsumed by the individual issues. It is not preferable if resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members (see for instance *Western Canadian Shopping Centres* at para. 39).

**121**  I am convinced that to certify a class action in these proceedings would merely be a prelude to many individual trials. A class action is not the preferable procedure for the fair and efficient resolution of these common issues.

**5. Proposed Representative Plaintiffs**

**122**  The plaintiffs suggest that Mr. Jacob is an appropriate representative plaintiff for the class as a resident of British Columbia living in Vancouver. He is apparently willing and able to conduct the litigation and do whatever is necessary to assist counsel in preparing for trial. He considers that his experience at the Jail was typical of individuals who were subject to routine strip searches during the period at issue and that he would be an effective representative witness for the plaintiffs' claims.

**123**  Mr. Jacob sets out a plan for the proceeding.

**124**  The plaintiffs also maintain that Ms. Thorburn is an appropriate representative plaintiff for individuals who were at the Jail during the proposed period but who do not reside in British Columbia at this time. The plaintiffs propose to certify a subclass comprising of all individuals who were subject to strip searches at the Jail after December 6, 2001, but who are not currently ordinary residents of British Columbia.

**125**  The defendants argue that the plaintiffs fail to meet the statutory pre-requisites for certification as representative plaintiffs in accordance with s. 4(1)(e) of the *CPA*. Mr. Jacob and Ms. Thorburn cannot "fairly and adequately represent the interests of the class", most particularly because neither knows how many persons are in the proposed class. The size or potential scope of the claim is likely enormous and unwieldy. The defendants say that the plan proposed will not assist the court: it is too general and it does not necessarily reflect the interests of all parties. The defendants argue that there is potentially a conflict of interest between Mr. Jacob and Ms. Thorburn with the interest of other class members. The Province provides this example in its written submissions at p. 55:

As the case proceeds, it may become apparent that the Plaintiffs would seek to emphasize elements of the claim that maximize the amount of their individual claims but de-emphasize or even totally ignore the interests of other class members. Equally, given the various categories of inmates and various relevant timeframes involved, as well as the several iterations of legislation, policy and management at the Jail, it may be impossible for these plaintiffs to represent the interests of the entire proposed class.

**126**  Finally, the defendants point out that the plaintiffs have not provided any evidence that has shown they have taken steps to identify the actual interests or concerns of other proposed class members regarding what terms, if any, they wish to pursue, against whom and for what remedy.

***Decision***

**127**  Section 2 of the *CPA* requires that the proposed representative plaintiffs be a member of the class and meet the requirements set out in s. 4(1)(e). I agree with the defendants that the plaintiffs have failed to meet the statutory and evidentiary requirements of establishing that they are in a position to fairly and adequately represent the interests of the class. This element of their submission is particularly sparse; the plaintiffs have only expressed a willingness to represent the class.

**Conclusion**

**128**  I find that as the pleadings stand, the statement of claim does not disclose a cause of action. While I consider that the class is identifiable, there is no link between that identifiable class and the proposed common issues because, in my view, there are none. A class action must fulfill the goals of fairness and efficiency. Certifying this action will necessarily result in a break-down into individual proceedings. Finally, I find that the proposed representative plaintiffs do not meet the criteria specified in the *CPA*.

**129**  As a result, the plaintiffs' application to certify the class is dismissed.

J.M. GROPPER J.

**End of Document**